Aboriginal Dominion in Canada

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Declaration

I, Michael Patrick Doherty, declare: that this thesis has been composed by me; that it has not been accepted on any previous application for a degree; that the work is my own; and that all quotations have been distinguished and the sources of identification specifically acknowledged.

Michael Patrick Doherty
August 2017

Summary

In much of Canada, Aboriginal rights – including land rights – were never extinguished by treaty, and presumptively continue to exist. Jurisprudence has established that in Aboriginal groups' traditional territories, they will have Aboriginal title – the right to exclusive use and occupation - in those areas where they can demonstrate both occupation and exclusivity at the date of the assertion of Crown sovereignty, and that they will have hunting and fishing rights in areas where they can demonstrate occupation but not exclusivity. This leaves open the question of what right they have in areas where they can demonstrate exclusivity but not occupation. This thesis argues for the existence in such areas of a right that has not previously been recognized in Canada, namely a right to prohibit resource use or extraction. This right – here termed "Aboriginal dominion" – is argued to be analogous to a negative easement in European property law systems. Even drawing such an analogy, however, requires a level of analysis that has been lacking with regard to Aboriginal property rights in Canada, since courts have insisted that such rights are *sui generis*, unique. This insistence is here called into question, and an approach that analyzes property rights as being responsive to the needs of human beings in particular times and places is urged instead. To the extent that such analysis results in the recognition of new Aboriginal rights, including Aboriginal dominion, it may help to bring Canada in line with international norms, as embodied in the United Nations Declaration on the Rights of Indigenous Peoples and other instruments, and may contribute to achievement of the ultimate goal of Canadian Aboriginal law: reconciliation.

Acknowledgments

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I am indebted to Jo Kunzlik and Caroline Ransom for the kindness they both showed me and for their assistance in dealing with the administrative challenges posed by completing a degree at a university 7,000 kilometres from my home.

I shamelessly benefitted from the skill, industry and perfectionism of my former assistant, Indira Szabla, without whose help this thesis would be disorganized and unsightly.

The ideas contained in this thesis were shaped by my interactions in the past thirteen years with many members of British Columbia's Aboriginal Bar, with Indigenous litigants and witnesses, and with expert witnesses in various fields. I am grateful to them all, and in particular to my colleagues at Justice Canada. That said, nothing in this thesis reflects in any way the positions or policies of Justice Canada or the Government of Canada.

Finally, and most importantly, I thank my wife, Jane, whose love and support over the past four decades has made many things possible that would otherwise have been impossible. This thesis is one of those things.

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Introduction

This introduction provides an overview of the scope and aims of this thesis and the general methodology adopted in the thesis as a whole. It also provides a chapter-by-chapter introduction to the topics to be covered and a guide to the relationship of those topics to the overarching argument that will be made in this thesis. The introduction concludes with a brief glossary of core terms.

Thesis topic

This thesis arises out of a series of decisions by the Supreme Court of Canada ("the Court") in the past half-century that have determined that in Canada, Aboriginal[1] rights survived the assertion of Crown sovereignty and are now constitutionally protected from infringement. Those rights include one recognized form of property right that this thesis will argue equates to outright ownership, namely "Aboriginal title", but the case law to date suggests that Aboriginal title will only be found to exist in a portion of any Aboriginal group's traditional territory. In effect, this thesis began as an attempt to determine whether any form of property right exists throughout that portion of an Aboriginal group's traditional territory where Aboriginal title does not exist, namely to

[1] "Aboriginal" is the adjective most often used today to refer collectively to Canada's original occupants, and is used in s 35 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. It derives from the Latin "*ab origine*", meaning people who have been present "from the beginning" of time. Two other terms, "Indigenous" and "First Nations" are also commonly used. Notably, the newly-elected Government of Canada in late 2015 indicated that it would be using "Indigenous" in preference to "Aboriginal", even changing the name of its responsible government department from "Aboriginal Affairs and Northern Development Canada" to "Indigenous and Northern Affairs Canada" Etymologically, "Indigenous" – meaning "begotten" in a particular place - could be said to have the advantage of including the Métis, whose presence predates Canada's existence as a nation but who have not been present from the beginning of time. As mentioned above, however, s 35(2) of the *Constitution Act, 1982* defines the "aboriginal peoples of Canada" as including not just the Indian and Inuit, but also the Métis. These issues of terminology are admittedly difficult and confusing, even leaving aside the related issues of which individuals actually are Aboriginal or Indigenous or the necessity of any such labelling: see Jeff J Corntassel, 'Who is Indigenous? 'Peoplehood' and Ethnonationalist Approaches to Rearticulating Indigenous Identity' (2003) 9(1) NEP 75. See also Paul LAH Chartrand, 'Indigenous Peoples: Negotiating Constitutional Reconciliation and Legitimacy in Canada' (2011) 19 Waikato L Rev 14, 27. Note also that there is some controversy as to whether to use a lower-case or upper-case spelling for "Aboriginal". Although a lower-case spelling is used in s 35 of the *Constitution Act, 1982* and was used by the Supreme Court of Canada until 2003, since 2004 the Court appears to have used an upper-case spelling. An upper-case spelling will be used in this thesis.

lands held in unallocated Crown title or in fee simple. Put another way, the Court: (i) has established that Aboriginal groups will have Aboriginal title where they can demonstrate exclusivity and sufficient occupation in the pre-assertion of sovereignty era; and (ii) has stated that Aboriginal groups will have "usufructuary" rights where they had sufficient occupation but not exclusivity; but (iii) has so far not indicated what right, if any, Aboriginal groups will possess in areas where they had exclusivity but not occupation. The answer that is proposed here is that the application of the legal principles handed down by the Court suggests the existence of a previously-unrecognized Aboriginal property right in areas where Aboriginal groups had exclusivity but not sufficient occupation for Aboriginal title, a right here termed "Aboriginal dominion". This Aboriginal right would be analogous to a negative easement – otherwise known as a negative servitude – in European property law systems, in that it would give those Aboriginal groups that possess it the right to prohibit certain uses of lands within their traditional territories, specifically those that involve the use or extraction of natural resources.

Before proceeding further, it may be useful to unpack and expand upon the content of the preceding paragraph for the benefit of lay readers or those who are unfamiliar with the field of Aboriginal law. Put into colloquial rather than strictly legal terms, it is now known that the Aboriginal peoples of Canada possess legal rights – including property rights – that are not possessed by other Canadians. In areas where Aboriginal groups have entered into comprehensive treaties, they will have treaty rights, while in areas where they have not entered into comprehensive treaties, they will have common law rights, which are referred to simply as "Aboriginal rights". These Aboriginal rights are based upon their occupation of their traditional territories and their practising of their traditional cultures prior to the arrival of Europeans and the assertion of sovereignty first by European states and later by the Canadian state that is the successor to those European states. The one known Aboriginal right to real property is "Aboriginal title", which is the right to exclusive use and occupation of land. The courts have held that Aboriginal title will exist in those areas where – prior to the assertion of Crown sovereignty – Aboriginal groups both physically occupied the land and excluded others, or at least had the capacity to exclude others.

While Aboriginal title may exist over very large areas, it is unlikely to exist throughout all of an Aboriginal group's traditional territory, since there will be areas that the group physically occupied but where it did not maintain exclusivity, and other areas where it maintained exclusivity but that it did not physically occupy. The former would have been areas that the group would have used, such as for hunting, fishing or gathering, but that other groups might also have used, and in those areas the group should still have a right of use today, such as for hunting, fishing or gathering With regard to the latter type of area, however, that where a group maintained exclusivity but not physical occupation, it is not known what Aboriginal right might exist, since the courts have simply never turned their minds to this question. That is, it is not known what Aboriginal right, if any, exists with regard to those areas where before the assertion of Crown sovereignty, a group would, in effect, have said to its neighbours, "Everything between this river and that mountain range is ours, and even though we're not using it, we forbid you from using it." The central question that this thesis attempts to answer is what Aboriginal right, if any, exists in those areas that Aboriginal groups occupied but where they did not maintain exclusivity.

Why is this an important question? In part, the question is important because the answer will affect vast areas of Canada. In most of Canada, no treaties were ever entered into that purported to extinguish Aboriginal land rights, so Aboriginal land rights probably exist – but without having been given legal recognition – throughout most of Canada. Aboriginal title, however, dependent as it is upon actual physical occupation, might well exist in only a fraction of the areas where some sort of Aboriginal land right exists, since even today Canada's population – though many times larger than that before colonization began - is concentrated in a relatively small proportion of its land mass. The identification of Aboriginal land rights other than Aboriginal title may therefore be crucial to determining the legal status of much of the land contained within Canada.

A second reason why the question is important is that the term "rights" when used with regard to Aboriginal rights in Canada does not refer to something that is merely aspirational, as has frequently been the case with regard to socio-economic "rights"

since their inception in the Universal Declaration of Human Rights.[2] Aboriginal rights are enforceable, legal rights. Furthermore, their affirmation in the *Constitution Act, 1982* means not only that they may "trump" statutory or regulatory provisions, but also that neither Canada's federal government nor any of its provincial governments may unilaterally extinguish Aboriginal them. Aboriginal land rights therefore are accorded a degree of importance that is not possessed by any other form of property right in Canada. This, it may be noted in passing, is why this thesis looks at "Aboriginal" rights through the lens of European legal traditions rather than considering "Indigenous" perspectives regarding land and through private law rather than public law concepts, in that it is by translating Indigenous practices into legal concepts cognizable by Common Law and Civil Law[3] courts that the constitutional protections accorded to the rights of Canada's Aboriginal peoples are given practical rather than merely theoretical effect, most particularly with regard to land rights.

A third reason why the question is important is that the answer to it may have sweeping and dramatic consequences for both Aboriginal and non-Aboriginal people, as well as for governments and industry. Much of the land in Canada has to date been understood to be unalienated Crown land which governments have been able to make available for economic development through licensing such activities as mining, logging, and electrical generation and transmission. To the extent that "Crown" lands are actually subject to some form of Aboriginal land right, such activities may be curtailed or at least differently authorized. The situation with regard to those lands that are subject to Aboriginal claims but are currently held as fee simple lands by individual homeowners, farmers, businesses, and others, may be even more fraught with disruptive potential.

Even upon arriving at an answer to the question posed, however, this will be seen to have led to additional questions and additional answers. So, for example, if one

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[2] Ellen Wiles, 'Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law' Am U Intl L Rev 35 (2006) 22(1) 35, 36. See also Sam Kalen, 'An Essay: An Aspirational Right to a Healthy Environment?' (2016) 34(2) UCLA J Envtl L & Pol'y 156.

[3] While the relevant Aboriginal law jurisprudence could easily give the impression that the Common Law provides is the only relevant European law tradition, it must be remembered that Canada's largest province – Quebec – retains the Civil Law tradition, and contains large areas where Aboriginal rights have not been extinguished by treaties. The advantage of a consistent approach to Aboriginal rights throughout Canada therefore provides one reason why this thesis will frequently draw upon the Civil Law. In addition, however, the analytical approach to legal questions will be particularly useful in Chapter VII.

additional Aboriginal right – Aboriginal dominion – is proposed to exist, then does that not tend to suggest that other Aboriginal rights may also exist? As will be seen, the tentative answer given in this thesis will be "yes". Support for the existence of more Aboriginal rights generally will be found in international law, which recognizes a wide variety of Aboriginal rights – more often termed "Indigenous" rights in international law – as embodied in instruments originating with the United Nations, the International Labour Organization, and the Organization of American States. Since the particular right that is proposed to exist in this thesis is a property right, that will be seen to lead to the question of why property rights recognized by the Common Law and Civil Law systems are so diverse and have been so thoroughly analyzed by academics and judges, while in comparison the analysis that has so far been directed toward the property needs and rights of Aboriginal peoples seems relatively impoverished. Answering that question will be seen to suggest the need for a more rigorous approach to Aboriginal property rights than that taken by Canadian courts to date.

Scope and methodology

Methodologically, this thesis represents an extended application of legal reasoning. That is, having identified the issue under consideration – whether Aboriginal property rights exist in areas of Aboriginal traditional territories that are not Aboriginal title areas – an inquiry is made as to the legal rule that governs the issue (the major premise) and the facts relevant to the rule (the minor premise), with the rule being applied to the facts in such a way as to arrive at a logical result (the conclusion). Stated succinctly, this would be as follows:

> A pre-contact[4] practice which was integral to the distinctive culture of a particular Aboriginal community will translate into a modern Aboriginal

[4] The courts have established that it is generally at the date of the first contact between members of an Aboriginal group and Europeans or Euro-Americans that is the threshold date for the establishment of the Aboriginal rights of that group. While this is generally presumed to mean face-to-face contact, courts have taken note of the influence of indirect contact in the "proto-contact period", such as through trade or disease, and have indicated that this could itself constitute contact for the purposes of the test: see *Queen v Drew et al* 2003 NLSCTD 105 [620] < https://www.canlii.org/en/nl/nlsctd/doc/2003/2003nlsctd105/2003nlsctd105.html?searchUrlHash=AAAAAQAwQWJvcmlnaW5hbCAicHJvdG8tY29udGFjdCIgb3IgImluZGlyZWN0IGNvbnRhY3QiAAAAAAE&resultIndex=11 >. See in Chapter II the discussion of the creation of this test in *R v Van der Peet* [1996] 2 SCR 507 <

> right. For any Aboriginal group that possessed a traditional territory, it seems likely that its distinctive culture would have been tied to that territory and to its ability to control or prevent other groups from infringing upon that territory and appropriating its resources. This pre-contact practice of preventing others from using resources located within their traditional territories will give rise to a modern right by which Aboriginal groups continue to be able to prevent others from using resources located within their traditional territories.

Given that this thesis is being written within the discipline of law, the greater part of it will be directed to demonstrating the major premise, ie the relevant legal principles derived primarily from Canadian case law that establish the existence of modern Aboriginal rights, particularly Aboriginal property rights. While legal principles will apply generally within a jurisdiction – in this case Canada - facts must always be proven on a case-by-case basis, so actually establishing that, for example, the Haida or the Heiltsuk or any particular one of the hundreds of Canadian Aboriginal groups did indeed control resource use within their traditional territories prior to contact and that this was integral to their distinctive cultures will have to await real world application. Some preliminary support will, however, be offered in support of the reasonableness of the hypothesis that such control can be presumed. In addition, arguments will be mustered in support of the existence of the proposed right that draw upon international law, real – ie immovable - property law, and the principles of reconciliation. In particular, there will be frequent references to and quotations from binding Supreme Court of Canada decisions.

Chapter outline

This thesis is predicated upon the fact that throughout vast areas of Canada, there are either no treaties whatsoever between the Crown and Aboriginal peoples, or merely "peace and friendship treaties", and that the result in either case is that whatever Aboriginal rights – including property rights – may exist in those areas were never extinguished. Chapters I through III detail the evolution of Aboriginal rights, particularly Aboriginal land rights, as delineated by a series of judicial decisions.

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https://www.canlii.org/en/ca/scc/doc/1996/1996canlii216/1996canlii216.html?autocompleteStr=r.%20v.%20van%20&autocompletePos=1 >.

Chapter I begins with *Johnson v M'Intosh* [5], an 1823 case by which the United States Supreme Court held that the Crown had acquired title by right of discovery, subject only to Aboriginal peoples' right of occupancy, a right which the Crown had the exclusive ability to acquire from them. The first judicial consideration of Aboriginal land rights in Canada, the 1889 decision of the Privy Council in *St. Catherine's Milling*[6], represented a further diminishment of Aboriginal land rights, in that the Crown was held – in the words of the Scottish judge Lord Watson[7] – to have always had a "present proprietary estate in the land" [8], with Aboriginal tenure amounting to "a mere burden" [9] and "a personal and usufructuary right, dependent upon the good will of the Sovereign"[10]. Twentieth century decisions of the Privy Council from other parts of the Commonwealth also suggested that "native title" would continue as a burden on the title of whomever was sovereign. The 1973 decision of the Supreme Court of Canada in *Calder* [11], however, established that in Canada Aboriginal rights had not only existed and survived settlement, but might never have been extinguished. The possible existence of unextinguished Aboriginal rights took on greater significance after s 35 of the *Constitution Act, 1982* [12] gave Aboriginal rights constitutional protection.

Chapter II reviews the post-*Calder* decisions that established the parameters of Aboriginal rights, including Aboriginal title. Cases such as *Guerin* [13], *Sparrow* [14], *Van*

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[5] *Johnson v M'Intosh* 21 US (8 Wheat) 543 (1823).
[6] *St. Catherine's Milling and Lumber Co v The Queen* (1889) 14 App Cas 46, construing a formal treaty or contract of 3rd October 1873 between commissioners appointed by the Government of the Dominion of Canada on behalf of Her Majesty the Queen and a number of chiefs and headmen chosen to represent the Salteaux Tribe of Ojibbeway Indians. Note that the name of the defendant company was spelled "St. Catharines" in the report of the Supreme Court of Canada decision but "St. Catherine's" in the report of the Privy Council decision; for consistency, the latter spelling will generally be used here.
[7] 'Lord Watson' (1902) 4 J Soc Comp Leg (new series) 9-10. See also John Saywell, 'The Watson Era, 1889-1912' in Christian Leuprecht and Peter H Russell (eds) *Essential Readings in Canadian Constitutional Politics* (University of Toronto Press 2011) 234.
[8] (n 6) 58.
[9] ibid.
[10] ibid 54.
[11] *Calder v Attorney General of British Columbia* [1973] SCR 313 < https://www.canlii.org/en/ca/scc/doc/1973/1973canlii4/1973canlii4.html?autocompleteStr=calder%20v%20att&autocompletePos=1 >.
[12] *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[13] *Guerin v The Queen* [1984] 2 SCR 335 < https://www.canlii.org/en/ca/scc/doc/1984/1984canlii25/1984canlii25.html?autocompleteStr=guerin%20v.%20the%20queen&autocompletePos=1 >.
[14] *R v Sparrow* [1990] 1 SCR 1075 < https://www.canlii.org/en/ca/scc/doc/1990/1990canlii104/1990canlii104.html?autocompleteStr=r.%20v.%20sparrow&autocompletePos=1 >.

der Peet [15], *Gladstone* [16], *Adams* [17] and *Côté* [18] each incrementally advanced the law in this area; while they did not directly concern Aboriginal property rights, some of them did make passing commentary on the topic, as well as creating the more general rules that would apply to all Aboriginal rights, including property rights. Eventually, the Supreme Court of Canada in its *Delgamuukw* [19] decision in 1997 clearly broke with the past – as embodied in the trial judgment in that case – and set out to describe its interpretation of Aboriginal title, namely that it was a *sui generis* right to exclusive use and occupation of land by Aboriginal groups, with such use not to be irreconcilable with the nature of a group's attachment to the land. When Mi'kmaq in Nova Scotia and New Brunswick attempted to rely on their asserted Aboriginal title to establish a defence to regulatory prosecutions in *R v Marshall*; *R v Bernard* [20], however, the 2005 decision of the Supreme Court of Canada upholding their convictions illuminated the uncertainty and confusion about the nature of Aboriginal title that still existed.

Chapter III describes a period of uncertainty that seemed to follow the decision in *Marshall; Bernard* [21], and suggests that during that period the courts were finding ways to avoid making findings in Aboriginal property rights cases, possibly because of dissatisfaction with that decision and in the hope that governments and Aboriginal groups would resolve land issues through negotiation. The chapter describes in detail how this impasse was eventually resolved by *Tsilhqot'in Nation* [22], examining the inconclusive trial decision, the British Columbia Court of Appeal's vision of Aboriginal

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[15] *R v Van der Peet* (n 4).
[16] *R v Gladstone* [1996] 2 SCR 723 < https://www.canlii.org/en/ca/scc/doc/1996/1996canlii160/1996canlii160.html?autocompleteStr=r.%20v.%20gladst&autocompletePos=1 >.
[17] *R v Adams* [1996] 3 SCR 101 < https://www.canlii.org/en/ca/scc/doc/1996/1996canlii169/1996canlii169.html?autocompleteStr=r.%20v.%20adams&autocompletePos=2 >.
[18] *R v Côté* [1996] 3 SCR 139 < https://www.canlii.org/en/ca/scc/doc/1996/1996canlii170/1996canlii170.html?autocompleteStr=r.%20v.%20cote&autocompletePos=4 >.
[19] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 < https://www.canlii.org/en/ca/scc/doc/1997/1997canlii302/1997canlii302.html?autocompleteStr=delgam&autocompletePos=1 >.
[20] *R v Marshall; R v Bernard* [2005] 2 SCR 220, 2005 SCC 43 < https://www.canlii.org/en/ca/scc/doc/2005/2005scc43/2005scc43.html?autocompleteStr=marshall%20bernard&autocompletePos=1 >.
[21] ibid.
[22] *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 256, 2014 SCC 44 < https://www.canlii.org/en/ca/scc/doc/2014/2014scc44/2014scc44.html?autocompleteStr=tsilh&autocompletePos=2 >.

title as merely one component of a web of Aboriginal rights, and the Supreme Court of Canada's eventual finding that Aboriginal title could exist across broad territories and does exist in a large portion of that part of central British Columbia that had been claimed by the plaintiffs. The conclusions to be drawn from that decision are discussed.

Although the legal framework for Aboriginal rights as established by the Canadian courts and set out in Chapters I through III provides the underpinning for the proposed right of Aboriginal dominion, Chapter IV deals with a topic that flows from it, namely the question: if there do exist additional Aboriginal rights which have not yet been recognized at law in Canada, how could these rights be discovered? Among other sources, this chapter proposes that international law could constitute a source of inspiration in the search for new Canadian Aboriginal rights as well as providing support for the existence of proposed new rights, including the proposed right of Aboriginal dominion.

Chapter V sets out the central argument of this thesis, namely that the pre-contact practice of controlling access to land and resources in their traditional territories would have been integral to the distinctive cultures of any Aboriginal groups that did, in fact, possess traditional territories and should therefore give rise to a modern Aboriginal right that relates to that practice. This is asserted to be simply the logical outcome of applying the test set out in cases such as *Sappier*; *Gray* [23] to a known characteristic of many Aboriginal groups, one that it is argued would have been foundational to the ability of any such group to establish and maintain its distinctive culture. That is, since it was by excluding others who were not part of their group and controlling access to the resources necessary for their survival that a group could even exist, that practice must have been integral to the culture of such a group. The modern Aboriginal right that is here proposed to flow from that pre-contact practice would be the right to say "no" to any proposed resource extraction or development within the group's traditional territory with which the group disagreed, a right that would be most likely to be exercised with regard to proposals for logging, mining, pipelines, dams or similar

[23] *R v Sappier; R v Gray* [2006] 2 SCR 686, 2006 SCC 54 < https://www.canlii.org/en/ca/scc/doc/2006/2006scc54/2006scc54.html?autocompleteStr=sappier&autocompletePos=1 >.

undertakings. Some preliminary consideration is given to how this right might function in practice.

Because the Common Law has tended to conflate the Crown's role as the holder of the underlying title to real property with its role as the wielder of sovereign power, and because saying "no" to resource extraction or development within a given area might appear to be more in the nature of the exercise of sovereign power than the exercise of a property right, Chapter VI considers the concept of sovereignty and contrasts it with the proposed right of Aboriginal dominion. Since the courts have been clear in holding that the Crown is sovereign, this chapter considers the question of whether Aboriginal groups somehow lost a sovereignty they once possessed or whether they always lacked some necessary attribute of sovereignty. Since it seems likely that in most pre-contact Aboriginal groups there was no person or entity that exercised sovereign power, it may be that such groups were not "sovereign" in the sense that that term is understood by the courts. This would tend to confirm that the pre-contact control Aboriginal groups exercised over their traditional territories was a form of property right, and would therefore be appropriately translated into the proposed modern property right of Aboriginal dominion.

Since Aboriginal dominion is proposed to be a form of property right, it is appropriate to consider how it fits into property law more generally, and this is done in Chapter VII. This is at odds with the approach that has so far been taken to Aboriginal property rights by the Supreme Court of Canada, which has termed such rights "*sui generis*" and has chosen not to place them within the framework of property law more generally. This, it is argued, is misguided; the same human needs that have given rise to European property law systems apply in the Aboriginal context, though manifested differently to reflect different environments, cultures and lifestyles. The proposed right of Aboriginal dominion is suggested to be analogous to what in European systems would be termed a "negative easement", a concept that is both useful and familiar.

Chapter VIII asks whether the proposed recognition of the right of Aboriginal dominion would be socially beneficial, a question that is answered in terms of whether it would promote reconciliation. While reconciliation of Canada's Aboriginal and non-Aboriginal communities has been identified by the Supreme Court of Canada as the

"fundamental objective" [24] of Aboriginal law, the term "reconciliation" has been used inconsistently. This chapter explores the concept and argues that there are several ways in which reconciliation would indeed be furthered by recognition of the right of Aboriginal dominion. In addition, the chapter briefly considers the first modern treaty to be entered into in British Columbia – the Nisga'a Final Agreement – and suggests that the recognition in that agreement of the Nisga'a Nation's ongoing right to affect resource use in those parts of the Nass Area that it does not own outright reflects what is proposed here in a more general way, namely recognition of the right of Aboriginal dominion in areas where Aboriginal groups do not hold title. The fact that this result was freely arrived at through negotiation between an Aboriginal group and the Crown in arriving at the Nisga'a Final Agreement is argued to indicate that Aboriginal dominion can be a useful tool for reconciliation.

Finally, a short "Conclusions" section recaps the advantages and disadvantages of the known legal concepts that currently define the relationship of Aboriginal peoples to land and how recognition of Aboriginal dominion would result in an improvement over the *status quo*. It also, however, sets out misgivings as to whether Aboriginal dominion is likely to ever be recognized by the courts despite the arguments made in this thesis as to why it should be so recognized.

Limitations

In order to make the case for so novel a proposition as the recognition of an Aboriginal property right that has previously been unrecognized in Canadian domestic law, it has been necessary to draw together several disparate threads of argument. It must in fairness be acknowledged that this will have left this thesis open to criticism for treating some of subjects touched upon with less depth and thoroughness than they deserve. Even the three chapters that have been allocated to setting out the evolution of the legal framework for Aboriginal rights in Canada have, of necessity, focused solely on the binding decisions issued by the Supreme Court of Canada, largely ignoring the

[24] *Lax Kw'alaams Indian Band v Canada (Attorney General)* 2011 SCC 56 [12] < https://www.canlii.org/en/ca/scc/doc/2011/2011scc56/2011scc56.html?autocompleteStr=lax&autocompletePos=2.

important trial and court of appeal decisions that formed their foundation and the academic works and non-Canadian judicial decisions that were so often cited in them. The entire subject of international law as it concerns Aboriginal rights is subsumed into a portion of one chapter, with coverage of that topic limited to the support it could provide for the existence of the proposed right of Aboriginal dominion; again, the topic of the international law of indigenous rights could by itself justify a longer work than this one. A chapter that in earlier drafts was devoted to the topic of the Crown's duty of consultation and why it does not obviate the need for the proposed right of Aboriginal dominion that is proposed in this thesis was, regrettably, deleted in its entirety, as was a chapter on the history of Euro-Canadian interaction with Aboriginal peoples and the resulting system of treaties and reserves.

Most notably, the thesis makes only a preliminary attempt in Chapter V to answer the question of exactly how the exercise of the right of Aboriginal dominion would work in practice. The full answer to this question is currently unknowable, given the great number of Aboriginal groups that would possess this right, their disparate circumstances, and the different choices that could be made by those groups and by the Crown and other actors with regard to Aboriginal dominion lands. As Martin Luther King is reported to have said, however, it is not necessary to see the whole staircase in order to take the first step. If, as is argued in this thesis, the right of Aboriginal dominion does exist, then its recognition cannot be dependent upon knowing all of the consequences that may flow from that recognition.

Introductory Glossary

Aboriginal

A term that was originally used by the Romans to refer to peoples from other parts of the Apennine Peninsula, the term is from the Latin "*ab origine*", meaning – when used with regard to people - those whose ancestors have been in a particular place "since the beginning". In the *Constitution Act, 1982*, this term is used to refer comprehensively to Indians, Inuit and Métis, but it is sometimes used colloquially to refer just to the largest of these three groups, namely Indians.

Aboriginal law

The field within the Common Law and Civil Law ("*droit d'Autochtones*") systems that comprises the law as it relates specifically to Aboriginal peoples. Because so many aspects of the lives of Aboriginal people, particularly those living on reserves, are governed by the *Indian Act*, Aboriginal law encompasses fields that otherwise be seen as distinct, such as wills and estates, property, tax, and family law. It is distinguished from Indigenous law; see below.

Aboriginal right

A practice that was an integral part of a particular Aboriginal group's distinctive culture before the date of contact (or, with regard to land rights, the date of the assertion of sovereignty) will give rise to a modern Aboriginal right. The common law gives effect to those Aboriginal rights, and those which remained in existence in 1982 were recognized and affirmed by s 35(1) of the *Constitution Act, 1982* and now enjoy constitutional protection.

assertion of sovereignty

The date at which Aboriginal title - and presumably other Aboriginal land rights as well - crystalized has been identified by the courts as the date of the assertion of Crown sovereignty. An Aboriginal group that can demonstrate that it exclusively occupied land at the date of the assertion of sovereignty will be held by the courts to have Aboriginal title to those lands. The date of the assertion of sovereignty would presumably vary across Canada to reflect the gradual expansion of British and later Canadian sovereignty. In practice, courts in British Columbia considering Aboriginal land rights have tended to rely upon the date of the conclusive establishment of Crown sovereignty – 1846, the date when the Oregon Treaty settled the border with the United

States – rather than the date of the assertion of sovereignty, the identification of which remains subject to interpretation.

band

The modern form of collectivity created by the *Indian Act* by which the Government of Canada defines and regulates its relationship to Indian people. Section 2(1) of the *Indian Act* defines "band" as follows:

"band" means a body of Indians

> (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,
>
> (b) for whose use and benefit in common, moneys are held by Her Majesty, or
>
> (c) declared by the Governor in Council to be a band for the purposes of this Act;

Civil Law

The codified legal system derived from late Roman law that is in force throughout continental Europe as well as in many jurisdictions elsewhere. Quebec, which is Canada's largest province, retains a civil law system, although it is greatly influenced by Common Law.

Common Law

The legal system "common" to all of England that was established following the Norman conquest in 1066, characterized by its reliance upon judicial precedent.

constitution

A constitution is the underlying law that establishes the legal existence of a state and principles by which it is governed. Canada's constitution has significant written components, of which the most notable are the *Constitution Act, 1867* and the *Constitution Act, 1982*. The former document delineates the division of powers between the federal and provincial governments, with the federal government being made responsible for "Indians, and Lands reserved for the Indians" pursuant to s 91(24). The latter document contains the *Canadian Charter of Rights and Freedoms*, as well as s 35, which states that the "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Statutory provisions or administrative actions that are inconsistent with the constitution are subject to being struck down.

contact

"Contact" when used by the courts appears generally to refer to the first meeting between a given Aboriginal group and Europeans, though it may possibly refer to indirect contact, when European goods or European diseases were first introduced. Customs that were integral to the group's identity at the date of will constitute constitutionally protected Aboriginal rights.

fee simple

Under the Common Law, fee simple is the highest possible interest that can be held in real property. It is generally equated to outright ownership, although government as the ultimate owner of all land in theory retains an interest that is referred to as an "allodial" or "radical" or "underlying" title.

First Nations

Entering common parlance in the 1980s, this is now the preferred term for the largest ethnic group of peoples whose presence in what is now Canada predates that of arrivals from Europe and elsewhere. It is a synonym for "Indians".

Indians

A term for the largest ethnicity of original inhabitants of the Americas that was apparently based on the belief by Columbus that he had arrived in the "Indies", ie Asia. Widely considered inappropriate in Canada, the term retains significance because of its usage in statutes and in constitutional documents.

Indigenous

As a term for the original inhabitants of a given region, this is an alternative to "Aboriginal" that is more commonly used internationally and is favoured by the Liberal government of Canada that was elected in 2015.

Indigenous law

As opposed to Aboriginal law, Indigenous law refers to the legal or customary practices of Aboriginal peoples themselves, particularly before they were affected by the arrival of Europeans and others.

Inuit

A term for that original ethnic group that inhabits the most northern regions of what is now Canada, as well as other polar countries. The term "Eskimo" that was used in earlier times is now considered offensive in Canada.

ownership

The term "ownership" could generally be said to mean the complete proprietary interest in something to the exclusion of all others. With regard to land, it is seldom used in Common Law jurisdictions because of the survival of the feudal notion that the Crown possesses the underlying title to all land.

reconciliation

Although the term "reconciliation" can be used in several different ways, in Canada it is most often used to refer to social reconciliation between Aboriginal and non-Aboriginal peoples, and in this context is has been identified by Canadian courts as the fundamental objective of Aboriginal law.

reserve

Lands owned by the Government of Canada that are set aside for the use and benefit of a band. The corresponding term in the United States is "reservation".

Rights

A legal or constitutional entitlement to have or to do something,

section 35

The provision in Canada's *Constitution Act, 1982* which mandates that the existing aboriginal and treaty rights of the aboriginal people in Canada are recognized and affirmed.

treaty

A formal agreement concluded either between states or between a state and its Indigenous peoples.

usufructuary right

In the Civil Law system, a property interest which includes the right of use of the property (*usus*) and any profits deriving from the property (*fructus*) but not the right to destroy the property (*abusus*). That is, it involves only two of the three attributes that are associated with full ownership of property.

UNDRIP

The *United Nations Declaration on the Rights of Indigenous Peoples* is the most prominent international instrument respecting Indigenous rights. Its adoption by former colonial states such as Canada has been contentious.

Chapter I: Early Judicial Conceptions of Aboriginal Rights and Aboriginal Title in North America

The Crown has a long and complex history of involvement with the Aboriginal peoples of Canada. Some aspects of this history and of the nature of the resulting relationships are set out in documentary form, while some are not. In the pre-Confederation era, treaties in what are now the Maritime Provinces and in parts of the provinces of Quebec and Ontario promised "peace and friendship" between Aboriginal and European peoples. In 1763, the signing by King George III of the *Royal Proclamation* [1] established the foundation for subsequent British and Canadian relations with Aboriginal peoples, affirming in the preamble:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds. [underlining added] [2]

As this excerpt suggests, the British Crown recognized – as most notably set out in the *Royal Proclamation* - that Aboriginal people retained their rights to those of their lands that they did not sell or cede to the Crown. In much of Ontario, all of Manitoba, Saskatchewan, and Alberta, and parts of British Columbia, Aboriginal people did surrender their land rights to the Crown by treaties, though parcels of reserve lands are held for their benefit by the federal Crown. In some other parts of Canada, however, treaties did not include provisions for land surrenders, while in yet other parts of the country no treaties were entered into at all.[3] The result is that Canada still contains vast

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[1] George R, *Proclamation*, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No 1.
[2] ibid. As to whether the Royal Proclamation continues to apply, for southern Ontario and Quebec see *Chippewas of Sarnia Band v Canada (Attorney General)* (2000) 51 OR (3d) 641 [19] (CA) < http://www.canlii.org/en/on/onca/doc/2000/2000canlii16991/2000canlii16991.html?autocompleteStr=chippewa&autocompletePos=1 > and *Kanekota v Canada* 2013 FC 350 [18] (FC). As to whether it continues to apply in British Columbia, see *William et al v British Columbia et al* 2006 BCSC 399 [11] < http://www.canlii.org/en/bc/bcsc/doc/2006/2006bcsc399/2006bcsc399.html?searchUrlHash=AAAAAQAnInJveWFsIHByb2NsYW1hdGlvbiIgImJyaXRpc2ggY29sdW1iaWEiAAAAAAE&resultIndex=3 > .
[3] Surtees estimated about one-half of the lands of Canada had been the subject of some formal agreement or treaty: Robert J Surtees, 'Canadian Indian Treaties' in Wilcomb E Washburn (ed) *History of Indian-White Relations: Handbook of North American Indians* 4 (Smithsonian Institution 1996) 202. For a recent analysis of the ambivalent system for acquiring Aboriginal lands in pre-Confederation Canada, see

areas of land that have never been formally surrendered or ceded by Aboriginal peoples. These areas include most of British Columbia and Yukon, parts of Quebec, Nunavut and the Northwest Territories, and all of Newfoundland (though the indigenous Beothuk people of the island of Newfoundland had ceased to exist by 1829) and Prince Edward Island. As will be discussed in subsequent chapters, Aboriginal rights continue to exist in those areas, and their continued existence has, since 1982, been given constitutional protection by s 35 of the *Constitution Act, 1982*. These Aboriginal rights include rights to land, though the exact nature and extent of such rights is unknown, and until recently there had been no official recognition of those rights.

The definition of those Aboriginal rights that continue to exist has been accomplished to date through the litigation process in the courts. As will be seen, that process has been an iterative one that has so far taken several decades and has principally succeeded in identifying hunting and fishing rights, while only recently having established the existence of any Aboriginal rights to defined tracts of land. The history of that process will be the subject of the first three chapters of this thesis, which will not only demonstrate how Aboriginal rights have come to be recognized, but will also provide the legal basis for the assertion that additional Aboriginal rights, including that proposed in Chapter V of this thesis as "Aboriginal dominion", also exist but have yet to be recognized.

The context for the erosion of Aboriginal land rights

That Aboriginal peoples in colonized lands continued to enjoy rights of some sort despite the arrival of Europeans does not originally seem to have been questioned. In the early decades following European arrival in North America, this would have been dictated by political reality if by nothing else, since the newcomers would have been in

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Alain Beaulieu, 'The Acquisition of Aboriginal Land in Canada: The Genealogy of an Ambivalent System (1600-1867)' in Saliha Belmessous (ed), *Empire by Treaty: Negotiating European Expansion 1600-1900* (OUP 2015). See also John Clarke, *Land, Power and Economics on the Frontier of Upper Canada* (McGill-Queen's University Press 2001), c 3.

the minority, with Aboriginal people – even at the local level – remaining in the majority. As Norris JA put it in *R v White and Bob*:[4]

> Clearly, if only as a matter of expediency, the original explorers and their governments, with limited forces at their command and little or no knowledge of the country in which they were required to have dealings with the Indians, were bound to give recognition to "rights" of the native inhabitants. Motives, of course, varied from regard for fair dealing, through enlightened self-interest, to fear of death and destruction at the hands of savage tribes.

In fact, both the British and French depended upon their numerically superior Aboriginal allies as their conflict in Europe spilled over to North America. Most notably, this occurred between 1754 and 1763 when Britain and the other great powers of the time fought the Seven Years War, which eventually resulted in Britain becoming the dominant European power throughout most of North America. The achievement of military victory in North America had been realized through the military support of Britain's Aboriginal allies and successful diplomatic efforts to achieve peace with France's Aboriginal allies.

The exact extent to which Aboriginal people originally outnumbered the European newcomers is unknowable. While actual numbers are not known, however, estimates of the pre-Contact population of North America north of the Rio Grande range from a low of 900,000 to a high of 18,000,000.[5] Two relatively recent and persuasive – albeit disparate – estimates are Thornton's[6] of 7,000,000+ and Ubelakers's[7] of 1,894,350. Whatever the real numbers might have been, the Aboriginal people of North America would certainly have greatly outnumbered the "210 souls maintaining a precarious foothold upon an unexplored continent" [8] recorded in the first decennial census of what is now the United States in 1610. Despite the technological advantages of the

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[4] (1964) 52 WWR 193, 211 (BCCA).
[5] Douglas H Ubelaker, 'Patterns of disease in early North American populations' in Michael R Haines and Richard H Steckel, (eds) *A Population History of North America* (Cambridge University Press 2000) 53.
[6] Russell Thornton, 'Population history of North American Indians' in Haines and Steckel (n 3) 13.
[7] Ubelaker (n 5) 13.
[8] WS Rossiter, A Century of Population Growth From the First Census of the United States to the Twelfth (Washington 1909) < http://www.archive.org/stream/centuryofpopulat00unit/centuryofpopulat00unit_djvu.txt > accessed 21 March 2012.

Europeans, any suggestion that Aboriginal people did not have rights connected to their occupation of land would therefore have been impolitic, to say the least.

With time, however, the relative proportions of newcomers to Aboriginal people – and therefore the amounts of power they respectively wielded – were reversed. On one hand, this was because of the rapid expansion of the European presence in North America, with the population of the United States alone growing to 3,929,625 by the time of the Federal census of 1790.[9] That is, by shortly after the founding of the United States and while the population of that country was still confined to a thin strip along the eastern seaboard, by most estimates its population already outnumbered the entire pre-contact Aboriginal population of both the United States and British North America. At the same time, however, the Aboriginal population was declining as dramatically as the European population was increasing. In large part, this was attributable to the effect of diseases to which Aboriginal North Americans had no resistance, namely smallpox, measles, bubonic plague, cholera, typhoid, diphtheria, scarlet fever, whooping cough, pneumonia, malaria, yellow fever, and various venereal diseases. Other factors, such as warfare, alcohol, and a low rate of reproduction also contributed to this decline in population. The eventual result was that the North American Aboriginal population reached a nadir around 1900 that is estimated to have been as low as 375,000, merely a fraction of the pre-Contact number.[10]

As the Aboriginal population shrank and the population of newcomers grew, the balance of power between them shifted. And as new immigrants demanded new lands, the pressure grew to dispossess Aboriginal peoples of their traditional territories, particularly after the Louisiana Purchase of 1803 created the potential for U.S. expansion west of the Mississippi. While the *Royal Proclamation* [11] continued to offer some protection to Aboriginal peoples against dispossession of their lands in British North America, the situation in the United States was less clear. On the one hand, the *Royal Proclamation* had been so unpopular that it is considered to have been a major cause of the United States declaring its independence from Britain. On the other hand,

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[9] ibid.
[10] Thornton (n 6) 14, 27. See also David J Hacker and Michael R Haines, 'American Indian Mortality in the Late Nineteenth Century: the Impact of Federal Assimilation Policies on a Vulnerable Population' [2005] [2] ADH 17.
[11] (n 1).

some initial attempts by the United States to claim Aboriginal lands by right of conquest had quickly been replaced by a policy of purchasing tribal lands. By 1820, therefore, when the white population of the United States had reached 9,639,000,[12] there was pressure for dispossession, but while the political and practical underpinnings for such dispossession were in place, there had previously been no need to establish the legal basis for doing so. This was about to result in the judicial system of the United States making the first legal determination of the respective rights of Aboriginal peoples and the states that had recently purported to exert sovereign authority in their traditional territories.

The first judicial identification of Aboriginal rights*: Johnson v M'Intosh*

Understanding the jurisprudential foundation upon which modern Aboriginal rights in Canada was built can be accomplished by considering in depth only three cases, namely one from the mid-nineteenth century United States Supreme Court, one late nineteenth century decision of the Judicial Committee of the Privy Council, and one late twentieth century decision of the Supreme Court of Canada, as well as making passing references to a handful of other cases.

It was in the United States that the seminal case regarding Aboriginal land rights was decided, namely *Johnson v M'Intosh*.[13] In that case, the United States Supreme Court was required to determine the validity of an alleged acquisition of land from Indians by a private company, ie an acquisition that was not accomplished via an intermediary acquisition by the Crown or any other government authorization, contrary to the *Royal Proclamation* of 1763[14]. The land in question included 23,000 square miles of farmland at the junctures of four major rivers in Indiana and Illinois. It was alleged to have been acquired by David Franks for the Illinois Company in 1773, who had bluffed British military authorities in North America with a doctored version of a legal opinion that had been issued by England's attorney general and solicitor general. Although that opinion actually concerned the right of the East India Company to purchase land

[12] Michael R Haines, 'The White Population of the United States, 1790-1920' in Haines and Steckel (n 3) 306.
[13] 21 US (8 Wheat) 543 (1823).
[14] (n 1).

directly from "the Mogul or any of the India princes or governments," an amended version was used to allow Franks to enter into an agreement with the local Aboriginal peoples for the purchase of the land. Although the British secretary of state for North America had in 1774 ordered the purchase declared invalid and any record of it at the public notary's register deleted, over the succeeding decades the land speculators had made numerous attempts to obtain executive and legislative recognition of their title to the lands.[15] The admission of Indiana to the United States in 1816 resulted in the creation of a new federal district court in that new state, which in turn created for the land speculators an opportunity to seek judicial recognition of the validity of their title to the lands.[16] Robertson has described the result as follows:

> This circumstance allowed for enormous manipulation by both litigants and the court. Shortcomings in the judicial structure, tolerance for collusion and misstatement of fact, conflicts between states and between states and the federal government, and the enthusiastic willingness of the chief justice of the United States to use one case to resolve another would all play their role in the action that followed. The result was the judicial conquest of Native America. [17]

Chief Justice John Marshall's decision on behalf of the United States Supreme Court found that the title claimed by the land speculators was invalid. The Court stated with regard to the *Royal Proclamation* of 1763 that it "has been considered, and, we think with reason, as constituting an…objection to the title of the plaintiffs. By that proclamation, the crown …strictly forbade all British subjects from making any purchases or settlements whatever, or taking possession of the reserved lands."[18] The Court also upheld the validity of a 1779 Virginia Declaratory Act, which had purported retroactively to invalidate unlicensed Indian land purchases, finding it to be "an unequivocal affirmance, on the part of Virginia, of the broad principle which had always been maintained, that the exclusive right to purchase from the Indians resided in the government."[19] Further, the Court recognized "… the absolute title of the Crown,

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[15] Lindsay G Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (OUP 2005) 7-10.
[16] ibid 41-45.
[17] ibid 43-44.
[18] *Johnson v M'Intosh* (n 13) 594.
[19] ibid 585.

subject only to the Indian right of occupancy, and…the absolute title of the Crown to extinguish that right."[20]

While the Court's finding on these two grounds would have been sufficient to dispose of the litigation, Chief Justice Marshall went further. He engaged in a retrospective legal characterization of the historical and political process of colonization, arriving at a finding that the Crown had acquired title by discovery, subject only to "the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring."[21] This was, in actuality, a departure from previously recognized principles.
Early in his reasons, Marshall introduces an element of *realpolitik*, intimating that if the British Crown had not acquired rights to North America, then they would have been seized by some competing European power:

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all, and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendency. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new by bestowing on them civilization and Christianity in exchange for unlimited independence. But as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted should be regulated as between themselves. This principle was that discovery gave title to the government by whose subjects or by whose authority it was made against all other European governments, which title might be consummated by possession.[22]

The statement that "discovery gave title" to the discovering European government is at odds with the practice that had actually prevailed, namely that the British Crown had had the exclusive right to purchase lands from the Aboriginal inhabitants of the areas it

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[20] ibid 588.
[21] ibid 592. See also: Robert J Miller, 'The International Law of Colonialism: A Comparative Analysis' (2011) 15 Lewis & Clark L Rev 847. See also Michael C Blumm, 'Why Aboriginal Title is a Fee Simple Absolute' (2011) 15 Lewis & Clark L Rev 975, 981.
[22] *Johnson v M'Intosh* (n 13) 572.

controlled.[23] In addition to inflating the rights of the European "discoverers", however, Marshall went further and diminished the rights of those Aboriginal peoples:

> In the establishment of these relations, the rights of the original inhabitants were in no instance entirely disregarded, but were necessarily to a considerable extent impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty as independent nations were necessarily diminished, and their power to dispose of the soil at their own will to whomsoever they pleased was denied by the original fundamental principle that discovery gave exclusive title to those who made it. [24]

At the political level, Marshall thus expressed the view that the Aboriginal peoples had been completely sovereign, but went on to say that they had lost that sovereignty. With regard to their rights to land, Marshall implicitly dismissed any possible right of ownership, finding instead that the Aboriginal peoples were merely "occupants", albeit rightful ones, and that their rights respecting land were restricted to possession and use. The immediate significance of these findings for Aboriginal people in the United States and its territories is apparent. Prior to *Johnson v M'Intosh*, it was legally possible that they could treat with the government of the United States – and presumably other governments – as sovereign equals, and could dispose of some or all of their lands to those governments if they chose to do so, or could refuse to part with any of their lands. Admittedly, the reality of their political and military situation might have been very different; to the extent that the American Revolution itself was a reaction to the restrictions imposed by the *Royal Proclamation* [25], it suggests that the American people would not have acknowledged the legitimacy of any government that attempted to prevent them from appropriating lands held by Aboriginal peoples, and the nineteenth century is replete with incidents that would lend further support to this hypothesis. Chief Justice Marshall's reasons in *Johnson v M'Intosh*, however, provided the necessary legal underpinning to allow such takings to be considered legitimate in a country that was subject to the rule of law: that is, since the government had been found to already own the land over which Aboriginal peoples' rights had been reduced to mere occupancy, that right of occupancy provided no meaningful protection when

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[23] Robertson (n 15) 101.
[24] *Johnson v M'Intosh* (n 13) 574.
[25] (n 1).

governments wished to vest ownership of that land in new settlers. As will be seen, the decision in *Johnson v M'Intosh* would eventually contribute to the same result in other countries as well.

Two points must be made about the decision. First – and this is a point that will resonate with other parts of this thesis – the decision seems to have conflated sovereignty and property rights, and to have given little thought to the latter. That is, if one nation-state asserts to other, competing nation-states that it is now sovereign in an area, it is simply not apparent why it would be presumed that the assertion or establishment of sovereignty would necessarily be accompanied by acquisition of all of the real property rights in that area. In particular, it is not clear either why the original inhabitants would be presumed to have lost some or all of whatever property rights they possessed, or why presumptions should be made about their property rights without any attempt to classify the nature of their estates.

Second, the enduring importance of the *Johnson v M'Intosh* decision is despite that entire portion of the reasons that set out the doctrine of discovery and the respective rights of discovering and discovered nations arguably constituting merely *obiter dicta*, unnecessary to the final decision and therefore of no legal effect. Indeed, Marshall seemed to resile from his own earlier decision in the later case of *Worcester v Georgia*.[26] While Marshall's decisions in that case and in *Cherokee Nation v Georgia*[27] were at least in theory important in determining the relationship between federal and

[26] 31 US (6 Pet) 515 (1832) < http://caselaw.findlaw.com/us-supreme-court/31/515.html >. The facts of this case involved the conviction of the missionary Samuel Marshall for being present on Cherokee land contrary to a Georgia statute that made that a criminal offence, a conviction that was vacated by the US Supreme Court. Marshall's judgment set out at length the continuing right of the Cherokee to ownership and governance of their traditional lands and the inability of state governments to infringe those rights. The following is a representative passage [557]: "From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians; which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied by the United States."

[27] 30 US 1 (1831) < http://caselaw.findlaw.com/us-supreme-court/30/1.html >. As a preliminary step toward removing the Cherokee from their lands, Georgia had passed a series of statutes stripping the Cherokee of their rights under state laws. This was challenged by the Cherokee Nation in court. In a decision a year before its subsequent decision in *Worcester v Georgia*, the US Supreme Court declined to rule on the merits of the case, holding that an Indian tribe was a "domestic dependent nation" which lacked the standing of a "foreign" state to bring a legal challenge in US courts. The decision did indicate that the Court viewed the Cherokee as an entity capable of governing itself and managing its own affairs.

state governments with respect to Indians in the United States– in reality, the federal and state governments of the time largely ignored the decisions and continued with the removal of Aboriginal peoples from their traditional lands - it was the *Johnson v M'Intosh* decision, with its recognition of "Indian title," that was later adopted by the courts in Canada and other nations.[28] This was despite Marshall J not having grounded his decision in law or legal precedent, and instead relying upon colonial history and custom.

The first major Canadian case: *St. Catherine's Milling*

In Canadian law, the first significant judicial consideration of the nature of "Indian title"[29] was in a case that was ultimately decided by the Privy Council: *St. Catherine's Milling and Lumber Co. v The Queen*.[30] This was the leading Canadian case on Aboriginal law for eighty years, despite – similarly to *Johnson v M'Intosh* – its most relevant passages arguably being merely *obiter dicta*.[31]

The Aboriginal people who had a connection to the case – the Saulteaux Ojibwa[32] people of north-western Ontario and north-eastern Manitoba – had, in fact, already surrendered their lands on October 3, 1873, pursuant to the provisions of Treaty 3 prior to the litigation taking place. It was the question of the effect of that surrender and, more specifically, whether it was the Government of Canada or the Government of Ontario that held title as a result of the surrender that gave rise to the litigation. Acting on the assumption that when the Saulteaux surrendered their lands – some 32,000 square miles – the beneficial interest in those lands had passed to the federal government, the federal government's Crown Timber Agent issued to the St.

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[28] Blake A Watson, 'The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand' (2011) 34 Seattle UL Rev 507.
[29] For a comprehensive review of other nineteenth century cases involving Aboriginal people in Ontario, see Sidney L Harring, 'Liberal Treatment of Indians: Native People in Nineteenth Century Ontario Law' (1992) 56 Sask L Rev 297.
[30] (1889) 14 App Cas 46 < http://www.bailii.org/uk/cases/UKPC/1888/1888_70.html >.
[31] Although *St. Catherine's Milling* was the first major case in this area and the leading case for many years, there were admittedly at least passing references to Aboriginal property rights in earlier cases. See, for example, the statement in *R. v McCormick* (1859), 18 UCQB 131, 133 (CA) that the status of certain Crown land required a determination of "whether it had been acquired by purchase from the aboriginal Indian tribe to which it had belonged."
[32] Note that the reasons of the Privy Council use what is now an archaic spelling. As noted elsewhere in this thesis, the variety in the spellings of the names of Aboriginal groups over time is problematic.

Catherine's Milling and Lumber Company a permit to cut and carry away lumber from a specified portion of the disputed area. When the company began logging pursuant to that licence, a writ was filed against it in the Chancery Division of the High Court of Ontario on the information of the Attorney-General of the Province, seeking: (1) a declaration that the appellants had no rights in respect of the timber cut on the disputed lands; (2) an injunction restraining them from trespassing and from cutting any timber on the disputed lands; (3) an injunction against the removal of timber already cut; and (4) a decree for the damage occasioned by the allegedly wrongful acts. The trial judge found against the logging company,[33] a judgment which was affirmed in succession by the Court of Appeal for Ontario[34] and the Supreme Court of Canada.[35] A further appeal was taken to the Judicial Committee of the Privy Council, with the Government of Canada being permitted to intervene in the appeal.

As stated, it was the Government of Canada that had entered into Treaty 3 with the Aboriginal groups. In argument, counsel for Canada[36] pointed out that the Indians had ceded their land by that treaty to the Dominion of Canada, and that the province of Ontario had not even been a party to the treaty. Further, attention was drawn to the provisions of s 91(24) of the *Constitution Act 1867* [37], which gave the federal government exclusive jurisdiction over "Indians and land reserved for the Indians". Counsel for Canada also referred to documentary evidence and argued that "the effect of it was to shew that from the earliest times the Indians had, and were always recognized as having**,** a complete proprietary interest, limited by an imperfect power of alienation."[38]

The Privy Council, however, ruled in favour of the province. It suggested in its reasons that had the Saulteaux surrendered their interest in their lands at any time between 1840 and 1867, there was no doubt that that interest would have passed to the former united province of Canada (ie what after 1867 became the separate provinces of Ontario and

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[33] (1885) 10 OR 196 (Ch).
[34] (1886) 13 Ont App R 148 < http://www.canlii.org/en/on/onca/doc/1886/1886canlii30/1886canlii30.html >.
[35] (1887) 13 SCR 577 < https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/3769/index.do >.
[36] Sir Richard Everard Webster QC and Attorney General, who later became Lord Chief Justice of England (1900-1913) and Master of the Rolls (1900).
[37] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1985, App II, No 5.
[38] *St. Catherine's Milling* (n 30) 48.

Quebec). In considering whether that result would have changed in 1867, it considered s 109 of the *Constitution Act, 1867*, which stated that:

> All lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick, at the union, and all sums then due or payable for such lands, mines, minerals, or royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise, subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same. [39]

This section, it reasoned, was sufficient to give to each province the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the union were vested in the Crown, with the exception of such lands as the federal government acquired for certain specified purposes, such as national defence. Section 91(24), on the other hand, it viewed as dealing only with the distribution of legislative power, and not as reflecting any intention on the part of the British Parliament to "deprive the Provinces of rights which are expressly given them in that branch of [the Constitution] which relates to the distribution of revenues and assets."[40]

That reasoning would have been sufficient to dispose of the appeal. Despite, however, stating that with respect to the "great deal"[41] of learned discussion at the Bar concerning the precise quality of the Indian right, it did not consider it necessary to express any opinion upon the point, the Privy Council nevertheless went on to do exactly that. Among the points it made concerning the nature of the Aboriginal interest in land were that:

- "The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden"[42];
- "[T]here has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished";[43]

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[39] (n 35) s 109.
[40] *St. Catherine's Milling* (n 30) 59.
[41] ibid 55.
[42] ibid 58.
[43] ibid 55.

- The Indian tenure with respect to that land was "a personal and usufructuary right, dependent upon the good will of the Sovereign"[44];
- Despite the *Royal Proclamation* reciting that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, it was expressly not the case that the entire property of the land remained with the Indians[45];
- The character of the interest that Indians held in unsurrendered lands was not in the nature of a fee simple interest.[46]

Just as in *Johnson v M'Intosh*, therefore, it can be seen that the effect of a ruling of the highest appellate court was to recognize the existence of "Indian title" but to appear to diminish the nature of the interest that could have been held by Aboriginal groups, though doing so in *obiter dicta*, without providing any explanation of the underlying rationale for key aspects of its reasoning, and in a case in which no Aboriginal group was actually a party. The result, particularly the observation that the Indian tenure was a personal and usufructuary right dependent upon the goodwill of the Sovereign, would seem to have been to create the impression that any Aboriginal interest in land was relatively insignificant (though admittedly greater than that of anyone else except the Crown). As described by a commentator with the advantage of a century of hindsight, the decision "was replete with dubious assumptions and obscure terminology" [47] and as a contribution to the law in this area it was "uncertain at best and misleading at worst".[48]

While such criticisms may be understandable, given that the decision is in some ways at odds with some modern views and case law, they are not entirely fair. A point that will be made more than once in this thesis is that courts are limited to adjudicating upon the legal questions that are put to them and are not able to function as commissions of inquiry or make general pronouncements on questions of law or policy that are not properly before them. In this case, there was no counsel whose brief was to argue for the greatest possible estate for Aboriginal peoples, so the Privy Council should not be

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[44] ibid 54.
[45] ibid.
[46] ibid 58.
[47] Brian Slattery, 'Making Sense of Aboriginal and Treaty Rights' (2000) 79 Can Bar Rev 196, 197.
[48] ibid. See also Michael Coyle, 'Addressing Aboriginal Land Rights in Ontario: An Analysis of Past Policies and Options for the Future – Part I' (2005-2006) 31 Queen's LJ 75, 95.

faulted for not applying that perspective. Further, since the Salteaux people had already surrendered their interest in the affected lands by the treaty of 1873, they would be unaffected no matter which way the Privy Council ruled on the nature of their surrendered rights. Despite the impression that the reference to Aboriginal tenure being "dependent upon the good will of the Sovereign" may have left, this was not a case in which a court was saying that Aboriginal title did not exist, or could be presumed to have been extinguished with neither any explicit expression of an intention by the Crown to do so or any compensation to the affected Aboriginal groups.

With the benefit of hindsight, it can, in fact, be seen that important parts of the Privy Council decision remain unaffected by later jurisprudence, in that the Crown is still acknowledged to have radical or underlying title[49] which becomes complete title if Aboriginal groups surrender their own interest, and it is still accepted that the property right of Aboriginal peoples is not in the nature of a fee simple interest (although it is argued in Chapter VII of this thesis that it is a form of outright ownership). The difference between much of the decision in *St. Catherine's Milling* and the law as defined by more recent decisions of the Supreme Court of Canada is really more a matter of language and inference than of substance.

It should also be noted that the decision is at odds with arguments made later in this thesis in two ways. First, it at least appears to presume that the Aboriginal interest in land is the same everywhere, while this thesis argues for the existence of more than one type of Aboriginal property right, with at least Aboriginal title and Aboriginal dominion existing in different parts of Aboriginal groups' traditional territories. Second, while

[49] It is interesting to note that this presumption of the Crown's underlying title has not been made by the courts in that part of the United Kingdom where udal law still survives, namely Orkney and Shetland. As noted by Cusine, "The distinctive feature of udal land holdings from the lawyer's point of view is that the land is not held of the Crown, as it is in a feudal system, and so there are no superiors and no feuduties….If land is held on udal tenure, no amount of possession can convert it into feudal tenure, and not even the fact that there is a written title on which sasine (an essential of the feudal system) has followed will suffice, since the distinctive feature of the latter is a title which can be traced to the Crown.": DJ Cusine, 'Udal Law' (1997) 32 Northern Studies 33. Possibly, the difference in the legal treatment of lands acquired in Canada and that acquired in these northern Scottish islands is that the latter were acquired by one sovereign power – Scotland – from another – Norway – but this is admittedly speculation. It is any event notable that the courts have been able to accommodate a system of landowning that is so different from that which is in effect throughout so much of the United Kingdom in cases dating back as far as *Sinclair v Hawick* (1624) M. 16393. Admittedly, the courts have not been as flexible in reconciling other aspect of udal law, such as that concerning the property in beached whales: *Bruce v Smith* (1890) 17R 1000.

the finding that Aboriginal peoples did not own their land in fee simple is legally correct, this thesis will suggest that Aboriginal title and fee simple title are analogous in that they equate to outright "ownership" in their respective milieux.

Canadian Aboriginal property law in stasis: 1889-1973

Other cases involving Aboriginal land interests followed over the succeeding decades, but without altering the law as set out in *St. Catherine's Milling*. Instead, the law regarding the respective rights of the provincial and federal governments was largely just clarified in cases such as: *AG Canada v AG Ontario* [50]; *AG Quebec v AG Ontario* [51]; *Ontario Mining Co v Seybold* [52]; and *Dominion of Canada v Ontario* [53].

While it might seem surprising that Aboriginal groups would not have taken steps during this period to assert Aboriginal title over those parts of their traditional territories that were outside of their allotted reserves, for several decades from the 1920s to the 1950s, there was a legal impediment to them doing so. Prior to that, however, in the first two decades of the twentieth century, Aboriginal groups and others were indeed actively attempting to have Aboriginal land rights recognized, particularly in British Columbia where few treaties had been signed. In 1906, for example, three Salish chiefs from British Columbia met with King Edward VII to petition him directly respecting their grievances, but received a response from the British Government that the matter was one to be dealt with by Canadian authorities.[54] In 1907, Nisga'a chiefs formed the Nisga'a Land Committee, which worked together with other north and south coast groups to create the Indian Rights Association in 1909. In 1910, Prime Minister Wilfred Laurier met with a number of Aboriginal delegations while touring British Columbia, and reportedly mused that "…the only way to settle this question…is by a decision of the Judicial Committee, and I will take steps to help you." [55] It appears, in

[50] (1895) 25 SCR 434, aff'd (1896), [1897] AC 1999 (PC).
[51] [1897] AC 199 (PC).
[52] [1903] AC 73 (PC).
[53] [1910] AC 637 aff'g 42 SCR 1 (PC).
[54] Paul Tennant, *Aboriginal Peoples and Politics* (UBC Press 1990) 85. See also Keith Thor Carlson, 'Rethinking Dialogue and History: The King's Promise and the 1906 Aboriginal Delegation to London' (2005) 16 NSR 1.
[55] Forrest E LaViolette, *The Struggle for Survival: Indian Cultures and the Protestant Ethic in British Columbia* (University of Toronto Press 1961) 127. See also House of Commons (Canada), Journals, Appendix No 1A, 17 George V, vol 64 (1926-27).

fact, that a 1913 petition by the Nisga'a addressed to "the King's Most Excellent Majesty in Council" may for many years have led to the mistaken belief among Aboriginal groups in British Columbia that the Judicial Committee of the Privy Council would indeed be making a ruling with regard to the existence of Aboriginal title in British Columbia.[56]

The only definite possibility of such a ruling actually being made arose in 1914, when the federal cabinet passed an order-in-council[57] by which it hoped to forestall any possibility that the British government might take steps in response to the Nisga'a petition. This provided that the federal government would refer "the Indian claim to the lands of the Province of British Columbia" to the Exchequer Court of Canada "with right of appeal to the Privy Council" providing that three conditions were accepted by the Aboriginal groups. First, that if the courts found that they had title, they would surrender that title in return for treaty benefits similar to those that existed elsewhere in Canada, and would accept as final the recommendations of a Royal Commission that proposed "cutting off" a large proportion of the most desirable lands held in reserves. Second, that any obligations of British Columbia for any of its past actions would be fulfilled by its granting of the land for reserves. Third, that while the province would be represented by legal counsel of its own choosing in the court case, that the Indians would be "represented by counsel nominated and paid by the Dominion."[58] Unsurprisingly, the proposal was not well-received by Aboriginal groups.[59]

Attempts by Aboriginal groups to seek recognition of their Aboriginal title came to a halt in 1927. Ironically, this was as a result of the federal government finally responding to native lobbying by appointing a Special Joint Committee of Parliament to consider the Aboriginal demands. At the conclusion of its hearings, the Committee unanimously concluded "…that the petitioners have not established any claim to the lands of British Columbia based on Aboriginal or other title." Further, since the

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[56] Tennant (n 54) 86-92. Regarding this time period more generally, see Hamar Foster, 'Letting Go the Bone: The Idea of Indian Title in British Columbia, 1849-1927' in John McLaren and Hamar Foster, eds, *Essays in the History of Canadian Law* vol VI (1995 University of Toronto Press) 28.
[57] PC 1914-0751.
[58] Special Committees of the Senate and House of Commons, 'To Inquire Into the Claims of the Allied Indian Tribes of British Columbia, As Set Forth in Their Petition Submitted to Parliament in June 1926: Session 1926-27, Proceedings, Reports and the Evidence' (King's Printer 1927) ix.
[59] Tennant (n 54) 92-93.

Indians had rejected the proposal for their claim to be referred to the Exchequer Court of Canada, "the matter should now be regarded as finally closed."[60]

Immediately following the Committee's 1927 report, an amendment was made to the *Indian Act* to make it an offence punishable by as much as a two hundred dollar fine or two months imprisonment for anyone to solicit or receive funds for the prosecution of any claim by an Indian band or tribe for the recovery of any claim or money for the benefit of the band or tribe.[61] This new provision – originally s 149A of the *Indian Act* but s 141 following the 1927 revision [62] – remained in force until 1951. For almost a quarter-century, therefore, neither Indians nor those non-Indians who were sympathetic to their situation could have recourse to the courts to attempt to define or enforce whatever rights, including rights to land, they might have without risking fines or imprisonment. It is not surprising that the law did not progress beyond what had been set out in *St. Catherine's Milling* [63] during this period.

Not only could Aboriginal groups not use the court system to press for their rights at this time, they were also significantly handicapped with regard to access to the mechanisms of Parliamentary government that might otherwise have been used to push for reform. Indians had neither citizenship nor the right to vote unless they became "enfranchised", ie gave up their Indian status, either voluntarily or involuntarily. The result of their being denied meaningful access to either the courts or Parliament appears to have been to arrest the development of the law concerning Aboriginal interests in land for many years.

Following World War II, a more enlightened approach to ethnic minorities, including Aboriginal peoples, began to be adopted by Canadian governments. There were major revisions to the *Indian Act* in 1951, such as the repeal of the bans on the potlatch and the Sun Dance, and also including the repeal of the s 141 restrictions on fundraising to pursue Indian claims.[64] In 1956, s 9 of the *Citizenship Act* was amended to grant

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[60] Special Committees (n 56) xi.
[61] *An Act to Amend the Indian Act*, SC 1926-27, Chap 32, s 6.
[62] *Indian Act* RSC 1927 Chap 98, s 141.
[63] (n 26).
[64] *Indian Act*, SC 1950-51, Chap 29.

citizenship to Status Indians and Inuit [65], retroactive to 1947.[66] In 1960 [67], pursuant to the *Act to Amend the Canada Elections Act*, s 14(2)(e) of the *Canada Elections Act* was repealed, thereby making Indians eligible to vote.[68] Newly enfranchised and once again able to fund litigation in pursuit of their rights, Aboriginal people were able to resume their attempts to obtain recognition of their claimed rights to land.

Privy Council decisions: affirmation of continuing native property rights

Although Canadian law regarding Aboriginal rights had not progressed beyond what was decided in *St. Catherine's Milling*, the law had continued to evolve in other jurisdictions, so that Canadian lawyers and courts would have at least some precedents they could rely upon when claims to those rights were once again advanced.
In addition to *Johnson v M'Intosh*, there did exist some case law dealing with Aboriginal title that predated *St. Catherine's Milling*.[69] In *R v Symonds*, for example, Chapman J of the New Zealand Supreme Court held native title to be a recognized right of customary use and possession of land, that was subject only to the exclusive right of the Crown to extinguish that right.[70]

After *St. Catherine's Milling* and before the next major Canadian case on Aboriginal title, however, the most significant rulings over several decades came from the Judicial Committee of the Privy Council, which remained the court of last resort for many

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[65] The statute actually used the now-archaic (in Canada) term "Eskimos".
[66] SC 1956, Chap 6, s 2.
[67] Interestingly, the extension of the franchise to Indians occurred just one month before Royal Assent was given to the *Canadian Bill of Rights* SC 1960, c 44, a statute that recognized certain rights and fundamental freedoms "without discrimination by reason of race, national origin, colour, religion or sex."
[68] SC 1960, chap 7, s 1.
[69] Note that although the "Marshall trilogy" cases are the only such cases referred to here that are from the United States, this is because United States jurisprudence – unlike that from Commonwealth nations that were appealed to the Privy Council – was not binding on Canadian courts and was not necessarily persuasive, rather than because of any shortage of applicable jurisprudence. Indeed, native law has been more heavily litigated in the United States than in Canada, and some consider it "indispensable" when researching questions of Aboriginal title to land: Jack Woodward, *Native Law*, Vol 1 (Carswell 2005-Rel 2) 202.
[70] (1847) NZPCC 387. Note that Mark Hickford refers to Symonds as "a singular fragment – a fossil that is estranged from its particular historical contexts" and argues that it belongs to a forgotten line of subsequent cases: 'Settling Some Very Important Principles of Colonial Law: Three Forgotten Cases of the 1840s' (2004) 35 Victoria U Wellington L Rev 1. See also Mark Hickford, 'John Salmond and Native Title in New Zealand: developing a Crown Theory on the Treaty of Waitangi, 1910-1920' (2008) 38 Vict U Wellington L Rev 853.

countries well into the twentieth century.[71] In a series of decisions concerning other colonial or Commonwealth jurisdictions, the principle that native property rights were unaffected by British sovereignty was made very clear. In the case of *In re Southern Rhodesia* [72], for example, the Privy Council accepted that some form of communal ownership of the lands by the natives existed, noting that:

> In any case it was necessary that the argument should go the length of showing that the rights, whatever they exactly were, belonged to the category of rights of private property, such that upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and forborne to diminish or modify them. [73]

The Privy Council also held that native conceptions of property were "no less enforceable than rights arising under English law" [74] and that native property rights survived conquest[75] and native legal systems must be given effect.

A decision to the same effect was *Amodu Tijani v Secretary, Southern Nigeria* [76], in which the Privy Council made a number of observations that supported the continued existence of native land rights after the British assertion of sovereignty:

> No doubt there was a cession to the British Crown, along with the sovereignty, of the radical or ultimate title to the land, in the new colony, but this cession appears to have been made on the footing that the rights of property of the inhabitants were to be fully respected. This principle is a usual one under British policy and law when such occupations take place.

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[71] The Supreme Court of Canada became Canada's highest court in 1949. Below it, in each Canadian province and territory there is a superior court of general jurisdiction and an appellate court, both of which have judges appointed by the federal government. Below these are courts which have judges appointed by provincial or territorial governments, which deal in the first instance with less serious civil and criminal matters. There is also the Federal Court and Federal Court of Appeal which deal with matters exclusively within federal jurisdiction.

[72] *In re Southern Rhodesia* [1919] AC 211, 232 < http://www.uniset.ca/other/cs2/1919AC211.html >.

[73] ibid 233 per Lord Sumner.

[74] ibid 234.

[75] Note, however, that the decision appeared to contemplate that the extinguishment of those rights would be relatively easy, since it stated that "…so long as the British South Africa Company continues to administer South Africa under the Crown, it is entitled to dispose of the unalienated lands in due course of administration….": ibid 248-249. Note as well that the fact that the lands in question were found to have been acquired through force of arms would distinguish the case from the situation of Aboriginal peoples in Canada.

[76] [1921] 2 AC 399.

> The general words of the cession are construed as having related primarily to sovereign rights only.[77]
> …
> In the light afforded by the narrative, it is not admissible to conclude that the Crown is generally speaking entitled to the beneficial ownership of the land as having so passed to the Crown as to displace any presumptive title of the natives.[78]
> …
> A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are prima facie to be construed accordingly.[79]

As those quotes make clear, the Privy Council clearly held that while the Crown might acquire both sovereignty and radical title to land, the land rights of the original inhabitants were presumed to continue to exist, and that this was the "usual" principle under British law and policy. Admittedly, such rights were capable of extinguishment, as noted in *Sobhuza II v Miller*.[80] In a series of native title cases throughout the twentieth century, however, whether from Nigeria,[81] the West African Gold Coast,[82] or Fiji, there was no deviation from the established principle of the continuation of established property rights.[83] In the late 1950s, Privy Council cases in which Lord Denning wrote decisions touched on the limits on the application of the Common Law outside of England,[84] and on the obligations of the Crown when purporting to acquire Aboriginal title land.[85] Regarding the latter, he stated the "one guiding principle" that would be used by the courts in considering what rights pass to the Crown and what rights are retained by the native inhabitants in stronger terms than had been used by the Court previously:

> The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation

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[77] ibid 407 per Viscount Haldane.
[78] ibid.
[79] ibid. See Chapter VI.
[80] [1926] AC 518, 525.
[81] *Bakare Jakaiye v Lieutenant Governor of the Southern Provinces* [1929] AC 679.
[82] *Stool of Abinabina v Chief Kojo Enyimadu* [1953] AC 207.
[83] *Nalukuya (Rata Taito) v Director of Lands* [1957] AC 325.
[84] *Nyali v Attorney General* [1956] 1 QB 1, 17.
[85] *Adeyinka Oyekan v Musendiku Adele* [1957] 2 All ER 785.

> according to their interests, even though those interests are of a kind unknown to English law….[86]

Since all of these Privy Council decisions in the decades up to and including the 1950s consistently recognized the existence of Aboriginal title and Aboriginal law, it might have been expected that following the social reforms and political activism of the 1960s, that new court decisions would go further and give more weight to these Aboriginal concepts than previously. The first Commonwealth case in what might be termed this new era, however, actually went in the opposite direction. In the Australian case of *Milirrpum v Nabalco Pty Ltd* [87], the Supreme Court of the Northern Territory – in a decision that was not appealed, but was overruled more than two decades later – gave the first judicial consideration to the concept of Aboriginal title in Australia. It dismissed the attempt by the Yolngu people to claim legal and sovereign rights over the Gove Peninsula, on the basis that collective native title was not part of the law of Australia, that the plaintiffs' claims were not in the nature of proprietary interests, and that even had they existed, any native title rights had been extinguished by the relevant mining legislation. Further, it was held that even if such rights had existed and had not been extinguished, that the plaintiffs had failed to prove their case.[88]

What, then, would occur when Canadian courts had the first opportunity to consider the existence or non-existence of Aboriginal rights, including rights of Aboriginal title, after the passage of many decades? That is, empowered by the forces of activism and social change that had led to many minority groups around the world asserting their rights, and no longer handicapped by the legal impediments that had previously prevented them from asserting their claim to those rights, would Canadian Aboriginal groups obtain the same dismissive result seen in Australia in *Milirrpum*? Alternatively, would they at least achieve the level of recognition of native rights and title that had been accorded by the Privy Council? Or might they even achieve more? The answers to these questions would be determined in 1973 at the instigation of native people of northern British Columbia.

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[86] ibid 788.
[87] (1971) 17 FLR 141.
[88] Note that a very different result was obtained in the subsequent case of *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 [31] < http://www.austlii.edu.au/au/cases/cth/HCA/1992/23.html >. The influence of this case on Canadian law is referred to in Chapter VIII.

Aboriginal rights, not dead after all: *Calder v Attorney General of British Columbia*

Many of the most important legal decisions of recent decades concerning Aboriginal rights in Canada have arisen in response to very specific disputes about resource use. In many of these cases, there has been a prosecution brought because of Aboriginal fishing or hunting in violation of fishing and hunting regulations, and Aboriginal rights are raised as a defence. In other cases, Aboriginal groups that are opposed to proposed or ongoing resource development projects such as logging or mining in a watershed and that have exhausted other means of attempting to prevent those projects from proceeding will resort to litigation to achieve that end. There have been very few cases in which Aboriginal groups have attempted to use the courts purely in an attempt to prove the existence of their rights.

The Supreme Court of Canada's first significant Aboriginal rights decision of the modern era, however, involved exactly such a situation. In *Calder v Attorney General of British Columbia*,[89] Frank Calder and the Nisga'a Nation Tribal Council[90] sought a declaration "that the Aboriginal title, otherwise known as the Indian title, of the Plaintiffs to their ancient tribal territory… has never been lawfully extinguished".[91] In doing so, they continued a struggle that had been begun at least as early as the nineteenth century.

Although Fort Simpson (now Port Simpson) had been established in 1834, bringing traders to the Nass Valley area, and missionaries arrived in the mid-nineteenth century, it was not until more widespread attempts at white settlement and resource extraction began in the 1870s that native peoples of the Nass Valley began to be concerned. In 1881, Chief Mountain led a Nisga'a delegation to Victoria, and in 1885 three chiefs of the neighbouring Tsimshian travelled to Ottawa to meet with the Prime Minister.

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[89] [1973] SCR 313 < http://www.canlii.org/en/ca/scc/doc/1973/1973canlii4/1973canlii4.html?autocompleteStr=calder&autocompletePos=1 >.

[90] Note that the names of Aboriginal groups and the spelling of those names have varied over time. In this instance, the modern "Nisga'a" will generally be used, but the older spelling of "Nishga'a" will be used when required by historical references, such as to the "Nishga'a Land Committee".

[91] *Calder* (n 89).

Concerns about land led both groups to have meetings in their local communities in 1886, leading to a decision to meet with federal and provincial officials in 1887. The governmental authorities, apparently in part because of widespread concern about a possible Indian uprising on the north coast, agreed to joint federal-provincial meetings with a delegation of Nisga'a and Tsimshian chiefs in Victoria in 1887. In those meetings, the native chiefs, on the one hand, were clear about their determination to have their laws and lands protected, while Premier Smithe and other provincial officials, on the other hand, either did not understand or did not take seriously the native concerns. Nevertheless, a joint federal-provincial commission of inquiry was established that travelled to the north coast in late 1887, though with instructions that "…in particular you will be careful to discountenance, should it arise, any claim of Indian title to Provincial lands."[92]

In a passage quoted by the Supreme Court of Canada in its reasons,[93] Nisga'a representatives told the Commission on its visit to the Nass Valley of their belief in their ownership of their territory and their disbelief that the government of the newcomers could have somehow displaced them from that ownership:

> David Mackay—What we don't like about the Government is their saying this: "We will give you this much land." How can they give it when it is our own? We cannot understand it. They have never bought it from us or our forefathers. They have never fought and conquered our people and taken the land in that way, and yet they say now that they will give us so much land—our own land. These chiefs do not talk foolishly, they know the land is their own; our forefathers for generations and generations past had their land here all around us; chiefs have had their own hunting grounds, their salmon streams, and places where they got their berries; it has always been so. It is not only during the last four or five years that we have seen the land; we have always seen and owned it; it is no new thing, it has been ours for generations. If we had only seen it for twenty years and claimed it as our own, it would have been foolish, but it has been ours for thousands of years. If any strange person came here and saw the land for twenty years and claimed it, he would be foolish. We have always got our living from the land; we are not like white people who live in towns and have their stores and other business, getting their living in that way, but we have always depended on the land for our food and clothes; we get our salmon, berries, and furs from the land. [94]

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[92] Tennant (n 54) 55-59.
[93] *Calder* (n 89) 319.
[94] British Columbia, 'Papers Relating to the Commission Appointed to Enquire Into the condition of the Indians of the north-west coast' (Government Printer 1888) 435-436 <

The Commission report, however, was unsympathetic, as were the federal and provincial governments. Despite continued political activism in the later nineteenth century and the early twentieth century, the Nisga'a had never had any way of moving recalcitrant federal and provincial governments to deal with the issue of their Aboriginal title.[95] Following the lifting of the restrictions on legal action, however, litigation once again became an option. Although in the late 1950s, it appeared that the Nisga'a claim might be pursued through a more comprehensive claim by the Native Brotherhood of British Columbia, inter-organizational politics led to the abandonment of that option and the development by the Nisga'a of an independent claim.[96] To succeed, the Nisga'a claim would require that the Supreme Court of Canada agree that Aboriginal rights continued to exist, and that those rights included Aboriginal title to land.

At trial in British Columbia Supreme Court, Gould J found that "if there ever was such a thing as Aboriginal or Indian title in, or any right analogous to such over, the [Nisga'a claim area], such has been lawfully extinguished in toto" by a series of proclamations, ordinances and proclaimed statutes involving land use in British Columbia.[97] This was despite the judge noting that "One would have to be self-blinded to the events and attitudes of the day to ignore the fact that this litigation is of great concern, and this judgment a deep distress, to the Indian peoples of British Columbia."[98] At the British Columbia Court of Appeal, the Nisga'a obtained the same result, though without the same expression of judicial sympathy. All three Court of Appeal judges held that if Aboriginal title had ever existed, it had been extinguished. Tysoe JA acknowledged that it was true that in none of the pieces of legislation that were held to have extinguished any Aboriginal title that might have existed could one find express words

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http://www.archive.org/stream/papersrelatingto00britrich/papersrelatingto00britrich_djvu.txt >, accessed 14 March 14 2012.

[95] For a fuller account of their attempts to do so, see Hamar Foster, 'We Are Not O'Meara's Children: Law, Lawyers, and the First Campaign for Aboriginal Title in British Columbia, 1908-28' in Hamar Foster, Heather Raven and Jeremy Webber, *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (UBC Press 2007). See also Robert Exell, 'History of Indian Land Claims in B.C.' (1990) 48 Advocate 866, 874.

[96] Tennant (n 54) 129.

[97] *Calder v Attorney-General of British Columbia* (1969) 3 DLR (3d) 59, 82 (BCSC).

[98] ibid 83.

extinguishing Aboriginal title, but he observed that "actions speak louder than words."[99]

At the Supreme Court of Canada, however, the Nisga'a obtained a result which, while not constituting success for their own claim, was nevertheless a victory for the recognition of Aboriginal land rights. One of the seven judges hearing the appeal – Pigeon J – ruled against the Nisga'a on a technical point of proceeding, namely that they had not met the requirements of the provincial *Crown Procedure Act* [100] that they obtain a fiat. He therefore did not deal with the merits of the case. The other six judges, however, all found that Aboriginal title had existed and survived Crown sovereignty. Three of the judges – Martland, Judson and Ritchie JJ – held that the *Royal Proclamation* of 1763 [101] had not extended geographically to the lands west of the Rocky Mountains, but did not then go on to conclude that that meant there had been no Aboriginal title, ie that any Aboriginal title must have been dependent upon the *Royal Proclamation* for its existence. Instead, their judgment said:

> …the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means…[102]

Although they found that Aboriginal title had existed, those three judges did not say whether it constituted a legal right, but instead went on to find that the Crown had elected to exercise complete dominion over the lands claimed, adverse to any right of occupancy which the Nisga'a Tribe might have had when, by legislation, it opened up such lands for settlement.

The other three judges – Hall, Spence and Laskin JJ – observed that "there is a wealth of jurisprudence affirming Common Law recognition of Aboriginal rights to possession and enjoyment of lands of aborigines precisely analogous to the Nisga'a situation here."[103] They held that the *Royal Proclamation* [104] did extend past the Rockies to the

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[99] *Calder v Attorney-General of British Columbia* (1970) 13 DLR (3d) 64, 95 (BCCA).
[100] RSBC 1960 c 89.
[101] (n 1).
[102] *Calder* (n 89) 328.
[103] ibid 376.
[104] (n 1).

coast, and paralleled and supported the Nisga'a claim. Furthermore, they found that Nisga'a title had never been extinguished.

Although the end result was that the Nisga'a claim was dismissed, the peculiar three-way split by the Court meant that that dismissal was not based upon a finding that the plaintiffs' arguments on Aboriginal rights lacked merit. Instead, although some at the time said that the ambiguity in the reasons of Judson J left room for argument on the point,[105] the case was generally seen to stand for the proposition that Aboriginal rights had not only existed and survived settlement, but might well never have been extinguished. Despite its narrow ratio, the decision was very significant. Together with developments that were occurring in other jurisdictions, it was seen as having "gone far toward rescuing the concept of Indian title from the obscurity to which it appeared to have been consigned by lawyers and laymen alike …."[106]

The Supreme Court of Canada itself was later to clarify and confirm the significance of *Calder* in its decision in *Guerin,*[107] which will be discussed further in the next chapter:

> In *Calder v. Attorney General of British Columbia*… this Court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands.…Judson and Hall JJ. were in agreement, however, that Aboriginal title existed in Canada (at least where it had not been extinguished by appropriate legislative action) independently of the Royal Proclamation…Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it.[108]

One result of the *Calder* decision was that the Government of Canada started the negotiation of modern treaties. As discussed briefly in Chapter VIII, however, almost four decades after *Calder* the treaty process has achieved very few successes. Some might wonder whether *Calder* might also have prompted legislative action as an

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[105] Brian Slattery, 'Understanding Aboriginal Rights' (1987) 66 Can Bar Rev 727, 730 and see also Douglas E Sanders, 'Aboriginal People and the Constitution' (1981) 19 Alta L Rev 410, 413.
[106] K Lysyk, 'The Indian Title Question in Canada: An Appraisal in Light of Calder' (1973) LI Can Bar Rev 450, 451. See also WH McConnell, 'The *Calder* Case in Historical Perspective' (1974) 38 Sask L Rev 88, 119.
[107] *Guerin v The Queen* [1984] 2 SCR 335 < https://www.canlii.org/en/ca/scc/doc/1984/1984canlii25/1984canlii25.html?autocompleteStr=guerin&autocompletePos=1 >.
[108] ibid 376.

alternative approach to resolving Aboriginal land issues. While the division of powers between the federal and provincial governments makes this problematic – ie with the federal government responsible for Indians and the provincial governments responsible for natural resources, including lands – the 1996 Report of the Royal Commission on Aboriginal Peoples did propose legislation and other steps to deal with issues that included land.[109] While this did eventually result in a new tribunal to deal with "specific" claims – ie those resulting from government mishandling of reserve lands or other specific interests – it did not result in any progress on Common Law Aboriginal land issues. The Government of British Columbia made an attempt to unilaterally legislate on Aboriginal title through a proposed *Reconciliation and Recognition Act* [110] in 2005 but despite the province working closely with leading Aboriginal organizations and the Aboriginal plaintiffs' Bar, that initiative failed.

It is not surprising, therefore, that the clearest legacy of *Calder* was that it encouraged Aboriginal groups to pursue recognition of their Aboriginal title claims through the courts. As will be seen in the next two chapters, it took four decades following *Calder* before any such claim succeeded, and during that time – and to some extent following it – widely disparate interpretations of the meaning and scale of "Aboriginal title" were held by the federal and provincial Crown on the one hand and Aboriginal groups on the other. During that period, it was questionable whether any Aboriginal group would actually be able to establish an Aboriginal right to property through litigation and whether – if any groups did manage to do so – a finding of Aboriginal property rights would be of any practical benefit.

This uncertainty following the *Calder* decision left it open to the Supreme Court of Canada to engage in an extraordinary undertaking: creating *de novo* the modern Canadian law of Aboriginal rights and title.

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[109] Royal Commission on Aboriginal Peoples, Report, Volume 5, 'Renewal: A Twenty-Year Commitment' (1996) 2.2.8(d) < http://www.collectionscanada.gc.ca/webarchives/20071211055625/http://www.ainc-inac.gc.ca/ch/rcap/sg/ska5a2_e.html>.

[110] British Columbia, 'Discussion Paper on Instructions for Implementing the New Relationship' (2005) 1 < http://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations/paper_implementing_the_new_relationship.pdf > accessed 23 February 2016.

Chapter II: Aboriginal Rights and Title post-*Calder*: inventing the modern law

Although *Calder v Attorney General of British Columbia* [1] established that Aboriginal title at least had existed prior to and even after British sovereignty, at the time the decision was issued it appeared to have left important questions unanswered, notably: did Aboriginal title or other property rights still exist; and what exactly is (or was) Aboriginal title? As will be discussed in this chapter, during the period between the *Calder* decision in 1973 and the 2005 decision in *R v Marshall*; *R v Bernard* [2] the answer to the first of these questions was to be definitively established as "yes," and the answer to the second question was at least to be sketched in broad terms, if not with the level of detail that might have been desirable.

To understand how the law regarding Aboriginal title emerged, however, it will be necessary to examine how a completely new body of Aboriginal rights law had to be created by the courts after *Calder* brought the long stasis period for Canadian Aboriginal law to an end but governments failed to act to address outstanding grievances by Canada's Aboriginal peoples.[3] This development of "Aboriginal rights" law will immediately be seen to be peculiar in one respect, in that it combines Aboriginal rights to engage in certain protected practices with Aboriginal rights to property. In Canadian law more generally – or that of other nations – one would not look to the same legal texts or bodies of jurisprudence when considering rights to engage in expression or assembly, for example, as one would when considering property ownership. After all, while property rights could be said to be guaranteed by governments, other rights are more often guaranteed against government oppression. In the field of Aboriginal law, however, an Aboriginal right to property – Aboriginal title – has been defined as just one specific Aboriginal right among other, disparate rights.

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[1] [1973] SCR 313 < https://www.canlii.org/en/ca/scc/doc/1973/1973canlii4/1973canlii4.html?autocompleteStr=calder&autocompletePos=1 >.

[2] *R v Marshall; R v Bernard* [2005] 2 SCR 220, 2005 SCC 43 < https://www.canlii.org/en/ca/scc/doc/2005/2005scc43/2005scc43.html?autocompleteStr=marshall%20bernard&autocompletePos=1 >.

[3] Kirsten Matoy Carlson, 'Political Failure, Judicial Opportunity: The Supreme Court of Canada and Aboriginal and Treaty Rights' (2014) 44 Am Rev Stud (3) 334. See also Gordon Christie, 'Who Makes Decisions Over Aboriginal Title Lands' (2015) 48 UBCL Rev 743, 783.

Much of the relevant law that emerged post-*Calder* was therefore primarily concerned with topics other than rights to land, most notably with Aboriginal resource harvesting rights. It will be suggested here that, if anything, the preponderance of cases concerning resource harvesting has had the result that that the law concerning Aboriginal property rights has been shaped by the harvesting rights cases, and that this has contributed to a failure to provide a sufficiently robust property law-oriented analysis of Aboriginal title and other possible property rights.

1973-1997: Aboriginal property law subsumed within Aboriginal rights law

Following *Calder*, the first Supreme Court of Canada case to indicate that Aboriginal title continued to exist was *Guerin v The Queen*.[4] This case is actually best remembered for having established that the Crown owes a fiduciary duty to Aboriginal groups, despite its significant pronouncements on Aboriginal title. The facts involved a 1958 lease of Musqueam reserve land by the Government of Canada to the Shaughnessy Golf and Country Club at a fraction of the land's value and on terms that were not those that had been agreed to by the Musqueam Band, and the subsequent concealment of the terms of that lease from the band. On those facts, it will be apparent why the case was principally about fiduciary duty rather than Aboriginal title; indeed, counsel for the plaintiff Musqueam had had no intention of even making argument about Aboriginal title, and only did so in response to an objection by the Crown's lawyer.[5] This led to a broader discussion of the nature of the Aboriginal interest in reserve lands, in which two of the three sets of reasons issued by the Supreme Court of Canada firmly grounded the Crown's fiduciary obligations to the Musqueam in their land rights.

Dickson J (Beetz, Chouinard and Lamer JJ concurring) held that the Musqueam's interest in their lands was a pre-existing legal right not created by the *Royal*

[4] [1984] 2 SCR 335 < https://www.canlii.org/en/ca/scc/doc/1984/1984canlii25/1984canlii25.html?autocompleteStr=gueri&autocompletePos=1 >.
[5] James I Reynolds, 'The Impact of the *Guerin* Case on Aboriginal and Fiduciary Law' (2005) 63(3) The Advocate 365, 369.

Proclamation[6], by s 18(1) of the *Indian Act* [7], or by any other executive order or legislative provision. Instead, Musqueam Aboriginal title was a legal right derived from the Musqueam's historic occupation and possession of their tribal lands. Dickson J also held in his reasons that the Indian interest in reserve lands was the same as that in unrecognized Aboriginal title in traditional lands.

Wilson J (Ritchie and McIntyre JJ concurring) found that the federal Crown had a fiduciary duty toward Aboriginal groups in the administration of their reserve lands, and that that duty was not created by statute, but that it instead "has its roots in the Aboriginal title of Canada's Indians as discussed in *Calder*...."[8]

While the eighth judge, Estey J, based his concurring judgment upon the law of agency, therefore not furthering the law with regard to Aboriginal title, the combined effect of the reasons of Dickson J and Wilson J was to have a "profound significance for Aboriginal land claims." [9] This was true in several respects. First, prior to the decision in *Guerin*, it might have been possible to interpret the split decision in *Calder* as leaving open the question of whether or not Aboriginal rights and title had ceased to exist everywhere, as opposed to where it could be shown to have been extinguished by lawful authority. Dickson J, however, in referring to *Calder* said that in that case:

> …this Court recognized Aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands.[10]

While giving little clue as to the nature of this "legal right", Dickson J was at least interpreting the decision of Judson J in *Calder* - rather than just that of Hall J - as standing for the proposition that Aboriginal title existed where it had not been extinguished by legislation. As one academic later put it, "Pre-existing Aboriginal title as a legal right was suddenly established in Canadian law." [11] For academic

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[6] George R, *Proclamation*, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No 1.
[7] RSC 1952 c 149.
[8] *Guerin* (n 4) 348.
[9] Brian Slattery, 'Understanding Aboriginal Rights' (1987) 66 Can Bar Rev 727, 730. See also Leonard I Rotman, 'Crown-Native Relations as Fiduciary: Reflections Almost Twenty Years After Guerin' (2003) 22 Windsor YB Access Just 363.
[10] *Guerin* (n 4) 376.
[11] Paul Tennant, *Aboriginal Peoples and Politics* (UBC Press 1990) 222.

commentators, this formed a hook upon which it was possible to hang an entire theory of Aboriginal rights.[12] For activist Aboriginal groups, the decision gave them a legal basis upon which they almost immediately began to base requests for interlocutory injunctions against logging and other resource development proposals.[13] Most importantly of all, perhaps, *Guerin* was the first Aboriginal law case decided by the Supreme Court of Canada post-1982, when Canada's new *Constitution Act, 1982* became law.[14] Section 35(1) of that document states that "the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed." While *Guerin* was not actually concerned with s 35(1), its recognition that Aboriginal rights actually continued to exist was the first definite indication that s 35(1) would not be an "empty box."

While *Guerin* involved Musqueam land rights but not s 35(1), the next major Aboriginal case to come before the Supreme Court of Canada involved the Musqueam and s 35(1) but not land rights (though it did at least include a discussion of Aboriginal title). In *R v Sparrow*,[15] charges had been laid under the *Fisheries Act* arising from fishing conducted with a 45 meter drift net when only a drift net with a maximum length of 25 meters was permitted by the terms of the Musqueam Band's Indian food fishing licence. The defendant admitted the facts of the offence, but argued that he had been exercising an Aboriginal fishing right and that the net length restriction contained in the Band's licence was inconsistent with s 35(1) of the *Constitution Act, 1982* and was therefore invalid. Mr. Sparrow was convicted at trial and that conviction was upheld on appeal to the County Court, essentially on the basis that Mr. Sparrow possessed no applicable right.[16] The British Columbia Court of Appeal noted that the conviction was based upon an erroneous view of the law, but found that the trial judge's findings of fact were insufficient to lead to an acquittal.[17]

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[12] ibid.
[13] ibid 222-226.
[14] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[15] [1990] 1 SCR 1075 < http://www.canlii.org/en/ca/scc/doc/1990/1990canlii104/1990canlii104.html?autocompleteStr=r%20v%20sparrow&autocompletePos=1 >.
[16] [1986] BCWLD 599 (Co Ct).
[17] (1986) 36 DLR (4th) (BCCA).

The Supreme Court of Canada allowed the appeal of Mr. Sparrow, overturning his conviction. A number of important points were made in the decision, and while these are most obviously relevant to Aboriginal resource harvesting rights such as fishing rights, they also established the rules that are more generally relevant to Aboriginal rights, including Aboriginal title. As the first case to consider s 35(1), *Sparrow* established the parameters for the courts' subsequent treatment of that provision, including what constituted "existing" rights in the language of that section, and what it meant for those rights to be "recognized and affirmed." [18]

With regard to what rights still existed, the Court found that s 35(1) did not revive previously extinguished rights, but that neither could an Aboriginal right be extinguished merely by its being controlled in great detail by regulations, such as those created under the authority of the *Fisheries Act*. Such regulations were said to be intended merely to control the fishery, not to define underlying rights. The Court was surprisingly vague on what constituted an Aboriginal right; it said, in fact, that it was "impossible to give an easy definition of fishing rights".[19] It did say, however, that for the Musqueam, the salmon fishery had always been "an integral part of their distinctive culture," [20] a phrase that would resonate in later judgments.

At a purposive or philosophical level, the Court made several pronouncements that indicated the weight it intended to attach to s 35(1). It stated that the appeal "requires this Court to explore for the first time the scope of s 35(1) of the *Constitution Act, 1982*, and to indicate its strength as a promise to the aboriginal peoples of Canada. [underlining added]"[21] The Court said further that "When the purposes of the affirmation of Aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded."[22] Referring specifically to academic articles that had questioned the contents of the s 35(1) "box", the Court stated that s 35(1) "is a solemn commitment that must be given meaningful content." [23] Clearly, the

[18] (n 15) 1101-1111.
[19] ibid 1112.
[20] ibid 1099.
[21] ibid 1083.
[22] ibid 1106.
[23] ibid 1108.

Court was not prepared to countenance the possibility that while s 35(1) protected existing rights, no such rights actually existed to attract that protection.

Regarding the courts' function when Aboriginal rights are alleged to have been infringed, the Court set out the test to be applied and the means by which government is required to bear the burden of justifying any legislation that has some negative effect on any protected Aboriginal right. The first step in such a situation is to ask whether legislation has the effect of interfering with an existing Aboriginal right, with determination of that point involving questions of the reasonableness of the limitation on the right, whether undue hardship results, and whether the Aboriginal group is denied its preferred means of exercising its right. Any such effect would represent a *prima facie* infringement of s 35(1). If *prima facie* infringement is found, then the judicial analysis moves to justification, with the court asking first if there is a valid legislative objective, and second if the means embodied in the legislation is required to achieve that objective, thereby recognizing the Honour of the Crown in its dealing with Aboriginal peoples and the priority to be afforded to those Aboriginal peoples in the allocation of scarce resources.[24]

When the Court attempted to apply this test, it found that the findings of fact at trial were insufficient to allow it to do so. Accordingly, it dismissed both the appeal and cross-appeal and sent the matter back for a new trial (a trial which never actually took place).

It must be suggested that the wording of the test is much more clearly relevant to harvesting rights than to land ownership. That is, while restrictions on net length might "infringe" fishing rights and interfere with a preferred means of exercising those rights, would that really be the most appropriate terminology to use where, for example, fee simple had been granted to someone who built a house on land claimed as Aboriginal title? That seems like more than "infringement", and like more than an interference with the preferred means of exercising the relevant right, ie ownership. This is despite the Court's reasons containing numerous references to property and to Aboriginal title, and the Court specifically discussing the history of the concept of Aboriginal title as

[24] ibid 1111-1119.

part of its consideration of the origin of s 35(1). A lengthy indictment by the Court of governments' treatment of Aboriginal people's land rights and of the failure of the legal system over many decades began with the following paragraph:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown….And there can be no doubt that over the years the rights of the Indians were often honoured in the breach … As MacDonald J. stated in *Pasco v. Canadian National Railway Co*…. "We cannot recount with much pride the treatment accorded to the native people of this country." [25]

Following the decision in *Sparrow*, then, it was clear that not only did constitutionally protected Aboriginal rights still exist and that the courts were determined to ensure that those rights were given substantive content, but also that the perspective that the courts would bring to that task seemed to be based upon a recognition that Aboriginal peoples' legal rights had been persistently ignored by Canada's governments.

While the Supreme Court of Canada continued to clarify various aspects of Aboriginal law in succeeding decisions, handing down twentyfive decisions on Aboriginal rights in the ten-year period following the release of *Sparrow*,[26] most of those decisions either did not concern Aboriginal title or land rights, or did so only indirectly. While some of these cases will be noted in the following paragraphs, only those necessary for an understanding of Aboriginal rights relating to land will be mentioned.

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[25] ibid 1103-1104.

[26] John Borrows, 'Uncertain Citizens: Aboriginal Peoples and the Supreme Court' (2001) 80 Can Bar Rev 18 and John Borrows, 'Indian Agency: Forming First Nations Law in Canada' (2001) 24 PoLAR 9, 12.

In *R v Van der Peet* [27] (decided together with the companion cases of *R v NTC Smokehouse* [28] and *R v Gladstone* [29]) the conviction of a Sto:lo woman for the sale of fish caught under the authority of an Indian food fish licence was upheld. Picking up on the suggestion of *Sparrow*, the Court established the test to be used to identify whether an Aboriginal right exists that is protected by s 35(1): in order to be an Aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right.[30] As to what is "integral", the Court said that this determination must take into account the perspective of the Aboriginal peoples themselves, but that for a custom, practice or tradition to be integral it must be a central and significant part of the society's distinctive culture.[31] That is, it must be "one of the things which made the culture of the society distinctive -- that it was one of the things that truly made the society what it was. [underlining in original]"[32] Since the test for Aboriginal rights aimed at identifying the crucial elements of pre-existing distinctive societies – ie those societies as they were prior to European contact – it was the time of contact[33] that was established as an element of that test, ie the time at which the custom, practice or tradition must have existed in order to give rise to an Aboriginal right.[34]

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[27] [1996] 2 SCR 507 < https://www.canlii.org/en/ca/scc/doc/1996/1996canlii216/1996canlii216.html?autocompleteStr=1996%202%20scr%20507&autocompletePos=1 >.

[28] [1996] 2 SCR 672 < https://www.canlii.org/en/ca/scc/doc/1996/1996canlii159/1996canlii159.html?autocompleteStr=ntc%20smok&autocompletePos=1 >.

[29] [1996] 2 SCR 723 < https://www.canlii.org/en/ca/scc/doc/1996/1996canlii160/1996canlii160.html?autocompleteStr=gladstone&autocompletePos=1 >.

[30] There seems to have been no attempt to date to identify limitations on this test, although these presumably must exist. So, for example, while slavery was a common practice on the coast of what is now British Columbia, that practice presumably could not now form the basis of an Aboriginal right. Whether this might be because it could not be reconciled with a "morally and politically defensible conception of aboriginal rights" (*Van der Peet* (n 27) [42]) or for some other reason can only be a matter of speculation at this time.

[31] For a critique of this test, see James Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Native Law Centre, University of Saskatchewan 2006) 206. See also John Borrows, 'The Trickster: Integral to a Distinctive Culture' (1997) 8 Const F 27.

[32] *Van der Peet* (n 27) [55].

[33] ibid [60]. Note that each of the two dissenting judges would have taken an approach that would not have set the date of contact as the threshold date for the establishment of Aboriginal rights: per L'Heureux-Dubé J [165-180]; per McLachlin J [244-250].

[34] Note that while the date of contact is the relevant date for establishing Aboriginal rights to engage in specific activities, for establishing Aboriginal title the relevant date is the date of the assertion of sovereignty: see *Delgamuukw v British Columbia* [1997] 3 SCR 1010 [144] < https://www.canlii.org/en/ca/scc/doc/1997/1997canlii302/1997canlii302.html?autocompleteStr=delgamuukw&autocompletePos=1 >.

Again, as with *Sparrow*, above, the question must be posed of whether the test set out by the Court is as useful when applied to land ownership as to resource harvesting. That is, while it might readily be imagined that, for example, hunting bison would be integral to the culture of one group while fishing for salmon was integral to another,[35] the right to own land or at least control its use is arguably a need so universal as to be an unlikely attribute for distinguishing one group from another. And since other holders of real property rights are not required to prove that their property is integral to their identities, it seems very odd that Aboriginal groups should be required to do so, if that was indeed the Court's intention. That the Court did not simply fail to consider Aboriginal property rights can be perceived in its reasons, which relate its decision regarding Aboriginal rights generally to Aboriginal title specifically. The Court stated that Aboriginal title is a sub-category of Aboriginal rights that deals solely with claims of rights to land. That is, while Aboriginal title is, as its name suggests, about title to land, it is still part of the same broad category of Aboriginal rights that also includes, for example, fishing rights and hunting rights. The Court cautioned that the relationship between these rights must not confuse the analysis of what constitutes an Aboriginal right, and that courts must not focus so entirely on the relationship of Aboriginal peoples with the land that they lose sight of the other practices, customs and traditions arising from the claimant's distinctive culture that can give rise to other rights.

R v Adams [36] and *R v Côté* [37] were companion cases that also were handed down in 1996. Both involved the question of whether Aboriginal rights are necessarily based in Aboriginal title to land (which would have meant that the fundamental claim that would be required in any Aboriginal rights case would be to Aboriginal title) or whether Aboriginal title is only one subset of the larger category of Aboriginal rights (which

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[35] Another 1996 case in which the test was more clearly applicable was *R v Pamajewon* [1996] 2 SCR 821 < https://www.canlii.org/en/ca/scc/doc/1996/1996canlii161/1996canlii161.html?searchUrlHash=AAAAAQAJcGFtYWpld29uAAAAAAE&resultIndex=1 >, in which convictions for running gambling operations were upheld where the evidence at trial had not demonstrated that gambling was of central significance to the Ojibwa people.

[36] [1996] 3 SCR 101 < https://www.canlii.org/en/ca/scc/doc/1996/1996canlii169/1996canlii169.html?autocompleteStr=1996%203scr%20101&autocompletePos=1 >.

[37] [1996] 3 SCR 139 < https://www.canlii.org/en/ca/scc/doc/1996/1996canlii170/1996canlii170.html?autocompleteStr=1996%203scr%20139&autocompletePos=1 >.

would mean that fishing and other Aboriginal rights could exist independently of a claim to Aboriginal title). This argument foreshadowed the Crown argument that later persisted in *Delgamuukw v British Columbia* [38] that Aboriginal title was no more than a "bundle of rights."[39] In *Adams*, the Aboriginal title of the Mohawks had been extinguished, so that a defence against the charge of unlawfully fishing for pike on Lake Saint Francis could not be grounded in Aboriginal title. In *Côté*, the ability of the defendant Algonquins to raise Aboriginal title as a defence to charges of illegal fishing was complicated by the intervention of the laws of New France prior to British sovereignty. In both cases, it was held that Aboriginal fishing rights could exist independently of Aboriginal title, and the Aboriginal defendants were acquitted of the illegal fishing charges against them (though in *Côté* a conviction of entering a controlled harvest zone was upheld).

While all of these post-*Calder* cases advanced the law regarding Aboriginal rights generally, and some clarified the nature of Aboriginal title as merely one type of Aboriginal right, none of them dealt squarely with questions of the nature of Aboriginal title. A pronouncement by the Supreme Court of Canada of that nature did not occur until 1997 in the first post-*Constitution Act, 1982* case that was principally concerned with Aboriginal title: *Delgamuukw v British Columbia*.[40]

Aboriginal title defined: *Delgamuukw*

Before looking at the specifics of *Delgamuukw* [41], it might be useful to clearly note its significance as the most important case regarding Aboriginal land rights in Canada. PG McHugh, for example, argues that Aboriginal title is a concept that was invented by academics in western Canada and subsequently adopted by the courts.[42] If so, then

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[38] (n 34).
[39] ibid 1080. Admittedly, a valid if somewhat esoteric argument could be made that all property is really a bundle of rights, or – conversely – that rights constitute property: see, for example, *Manrell v The Queen* 2001 Canlii 37486 (TCC). The point of the Crown's argument, however, would seem to have been that the bundle of rights associated with Aboriginal title is less than that associated with ownership of property. If so, that would be inconsistent with the views expressed in this thesis.
[40] (n 34).
[41] ibid.
[42] PG McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (OUP 2011). As to the importance of *Delgamuukw*, see Nigel Bankes, 'Delgamuukw, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights' (1998) 32 UBC L Rev 317.

although there had been references to Aboriginal title in cases such as *Adams* [43] and *Côté* [44], *Delgamuukw* must be viewed as a first Canadian attempt to give legal effect to what was previously only academic theory and to tailor a new legal paradigm virtually out of whole cloth. The extent to which that necessitated a departure from existing legal models can be seen in the differences between the trial judgment of McEachern CJ,[45] which reflected a traditionally restrictive approach to Aboriginal rights, and the decision of the Supreme Court of Canada, which definitively rejected that traditional approach. As will be seen, however, the result was a concept of Aboriginal title that was not fully fleshed, and was conceived of entirely differently by plaintiffs – ie Indian bands and their counsel – and by defendants, ie provincial and federal governments.

Delgamuukw was an action commenced in 1984 by 35 hereditary chiefs of the Gitxsan Nation and 13 hereditary chiefs of the Wet'suwet'en Nation. They originally sought "ownership" of their territory (though they acknowledged the Crown's underlying title)[46] and "jurisdiction" over it, though their claim was later converted to one for "aboriginal title." The total territory at issue was approximately 58,000 square kilometers, an area three-quarters of the size of Scotland. As a trial, the case was extraordinary: 61 witnesses testified, with many giving their testimony in Gitksan or Wet'suwet'en and utilizing translators; 15 additional witnesses gave commission evidence; 53 territorial affidavits were filed; 30 deponents were cross-examined out of court; there were 23,503 pages of transcript evidence and 5,898 pages of transcript of argument; about 9,200 exhibits were filed; the arguments filed by the plaintiffs, British Columbia and Canada were 3,250 pages, 1,975 pages and over 1,000 pages respectively; 32 binders of authorities were filed; the evidence took 318 days and the legal argument took 56 days; published in book form, the Reasons for Judgment were 394 pages.[47]

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[43] (n 36).
[44] (n 37).
[45] 79 DLR (4th) 185 (BCSC) < https://www.canlii.org/en/bc/bcsc/doc/1991/1991canlii2372/1991canlii2372.html?autocompleteStr=79%20dlr%204th%20185&autocompletePos=1 >.
[46] ibid 209.
[47] ibid 199-200. See also Darrell W Roberts, 'Long Trials – Long Overdue Change'(1993) 51(3) Advocate (Vancouver) 349, 350.

The trial was heard by the Chief Justice of the British Columbia Supreme Court, Allan McEachern. His reasons for judgment are replete with statements that indicate the traditional, legally conservative approach he took to his task. Regarding the huge volume of evidence and argument, for example, he stated that he had "sufficient information to fuel a Royal Commission," despite having assured counsel that that was not his function. Instead, he explained, his mandate was as follows:

> I have heard much at this trial about beliefs, feelings, and justice. I must again say, as I endeavoured to say during the trial, that courts of law are frequently unable to respond to these subjective considerations. When plaintiffs bring legal proceedings, as these plaintiffs have, they must understand (as I believe they do), that our courts are courts of law which labour under disciplines which do not always permit judges to do what they might subjectively think (or feel) might be the right or just thing to do in a particular case. Nor can judges impose politically sensitive non-legal solutions on the parties. That is what legislatures do, and judges should leave such matters to them. [48]

While this conceptualization of judicial decision-making might be unremarkable in the context of a torts or contract case, it seems, with hindsight, to have been out of step with changing societal and judicial values; indeed, in his survey of academic commentary on the judgment, Borrows found no support for the judgment, only criticism.[49] As one commentator remarked, "With all of the sensitivity to difference

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[48] ibid 201.

[49] John Borrows, 'Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia' (1999) 37 OHLJ (3) 540-541, footnote 15. See also Kirsten Matoy Carlson, 'Does Constitutional Change Matter: Canada's Recognition of Aboriginal Title' (2005) 22 Ariz J Int'l & Comp L 449, 475. For this thesis, a review was undertaken of all 60+ mentions of "Delgamuukw" between 1991 and 1993 (the decision dates of the British Columbia Supreme Court and British Columbia Court of Appeal, respectively) in the HeinOnline legal database, and only two positive mention of McEachern's judgment could be found, one with regard to his comment that the answers to legal questions would not solve underlying social and economic problems of disadvantaged Indian peoples (Editorial, 'Entre Nous' (1992) Advocate (Vancouver) 50(2) 175, 181) and the other that his decision "provides some relief to the industrial sector of the province (Deborah Satanove, 'Canada: No such thing as aboriginal title' (1991) 16(4) Int'l Legal Prac 102). The more general tone was summed up by an editorial in the legal journal of the Vancouver Bar Association: "They should not have visited upon them the kind of vitriol that was poured upon, for instance, the reasons for judgment of McEachern, C.J.B.C. in Delgamuukw by people, academics and members of the Bar, who should know better than to employ mere invective instead of reasoned logic. Some of the vicious comments about that case amounted to unprofessionalism. One is entitled to disagree with those reasons, one is entitled to express that disagreement, but it is unacceptable, in any circumstances, to attack somebody else's expressed views with the kind of invective that is now becoming popular." (Editorial, 'Entre Nous' (1992) 50(4) Advocate (Vancouver) 503, 504). In addition, some references were neutral, neither commending nor condemning McEachern J's approach, eg Evelyn Stokes, 'The Land Claims of First Nations in British Columbia' (1993) 23 Victoria U Wellington L Rev 171.

that McEachern CJ displayed, the trial could have been conducted by a machine."[50] Among those portions of the judge's reasons that commentators considered objectionable, particular exception[51] was taken to his quoting Hobbes[52] in saying that pre-contact existence in the Gitksan and Wet'suwet'en territory was, "at best, 'nasty, brutish and short.'"[53]

The adherence by the trial judge to what he understood to be settled law would prove problematic not only with regard to the substance of the plaintiffs' claim, but also with regard to the evidence offered to prove it. Each Gitksan and Wet'suwet'en House has an *adaawk* or *kungax*. While this type of evidence is now generally subsumed under the term "oral history", McEachern CJBC described *adaawk* and *kungax* as "an unwritten collection of important history, legend, laws rituals and traditions of a House, including a description of its territories."[54] While the judge was prepared to acknowledge the admissibility of this evidence, he held that he was precluded from treating it as direct evidence of facts in issue in the case except in a few cases where it could constitute confirmatory proof of other evidence.[55] More specifically, he held that he did not find the *adaawk* and *kungax* "helpful as evidence of use of specific territories at particular times in the past."[56] That is, they were not given any weight with regard to the plaintiffs' Aboriginal title claims.[57]

The trial judge started from the proposition, for which he cited *St. Catherine's Milling*, that Aboriginal rights are not proprietary in nature, but rather "personal and usufructuary", and dependent upon the good will of the Sovereign. Although he was satisfied that at the date of British sovereignty, the appellants' ancestors were living in

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[50] Larry Innes, 'Aboriginal Rights and Interpretative Responsibility' [1997] 4 Murdoch UEJL of Law 3 [46].
[51] B Douglas Cox, 'The Gitksan-Wet'suwet'en as Primitive Peoples Incapable of Holding Proprietary Interests: Chief Justice McEachern's Underlying Premise in Delgamuukw' [1992] 1 Dal J Leg Stud 141, 145; Tom Isaac, 'Power of Constitutional Language: The Case Against Using 'Aboriginal Peoples' as a Referent for First Nations' (1993) 19 Queen's LJ 415, 433; James B Waldram, Pat Berringer, Wayne Warry, ''Nasty, Brutish and Short': Anthropology and the Gitksan-Wet'suwet'en Decision' (1992) 12(2) Can J Native Stud 309.
[52] Thomas Hobbes, *Leviathan* (JCA Gaskin tr, OUP 1998).
[53] *Delgamuukw* (n 34) 208.
[54] ibid 257.
[55] ibid 259.
[56] ibid 260.
[57] For a contemporaneous criticism of the treatment of the trial evidence, see Geoff Sherrott, 'The Court's Treatment of the Evidence in Delgamuukw v. B.C.' (1992) 56 Sask L Rev 441. See also Val Napoleon, '*Delgamuukw*: A Legal Straightjacket for Oral Histories?' (2005) 20 Can JL & Soc 123.

their villages in a form of communal society and that they were occupying or possessing fishing sites and the adjacent lands, as their ancestors had done, he was not satisfied that they owned the territory in any sense that would be recognized by the law, stating: "I cannot infer from the evidence that the Indians possessed or controlled any part of the territory, other than for village sites and for Aboriginal use in a way that would justify a declaration equivalent to ownership."[58] As to what rights they did have, the judge said that at the date of sovereignty, "Basically these were rights to live in their villages and to occupy adjacent lands for the purpose of gathering the products of the lands and waters for subsistence and ceremonial purposes."[59] Subsequent to that date, however, he held that colonial enactments exhibited a clear and plain intention to extinguish Aboriginal interests in order to give an unburdened title to settlers, and did result in such extinguishment, so that the plaintiffs' claims for Aboriginal rights were also dismissed. The only Aboriginal interest which the judge would have been prepared to recognize resulted from an implied "promise" that Indians could continue to make non-exclusive use of unoccupied Crown lands for sustenance purposes until such lands were required for any adverse purposes.[60]

Since the trial judgment was eventually overturned, as discussed below, it may not seem worthwhile to devote much space to critiquing it. As it relates to the subject matter of this thesis, however, two points may be briefly made. First, had the trial judge wished to be more flexible in regard to both the substance of the plaintiffs' case and the evidence supporting it, there existed precedent that he could have relied upon in doing so. That is, there is precedent for the use of extrinsic evidence – including "oral history" – to determine the geographic extent of rights in land [61] and even local systems of law[62], and also for determination of ownership on the basis of acts of possession rather than on legal title.[63] Given that British Columbia has a Torrens system of land

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[58] *Delgamuukw* (n 34) 451.
[59] ibid 196.
[60] ibid 490.
[61] See, for example, references to the evidence about what constituted the Hill of Bracklamore and the mosses at Bracklamore and Cowbog in a case establishing a servitude of grazing: *Ferguson v Tennant* 1978 SC (HL) 19, 45-47, 52, 54.
[62] Lord Hunter remarked regarding udal law that "…as time went on, it became increasingly difficult to know or to discover what the local laws and customs of Orkney and Shetland on many subjects were. The law book, it is said, became corrupted and one legend is that it was burnt." *Lord Advocate v University of Aberdeen* 1963 SC 533, 540.
[63] Note in particular that even evidence of isolated usages of land for specific purposes can serve as the basis for a finding of complete title to the land where it is used to support a claim of pre-existing title,

registration, it may simply have been the case that neither the judge nor legal counsel had previously had need for recourse to either Common Law or Civilian property law jurisprudence, so may have been unfamiliar with the relevant cases. Second, the judge's use of the term "proprietary interest" contributed to an ambiguity which runs through the jurisprudence concerning Aboriginal title. While the judge seemed to use the term to mean a property right, it is sometimes used to mean something less than that. Had the judge engaged in a more technical analysis of the nature of the right at stake – something which could also be said of subsequent judgments in Aboriginal title cases – this would have been clearer.

An appeal heard by a five-judge panel[64] of the British Columbia Court of Appeal resulted in a split decision, with four separate sets of reasons, two sets for the majority (MacFarlane JA, (Taggart JA concurring) and Wallace JA) and two sets for the dissenting minority (Lambert JA and Hutcheon JA).[65] The divergent reasons of the Court of Appeal judges were indicative of the undefined state of the concept of Aboriginal title at that time, as well as of the divided and evolving views of the judiciary. The majority decisions only went so far as to grant a declaration that the plaintiffs' Aboriginal rights had not all been extinguished by the colonial instruments enacted prior to British Columbia's entry into Confederation in 1871. The majority also granted a declaration that the plaintiffs possessed unextinguished, non-exclusive Aboriginal rights, formerly protected at Common Law, and now protected under s 35(1) of the *Constitution Act, 1982*. The majority went on to find, however, that those rights were not ownership or property rights. One of the dissenting judges (Lambert JA), on the other hand, would have substituted his own findings of fact for those of the trial judge and held that the plaintiffs' ancestral lands extended throughout the claimed territory, and that in areas where there were no conflicting claims to user rights, their rights should be characterized as Aboriginal title. The other dissenting judge (Hutcheon JA) would not have gone so far, but did find the existence of Aboriginal

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rather than a claim of prescriptive title. This would, of course, be the case for Aboriginal groups. See Lord Advocate v Wemyss (1899) 2 F (HL) 1 per Lord Watson (who also wrote the opinion in *St Catherine's Milling*), applied in *Kerr v Brown* 1939 SC 140, 147and in *Hamilton v McIntosh Donald* 1994 SC 304, 321.

[64] The British Columbia Court of Appeal normally convenes three-judge panels, but five-judge panels hear cases in which it may be necessary to overturn a previous decision of that Court.

[65] (1993) 104 DLR (4th) 470 (BCCA) < https://www.canlii.org/en/bc/bcca/doc/1993/1993canlii4516/1993canlii4516.html?autocompleteStr=delgamuukw&autocompletePos=1 >.

rights extending far beyond villages and throughout the traditional territory of the particular people that could "compete on an equal footing" with proprietary interests. Again, as noted above with regard to the trial decision, the term "proprietary interest" is ambiguous, though it does seem clearer here that the judge was using the term to mean ownership, though how Aboriginal rights could "compete on an equal footing" if they were not also a form of ownership is unclear. The result of the Court of Appeal's decision was characterized by one commentator as having "simply added to the uncertainty" as to the meaning of Aboriginal title.[66]

At the Supreme Court of Canada, six judges took part in the hearing of the appeal, an appeal which was almost entirely about Aboriginal title and not about those other questions, such as an Aboriginal right to self-government, that had been raised in the courts below. Although there was more than one set of reasons, all of the judges would have allowed the appeal in part and ordered a new trial. The judgment of Lamer CJC was concurred in by Cory, McLachlin, and Major JJ, though McLachlin J indicated that she was also in "substantial agreement" with the minority judgment of La Forest and L'Heureux-Dubé JJ. The decision provided a great deal of direction from the Court about the nature of Aboriginal title. Because defects in the pleadings and errors of fact made by the trial judge resulted, however, in all of the judges being in agreement that a new trial was required, the legal pronouncements were ultimately not grounded in fact. The result was a concept of Aboriginal title that was well-defined in some respects, but amorphous in others.

"In order to give guidance to the judge at the new trial,"[67] Lamer CJ posed and answered the questions: "What is the content of Aboriginal title, how is it protected by s. 35(1) of the *Constitution Act, 1982*, and what is required for its proof?"[68] Beginning with the observation that all of the parties to the litigation had characterized the content of Aboriginal title incorrectly, the judge found that the content of Aboriginal title

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[66] Kent McNeil, 'The Meaning of Aboriginal Title' in Michael Asch (ed), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity and Respect for Difference* (UBC Press 1997) 135. See also Andrea Bowker, '*Sparrow*'s Promise: Aboriginal Rights in the B.C. Court of Appeal' (1995) 53 U Toronto Fac L Rev 1, 16.
[67] *Delgamuukw* (n 34) 1080.
[68] ibid 1061.

resided somewhere between their respective positions. He summarized his own findings as follows:

> Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. Those activities do not constitute the right per se; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's aboriginal title. This inherent limit, to be explained more fully below, flows from the definition of aboriginal title as a *sui generis* interest in land, and is one way in which aboriginal title is distinct from a fee simple.[69]

As to whether Aboriginal title is truly *sui generis*, see Chapter VII of this thesis. The Chief Justice went on to summarize his findings even more, saying that:

> …the content of aboriginal title can be summarized by two propositions: first, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.[70]

The first of these two propositions, that Aboriginal title is a right to <u>exclusive</u> use and occupation – ie the right to exclude all others - indicated how important Aboriginal title could be for any group that was able to establish it. It suggested that Aboriginal title constituted what might colloquially be referred to as "ownership" of the land, and might at least be equivalent to – albeit not identical to – Common Law fee simple title.[71] Furthermore, given that the areas claimed by groups such as the Gitksan and Wet'suwet'en were geographically huge, it could have seemed that the impact on both Aboriginal and non-Aboriginal interests might be very significant where Aboriginal title could be established.

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[69] ibid 1080.
[70] ibid 1083.
[71] For a discussion of these attributes of Aboriginal title and of their parallels in Common Law and Civil Law, see Chapter VII of this thesis.

Depending upon the exact meaning accorded to terms such as "use" and "occupation," however, it can easily be imagined that what the Court wrote about the content of Aboriginal title might be consistent with title existing either over very large areas or over very small areas. That is, despite the Court having indicated the content of Aboriginal title as a right, it was not necessarily clear where Aboriginal title would exist. If guidance on that topic were to have been found in the *Delgamuukw* decision, it might have been looked for in the section of the Reasons on "proof of Aboriginal title."[72] In fact, however, the test for proof of Aboriginal title also incorporated quite loose terminology, in that it required: (i) the land must have been occupied prior to the assertion of sovereignty; (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation; and (iii) at sovereignty, that occupation must have been exclusive. The only language that gave any hint of what the Court might consider "occupation" sufficient to ground title was in the statement that "Physical occupation may be established in a variety of ways, ranging 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."[73]

Note that the date identified by the Court as the relevant time for the determination of Aboriginal title was different from that previously identified as being relevant for the determination of Aboriginal rights more generally; that is, it was the date of the assertion of sovereignty rather than the date of contact.[74] Note also that both the majority and minority decisions explicitly stated that Aboriginal title is not absolute, and that it may be infringed[75] by the federal and provincial governments.

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[72] *Delgamuukw* (n 34) 1095.
[73] ibid 1101.
[74] ibid 1098. While the Court did not explain its choice of this test in a particularly clear or convincing manner, it would appear that it chose the date of the assertion of sovereignty largely on the basis that Aboriginal title is a burden on the Crown's underlying title, and that the Crown did not gain that underlying title until it asserted sovereignty; thus, the Court held that it did not make sense to speak of a burden on the underlying title before title existed. While the Court also presumed that the date of the assertion of sovereignty would be more certain than the date of contact, this did not subsequently prove to be the case in *Tsilhqot'in Nation v British Columbia* 2007 BCSC 1700 [585-602].
[75] The term "infringed" may seem odd to anyone who applies a property law perspective to a reading of case law in this area, since one might think of a property right as being "limited" or "restricted" but not infringed. Because the courts have treated Aboriginal title as being, in effect, just another constitutional right, they have applied the same terminology as is used in cases involving constitutional rights more generally, namely that such rights are "infringed".

Given that, as noted above, the tests stated in *Delgamuukw* were not actually applied – ie because the Court determined that a new trial would be necessary, and that trial never occurred – one result was that after *Delgamuukw* Aboriginal groups could continue to believe that they had Aboriginal title to the entirety of their claimed traditional territories, areas amounting in some cases to thousands of square kilometres, while governments and some others could continue to believe instead that those groups had "occupied" only very small areas and could therefore establish title only to those small areas. That is, governments could focus on the references to "dwellings" and the "cultivation and enclosure of fields", while Aboriginal groups could instead focus on "tracts of land for hunting, fishing, or otherwise exploiting…resources." Other questions also remained outstanding, such as how to identify the date of the assertion of sovereignty, and whether Crown actions such as the granting of fee simple title to settlers were sufficient to extinguish Aboriginal title. Had a court actually made correct determinations of fact in *Delgamuukw* and then applied the legal test for Aboriginal title as articulated by the Supreme Court of Canada to those facts, then the result might have been a much clearer understanding of what Aboriginal groups could actually hope to obtain through declarations of Aboriginal title. Instead, what seemed to be a clarification of the test was only obtained eight years later when the Court handed down its decision in *R v Marshall*; *R v Bernard* [76], a decision which itself gave rise to interpretations that had to be completely revised after six more years when the Court provided its further clarification of the law of Aboriginal title in *Tsilhqot'in Nation*.[77]

In the meantime, debate by academics and members of the Aboriginal bar about Aboriginal rights and title continued, focused now on the Court's decision in *Delgamuukw*. [78] Generally speaking, however, the arguments made concerned the effects of the decision on Aboriginal peoples and on industry, with little consideration being given to its purely legal merits or flaws.

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[76] *Marshall; Bernard* (n 2).

[77] *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 256, 2014 SCC 44 < https://www.canlii.org/en/ca/scc/doc/2014/2014scc44/2014scc44.html?autocompleteStr=tsilhqot'in&autocompletePos=1 >.

[78] See: Borrows, 'Uncertain Citizens' (n 26) 36; and Borrows, 'Sovereignty's Alchemy' (n 49). See also Catherine Bell, 'New Directions in the Law of Aboriginal Rights' (1998) 77 Can Bar Rev 65. See also John JL Hunter, 'Consent and Consultation After *Delgamuukw*: Practical Implications for Forestry and Mining in British Columbia' (Aboriginal Title Update conference, Continuing Legal Education Society of British Columbia, 2009) 7.3.01. See also Louise Mandell, 'The *Delgamuukw* Decision"' (Aboriginal Title Update conference, Continuing Legal Education Society of British Columbia, 2009) 7.2.01.

Aboriginal title remains elusive: *Marshall*; *Bernard*

While *Delgamuukw* had been a comprehensive, proactive attempt to determine the rights and title of the plaintiff Aboriginal groups, *Marshall*; *Bernard* [79] arose from regulatory prosecutions in which the defendants – Mi'kmaq Indians in Nova Scotia and New Brunswick – had been charged with offences relating to illegal logging on Crown lands. In both cases, the accused raised as defenses that they were not required to obtain provincial authorization to log because they had Aboriginal rights to log on Crown lands for commercial purposes pursuant to treaty or Aboriginal title.
In both cases, the opposing interpretations of the scope of Aboriginal title were almost perfectly illustrated by the radically differing judgments of the trial judges in the Nova Scotia and New Brunswick courts, and the respective courts of appeal in those provinces. The original decisions of the provincial court judges in *Marshall*; *Bernard* were issued in 2000 (*Bernard*) and 2001 (*Marshall*) respectively, both several years after the decision in *Delgamuukw*. In both cases, the trial judges required proof of regular and exclusive use of the cutting sites to establish Aboriginal title. Both trial judgments were upheld by the summary appeal courts. The Courts of Appeal, however, held that the test applied was too strict and applied a less onerous standard of incidental or proximate occupancy.

In *Marshall* [80], Cromwell JA for the Nova Scotia Court of Appeal held that the standard of occupation necessary to establish Aboriginal title involved "actual entry, and some act or acts from which an intention to occupy the land could be inferred."[81] He found that acts of "cutting trees or grass, fishing in tracts of water, and even perambulation, may be relied upon."[82] Similarly, in *Bernard* [83], Daigle JA for the New Brunswick Court of Appeal concluded that it was not necessary to prove specific acts of

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[79] *Marshall; Bernard* (n 2).
[80] *R v Marshall* 2003 NSCA 105 < https://www.canlii.org/en/ns/nsca/doc/2003/2003nsca105/2003nsca105.html >.
[81] ibid [136].
[82] ibid. Note that very similar acts such as shooting and peat cutting were led as evidence to argue ownership in a non-Aboriginal context in *Hamilton v McIntosh Donald* (n 62).
[83] *R v Bernard* 2003 NBCA 55 < http://www.canlii.org/en/nb/nbca/doc/2003/2003nbca55/2003nbca55.html?autocompleteStr=r%20v%20bernard&autocompletePos=5 >.

occupation and regular use of the logged area in order to ground Aboriginal title. Instead, it was sufficient to show that the Mi'kmaq had used and occupied an area near the cutting site, with this proximity permitting the inference that the cutting site would have been within the range of seasonal use and occupation.[84] Contrasting the alternative approaches at trial and in the Courts of Appeal, McLachlin CJ set out the alternative choices available to the Supreme Court of Canada:

> The question before us is which of these standards of occupation is appropriate to determine aboriginal title: the strict standard applied by the trial judges; the looser standard applied by the Courts of Appeal; or some other standard? Interwoven is the question of what standard of evidence suffices….[85]

The Court ruled that the trial judge in each case had applied the correct test to determine whether the respondents' claim to Aboriginal title was established, by requiring in each case proof of sufficiently regular and exclusive use of the cutting sites by Mi'kmaq people at the time of assertion of sovereignty. In arriving at that conclusion, the Court made a number of observations that clarified – and appeared to restrict – the nature of Aboriginal title. As set out below, a number of different statements can be excerpted from the Reasons of the majority that might have been interpreted as indicating that Aboriginal title, rather than being the sweeping right to the entirety of their territories that it was presumed to be by Aboriginal groups, would be a much more restricted right that would only be found to exist in relatively small areas, though – as will be seen in the next chapter – such an interpretation would eventually be shown to be incorrect by the 2014 decision in *Tsilhqot'in Nation*.[86]

First, Aboriginal title to land was said to be "established by aboriginal practices that indicate possession similar to that associated with title at common law."[87] Drawing a parallel between Aboriginal title and Common Law title – ie fee simple title – leads inevitably to consideration of what Common Law possession tends to look like. Houses, with the small bits of ground that surround them in most cases, might have seemed the most obvious comparator. In the modern, urbanized world, therefore, it

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[84] ibid [119].
[85] *Marshall; Bernard* (n 2) [44].
[86] *Tsilhqot'in Nation* (n 77).
[87] *Marshall; Bernard* (n 2) [54].

seems likely that possession in most cases would be to a fraction of an acre; by way of comparison, the claim in *Delgamuukw* was to approximately fourteen million acres. Farms might offer an example of Common Law possession on a somewhat larger scale, but even these would be dwarfed in comparison with Aboriginal claims to traditional territories. The average size of a farm in Canada in 2011, for example, was 778 acres, a figure that reflects both the growth in farm size in the modern era and the skewing effect of large-scale grain farming in the Prairie Provinces.[88] Farms in the United Kingdom – which could arguably give a better indication of the Common Law perspective – average only about 141 acres in the modern world[89] and were very much smaller in early Common Law England. When practices that would establish Aboriginal title were said to be comparable to those pursuant to the Common Law, it might therefore have been thought that parcels of Aboriginal title land would be similar in size to parcels of Common Law title land, and would therefore be relatively small. That said, it must be acknowledged that even in western legal systems, it may at least be argued that acts of possession that only take place in part of a property can support a finding of ownership to all of the larger property.[90]

Second, the Court said that to establish title, claimants must prove exclusive pre-sovereignty "occupation" of the land by their forebears, with "occupation" meaning "physical occupation".[91] Even at the higher levels that existed prior to their reduction by epidemic diseases and other factors, Aboriginal populations would generally not have been comparable to those even in agrarian England, let alone post-Industrial Revolution England. The dynamics of hunter-gatherer societies would require that large areas be left largely unaltered in order to serve as wildlife habitat, and that human populations remain relatively small. It might therefore have seemed that it would not have been possible for Aboriginal groups in that situation to have physically occupied more than a small portion of their territories.

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[88] Statistics Canada, 2011 Census of Agriculture < http://www29.statcan.gc.ca/ceag-web/eng/index-index;jsessionid=2FEFF428C6543A2331E0DB293FD055D6 > accessed August 1, 2012.
[89] UK Agriculture, "UK Farming – an Introduction" < http://www.ukagriculture.com/uk_farming.cfm > accessed 1 August 1 2012.
[90] *Hamilton v McIntosh Donald* (n 63) 314-316.
[91] *Marshall; Bernard* (n 2) [55-56].

Third, exclusive occupation was said to mean "the intention and capacity to retain exclusive control."[92] Although open to interpretation, it is quite possible that it might have seemed that this would also be an impediment to establishing Aboriginal title over large areas. That is, since a small group in a large territory could not maintain a presence in all parts of that territory at all times (particularly with a socio-political structure that did not permit a standing army or other accoutrements of a centralized government), it might be argued that it would not be possible to maintain exclusive control over that territory, and that incursions might be made by neighbouring groups without the resident group even being aware of them, let alone being able to prevent them. Admittedly, however, it might be argued in opposition to this that inter-group diplomacy or recognized rules of behaviour might contribute to a group's ability to retain exclusive control, and that an inability to exercise force and physically exert control need not be a definite indicator of a lack of capacity to retain exclusive control.

Fourth, and perhaps seeming most explicitly damaging to claims of Aboriginal title over large areas, the majority said the following:

> It follows from the requirement of exclusive occupation that exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into aboriginal title to the land if the activity was sufficiently regular and exclusive to comport with title at common law. However, more typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right.[93]

And referring to earlier cases involving Aboriginal fishing rights, the Court said:

> In those cases, aboriginal peoples asserted and proved ancestral utilization of particular sites for fishing and harvesting the products of the sea. Their forebears had come back to the same place to fish or harvest each year since time immemorial. However, the season over, they left, and the land could be traversed and used by anyone. These facts gave rise not to aboriginal title, but to aboriginal hunting and fishing rights.[94]

For many Aboriginal groups, their subsistence would be dependent upon a "seasonal round" or some other pattern of going to where the food and resources they needed

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[92] ibid [57].
[93] ibid [58].
[94] ibid.

could be found. That is, in some cases a group might be, for example, in one location in the spring to get an early run of fish, at several other specific locations over the summer to hunt game or harvest berries or tubers, and at some other location in the autumn to harvest a late run of fish. In other cases, a group might pursue large herbivores such as bison or caribou wherever their herds chose to roam. Even though such patterns might take them through the entirety of their territories over time, it might have seemed that this would not be sufficient to establish Aboriginal title according to the Court's explicit pronouncement on this topic.

Fifth, in a criticism of the Nova Scotia Court of Appeal's reasoning, the majority said that the requirement of sufficiently regular and exclusive use in order to establish title in the Common Law sense cannot be diminished in order to avoid the unfairness of denying title to semi-nomadic Aboriginal groups. In a blunt recognition that the application of its ruling could have been expected to deny Aboriginal title to some groups, it said:

> The common law right to title is commensurate with exclusionary rights of control. That is what it means and has always meant. If the ancient Aboriginal practices do not indicate that type of control, then title is not the appropriate right. To confer title in the absence of evidence of sufficiently regular and exclusive pre-sovereignty occupation, would transform the ancient right into a new and different right.[95]

In contrast to the presumption by many Aboriginal groups, academics and members of the Aboriginal plaintiffs' bar that Aboriginal groups would always or normally possess Aboriginal title, the majority was explicitly saying that that would not be the case.

Sixth, the majority stated that even where the *Royal Proclamation* of 1763[96] applies, as it assumed that it did in Nova Scotia, that would not establish Aboriginal title for the Indian inhabitants. Several grounds of argument had been made on behalf of the Aboriginal groups in reliance upon the *Royal Proclamation*, depending upon several passages that are to the effect that lands not ceded or purchased "are reserved to the said Indians." By dismissing this ground of argument, the Court eliminated any

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[95] ibid [77].
[96] (n 6).

possibility that it could be used to establish Aboriginal title as a "default" Aboriginal right, and established instead that Aboriginal title would indeed have to be established through a case-by-case consideration of the available evidence.[97]

In sum, the majority judgement in *Marshall*; *Bernard* provided multiple grounds from which it could have been concluded that not all Aboriginal groups will hold Aboriginal title and that those that do will hold it only to relatively small areas rather than to those large areas that they may view as constituting their traditional territories. The conclusion that this decision did indeed restrict the scope of Aboriginal title seemed to be supported by the minority judgment of Lebel J. Although agreeing with the ultimate disposition of the case, the minority stated the view that given the nature of historical land use by Aboriginal peoples — and in particular the nomadic nature of that use by many First Nations —the approach adopted by the majority was too narrowly focused on Common Law concepts relating to property interests. The minority's reasons expressed a concern that while the test for Aboriginal title set out in the majority's reasons did not foreclose the possibility that semi-nomadic peoples would be able to establish Aboriginal title, it might prove to be fundamentally incompatible with a nomadic or semi-nomadic lifestyle.[98] This test might therefore amount to a denial that any Aboriginal title could have been created by patterns of nomadic or semi-nomadic occupation or use. As sympathetic to the situation of Aboriginal groups as the minority's reasons might have been, however, they served mainly to emphasize that the majority's reasons might effectively have seemed to signal that Aboriginal title would exist only in relatively small areas, and that many Aboriginal groups might not have any Aboriginal title at all.

Among those supporters of Aboriginal interests who read and analyzed the decision, the response was uniformly negative, since academics and the Aboriginal plaintiffs' bar seemed to have indeed interpreted the decision as allowing for only that restricted view of Aboriginal title outlined above.[99] Most academic criticism was about the negative

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[97] ibid [85-96].
[98] ibid [126].
[99] See: Brian Slattery, 'The Metamorphosis of Aboriginal Title' (2006) 85 Can Bar Rev 255; Michael Murphy, 'Prisons of Culture: Judicial Constructions of Indigenous Rights in Australia, Canada, and New Zealand' (2008) 87 Can Bar Rev 357; Nigel Bankes, 'Marshall and Bernard: Ignoring the Relevance of Customary Property Laws' (2006) 73 UNBLJ 120; Paul LAH Chartrand, 'R. v. Marshall; R. v. Bernard: The Return of the Native' (2006) 73 UNBLJ 135; Margaret McCallum, 'After Bernard and Marshall'

implications of the decision for Aboriginal groups, and much of it focused on the poverty to which many of these groups are subject. Generally speaking, the criticism was not that the decision was inconsistent with existing law but that it was not what writers believed the law should be.

None of this criticism is surprising when considered in the context of the evolution of Aboriginal law in the post-*Calder* era as reviewed in this chapter, and in the broader context of the post-contact history of Aboriginal peoples in Canada. That is, after centuries of interaction with newcomer society for most of which they had been denied democratic and legal rights as well as being geographically, socially and economically marginalized, Aboriginal peoples had finally achieved legal recognition of their constitutionally protected Aboriginal rights. They had been told that a "generous, liberal interpretation" of those rights would be required. Suddenly, however, they saw the scope of those rights narrowly constrained in *Marshall*; *Bernard*. Rather than Aboriginal groups having property rights to the entirety of their traditional lands recognized, it now seemed that the only known Aboriginal property right – Aboriginal title – would be restricted to very small areas, with the only rights attaching to the entirety of Aboriginal groups' territories being the right to engage in hunting, fishing and similar activities. And while subsistence hunting and fishing remains important in many Aboriginal communities, it offers little opportunity for participation in modern, profitable economic activities. It is no wonder that those who sympathized with Aboriginal groups were disappointed.

To ask whether the decision was legally correct is, in one sense, meaningless, since as the court of last resort for Canada, the decisions of the Supreme Court of Canada could be said to always be legally correct. One point should at least be made with regard to the decision and to Aboriginal title litigation more generally, however, namely that at least some Aboriginal groups traditionally did not believe that land was even capable of ownership, so that their real legal complaint might be characterized not so much as being that they owned land pre-Contact and that their ownership has not been respected, but that when the imposition of a new system of law made land capable of

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(2006) 73 UNBLJ 73. For a criticism of these criticisms, see Dwight G Newman, 'Prior Occupation and Schismatic Principles: Toward a Normative Theorization of Aboriginal Title' (2007) 44 Alta L Rev 779, 783.

ownership, that ownership was given to someone else despite their pre-existing interest. That is, for at least some Aboriginal groups, even being required to assert Aboriginal title in order to achieve their broader goals has meant arguing for the application of a concept that is inconsistent with their own laws and beliefs. It is hardly surprising that criticism of court decisions is grounded more in social justice concerns than in law.

As will be seen in the next chapter, however, the reaction to *Marshall*; *Bernard* went beyond criticism by academics, in that the decision - or at least the interpretation of the decision set out above that would have resulted in small areas of Aboriginal title for some groups and no Aboriginal title at all for other groups – appears to have simply not been accepted by Aboriginal groups, by the Aboriginal plaintiffs' Bar, or even by the judiciary. Instead, the immediate post-*Marshall*; *Bernard* period was one in which court judgments on the one hand and public pronouncements by Aboriginal leaders on the other seemed to suggest that rather than that decision having resolved uncertainties regarding Aboriginal rights to land, it had served to cast into sharper relief the division of opinion over those rights. As will be seen, this period was only ended when the subsequent decision of the Supreme Court of Canada in *Tsilhqot'in Nation* appeared to support very different conclusions from those that might have been drawn from the decision in *Marshall; Bernard*.

Chapter III: The Dilemma of Aboriginal Title post- *Marshall; Bernard*

It might have been presumed that after the Supreme Court of Canada had handed down two major decisions providing explicit guidance on the nature of Aboriginal title, a degree of certainty would have emerged on this subject within the Canadian polity. In particular, it might have seemed that *Marshall*; *Bernard* [1] should have presaged an era in which a shared understanding of Aboriginal property rights would have resulted in a process by which governments and Aboriginal groups would have applied the judicially-supplied criteria to identify those areas in which Aboriginal title continued to exist. As will be discussed in this chapter, however, that was not the case. Instead, there initially followed a period during which no findings of Aboriginal title were made by the courts and no agreements as to Aboriginal title were arrived at through negotiations. Instead, there remained considerable disagreement and uncertainty about the appropriate scale and scope of Aboriginal title and about where Aboriginal title could exist.

Why did this uncertainty persist? It will be shown in this chapter that courts repeatedly avoided making conclusive rulings when the issue of Aboriginal title was placed before them, so that the case law did not advance. Further, it will be suggested that this was a deliberate choice by courts, and that this was not merely due to judicial deference, but also because the courts would have been cognizant of a serious dilemma regarding Aboriginal property rights and their own lack of appropriate tools to resolve that crisis. As will be shown, the decision of the Supreme Court of Canada in *Tsilhqot'in Nation* [2] eventually changed the dynamic of the ongoing conflict over Aboriginal property rights, but not in a way that pointed to a comprehensive resolution of that conflict.

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[1] *R v Marshall; R v Bernard* [2005] 2 SCR 220, 2005 SCC 43 < https://www.canlii.org/en/ca/scc/doc/2005/2005scc43/2005scc43.html?autocompleteStr=marshall%20bernard&autocompletePos=1 >.

[2] *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 256, 2014 SCC 44 < https://www.canlii.org/en/ca/scc/doc/2014/2014scc44/2014scc44.html?autocompleteStr=tsilhqot'in&autocompletePos=1 >.

Why a "dilemma" regarding Aboriginal property rights?

As noted in Chapter I, there are large areas in Canada where there are no treaties that purport to extinguish or define whatever rights in land are held by Aboriginal peoples. As also shown in that chapter, while it seemed at one time that such rights either did not exist in the first place or had somehow ceased to exist, the decision in *Calder*[3] indicated that Aboriginal rights, including property rights, continued to exist where they had not been extinguished by law. And as discussed in Chapter II, such rights gained constitutional protection in 1982 and were subsequently established as including a right to exclusive use and occupation, namely Aboriginal title.

Anyone who brings a property law perspective to the reading of this thesis might think at this point, "Canada's Aboriginal peoples and the Crown simply have to determine who owns what; this is a function that courts have exercised for centuries, and the sooner they do so in this instance, the better." Readers who bring a background in minority rights might think "An oppressed and impoverished minority may be able to use the courts to improve their situation through recognition of their land rights, and the sooner they do so in this instance, the better." Neither of these perspectives would be wrong, but might overlook some dimensions of the problem that the courts faced following the decision of the Supreme Court of Canada in *Marshall; Bernard*.

Why Aboriginal groups and their supporters would be demanding recognition of their property rights will be apparent from what has been written so far. Those groups are frequently impoverished, with no acknowledged property rights in the traditional territories that were once theirs alone, while the exploitation of the resources in those territories generates vast wealth for others. While their situation obviously cries out for redress, are there opposing factors that could have made judges hesitant to be the ones to provide that redress?

Although many parts of Canada have unresolved Aboriginal land rights, that question might best be answered by considering the situation of British Columbia, where so

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[3] *Calder v Attorney General of British Columbia* [1973] SCR 313 < https://www.canlii.org/en/ca/scc/doc/1973/1973canlii4/1973canlii4.html?autocompleteStr=calder%20v%20att&autocompletePos=1 >.

many of the leading Aboriginal rights and title cases have originated. Aside from that small fraction of the province that is covered by the Douglas Treaties, Treaty 8, or the modern treaties, all of the rest is subject to one or more claims of Aboriginal title. Should claims of Aboriginal title– ie the right to exclusive use and occupation but with restrictions on alienation and on uses that are inconsistent with the nature of that Aboriginal title - be recognized to that majority of the land base that consists of unallocated Crown lands, this by itself would have very serious implications for industrial activity in the province, for provincial revenues from mining and logging royalties, and for the ability of people to engage in free movement. Much more serious, however, would be decisions leading to the conclusion that Aboriginal title exists to all of the lands that are currently thought to be held in fee simple. If Aboriginal peoples have a constitutionally protected right to the exclusive use and occupation of those lands, then this would create a problem for the fee simple title owners who currently believe that they are the ones who have a right to the exclusive use and occupation of their properties. Since the constitutionally protected Aboriginal right could be expected to trump land tenures issued pursuant to statute or the Royal prerogative, then the fee simple titles which the current owners hold would presumably be rendered worthless, and those fee simple owners would have to seek their remedy for their losses against the provincial government that had issued those tenures. Since there are more than two million property owners in British Columbia, whose property has a combined value of over $1.6 trillion dollars[4], the financial cost would be more than the provincial government – which currently has an annual budget of approximately $46 billion[5] – could pay, and it would presumably go into default. The social costs, of course, might conceivably be much more serious than the financial costs.

While some legal defences might be raised even against those Aboriginal title claims that could satisfy the criteria of pre-sovereignty occupation and exclusivity – laches, statutory limitations, extinguishment – the jurisprudence provides no indication that such defences could succeed. In particular, arguments that Aboriginal title might have been extinguished by acts such as the Crown's issuance of fee simple titles would be

[4] British Columbia Assessment, 'Property Information and Trends: 2017 Property Assessments of British Columbia' (3 January 2017).
[5] British Columbia Ministry of Finance, 'Budget and Fiscal Plan 2016/2017 – 2018/19' (16 February 2016) 1.

undermined by the fact that in most cases fee simple title would have been created by the provincial Crown, while only the federal Crown could extinguish Aboriginal title between Confederation and 1982.[6] Post-1982, of course, neither the federal nor provincial governments could unilaterally extinguish Aboriginal rights or title.

While this scenario would not arise if Aboriginal title were confined to isolated sites – as the *Marshall; Bernard* decision seemed to presage – that alternative would arguably result in terrible injustice for Aboriginal peoples. Given what seemed to be the binary nature of the choice available to them – Aboriginal title or no Aboriginal title – and with diminishing hope of settlements negotiated by government, the courts faced a difficult choice.

Deferring the resolution of Aboriginal Title

While Chapter II summarizes what was said about Aboriginal title both in *Delgamuukw*[7] and in *Marshall*; *Bernard,*[8] attention has so far not been drawn to what these decisions did not say or do, namely make any findings of Aboriginal title. Given the remarkable length – 374 days of evidence and argument – and complexity of the *Delgamuukw* trial, it seems remarkable that the Supreme Court of Canada would ultimately say, in effect, "start over again". It might have been thought that access to such a thorough trial record would allow the Court either for reasons of judicial economy or of sympathy for the parties to make a finding that Aboriginal title existed at least somewhere in the territories claimed. After all, the Court's governing statute gives it a very wide discretion[9] with regard to the judgments it can make and relief it

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[6] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 < https://www.canlii.org/en/ca/scc/doc/1997/1997canlii302/1997canlii302.html?autocompleteStr=delgamuukw&autocompletePos=1 >. Note that – surprisingly – there has been no definitive ruling on whether or not Aboriginal title was extinguished in British Columbia during the colonial era by the February 14, 1859 proclamation by Governor Douglas that "All the lands in British Columbia, and all the Mines and Minerals therein, belong to the Crown in fee." The 3-3 split in *Calder* meant that it was open to McEachern J to decide either way at the trial level in *Delgamuukw*, and he decided that this did have the effect of extinguishing Aboriginal title. All five judges of the British Columbia Court of Appeal held that the colonial instruments did not have the effect of extinguishing Aboriginal title. The Supreme Court of Canada, however, did not deal with the issue. In *Tsilhqot'in*, the defendants did not make the argument that the proclamation had extinguished Aboriginal title, so the courts did not have to resolve the issue.

[7] ibid.

[8] (n 1).

[9] *Brown on Supreme Court of Canada Practice* (2012) [106].

can grant, including the power to give the judgment and award the remedies that should have been given by the court from which the decision is appealed.[10] While it would be understandable that the Court would not have wished to begin sifting through the entirety of the trial record in order to make a determination of exactly where in the plaintiffs' territories they possessed Aboriginal title, it might have chosen to make at least some findings of Aboriginal title and remanded the remainder of the appeal back to the trial court. This option would seem to come within the ambit of remanding "any part of an appeal to the court appealed from or the court of original jurisdiction" [11] and academic commentary notes that "…an appellate court will usually attempt to do the best that it can on the record as it exists, or as supplemented." [12]

It is more understandable that no finding of Aboriginal title was made in *Marshall*; *Bernard*.[13] Because of the origins of that case in regulatory prosecutions, no declaratory relief – eg to declarations of Aboriginal title – would have been sought, so of course the Court would not make such orders. Since the Court upheld the trial judges' findings that the defendants did not possess Aboriginal title to the cutting sites, it would have been unnecessary for the Court to go further and remark on the likely existence of Aboriginal title at other specific sites. Nevertheless, for it to have done so – assuming that the Mi'kmaq hold Aboriginal title somewhere – would have helped to provide clarity as well as promoting judicial economy by making it easier for some future court – or government negotiators - to determine whether Aboriginal title exists at such sites.

Why, then, did the Court not make such a finding in either case? While this can only be a matter for speculation, it must be suggested that the Court's approach in these two cases was consistent with a more general judicial practice during the time period of those cases of trying to avoid making any decision that any group either did or did not possess Aboriginal title, and that the principal underlying rationale for this practice was the belief that reconciliation of Aboriginal land interests with the interests of Canada as

[10] *Supreme Court Act* RSC 1985, c S-26.
[11] ibid s 46.1.
[12] *Brown on Civil Appeals,* vol 2, para 6:2221 (July 2011).
[13] (n 1).

a whole is a task better suited to the Crown and Parliament than to the courts. The latter belief was expressly stated by La Forest J for the minority in *Delgamuukw*:

> On a final note, I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake. This point was made by Lambert JA in the Court of Appeal, [1993] 5 W.W.R. 97, at pp. 379-80:
>
> > So, in the end, the legal rights of the Indian people will have to be accommodated within our total society by political compromises and accommodations based in the first instance on negotiation and agreement and ultimately in accordance with the sovereign will of the community as a whole. The legal rights of the Gitksan and Wet'suwet'en peoples, to which this law suit is confined, and which allow no room for any approach other than the application of the law itself, and the legal rights of all aboriginal peoples throughout British Columbia, form only one factor in the ultimate determination of what kind of community we are going to have in British Columbia and throughout Canada in the years ahead. [Emphasis added.][14]

Similar remarks were made by the Chief Justice on behalf of the majority:

> Finally, this litigation has been both long and expensive, not only in economic but in human terms as well. By ordering a new trial, I do not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts. As was said in *Sparrow*, at p. 1105, s. 35(1) "provides a solid constitutional base upon which subsequent negotiations can take place". Those negotiations should also include other aboriginal nations which have a stake in the territory claimed. Moreover, the Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra*, at para. 31, to be a basic purpose of s. 35(1) -- "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay [emphasis added].[15]

The judicial preference for a negotiated resolution of Aboriginal title interests is understandable. After all, negotiation is preferable to litigation generally, not just in Aboriginal matters, and courts have often stated that it is sound public policy to

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[14] *Delgamuukw* (n 6) [207].
[15] ibid [186].

encourage litigants to settle their differences rather than litigate them to a finish.[16] The explicitly stated preference in *Delgamuukw* that the Crown and first nations enter into interest-based negotiations to arrive at a mutually agreeable compromise, however, also provides the most likely explanation for the Court's decision not to make any finding of Aboriginal title, as well as subsequent decisions by other courts that also sidestepped questions about the existence or non-existence of Aboriginal title in particular disputes. That is, while the underlying motivations of judges cannot be known, the results of the small number of Aboriginal title cases dealt with by the courts prior to the Supreme Court of Canada's 2014 decision in *Tsilhqot'in Nation* seem to have suggested something more than just the common practice of judicial restraint that results in judges refraining from basing their decisions on reasons that are more expansive than are strictly required to give judgment. Instead, it seems that when it comes to Aboriginal title, Canadian courts were for a time approaching something like the "constitutional avoidance" or "last resort" rule that is well-known in United States law[17] but has also been given academic recognition in Canada,[18] as well as some judicial acknowledgement.[19]

If Canadian courts were indeed following such a practice, then the basis for them doing so would be different than in non-Aboriginal constitutional cases, in that the usual explanation for the practice in such cases – deference to other branches of government – would not apply. As has been suggested above, a possible explanation might instead be found in the zero-sum nature of Aboriginal title claims and the serious consequences for both the "winners" and "losers" in Aboriginal title litigation. While the famous dictum *fiat justitia ruat caelum* [20] suggests that the courts should not be concerned with the practical consequences of their decisions, this undoubtedly contrasts with the reality of judicial decision-making. It should therefore not be surprising if the following survey of Aboriginal title judgments indicates that for a time there was a lack of any judicial appetite for actually making final determinations regarding Aboriginal title.

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[16] *Rush & Tompkins Ltd v Greater London Council* [1988] 3 All ER 737, 739-40 (HL).
[17] *Ashwander v Tennessee Valley Authority,* 297 US 288 (1936). See also Lisa A Kloppenberg, 'Does Avoiding Constitutional Questions Promote Judicial Independence' (2006) 56 Case W Res L Rev 1031.
[18] *Hogg on Constitutional Law of Canada*, vol 2 (5th edn) 59-22 and Sujit Choudhry, 'Rights Adjudication in a Plurinational State: The Supreme Court of Canada, Freedom of Religion, and the Politics of Reasonable Accommodation' (2013) 50 Osgoode Hall LJ 575, 604.
[19] "If the facts of the case do not require that constitutional questions be answered the Court will ordinarily not do so." *Moysa v Alberta (Labour Relations Board)* [1989] 1 SCR 1572 at 1580.
[20] Let justice be done though the heavens fall.

Working around the Aboriginal title test: *Tsilhqot'in Nation v British Columbia*

The first clear indicator that the application of the test from *Marshall*; *Bernard* [21] would not be as straightforward and as restrictive of Aboriginal property rights as some might have assumed was in the trial of an Aboriginal rights and title case brought by a sub-group of the Tsilhqot'in Nation. The Tsilhqot'in people live in an interior part of British Columbia, the "Chilcotin" area. The Xeni Gwet'in, the people of the Nemiah Valley, are one of the bands that together make up the Tsilhqot'in. Because of the remoteness of the Nemiah Valley and the relatively poor calibre of the timber it contains, government and industry had not proposed that logging occur in the territory until much later than in many other parts of the province. In 1989, however, the commencement of forestry activities led the Xeni Gwet'in to begin the first of several lawsuits that were initially aimed at obtaining injunctions to prevent logging by forest companies, but that eventually morphed into a consolidated claim against the governments of Canada and British Columbia for declarations of Aboriginal trapping rights and Aboriginal title. Although that portion of the case that involved Aboriginal resource harvesting rights, including trapping, is significant, the discussion below will be limited to the Aboriginal title component of the case.

The trial of *Tsilhqot'in Nation v British Columbia*[22] (sometimes known as "*Roger William v British Columbia*," after the chief of the Xeni Gwet'in Band who commenced the representative action) began in November of 2002. What plaintiffs' counsel originally predicted would be a six-week trial eventually consumed 339 trial days, almost as many as *Delgamuukw*. It is worth noting the enormous cost of such a lengthy trial in that it indicates the financial obstacles that Aboriginal groups face in pursuing their property rights. The plaintiffs were, in fact, only able to undertake such a lengthy and expensive trial because of a series of court orders that resulted in the two defendant governments each having to pay half of the plaintiffs' special costs in advance in any event of the cause, including one hundred percent of disbursements billed.[23] The

[21] (n 1).
[22] 2007 BCSC 1700 < http://www.courts.gov.bc.ca/jdb-txt/SC/07/17/2007BCSC1700.pdf >.
[23] *William v British Columbia* 2004 BCSC 963 < http://www.courts.gov.bc.ca/jdb-txt/sc/04/09/2004bcsc0963err1.htm >.

resulting combined cost to the two governments of underwriting the plaintiffs' case was approximately $18 million, an amount which did not, of course, include the two governments' costs of mounting their own defences.

One result of the extraordinary length of the trial was that while it began before the Supreme Court of Canada handed down its decision in *Marshall*; *Bernard*, it did not conclude until well after that decision. It is therefore not surprising that the claim as originally advanced on behalf of the approximately 400 Xeni Gwet'in was to the entirety of the Xeni Gwet'in traditional territory, an area comprising approximately 4,380 square kilometres; this is a land area comparable to that of a small country, slightly larger than French Polynsesia and slightly smaller than Trinidad and Tobago. What could have seemed surprising was that despite *Marshall*; *Bernard* having seemingly narrowed the scope of Aboriginal title, the plaintiffs did not amend their pleadings to reflect what seemed to be the site-specific nature of Aboriginal title lands, but instead continued to make a territorial claim to Aboriginal title and to rely upon seasonal visits to particular areas for hunting and fishing purposes by which to prove their case. As it turned out, they were right to do so, since the trial judge essentially accepted their claims and would – except for a problem with the pleadings discussed below - otherwise have been prepared to find that they did possess Aboriginal title to a substantial proportion of the territory they claimed. In making that finding, the judge was not unaware of the decision in *Marshall*; *Bernard*, and he noted the defendants' reliance upon it. [24]

The judge noted that both defendant governments had argued that Aboriginal title might exist to smaller sites within the claim area where specific activities or practices had taken place, and had given particular types of hunting and fishing sites as examples.[25] Despite the defendants grounding their arguments in the Supreme Court of Canada decision in *Marshall*; *Bernard*, however, the judge rejected what the plaintiffs had characterized as a "postage stamp" approach to Aboriginal title, a characterization he adopted.[26]

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[24] *Tsilhqot'in Nation* (n 22) [604-605].
[25] ibid [608-609].
[26] ibid [610].

Despite his expansive view of Aboriginal title, the trial judge's stated reason for not actually making a finding that the plaintiffs possessed it was that he accepted British Columbia's argument that the plaintiffs had made an "all or nothing" argument. That is, British Columbia had argued that because the plaintiffs had claimed the entirety of a large territory and organized their evidence on that basis, case law[27] established that the Court did not have jurisdiction to find that only some portions of that territory might constitute definite tracts of land that would qualify for a declaration of Aboriginal title.

Rejecting the defendants' arguments while simultaneously accepting that a legal technicality prevented him from accepting the plaintiffs' arguments allowed the judge to engage in an unusual exercise in *obiter dicta*. While acknowledging that "a court does not normally decide an issue if that decision is only to become unnecessary *obiter dicta* of the court,"[28] the judge proceeded to do exactly that, expressing his opinion as to which areas were subject to Aboriginal title, areas that included approximately forty percent of the claim area, plus some lands outside of it.

Why did the trial judge deliver such peculiar Reasons for Judgment? Again, this can only be a matter for speculation, but those Reasons once again indicate the judicial preference for a negotiated settlement of Aboriginal land interests, rather than a resolution arrived at through litigation. The Reasons are replete with statements to that effect, and with expression of the judge's hope that his judgment would "assist the parties in finding a contemporary solution that will balance Tsilhqot'in interests and needs with the interests and needs of the broader society. [29]

Arguably, these excerpts support a hypothesis that the trial judge's intention in delivering the Reasons that he did was not to conclusively adjudicate the dispute between the parties, but to continue the judicial practice of throwing Aboriginal land rights back to the parties to negotiate. Since his reasons indicated that he would have found Aboriginal title to exist over a very large area, this might have been thought to incent governments to give greater priority to negotiating Aboriginal treaties. Adding

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[27] *Biss v Smallburgh Rural District Council* [1964] 2 All ER 543 (CA).
[28] *Tsilhqot'in Nation* (n 22) [18].
[29] ibid [1368-9].

to that incentive, the judge found that the provincial *Forest Act*[30] was constitutionally inapplicable to Aboriginal title lands;[31] this in turn suggested the possibility that many other provincial statutes – the *Water Act* [32], the *Mines Act* [33], the *Environmental Management Act* [34], the *Range Act* [35], and others – might also not apply to Aboriginal title lands.

If the trial judge's goal was to get the parties to negotiate a settlement to their dispute, it failed, since all three parties appealed the decision to the British Columbia Court of Appeal. That court found that the Tsilhqot'in claim was essentially a territorial one, and that a territorial claim for Aboriginal title did not meet the tests in *Delgamuukw* and in *Marshall*; *Bernard*, did not fit within the purposes behind s 35 of the *Constitution Act, 1982* or the rationale for the Common Law's recognition of Aboriginal title, and would be antithetical to the goal of reconciliation.[36] The Court ruled instead that Aboriginal title would exist only to "well-defined, intensively-used areas" and that in the case of lands used for resource harvesting, examples of the only types of sites that could support findings of Aboriginal title would include "salt licks, narrow defiles between mountains and cliffs, particular rocks or promontories used for netting salmon, or, in other areas of the country, buffalo jumps."[37] While explicitly disagreeing with the trial judge's reasoning, the Court arrived at the same result, namely that the claim to Aboriginal title could not succeed. Rather than dismiss the plaintiff's Aboriginal title claim outright, however, or making a ruling on what portions of the claim area might actually be subject to an Aboriginal title claim, the Court ruled that the trial judge was correct to dismiss the plaintiffs' claim on a "without prejudice" basis. That is, although plaintiffs are normally required to bring all related claims together in a single action and the same subject matter cannot normally be subsequently re-litigated, the Court ruled that – twenty-three years after commencing their litigation and after a long and expensive trial and appeal – the plaintiffs were at liberty to begin their case all over again.[38]

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[30] RSBC 1996 chap 157.
[31] *Tsilhqot'in Nation* (n 22) [1049].
[32] RSBC 1996 chap 483.
[33] RSBC 1996 chap 293.
[34] RSBC 1996 chap 53.
[35] SBC 2004 chap 71.
[36] *William v British Columbia* 2012 BCCA 285 [219].
[37] ibid [221].
[38] ibid [129].

Notably, the Court commented on the point made in this chapter that courts had been reluctant to make definitive findings in Aboriginal title cases:

> Even, however, taking into account the difficulties inherent in this area of the law, jurisprudential development has been slow. While several full-scale claims for title to large areas of land have been advanced to the level of the Supreme Court of Canada, none has succeeded, and considerable areas of uncertainty subsist.
>
> To some degree, the apparent reluctance of the courts to go beyond what is needed to resolve the specific cases is understandable. I have already noted that that is the traditional manner in which the common law has developed. Further, the stakes in Aboriginal title claims have been high – cases such as *Calder*, *Delgamuukw*, and *Marshall*; *Bernard* involved vast areas of land. The resolution of such claims can be critical to the future of both the First Nation involved and the broader Canadian population.
>
> The technical difficulty of this area of law has exacerbated the problem, and has led to considerable frustration. The efforts of the Nisga'a in *Calder*, the Gitksan and Wet'suwet'en in *Delgamuukw*, and the Tsilhqot'in in this case (to this point) all consumed enormous amounts of resources, only to have the cases end inconclusively due to problems with the way they were commenced or pleaded. [39]

As will be discussed below, this was not, in fact, the end of the Tsilhqot'in case, which would conclude with a dramatic reversal. At the time of the British Columbia Court of Appeal's decision, however, the quest for the recognition of Aboriginal property rights remained a fruitless one, a situation that was to persist for several more years.

Other foregone opportunities for ruling on Aboriginal title

There were several other cases that at times appeared likely to result in the adjudication of Aboriginal property rights claims, in which, for one reason or another, such adjudication did not occur.

A case mentioned in the previous chapter was *Adams*, which involved a Mohawk Aboriginal right to fish in Lake St. Francis in Quebec. Because the Supreme Court of

[39] ibid [159-162].

Canada found, however, that the defendant had satisfied the *Van der Peet* test for establishing an Aboriginal fishing right, Lamer CJ stated that it was unnecessary to consider the Aboriginal title argument. [40]

In *Taku River Tlingit First Nation v Tulsequah Chief Mine Project*,[41] the Aboriginal petitioners had sought judicial review of the issuance of a Project Approval Certificate pursuant to the *Environmental Assessment Act* for a proposed reopening of a mine and construction of a 160 kilometre mine access road. The defendants successfully argued, however, that Aboriginal rights and title issues were not suitable to be dealt with on a judicial review, a decision from which leave to appeal was refused,[42] with that refusal being upheld on appeal.[43]

Lax Kw'alaams Indian Band v Canada (Attorney General) was a case commenced in 2002 by an Aboriginal group that was primarily interested in establishing right to fish and to sell fish, but that also claimed Aboriginal title to certain fishing sites. Although their case was heard in the Supreme Court of British Columbia,[44] the British Columbia Court of Appeal[45] and the Supreme Court of Canada,[46] the decisions did not deal with Aboriginal title claim since the plaintiffs had successfully brought a motion, supported by the defendant British Columbia but opposed by the defendant Canada, severing that claim.[47]

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[40] *R v Adams* [1996] 3 SCR 101 [34].
[41] [1999] BCJ No 984.
[42] 1999 BCCA 442 < https://www.canlii.org/en/bc/bcca/doc/1999/1999bcca442/1999bcca442.html?searchUrlHash=AAAAAQANMTk5OSBiY2NhIDQ0MgAAAAAB&resultIndex=1 >.
[43] 1999 BCCA 550 < https://www.canlii.org/en/bc/bcca/doc/1999/1999bcca550/1999bcca550.html?searchUrlHash=AAAAAQANMTk5OSBiY2NhIDU1MAAAAAAB&resultIndex=1 >.
[44] *Lax Kw'alaams Indian Band v Canada (Attorney General)* 2008 BCSC 447 < https://www.canlii.org/en/bc/bcsc/doc/2008/2008bcsc447/2008bcsc447.html?searchUrlHash=AAAAAQANMjAwOCBCQ1NDIDQ0NwAAAAAB&resultIndex=1 >.
[45] *Lax Kw'alaams Indian Band v Canada (Attorney General)* 2009 BCCA 593 < https://www.canlii.org/en/bc/bcca/doc/2009/2009bcca593/2009bcca593.html?searchUrlHash=AAAAAQANMjAwOSBCQ0NBIDU5MwAAAAAB&resultIndex=1 >.
[46] *Lax Kw'alaams Indian Band v Canada (Attorney General)* 2011 SCC 56 < https://www.canlii.org/en/ca/scc/doc/2011/2011scc56/2011scc56.html?searchUrlHash=AAAAAQALMjAxMSBTQ0MgNTYAAAAAAQ&resultIndex=1 >.
[47] *Lax Kw'alaams Indian Band v Canada (Attorney General)* 2006 BCSC 1463 < https://www.canlii.org/en/bc/bcsc/doc/2006/2006bcsc1463/2006bcsc1463.html?searchUrlHash=AAAAAQAOMjAwNiBCQ1NDIDE0NjMAAAAAAQ&resultIndex=1 >.

Despite having an advance costs order in hand, the plaintiffs' Aboriginal title claim in *Her Majesty the Queen in Right of British Columbia v Chief Jules* was stayed.[48] Although the issue of Aboriginal title failed to proceed as far as trial and judgment in the cases noted above, that was not the case in *Ahousaht v Attorney General of Canada*.[49] The plaintiffs' claim to Aboriginal title to the submerged lands as far as one hundred nautical miles off the west coast of Vancouver Island was heard by the trial judge, but after a long, expensive trial, the judge declined to rule on the Aboriginal title issue, [50] instead restricting her ruling to the claimed Aboriginal fishing right. This was despite the plaintiffs having argued that if the Court found anything less than a full commercial fishing right – as indeed it did – that the Court should then rule on the question of Aboriginal title

It can be seen, then, that from the 1997 *Delgamuukw* [51] decision onward, the courts for a period seem to have avoided making any final determination that any Aboriginal group either did or did not have Aboriginal title to any particular land anywhere in Canada. While a judicial reluctance to rule on Aboriginal title may simply have reflected an ideological view that negotiation is preferable to adjudication in this area, it may also – as discussed further below – have indicated a judicial awareness of a significant social division on the issue of Aboriginal title and reluctance to provide any focal point for that division to manifest.

Aboriginal equation of Aboriginal title and traditional territory

In suggesting that there was a judicial unwillingness to make findings on Aboriginal title issues in the post-*Marshall; Bernard* era, it should also be noted that judges do not operate in a vacuum and that they would have been aware of statements being made and positions being taken by Aboriginal people outside of their courtrooms. In particular, two points should be noted in this regard. First – and this point will link to

[48] 2005 BCSC 1312 < https://www.canlii.org/en/bc/bcsc/doc/2005/2005bcsc1312/2005bcsc1312.html?searchUrlHash=AAAAAQAOMjAwNSBCQ1NDIDEzMTIAAAAAAQ&resultIndex=1 >.
[49] 2009 BCSC 1494 < http://www.courts.gov.bc.ca/jdb-txt/SC/09/14/2009BCSC1494cor3.htm >.
[50] ibid [502].
[51] (n 6).

discussion in Chapters V and VII about the existence of other forms of Aboriginal land tenures – Aboriginal groups themselves seem to have shared the general presumption that Aboriginal title is the only form of tenure specifically available to them as a form of Aboriginal right, and advanced their positions accordingly. Second, those speaking on behalf of Aboriginal organizations did not hesitate to promise dire consequences if the courts failed to make findings of Aboriginal title to broad territories.

On the first point, note that while legal discussion of the relationship of Aboriginal people to land usually involves the concept of Aboriginal title, Aboriginal groups themselves are likely to use the terms "Aboriginal title" and "traditional territory" interchangeably. The concept of traditional territory – in effect, the entirety of the land occupied, controlled and used historically or in pre-Contact times – is one that holds great significance for Aboriginal groups. One indicator of this is that when Aboriginal groups enter the British Columbia Treaty Process, it is their traditional territory that is outlined in the Statement of Intent with which they begin the process.[52] The equation of Aboriginal title and traditional territory is, in fact, so prevalent that it would be difficult to find an Aboriginal group that does not assert that it has Aboriginal title to the entirety of its traditional territory. The Squamish Nation, which inhabits an area that extends north from Vancouver, provides an example of this equation of traditional territory and Aboriginal title:

> We, the people of the Squamish Nation, by this document, assert our Aboriginal title to those lands and waters that constitute our traditional territory, our rights to the resources of our traditional lands and waters, and our inherent right to self-determination. In so doing, we seek to provide a framework for negotiations with the Federal government and the government of the Province of British Columbia in order to resolve the long-standing Aboriginal title dispute between us.[53]

While individual Aboriginal groups draw the link between Aboriginal title and their traditional territories clearly enough, their larger political bodies, such as the Union of BC Indian Chiefs, are even more direct on this point:

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[52] British Columbia Treaty Commission, 'Land and Resources Overview' < http://www.bctreaty.net/files/issues_landres.php > accessed 23 September 2012.
[53] Squamish Nation Network, 'Our Land' < http://www.squamish.net/aboutus/ourLand.htm >, accessed 23 September 2012.

> Our relationship with the Land, our Title, rests over every square inch of our traditional territories: Every rock, mountain top, stream, valley and tidal swell. This is certain.[54]

It was not merely in their public pronouncements that Aboriginal groups continued to assert that Aboriginal title and traditional territories are one and the same, but also in their legal pleadings filed during that time period. A review by the author of this thesis of current British Columbia Supreme Court files, which may well be incomplete, reveals the existence of more than ninety cases that appear to seek Aboriginal title to large tracts of territory. While the vast majority of these appear to have begun with what have been termed "protective writs" – ie writs filed before the end of 2003 in order to avoid being caught by the six-year limitation period that may have been triggered by the decision in *Delgamuukw* [55] or in response to findings in *Wewaykum Indian Band v Canada* [56] that the provincial 30 year ultimate limitation period applied to equitable claims and that the defences of laches and acquiescence are available to the Crown – and have not been actively pursued since they were initiated, they all remain capable of being actively pursued at any time should their plaintiff Aboriginal groups wish. As filed, each one represented an expectation by an Aboriginal group that it should be able to use the judicial system in order to obtain Aboriginal title to the entirety of its traditional territory.

Related to that expectation is the second point made above, namely that during this period Aboriginal groups and those who spoke for them were making it clear that the restrictive approach to Aboriginal property rights that seemed to have been taken in *Marshall; Bernard* would simply not be acceptable. From a strictly legal point of view, this might seem a *non sequitur*. After all, the Supreme Court of Canada had the authority to determine the law regarding Aboriginal title and to the extent that it did so in *Marshall; Bernard*, it could be argued that all parties should then have tailored their views, expectations and conduct to match that determination. The apparent reluctance of the courts to apply that law to make definitive rulings on Aboriginal title would

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[54] Union of BC Indian Chiefs, 'Certainty: Canada's Struggle to Extinguish Aboriginal Title' < http://www.ubcic.bc.ca/Resources/certainty.htm#axzz27Kx5CSxj >, accessed 23 September 2012.
[55] *Delgamuukw* (n 6).
[56] [2002] 4 SCR 245, 2002 SCC 79 < https://www.canlii.org/en/ca/scc/doc/2002/2002scc79/2002scc79.html?searchUrlHash=AAAAAQAId2V3YXlrdW0AAAAAAQ&resultIndex=1 >.

presumably, by this view, be seen as a temporary and unimportant aberration. The dissatisfaction of Aboriginal groups would also be irrelevant. As Mohr notes in his contemplation of the sources of judicial authority, "the people cannot be the source of judicial authority in any sense as direct as one which decides outcomes or pits the views of the majority against the decisions of judges."[57] By this view, it simply does not matter if judicial decisions do not receive public support. This would be even truer with regard to the views of Aboriginal groups, since they only constitute a minority rather than a majority of the population.

Even Mohr, however, acknowledges that "At one level, judicial authority cannot be effective unless the people can be expected to recognise and obey it. … The beliefs of the people are clearly a factor in the acceptance of authority…." [58] In the case of Canada's Aboriginal peoples, the possibility that judicial authority would not be recognized and obeyed remained a real one. Disobedience – whether civil or otherwise – of legal authority is an established phenomenon among Canada's Aboriginal people. Caledonia,[59] Oka,[60] Gustafsen Lake,[61] Burnt Church,[62] and Ipperwash,[63] are all recent examples of Aboriginal occupations and protests that involved violent confrontation, and there are many other recent examples of more peaceful civil disobedience by Aboriginal people. If the restrictive view of Aboriginal title that seemed to have been set out in *Marshall*; *Bernard* and the expansive view of Aboriginal title held by many Aboriginal groups had both remain unchanged, it is not inconceivable that this disconnection would have resulted in some form of social unrest.

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[57] Richard Mohr, 'Authorised Performances: The Procedural Sources of Judicial Authority' (2000) 4(1) Flinders JLR 63, 70. See also Randy E Barnett, 'Foreword: Judicial Conservatism v. a Principled Judicial Activism' (1987) 10 Harv JL & Pub Pol'y 273, 281.
[58] ibid 78.
[59] Christie Blatchford, *Helpless: Caledonia's Nightmare of Fear and Anarchy, and How the Law Failed All of Us* (Doubleday Canada 2010).
[60] Harry Swain, *Oka: A Political Crisis and its Legacy* (Douglas & McIntyre 2010).
[61] Scott Steele, 'Gustafsen Lake Standoff: 15 Charged' *The Canadian Encyclopedia* < http://www.thecanadianencyclopedia.com/articles/macleans/gustafsen-lake-standoff-15-charged >, accessed 30 September 2012.
[62] Sarah J King, 'Conservation Controversy: Sparrow, Marshall, and the Mi'kmaq of Esgenoôpetit' (2011) 2(4) IIPJ < http://ir.lib.uwo.ca/iipj/vol2/iss4/5 > accessed 30 September 2012.
[63] Sidney B Linden, Commissioner, Report of the Ipperwash Inquiry < http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/report/index.html >, accessed 30 September 2012.

This possibility was, in fact, sworn to by various Aboriginal leaders in affidavits in support of an application for leave to appeal the *Tsilhqot'in Nation* decision to the Supreme Court of Canada. Sworn statements that First Nations would not accept the BC Court of Appeal decision as a legitimate statement of their Aboriginal title rights,[64] or that they would show the same commitment as nineteenth century warriors who had fought against the Colonial government, [65] or that there would not be peace if the Court of Appeal decision was allowed to stand, [66] or that Aboriginal peoples simply would not accept that decision, [67] all seemed to suggest that Aboriginal peoples would only respect the law if the law were shown by the courts to be in substantial accord with their views and interests.

If judges either shared the perspective of these Aboriginal leaders that *Marshall; Bernard* – or at least that understanding of *Marshall; Bernard* embodied in the British Columbia Court of Appeal's *Tsilhqot'in* decision – was unacceptable, or at least believed that its unacceptability to Aboriginal Canadians made it socially problematic, then that may have contributed to the courts' having continued to find ways during that time period to avoid actually ruling on Aboriginal title. To adopt the wording of the relevant test, judges may have believed that the *Marshall*; *Bernard* decision failed to meet the fundamental objective of the modern law of Aboriginal and treaty rights, namely the reconciliation of Aboriginal and non-Aboriginal peoples and their respective claims, interests and ambitions.[68] If so, they may have simply put off having to apply it.

Such a situation could not, of course, persist indefinitely. Eventually, a court would have to apply the existing law to make a ruling as to where some Aboriginal group did and did not hold Aboriginal title. As it turned out, that court was the Supreme Court of Canada, and as it also turned out, neither its decision in *Marshall; Bernard* nor the

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[64] Shawn A-in-chut Atleo, 'Affidavit' 7 September 2012, 17.
[65] Joey James Alphonse, 'Affidavit' 19 September 2012, 19.
[66] Stewart Phillip, 'Affidavit' 19 September 2012, 6.
[67] Jody Wilson-Raybould, 'Affidavit' 20 September 2012, 19.
[68] *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)* [2005] 3 SCR 388, 2005 SCC 69, 1 < https://www.canlii.org/en/ca/scc/doc/2005/2005scc69/2005scc69.html?autocompleteStr=mikisew%20cree&autocompletePos=1 >.

principle of *stare decisis* would prevent it from taking a more munificent view of Aboriginal property rights than might have been predicted.

Tsilhqot'in Nation at the Supreme Court of Canada

An appeal in *Tsilhqot'in Nation* was heard by the Supreme Court of Canada in November of 2013 [69], only eight years after the Court's decision in *Marshall; Bernard*. An expectation could have existed that since the pre-contact lifestyles of the plaintiff groups in the two cases involved a similar pattern of seasonal use of different resources in different locations – ie the "seasonal round" – that the outcome in *Tsilhqot'in Nation* might be the same as that in *Marshall*; *Bernard*, namely the denial of Aboriginal title or its confinement to small areas. If so, then such an expectation would, of course, be based upon the existence of the principle of *stare decisis*, which normally requires courts to follow established precedents. The rule as it applied in Canada prior to 1949 was explained by the Ontario Court of Appeal:

> The doctrine may be generally stated as follows: decided cases which lay down a rule of law are authoritative and must be followed….The House of Lords is the final Court in England, and its decisions are absolutely binding upon it….The decisions of our own Supreme Court of Canada until reversed are binding on all Canadian Courts, and the Supreme Court is bound by its own previous decisions.[70]

While the Supreme Court of Canada had considered the question of whether it was competent to overrule its own earlier decisions during that era, it had ruled that it was not.[71] After the abolition of appeals to the Privy Council in 1949, however, the Court gradually came to accept that it was not absolutely bound to follow its own previous decisions, though it should normally do so.[72] Hogg suggests that it is arguable that the Court should be more willing to overrule its own prior decisions in constitutional cases – and Aboriginal rights cases are, of course, constitutional cases – than in other cases,

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[69] The webcast of the hearing as well as the facta are available on the Supreme Court of Canada's website < http://www.scc-csc.gc.ca/case-dossier/info/webcast-webdiffusion-eng.aspx?cas=34986 >.
[70] *Re Canada Temperance Act* [1939] 4 DLR 14, 33 (Ont CA).
[71] *Stuart v Bank of Montreal* (1909) 41 SCR 516.
[72] Hogg (n 18) vol 1, 8-22.

since there is no legislative remedy if a doctrine developed by the courts proves to be undesirable.[73] Recently, the Court has even indicated that lower courts in some circumstances need not be bound to follow its decisions.[74] For the Court to explicitly overrule or disregard its decision in *Marshall*; *Bernard*, however, when that decision was so recent and not "wrong" in any objective way could have been seen as moving its decision-making from the judicial to the political realm in an unprecedented fashion.

Fortunately for the plaintiffs in *Tsilhqot'in Nation*, it was not actually necessary for the Court to overrule its own decision in *Marshall; Bernard* in order to arrive at a different outcome, as in fact it did. In part, of course, this is because no two cases are identical on the facts, though the facts in these two cases were so similar as to make it difficult to see any meaningful distinction between them. This is related to the second reason why the Court could arrive at a different decision in *Tsilhqot'in Nation* than it did in *Marshall; Bernard*, namely that determinations of fact are usually made by trial judges and appellate courts are loath to interfere with them. In *Marshall; Bernard*, the Supreme Court of Canada restored the judgments of the trial judges, which had held that Aboriginal title was not established. This, as it happened, was also the outcome of *Tsilhqot'in Nation*, namely the endorsement by the Supreme Court of Canada of the trial judge's application of the law to the facts as found by that trial judge. In *Tsilhqot'in Nation* unlike in *Marshall; Bernard*, however, the trial judge's finding was that exclusivity and occupation had been established in some – very large – areas; relying on that finding, the Supreme Court of Canada allowed the plaintiffs' appeal and granted a declaration of Aboriginal title to those areas. As the Court stated:

> The trial judge applied a test of regular and exclusive use of the land. This is consistent with the correct legal test. This leaves the question of whether he applied it appropriately to the evidence in this case.
> Whether the evidence in a particular case supports Aboriginal title is a question of fact for the trial judge: *Marshall; Bernard*. The question

[73] ibid 8-23.
[74] "The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, stare decisis is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that 'fundamentally shifts the parameters of the debate'…." *Carter v Canada (Attorney General)* [2015] 1 SCR 331, 2015 SCC 5 [44] < https://www.canlii.org/en/ca/scc/doc/2015/2015scc5/2015scc5.html?searchUrlHash=AAAAAQAKMjAxNSBzY2MgNQAAAAAB&resultIndex=1 >.

> therefore is whether the Province has shown that the trial judge made a palpable and overriding error in his factual conclusions.[75]

Because the Court in effect simply adopted the findings of fact of the trial judge and endorsed his application of the law to the facts, it was unnecessary for the Court to go further and provide much clarification of the law regarding Aboriginal property rights. Certain points can, however, be taken from the decision. First, the Court rejected the argument made by British Columbia and adopted by the British Columbia Court of Appeal that Aboriginal title would be confined to discrete sites and could not be found to exist on a "territorial" basis:

> There is no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites or farms, as the Court of Appeal held. Rather, a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is "sufficient" use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law. [76]

It is difficult to know what the Court could have meant when it referred to an Aboriginal group evincing an intention "to hold or possess the land in a manner comparable to what would be required to establish title at common law"; the idea that the Common Law would countenance a person or group of persons obtaining title by possession of an area as large as that at stake in this case seems unlikely, and the decision has, in fact, been characterized as "pushing into the background" the existing jurisprudence[77], leaving Aboriginal title jurisprudence in a "state of disarray"[78] and criticized for its misunderstanding of the Common Law test.[79] And although the decision contains a lengthy discussion regarding the first part of the test for Aboriginal title – namely establishing "sufficiency" of occupation – it gives no clear indication of how or where to draw the line between what is sufficient and what is insufficient. Instead, the Court quotes approvingly from case law (including the Nova Scotia Court of Appeal decision in *Marshall* that it had overruled in *Marshall; Bernard*) and

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[75](n 2)[51-52].
[76]ibid [42].
[77] Gordon Christie, 'Who Makes Decisions Over Aboriginal Title Lands' (2015) 48 UBCL Rev 755.
[78] Robert Hudson, 'The Failure of the *Delgamuukw* Test of Proof of Aboriginal Title' (2015) 48 UBC L Rev 361, 392.
[79] Alex M Cameron 'The Absurdity of Aboriginal Title After Tsilqot'in' (2015) 44 Adv Q 28.

academic commentary that provides no more precise guidance on this point than existed previously. That said, the Court's ruling that Aboriginal title can be established on a larger, territorial basis rather than a smaller, site-specific basis is undeniably a helpful clarification.

A second point to take from the decision is that Aboriginal title is still unlikely to be found to exist throughout the entirety of an Aboriginal group's traditional territory. In *Tsilhqot'in Nation*, only about forty percent of the land claimed in the litigation was found to be Aboriginal title land, despite the land at stake in the litigation only being a small portion of the Tsilhqot'in Nation's much larger claimed territory. The question posed in this thesis – ie what Aboriginal right attaches to those parts of Aboriginal groups' traditional territories that are not Aboriginal title lands – therefore remains outstanding and relevant.

A third point to take from the decision is the crucial importance of the trial judge in future Aboriginal title trials. As noted above, the trial judges in *Tsilhqot'in Nation* on the one hand and *Marshall; Bernard* on the other arrived at opposite conclusions despite what appear to have been very similar facts. In both cases, however, the Supreme Court of Canada reversed the decisions of the relevant provincial courts of appeal and restored the findings of those trial judges. The likelihood of the Court continuing to defer to the findings of trial judges regardless of their substantive findings seems likely given what seems to be a deliberate choice to refrain from providing any definitive indicia of occupation sufficient to ground Aboriginal title, as signalled in the following passage:

> In summary, what is required is a culturally sensitive approach to sufficiency of occupation based on the dual perspectives of the Aboriginal group in question — its laws, practices, size, technological ability and the character of the land claimed — and the common law notion of possession as a basis for title. It is not possible to list every indicia of occupation that might apply in a particular case. [80]

[80] *Tsilhqot'in Nation* (n 2) [41].

Finally, a fourth point to be taken from the decision in *Tsilhqot'in Nation* is the Court's recognition that while Aboriginal title requires both occupation and exclusivity, that a finding of only one of these attributes may give rise to a different right:

> Regular use without exclusivity may give rise to usufructory Aboriginal rights; for Aboriginal title, the use must have been exclusive. [81]

This, it is submitted, raises the question of what Aboriginal right arises from the obverse situation, namely where an Aboriginal group maintained exclusivity in an area which it did not regularly use. The answer proposed in this thesis, namely a right here dubbed "Aboriginal dominion," will be explored in chapters IV and V.

[81] ibid [47].

Chapter IV: Other Aboriginal Rights

The preceding review of the case law has shown that any property that Aboriginal peoples may have in their traditional lands arising from judicial recognition of their pre-assertion of sovereignty presence[1] will be categorized by the courts as a type of "Aboriginal right", with the only such right to property recognized to date being Aboriginal title. This review has also shown that Aboriginal title appears likely to exist only in part of any group's traditional territory, prompting the question of what Aboriginal right or rights to property, if any, may exist in the remainder of the group's territory. While this in itself would indicate the need to search for additional Aboriginal rights, it was also suggested in the preceding chapter that the binary nature of the courts' adjudication function when there is only one known Aboriginal property right has created a dilemma for the courts, given the extremely significant ramifications of their decisions in Aboriginal rights and title cases; this too suggests the need to search for additional Aboriginal rights, particularly property rights.

How should such a search be undertaken? If one were to begin by attempting to catalogue the known universe of rights to which human beings generally have been held to be entitled, the resulting list would be quite long, and would include such universally familiar rights as freedom of assembly, the right to legal counsel, and freedom of religion. If one wished to list only the Aboriginal rights recognized to date by Canadian courts, on the other hand, the list would be quite short, essentially limited on the one hand to Aboriginal title and on the other to resource harvesting rights, such as various fishing or hunting rights. And, as previously discussed, the former of these has to date so far been recognized to exist only once in practice, although it has been the subject of much theoretical discussion.

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[1] In addition to pursuing the recognition of their Aboriginal title lands through the courts, Aboriginal groups do have other means of establishing their ownership of lands. Modern treaties, such as the Tsawwassen Final Agreement or the Nisga'a Final Agreement (discussed in Chapter VIII) provide for band ownership of fee simple lands, as do self-government agreements such as that with the Sechelt Indian Band that was principally given legal effect by the *Sechelt Indian Band Self-Government Act* SC 1986, c 27. In addition, Indian bands are able to purchase fee simple lands or to obtain them by other means, such as through land swaps or in settlement of litigation. When this occurs, they will generally apply to have the fee simple lands added to their reserves.

The first step taken in this chapter will be to demonstrate that the search for new Aboriginal rights would not be pointless, by showing that the courts have not foreclosed the possibility that such rights exist. Next, attention will be directed to the field of international law; since Canada is not the only jurisdiction where issues arise regarding the rights of the original inhabitants vis-à-vis later arrivals, it will be useful to show that there is indeed a greater universe of Aboriginal rights (usually termed "Indigenous" rights in international law) of which the few recognized to date in Canada form only a subset. And since this thesis, however, hypothesizes the existence of an Aboriginal right previously unrecognized in Canadian domestic law, a form of real property here termed Aboriginal dominion – which will be sketched in more detail in Chapter V – particular attention will be paid to what international law may have to say specifically about land rights, particularly where those may afford some control over developments in Aboriginal groups' traditional territories.

As a preliminary point, it may be noted that in the Common Law or Civil Law systems, a discussion of the subject matter of this thesis – namely a form of property interest – might avoid ever referring to property as involving a "right" at all, let alone one that could have anything in common with, for example, voting rights or other civil rights. In the nascent field of Aboriginal law, however, subject matter divisions are not so definite. As will be seen below, this can cause confusion when attempting to conceptualize the relationship between these disparate Aboriginal rights.

A "spectrum" of rights

Although the development of Aboriginal rights jurisprudence, in particular that relating to land, has been traced in Chapters I through III of this thesis, it will be useful to return to some of the principles identified in that case law now that attention is turned to exploring the realm of Aboriginal rights that have not to date been recognized in Canadian law. A reminder of the fundamental principle underlying this exercise can be taken from *Mitchell v Canada (Minister of National Revenue)*:

> English law, which ultimately came to govern Aboriginal rights, accepted that the Aboriginal peoples possessed pre-existing laws and interests, and

> recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation….[2]

The test for establishing an Aboriginal right was set out in the seminal cases of *Delgamuukw* [3] and *Van der Peet*.[4] As restated in *Mitchell*, this is as follows:

> Stripped to essentials, an Aboriginal claimant must prove a modern practice, tradition or custom that has a reasonable degree of continuity with the practices, traditions or customs that existed prior to contact. The practice, custom or tradition must have been "integral to the distinctive culture" of the Aboriginal peoples, in the sense that it distinguished or characterized their traditional culture and lay at the core of the peoples' identity. It must be a "defining feature" of the Aboriginal society, such that the culture would be "fundamentally altered" without it. It must be a feature of "central significance" to the peoples' culture, one that "truly made the society what it was" (*Van der Peet*, *supra*, at paras. 54-59 (emphasis in original)). This excludes practices, traditions and customs that are only marginal or incidental to the Aboriginal society's cultural identity, and emphasizes practices, traditions and customs that are vital to the life, culture and identity of the Aboriginal society in question.[5]

At the risk of stating the obvious, it can be perceived that the Court has identified a framework or set of principles that can be applied to determine whether any particular asserted right – in *Mitchell*, for example, a claimed right to bring goods across an international boundary – is indeed a constitutionally protected Aboriginal right. What it has not done, by way of contrast, is to simply accept that certain generic practices, such as hunting and fishing, constitute the known and finite universe of Aboriginal rights.

Accepting that Aboriginal rights are not fully discovered, the courts have sometimes employed the terms "spectrum" or "continuum" to attempt to organize them in relation to particular interests. Thus in *Delgamuukw* [6], Lamer CJ wrote:

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[2] 2001 SCC 33 [9] < http://www.canlii.org/en/ca/scc/doc/2001/2001scc33/2001scc33.html?autocompleteStr=mitchell%20&autocompletePos=3 >.
[3] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 [144] < https://www.canlii.org/en/ca/scc/doc/1997/1997canlii302/1997canlii302.html?autocompleteStr=delgamuukw&autocompletePos=1 >.
[4] *R v Van der Peet* [1996] 2 SCR 507 < https://www.canlii.org/en/ca/scc/doc/1996/1996canlii216/1996canlii216.html?autocompleteStr=van%20der%20&autocompletePos=1 >.
[5] *Mitchell* (n 2) [12].
[6] *Delgamuukw* (n 3).

> …the Aboriginal rights which are recognized and affirmed by s. 35(1) fall along a spectrum [underlining added] with respect to their degree of connection with the land. At the one end, there are those Aboriginal rights which are practices, customs and traditions that are integral to the distinctive Aboriginal culture of the group claiming the right. However, [quoting *Adams*] the "occupation and use of the land" where the activity is taking place is not "sufficient to support a claim of title to the land" (at para. 26 (emphasis in original)). Nevertheless, those activities receive constitutional protection. In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an Aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity.
>
> …
>
> At the other end of the spectrum [underlining added], there is Aboriginal title itself. [7]

The "spectrum" analogy in relation to land was accepted and re-used in *Mitchell*:

> I note that the relevance of geography is much clearer in hunting and fishing cases such as *Adams* and *Côté*, which involve activities inherently tied to the land, than it is in relation to more free-ranging rights, such as a general right to trade, which fall on the opposite end of the spectrum. [underlining added][8]

In *NTC Smokehouse* [9] and in *Gladstone* [10], L'Heureux-Dubé J (dissenting) referred to a "spectrum" of Aboriginal fishing rights, with part of that spectrum relating to fishing for livelihood, support and subsistence purposes, while another part of the spectrum related to commercial fishing. Note that in referring to the reasons of Lamer CJ in those cases, L'Heureux-Dubé J said that the Chief Justice had identified a "continuum" of Aboriginal rights[11]; although the Chief Justice did not use that term himself, it has sometimes been adopted by lower courts.[12] The same or a similar spectrum of fishing rights was argued by

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[7] ibid [138].
[8] *Mitchell* (n 2)[56].
[9] *R v NTC Smokehouse Ltd* [1996] 2 SCR 672 [48] < http://www.canlii.org/en/ca/scc/doc/1996/1996canlii159/1996canlii159.html?autocompleteStr=n.t.c.&autocompletePos=1 >.
[10] *R. v Gladstone* [1996] 2 SCR 723 [14] < http://www.canlii.org/en/ca/scc/doc/1996/1996canlii160/1996canlii160.html?searchUrlHash=AAAAAQAPci4gdi4gZ2xhZHN0b25lAAAAAAE&resultIndex=4 >.
[11] ibid [13].
[12] *R v Nelson* [1997] MJ No 654 (Prov Ct) [116].

the appellant plaintiffs in *Lax Kw'alaams Indian Band* and utilized by the Court in its analysis.[13]

Although such use of the terms "spectrum" and "continuum" is useful for establishing that the courts clearly contemplate the existence of other Aboriginal rights that are currently unrecognized in Canadian domestic law, it should be borne in mind that such terms are only analogies, which will be useful in some analyses and not in others. Certainly, consideration of certain rights illustrates the problem with taking the idea of a "continuum" too literally.[14] With regard to potlatches, for example, ceremonial feasts associated with large-scale gift giving on important occasions, Lamer CJ speculated in *NTC Smokehouse* that "Potlatches and other ceremonial occasions may well be integral features of the Sheshaht and Opetchesaht cultures and, as such, recognized and affirmed as aboriginal rights under s. 35(1)…."[15] How, one might ask, could such rights be meaningfully placed into a "spectrum" or "continuum" alongside a real property right such as Aboriginal title?

Even if one thinks only of property rights, [16] it is easy to perceive that these are likely to be multidimensional rather than linear in nature. In Common Law and Civil Law systems, for example, such rights may vary in a number of respects, as, for example, whether or not they confer exclusive use (easements and servitudes, for example, generally do not while leases and fees simple do), the right to destroy (which a liferenter or usufructuary does not possess), or whether they can only be held in conjunction with other rights (such as in the case of a "praedial" or "appurtenant" easement). Just as no one would suggest attempting

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[13] *Lax Kw'alaams Indian Band v Canada (Attorney General)* 2011 SCC 56 [61] < http://www.canlii.org/en/ca/scc/doc/2011/2011scc56/2011scc56.html?autocompleteStr=lax%20kw'alaams&autocompletePos=1 >.

[14] See, for example, Brian Slattery's proposed framework of "generic" versus "specific" rights, with the former including such proposed rights as a right to conclude treaties and a right to customary law: Brian Slattery, 'A Taxonomy of Aboriginal Rights' in Hamar Foster, Heather Raven and Jeremy Webber, *Let Right be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (UBC Press 2007). See also the concept of a three-layer pyramid of Aboriginal rights in Brian Slattery, 'The Generative Structure of Aboriginal Rights' (2007) 38 Sup Ct L Rev 595.

[15] *NTC Smokehouse* (n 9) [26] It is interesting to speculate whether potlatches could now actually constitute Aboriginal rights, given that they were prohibited by statute from 1884 to 1951: *An Act further to amend The Indian Act, 1880*, SC 1884 (47 Vict.) c 27, s 3. Arguably, this could have constituted extinguishment of any such Aboriginal right, though a parallel right under the *Canadian Charter of Rights and Freedoms* would undoubtedly exist.

[16] Note that the notion of a "spectrum" of rights may have been tied to the notion that the only s 35 rights are those involving land, as proposed by David W Elliott, '*Delgamuukw*: Back to Court' (1998-1999) 26 Man LJ 97, 116.

to order property rights in those systems along a spectrum, so would it be unwise to do so with regard to Aboriginal property rights, particularly when – as is argued in this thesis – new rights remain to be discovered.

More advisedly, some courts have simply used the term "other rights" without attempting to speculate about what those other rights might be. The British Columbia Court of Appeal in *William v British Columbia* [17], for example seemed to suggest that the important question to be answered in every case will be what Aboriginal right will serve to protect Aboriginal culture:

> Where traditional use and occupation of a tract of land was less intensive or regular, however, recognition of Aboriginal rights other than title may be sufficient to fully preserve the ability of members of a First Nation to continue their traditional activities and lifestyles and may fully preserve Aboriginal culture. In such cases, the recognition of those other rights [underlining added] may be more commensurate with the reconciliation of Aboriginal rights with Crown sovereignty than would a broader recognition of Aboriginal title.[18]

Elsewhere in its reasons in that case, the British Columbia Court of Appeal appeared to specifically contemplate the existence of rights asyetunrecognized in Canadian domestic law:

> The Tsilhqot'in must be able to continue hunting and fishing throughout their traditional territory, and to have the right to pass and re-pass over the trails that they have used for hundreds of years. There will be other specific rights [underlining added] that must be recognized in order to preserve the rich traditions of the Tsilhqot'in people. It is not at all clear to me, however, that Tsilhqot'in culture and traditions cannot be fully respected without recognizing Aboriginal title over all of the land on which they roamed.[19]

While the British Columbia Court of Appeal's decision was later overruled by the Supreme Court of Canada – as discussed in Chapter III – there was no indication that the higher court disagreed that other specific rights should be recognized. The British Columbia Court of Appeal later in its reasons appeared to only just stop short of calling

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[17] 2012 BCCA 285 [173] < http://www.courts.gov.bc.ca/jdb-txt/CA/12/02/2012BCCA0285.htm >.
[18] ibid.
[19] ibid [232].

for the active exploration of the nature of additional Aboriginal rights which while currently unidentified are at least "identifiable":

> It seems to me that the plaintiff's approach to Aboriginal title does not account for the fact that title is not the only tool available to provide cultural security to the Tsilhqot'in.
>
> Aboriginal rights of various sorts protect cultural security and safeguard the ability of First Nations to continue to engage in traditional lifestyles. Indeed, as British Columbia points out, the phrase "cultural security and continuity" was originally used in *Sappier*; *Gray* to describe the function of Aboriginal rights in general, not merely Aboriginal title.
>
> Aboriginal title, while forming part of the picture, is not the only – or even necessarily the dominant – part. Canadian law provides a robust framework for recognition of Aboriginal rights. The cultural security and continuity of First Nations can be preserved by recognizing their title to particular "definite tracts of land", and by acknowledging that they hold other Aboriginal rights in much more extensive territories.[20]

If there is to be a search for Aboriginal rights that are asyet-unrecognized in Canadian domestic law, however, that raises the question of where to begin looking.

Looking for Aboriginal rights: Aboriginal practices and perspectives

Clearly, the most appropriate place to begin looking for a new Aboriginal right would be in the pre-Contact "practices, traditions and customs"[21] of individual Aboriginal groups. In looking at those and considering whether they give rise to modern rights, it would, of course, be important to take into account the perspectives of the Aboriginal groups themselves, as per one element of the test for Aboriginal rights devised by the Supreme Court of Canada.[22] Such an undertaking would, however, be extremely daunting, given the hundreds of Aboriginal groups in Canada, the diversity of their lifestyles and cultures, and the fact that such considerations of their cultures as may currently exist will often be based upon the perspectives of non-Aboriginal academics rather than those of the Aboriginal groups themselves. A macro-level exercise with a more realistic prospect for success would be one that looks in the first instance for such

[20] ibid [235-238].
[21] *Van der Peet* (n 4)[44].
[22] ibid [49-50].

generic practices, traditions and customs as would be likely to give rise to Aboriginal rights that might be held by a wide variety of Aboriginal groups.

Another place to look for new Aboriginal rights would be in judicial references to rights or rights-related concepts that have not received full judicial recognition. In one of the several sets of reasons for judgment handed down by the British Columbia Court of Appeal in *Delgamuukw*, for example, Hutcheon JA refers to what he terms "self-regulation", a term he chooses in preference to "self-government" because of his belief that the latter term carries with it connotations of enforcement by some state authority.[23] Preferring the term "traditions" to "laws" for the same reason, he listed among Gitksan and Wet'suwet'en traditions the right to names and titles, the use of masks and symbols in rituals, the use of ceremonial robes, the right to occupy or control places of economic importance, the control of descent through clan lineages, the feast system, the regulation of marriage and the control of relations with neighbouring societies. The judge then asked rhetorically, "When was the right to practice these traditions lost?"[24] The answer to that question would be that in contemporary Canada – unlike during that earlier era when the potlatch and the Sun Dance were banned by statute – the right to practice most such activities would at least be protected by the *Canadian Charter of Rights and Freedoms*, although they might also constitute Aboriginal rights. Because of that, and because of the unlikelihood of any government now attempting to deny Aboriginal groups their ability to engage in those sorts of practices, it seems unlikely that those particular proposed Aboriginal rights would ever be likely to receive judicial recognition. Still, some other references in judicial decisions, such as to recognizing indigenous customary adoption law,[25] do point to situations where conflicts can arise between Aboriginal traditional practices and modern statutory regimes so that it becomes necessary for courts to identify Aboriginal rights.

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[23] *Delgamuukw v British Columbia*, [1993] 5 WWR 97 (BCCA) [1163] < http://www.courts.gov.bc.ca/jdb-txt/ca/93/04/1993bcca0400.html >.
[24] ibid [1165].
[25] *Casimel v ICBC* (1993) 82 BCLR (2d) 387 (CA) < http://www.courts.gov.bc.ca/jdb-txt/ca/93/05/c93-0563.htm >. For a list of cases upholding the validity of adoptions and marriages that have taken place in accordance with Aboriginal customary laws, see Kent McNeil, 'The Sources and Content of Indigenous Land Rights in Australia and Canada: A Critical Comparison' in L Knafla and H Westra, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (UBC Press 2010), 154, 167 and see also the earlier NK Zlotkin, 'Judicial Recognition of Aboriginal Customary Law in Canada: Selected Marriage and Adoption Cases' (1984) 4 CNLR 1.

What might seem to be another potential source for discovering Aboriginal rights is comparative jurisprudence. In fact, however, an initial survey would seem to indicate that this approach would not be universally productive. In some countries, movements for Aboriginal rights have been aimed at merely achieving such goals as the right to vote and to receive equal treatment at law, and would have little relevance in modern Canada. In some other countries, such as the United States of America where every part of the contiguous forty-eight states is covered by treaty, the scope of treaty rights has left little room for the existence of Common Law Aboriginal rights.

Australia offers the most obvious comparator, in that both countries are very large, share a British, Common Law heritage, have settler populations that are confined to relatively small portions of their overall areas, and have Indigenous populations that are only a fraction of their total populations (3% in Australia, 4.3% in Canada) but that face significant socio-economic difficulties. There are, however, two significant differences. First, unlike in New Zealand, the United States, and much of Canada, Australia did not enter into historical treaties with its Aboriginal peoples. To the extent that treaties could be said to reflect at least some basic recognition of the existence of Aboriginal rights, it might be suggested that such recognition did not occur in Australia until very recently. Second, in the modern era Australian governments took a statutory approach to the definition of Aboriginal rights that constitutional entrenchment made impossible in Canada post-1982. The first of the relevant statutes, the 1976 *Aboriginal Land Rights (Northern Territory) Act* [26] made it possible for Aboriginal people in the Northern Territory to claim rights to land based on traditional occupation. A number of subsequent statutes had the effect of transferring lands or at least allowing for the transfer of lands in other parts of Australia to Aboriginal and Torres Strait Islander peoples. In addition, one year after the *Mabo* decision, the *Native Title Act 1993* [27] formalized the recognition of "native title", and established the National Native Title Tribunal to make determinations in the first instance of whether native title exists. These statutory schemes for resolving what might otherwise be opportunities for defining Aboriginal rights make it unlikely that the Australian experience will generate

[26] *Aboriginal Land Rights (Northern Territory) Act* (Cth).
[27] *Native Title Act 1993* (Cth).

examples of previously unknown types of right.[28] In addition, those rights that are known to exist in Australia, including land rights in particular, are subject to widespread criticism for their inadequacy.[29]

While comparative law may generally not offer much assistance, however, international law does.

Looking for Aboriginal rights: international law

Although the protection of the rights of minorities was actively developed in international law between the wars and reached its fruition in the post-World War Two era, Sohn traces the philosophical support for the concept to ancient China and eighteenth-century Switzerland, and its practical implementation to at least the middle of the nineteenth century.[30] Following the creation of the United Nations in 1945, however, the delineation of international law with regard to minority rights, including the rights of indigenous peoples, was largely focused on the efforts of that body and its subsidiary entities. The *Charter of the United Nations* itself in its Preamble pledges to "regain faith in fundamental human rights" and in Article 55 asserts the "principle of equal rights and self-determination of peoples,"[31] which can be seen as establishing the basis for later documents relating to human rights generally and indigenous rights specifically. The best known of these later documents, the *Universal Declaration of Human Rights*,[32] asserted in Article 7 the right to equal protection against discrimination, which can also be seen as providing a foundation for the assertion in even later documents of more specific rights relating to minorities, particularly indigenous minorities. Two such later documents, the *International Covenant on Civil*

[28] For a discussion of the Australian situation, see eg Zia Akhtar, 'Aboriginal Determination: Native Title Claims and Barriers to Recognition' (2011) 7[2] Law Env't & Dev J 132. For a critical evaluation, see Nicolas Peterson, 'Common Law, Statutory Law, and the Politicial Economy of the Recognition of Indigenous Australian Rights in Land' in L Knafla and H Westra, *Aboriginal Title and Indigenous Peoples: Canada, Australia, and New Zealand* (UBC Press 2010) 171.
[29] See, for example, Ben Schokman and Lesley Russell, 'Moving Beyond Recognition: Respecting the Rights of Aboriginal and Torres Strait Islander Peoples' (Oxfam 2017) 30-31.
[30] Louis B Sohn, 'The New International Law: Protection of the Rights of Individuals Rather than States' (1982) 32 Am UL Rev 1, 5.
[31] *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7.
[32] UN General Assembly, *Universal Declaration of Human Rights*, GA Res 217(III), UN GAOR, 3d Sess, Supp No 13, UN Doc. A/810 (1948) 71.

and Political Rights [33] and the *Convention on the Elimination of All Forms of Racial Discrimination* [34] can, for the purposes of this thesis, be viewed with hindsight as further steps along the road to protection of the rights of indigenous peoples. Article 1 of the former document asserts that all peoples have the right of self-determination and that in no case may a people be deprived of its own means of subsistence, while by Article 2 each State Party undertakes to respect and to ensure to all individuals the rights recognized in the Covenant "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". In addition, Article 27 protects the rights of minorities to enjoy their own cultures, as well as to practice their own religions and speak their own languages. The latter document affirmed the protection of "other civil rights" including in Article 5, the right to nationality, the right to own property alone as well as in association with others and the right to inherit, all of which can be seen as relevant to Aboriginal land rights.

While all of these documents are at least relevant to the rights of Aboriginal peoples, other documents have subsequently been created that are much more directly on point. In 1982, the United Nations created a Working Group on Indigenous Populations. This group began working on the *Declaration on the Rights of Indigenous Peoples* [35] ("*UNDRIP*") in 1985, and submitted a draft to the Sub-Commission on the Promotion and Protection of Human Rights in 1993. That body gave its approval in 1994 and the draft Declaration was then referred to the Commission on Human Rights, which established a new Working Group to examine its terms. It was not until 2006 that the successor body to the Commission on Human Rights gave its approval, thereby allowing the draft declaration to be referred to the General Assembly in 2007. At the initial vote on September 13, 2007, 144 countries voted for its adoption, 34 states were absent, 11 abstained, and 4 – Canada, Australia, the United States and New Zealand – were opposed. Since that time, all four of those opposing countries have announced their support for *UNDRIP*, with the Government of Canada announcing in May of

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[33] UN General Assembly, *International Covenant on Civil and Political Rights*, GA Res. 2200A (XXI), UN GAOR, 1966 Supp (No 16) at 52, UN Doc. A/6316.
[34] UN General Assembly, *Convention on the Elimination of All Forms of Racial Discrimination*, GA Res 2106 (XX), UN GAOR, 1966 Supp (No 14) at 47, UN Doc A/6014.
[35] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295.

2016 that it intends "nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution".[36]

Early in the period during which *UNDRIP* was being developed, one of the United Nations' subsidiary bodies, the International Labour Organization, also was working in this area. It adopted *ILO-Convention 169* in 1989. This document had the effect of supplanting the ILO's earlier convention in this area, the *Indigenous and Tribal Populations Convention* 1957 (*ILO 107*).[37] The 1957 Convention had reflected the prevailing premise of the time that Aboriginal groups would become assimilated into dominant societies.[38] Since this notion was seen as anachronistic by the mid-1980s, the ILO had undertaken a process that was responsive to movements and demands by indigenous peoples themselves, with *ILO 169* being the result of that process.[39] To date, twenty-two countries have ratified *ILO 169*, with the majority of those countries being in Latin America. Note, however, that Canada is not one of those ratifying countries.

Although a variety of international bodies are concerned with indigenous peoples' rights, *ILO 169* and *UNDRIP* are the two most important manifestations of contemporary international law regarding such rights, though the proposed American Declaration on the Rights of Indigenous Peoples is also noteworthy. In looking at international law as a source for potential Aboriginal rights in Canada, therefore, it would seem reasonable to begin by looking at these documents.

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[36] CBC News, 'Canada officially adopts UN declaration on rights of Indigenous Peoples' (10 May 2016) < http://www.cbc.ca/news/aboriginal/canada-adopting-implementing-un-rights-declaration-1.3575272 > accessed 22 May 2016

[37] But note that ILO 107 remains in effect for those countries that had ratified it but that have not ratified ILO 169, a list of which can be found at < http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312252 > accessed 5 July 2016.

[38] S James Anaya, *Indigenous Peoples in International Law* (2nd edn, OUP 2004) 55. See also Athanasios Yupsanis, 'ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989-2009: An Overview' (2010) 79 Nordic J Int'l L 433, 434.

[39] Anaya (n 38) 59.

a) UNDRIP

The resolution by which the United Nations General Assembly adopted the *Declaration on the Rights of Indigenous Peoples* is itself quite brief. Annexed to it, however, is the Declaration consisting of twenty-four paragraphs of preamble and forty-six articles, which has become a "key touchstone" on international standards respecting indigenous rights.[40] Both the preamble and the articles set out a number of rights that are declared to attach to indigenous peoples, as well as giving some indication of the structure of rights that exist with respect to land. Looking just at those rights that the forty-six articles explicitly state are possessed by indigenous peoples, these include forty-two identified rights. The forty-two rights have been excerpted and are attached as an appendix to this thesis.

An obvious first point to make about the rights listed above is that there are very many of them, in comparison with the very few that have been identified through Canadian court cases. Broadly, they could be said to fall within several overarching categories: a right to self-determination; a right to be recognized as distinct peoples; a right to free, prior and informed consent; and a right to be free of discrimination. Some of the individual rights listed, however, might strike readers in western, industrialized countries as odd inclusions, with rights asserted that involve mental health (Article 24(2)) and vocational training (Article 21(1)), for example, being given as much weight as those involving self-determination (Article 3) or redress for the loss of traditional lands (Article 28). It must be understood, however, that the Declaration represents the culmination of more than two decades of work by the United Nations and its members and by indigenous peoples from around the world. Given that, it is unsurprising that some of the rights included may be more specifically relevant to local situations rather than being more universally relevant.

A second point to note, then, is that many, perhaps most, of these rights would be of little or no practical significance in Canada or other nations that currently embrace

[40] Dwight Newman, 'Indigenous Title and its Contextual Economic Implications: Lessons for International Law from Canada's Tsilhqot'in Decision' (2015) 109 AJIL Unbound 215 < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2718946&download=yes> accessed 31 January 2016. See also Mauro Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 Int'l & Comp LQ 957.

liberal, democratic values. The right to be free from discrimination, for example, is enshrined in the s 15 equality rights guarantee of the *Canadian Charter of Rights and Freedoms* [41], as well as in both federal and provincial human rights statutes. Given that, Indigenous individuals who had suffered discrimination would be more likely to have recourse in the first instance to binding, domestic laws rather than attempt to rely upon Article 2 of *UNDRIP*, though they might well hedge their bets by pleading both. Some of the asserted rights in *UNDRIP* would, admittedly, have been much more relevant in earlier times when other statutory and constitutional provisions had not been enacted, when they might have offered a counterpoint to the prevailing notions that Aboriginal people would inevitably be assimilated into the dominant culture, as well as to unchecked Parliamentary authority. The Article 11(1) right to practice cultural traditions and customs, for example, would have offered a counter to the historic ban on the potlatch and the Sun Dance, as the Article 14(1) right of Indigenous peoples to control their education systems might have done with regard to the residential school system.

As will be discussed below, for the purposes of this thesis it will be significant that several of the rights set out in *UNDRIP* are directly relevant to the question of what interest Aboriginal groups might retain in the lands contained within their traditional territories. In particular, attention should be drawn to the concept of "free, prior and informed consent" which is explicitly stated in: Article 10 with regard to the relocation of indigenous peoples; Article 11(2) with regard to the taking of cultural, intellectual, religious or spiritual property; Article 19 with regard to states' adoption and implementation of legislative or administrative measures that may affect indigenous peoples; Article 28(1) with regard to the taking of traditional lands; Article 29(2) with regard to the storage of hazardous materials on traditional lands or territories; and most relevant to this thesis, Article 32, which states:

> *Article 32*
> 1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions

[41] *Canadian Charter of Rights and Freedoms*, s 6, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

> in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
> 3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Clearly, Article 32(2) requires states to engage in consultation of a sort that in Canada is routinely engaged in as a result of the decisions in *Haida*,[42] *Taku* [43] and subsequent cases. To the extent that 32(2) goes further and requires states to obtain the free and informed consent of indigenous peoples prior to the approval of projects affecting their lands or territories[44], however, it seems that it should arrive at the same result as the proposed right of Aboriginal dominion proposed in this thesis, namely recognizing an ability in Aboriginal groups to prevent unwanted resource use or development in their traditional territories.

b) ILO 169

While *UNDRIP* contains some provisions setting out the obligations of states toward indigenous peoples, it is primarily focused upon setting out the rights possessed by those peoples. The structure of *ILO 169* is the reverse of this, in that while there is considerable substantive overlap between the two documents, *ILO 169* principally sets out state obligations to respect the rights of indigenous persons while making fewer pronouncements as to the nature or existence of those specific rights. The list of

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[42] *Haida Nation v British Columbia* (Minister of Forests) [2004] 3 SCR 511, 2004 SCC 73 < http://www.canlii.org/en/ca/scc/doc/2004/2004scc73/2004scc73.html?autocompleteStr=haida&autocompletePos=1 >.

[43] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* [2004] 3 SCR 550, 2004 SCC 74 < http://www.canlii.org/en/ca/scc/doc/2004/2004scc74/2004scc74.html?autocompleteStr=taku&autocompletePos=1 >.

[44] The United Nations Human Rights Committee in a case involving measures which would substantially compromise or interfere with culturally significant economic activities of a minority or indigenous community expressed the view that mere consultation would be insufficient, and that free, prior and informed consent of the members of the community would be required: *Poma Poma v Peru* UN Doc CCPR/C/95/D/1457/2006. For a critical evaluation of this decision, see Katja Gocke, 'The Case of *Ángela Poma Poma v. Peru* before the Human Rights Committee: The Concept of Free Prior and Informed Consent and the Application of the International Covenant on Civil and Political Rights to the Protection and Promotion of Indigenous Peoples' Rights' (2010) 14 Max Planck YB UNL 337.

indigenous rights that are declared to exist in *ILO 169* is therefore much shorter than the list set out above from *UNDRIP*:

- "…the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development." (Article 7(1))
- "…the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights." (Article 8(2))
- "…the right of these peoples to participate in the use, management and conservation of these resources." (Article 15(1))
- "…the right to return to their traditional lands, as soon as the grounds for relocation cease to exist." (Article 16(3))
- "…the right of these peoples to establish their own educational institutions and facilities, provided that such institutions meet minimum standards established by the competent authority in consultation with these peoples." (Article 27(3))

There are, admittedly, passing references to other, more general rights, such as to "internationally recognised human rights" in Article 9(1) or "general rights of citizenship" in Article 4(3), but these are general rights rather than rights specific to indigenous peoples.

c) The Organization of American States and the Proposed American Declaration on the Rights of Indigenous Peoples[45]

In 1948, twenty Latin American countries and the United States ratified the Charter of the Organization of American States (the "OAS"). While much of the impetus for the creation of the OAS may have originally been to oppose communism, the ongoing focus of the new organization was on the region's economic development, resolution of conflicts between members, and respect for human rights. The human rights system of the OAS is based upon the American Declaration of the Rights and Duties of Man (the "American Declaration"), the American Convention on Human Rights (the

[45] Strictly speaking, the OAS represents a manifestation of "supranational law" in that it concerns regional agreements, whereas the UN and ILO operate in the field of "public international law", but the distinction is arguably not germane for the purposes of this thesis.

"Convention") and other international legal instruments. The Convention establishes the rights that are to be guaranteed by State Parties to the Convention and also grants individuals the right to bring complaints about alleged violations by State Parties to the Convention before the Inter-American Commission on Human Rights (the "Commission"). From the Commission, complaints can be taken further to the Inter-American Court of Human Rights (the "IACHR"). The IACHR's jurisdiction over contentious cases is limited by two conditions: first, that it involve states that have ratified the Convention; and second, that participating states recognize the jurisdiction of the Court with respect to all matters relating to the interpretation and application of the Convention. Though Canada and the United States are members of the OAS, they are not parties to the Convention and have not attorned to the jurisdiction of the Court. As such, the Court's decisions are not legally binding on Canada or the United States.

This does not, however, mean that the decisions of the IACHR and other OAS entities (as with international bodies more generally) are not of any interest or applicability regarding Canada. Those decisions set a benchmark for state treatment of Aboriginal peoples both internationally and also in domestic debates and discussions. This is particularly true with regard to areas in which there are significant differences between domestic and international practices, which may be the very areas which have prevented the domestic ratification of the international covenant in the first place; domestic advocates for Aboriginal groups will invariably point to international standards and decisions in seeking to advance their positions with government actors and others as part of their ongoing dialogue. See discussion of some of the relevant cases in the following section of this chapter.

Note that in addition to the OAS being relevant with regard to Aboriginal land rights as a result of its jurisprudence arising under its authority, it is also of interest because of its development of a Proposed American Declaration on the Rights of Indigenous Peoples. Although it was in 1989 that the General Assembly of the Organization of American States asked the Inter-American Commission on Human Rights to prepare a legal instrument in regard to the human rights of indigenous peoples for adoption in 1992 and it was in 1997 that the resulting document was submitted to the Permanent Council, at the time of writing of this thesis in 2016 the document unfortunately remains in draft

form only as progress toward adoption is gradually made by consensus on a provision-by-provision basis.[46] The current version of the draft document contains forty-four provisions.[47] Although Section Five addresses "Social, Economic and Property Rights" and would be relevant to this thesis, the fact that alternative versions of the Section's provisions continue to be under consideration makes any attempt at analysis at this time premature. At most, this document can be flagged for future attention in the search for new Aboriginal rights.

d) Land rights

As detailed above, both *UNDRIP* and *ILO 169* provide guidance as to the broader universe of indigenous rights that are considered to exist pursuant to international law, as do decisions by entities of the OAS. While some of these rights concern such matters as culture, education, intellectual property, and group membership, the rights that are of most interest for the purposes of this thesis are those that pertain specifically to land. Given that, it will be useful to attempt to isolate those rights and identify relevant principles. As will be seen, several of these can be marshalled in support of the arguments made in this thesis for the existence of the previously unrecognized right of Aboriginal dominion.

In the preamble section of *UNDRIP*, several pronouncements refer to "land, territories and resources." So, for example, concern is expressed that indigenous people have been dispossessed of their "land, territory and resources". The urgent need to respect and promote the inherent rights of indigenous peoples is recognized, particularly their rights to their "lands, territories and resources". There is a statement of conviction that control by indigenous peoples over developments affecting them and their "lands, territories and resources" will enable them to strengthen the institutions, cultures and traditions. The preamble also contains a provision emphasizing the contribution of the demilitarization of the "lands and territories" of indigenous peoples to peace, economic

[46] Department of International Law, Organization of American States 'Indigenous Peoples: Introduction' < http://www.oas.org/dil/indigenous_peoples_preparing_draft_american_declaration.htm > <http://www.oas.org/dil/indigenous_peoples_preparing_draft_american_declaration.htmhttp://www.oas.org/dil/indigenous_peoples_preparing_draft_american_declaration.htm > accessed 6 August 2015.
[47] Department of International Law, Organization of American States 'Indigenous Peoples: Negotiation Texts' < http://www.oas.org/dil/indigenous_peoples_Negotiation_Texts.htm > accessed 6 August 2015.

and social progress and development. What should be taken from the use of these phrases?

First and most obviously, it is understood and affirmed that indigenous people do indeed possess lands, territories and resources. To state this in the reverse, the preamble to *UNDRIP* recognizes that at international law it will not be the case that indigenous people have no rights to their traditional lands, territories and resources; the fact that in Canada by the time of writing of this thesis only one Aboriginal group – the Tsilhqot'in – had been able to secure judicial recognition of its Aboriginal right to a portion of its traditional territory would seem to be at odds with expectations at international law. This same point can be understood from considering the *UNDRIP* articles, since Articles 2(b), 10, 25, 26(1), 26(2), 26(3), 27, 28(1), 28(2), 29(1), 29(2), 30, 32(1), and 32(2) all contain references – with slight variations in wording – to the lands, territories and resources of indigenous peoples. Although *ILO 169* is not as expansive in its references in this regard, the reference in article 16(3) to the "traditional lands" of indigenous peoples and in article 7(1) to the "lands they occupy or otherwise use" do provide some further support for the recognition at international law of indigenous land rights. Under the OAS, support for findings of Aboriginal peoples' right to own their traditional lands has been drawn from the more general recognition of the right to property found in Article XXIII of the Declaration of the Rights and Duties of Man and Article 21 of the American Convention on Human Rights.[48] The recognition that property rights include those of Aboriginal peoples has resulted in decisions such as *Awas Tingni*,[49] in which a finding that the Government of Nicaragua had violated the land rights of the Awas Tingni people resulted in the transfer to them of title to more than 73,000 hectares,[50] and *Yakye Axa*,[51] in which the Court ordered the Government of Paraguay to to demarcate the traditional lands of the

[48] Inter-American Commission on Human Rights, 'Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System' OEA/Ser.L/V/II. Doc. 56/09 30 December 2009 [59].
[49] I/A Court HR, *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua. Merits, Reparations and Costs*. 31 January 2001. Series C No. 79.
[50] For a discussion, see Jonathan P Vuotto, '*Awas Tingni v. Nicaragua*: International Precedent for Indigenous Land Rights?' (2004) 22 BU Intl LJ 219. See also S James Anaya and Claudio Grossman, 'The Case of *Awas Tingni v Nicaragua*: A New Step in the International Law of Indigenous Peoples' (2002) 19 Ariz J Intl & Comp L.
[51] I/A Court HR, *Case of the Yakye Axa Indigenous Community v Paraguay. Merits, Reparations and Costs*. 17 June 2005. Series C No. 125.

Yakye Axa people and submit them to the community, as well as to provide basic goods and services necessary for the community to survive until they recovered their land.[52]

A second point is that *UNDRIP* would seem to recognize the existence of more than one type of indigenous interest in land. If the words of this instrument are to be given effect – *ut res magis valeat quam pereat* [53] – then it must be understood that indigenous interests in groups' "lands" must be different than their interest in their "territories" or there would be no need for both terms to be used in such close proximity to each other. The inclusion of more than one term in *UNDRIP* would seem to suggest that international law recognizes more than one type of land-related indigenous interest.[54] This distinction supports the hypothesis that Canadian Aboriginal groups could have one type of right – Aboriginal title – to discrete portions of their traditional territories while having another type of right – Aboriginal dominion – to other portions of their traditional territories.

A third point to note is that the indigenous interests in land recognized by international law carry with them some legal right to control the use of those lands. In *ILO 169*, this is most clearly stated in the provision of Article 7(1) that indigenous peoples have "…the right to decide their own priorities for the process of development as it affects their lives…and the lands they occupy or otherwise use, and to exercise control, to the

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[52] For a discussion, see Jo M Pasqualluci, 'The Evolution of International Indigenous Rights in the Inter-American Human Rights System' (2006) 6 Hum Rts L Rev 281, 297. See also Jo M Pasqualluci, 'International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples (2009-2010) Wis Intl LJ 51, 71.

[53] It is better for a thing to have effect than to be made void.

[54] Admittedly, there is some ambiguity in the various international instruments and in their interpretation. So, for example, the decision in *Case of the Saramaka People v Suriname*, noted that the "territory" of the Saramaka people referred to the sum of the "territory" which belongs to all of the Saramaka people collectively and the "lands" within that territory that are owned by individual clans: I/A Court H.R., *Case of the Saramaka People v. Suriname. Preliminary Objections, Merits, Reparations and Costs*, 28 November 2007, Series C No 172, footnote 66. On the other hand, ILO 169 Article 13(2) states that the use of the term "lands" in Articles 15 and 16 "shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use"; while this definition of "territories" seems to indicate that they are the larger units that would include, for example, resource gathering areas as well as more intensively managed areas, the wording is not entirely clear. Possibly "lands" should be linked to Article 7, which refers to "lands they occupy or otherwise use" and to Article 14 which distinguishes between "lands which they traditionally occupy" and "lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities."

extent possible, over their own economic…development." The most relevant provisions of *UNDRIP* in this regard are those in Articles 26 and 32. The former asserts the right of indigenous peoples to their lands, territories and resources, plus their right to "…own, use, develop and control…" those lands [underlining added]. The latter asserts that indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources, and that states shall consult and cooperate in good faith with indigenous peoples "in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. [underlining added]"

This obligation to obtain the free, prior and informed consent of Aboriginal peoples before the approval of projects affecting their lands or territories is not exclusive to *UNDRIP* and the United Nations, [55] but is also recognized by the OAS through the decisions of the Inter-American Court. In the *Saramaka* [56] decision, for example, the Court stated that it "… considers that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions." [57] Two caveats should be noted, however, which make the concept of free, prior and informed consent less robust than it might at first appear. The first is that the situations where obtaining prior consent is mandatory as opposed to merely desirable appear to be limited to those in which Aboriginal peoples would be displaced, or would lose access to lands or resources necessary for subsistence, or where hazardous materials are to be stored or disposed of on their lands.[58] The second is that the relevant traditional territory, for purposes of the protection of the right to communal property, including by the requirement for free,

[55] Indeed, the concept is also applicable to non-Aboriginal situations; see Nicholas A Fromherz, 'From Consultation to Consent: Community Approval as a Prerequisite to Environmentally Significant Projects' (2013) 116 W Va L Rev 109. For the related concept of "social licence", see Peter Forester, Kent Howie, and Alan Ross, 'Energy Superpower in Waiting: New Pipeline Development in Canada, Social Licence, and Recent Federal Energy Reforms' (2015) 53 Alta L Rev 419.
[56] *Case of the Saramaka People* (n 54).
[57] ibid [134].
[58] IACHR 'Indigenous and Tribal Peoples' Rights' (n 48) [334.3].

prior and informed consent, is that of the community itself, and not that of its historical ancestors.[59]

To sum up the preceding discussion in a way that shows its relevance for this thesis, international law establishes that Aboriginal people have rights to their lands and to their territories, and the right to control development on their lands and territories. This is also a fundamental premise underlying the proposed right of Aboriginal dominion.

e) The domestic effect of international law

If international conventions – including one to which Canada is a signatory - clearly affirm the existence and effect of indigenous peoples' rights, this might raise the question of why it is necessary to go any further in this inquiry. That is, would *ILO 169* and *UNDRIP* have the effect of establishing the Aboriginal rights of Canadian Aboriginal groups, particularly rights to their lands and territories? If not, then why not, and would those conventions have any effect at all?

The answers to these specific questions are complex, in that the application of international law to Canada's domestic law more generally is not a straightforward endeavour. Lebel J, of the Supreme Court of Canada, has summed up the challenges arising from the application of international law in Canada:

> • principles of public international law are difficult to define;
> • the application of principles of international law to constitutional law cases is cumbersome as there are questions of their legitimacy and the place they should occupy in or alongside domestic law; and
> • there are many value-laden terms attached to the use of particular international principles/documents; these do not translate automatically into legal principles.[60]

Briefly, however, it is clear that international conventions are not legally binding in Canada unless they have been given legislative effect, as noted by Iacobucci J:

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[59] ibid [79].
[60] Louis Lebel and Gloria Chao, 'The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law' (2002) 16 SCLR (2d) 23, 58. See also Gib van Ert, 'Dubious Dualism: The Reception of International Law in Canada' (2010) 44 Val U L Rev 927.

> It is a matter of well-settled law that an international convention ratified by the executive branch of government is of no force or effect within the Canadian legal system until such time as its provisions have been incorporated into domestic law by way of implementing legislation…[61]

Although Canada has endorsed *UNDRIP*, it has not incorporated it into domestic law by way of implementing legislation; it therefore is not legally binding in Canadian courts.[62] The fact that *UNDRIP* and similar conventions are not legally binding, however, does not mean that they are without effect. International conventions, and customary international law as well, have often been taken into account by Canadian courts. Indeed, the number of Supreme Court of Canada cases making use of international public law instruments appears to have grown at an exponential rate in the decades following the enactment of the *Constitution Act, 1982*.[63] Although there have been few occasions for Canadian courts to consider the implications of international instruments with regard to domestic Aboriginal rights, a useful comparison can be drawn with the courts' treatment of other international instruments, such as the *International Covenant on Civil and Political Rights*, in their interpretation of the *Canadian Charter of Rights and Freedoms*.

In a decision not long after the 1982 introduction of the *Charter*, for example, *Reference re s. 94(2) of the Motor Vehicles Act (British Columbia)*,[64] the Supreme Court of Canada pointed to international conventions as being useful in the interpretation of the *Charter*:

> Many [principles of fundamental justice] have been developed over time as presumptions of the common law, others have found expression in the international conventions on human rights. All have been recognized as essential elements of a system for the administration of justice which is founded upon a belief in "the dignity and worth of the human person"… [underlining added].[65]

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[61] *Baker v Canada (Minister of Citizenship & Immigration)* [1999] 2 SCR 817, 856 [78] < http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/1717/index.do >.
[62] For a contrarian view on the value of UNDRIP, see Irene Watson, 'The 2007 Declaration on the Rights of Indigenous Peoples: Indigenous Survival - Where to From Here?' (2011) [ii] 20 Griffith LR 507, 508.
[63] Lebel and Chao (n 58) 42.
[64] [1985] 2 SCR 486 < http://www.canlii.org/en/ca/scc/doc/1985/1985canlii81/1985canlii81.html?autocompleteStr=reference%20re%20s.%2094&autocompletePos=1 >.
[65] ibid [30].

In 1987, Dickson CJ (dissenting on another point) stated that:

> The various sources of international human rights law--declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms--must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*'s provisions.[66]

And in 2003, the Court said that "…international obligations must undeniably be considered in interpreting national human rights legislation….[underlining added]"[67] The Court has made it clear, moreover, that it is not only in human rights cases that courts can look at international conventions and international law. In *Reference re Secession of Quebec*,[68] the Court stated that a concern that it, as a domestic court, was limited to looking only at domestic law rather than international law was "groundless"[69] and cited a variety of past cases in which it had considered international law "to determine the rights or obligations of some actor within the Canadian legal system."[70] And in recent years the Court has looked at international conventions in cases involving subject matters as diverse as intellectual property[71], stevedoring[72], DNA evidence[73] and child welfare[74]. Clearly, there would be nothing extraordinary about Canadian courts looking to international conventions such as *UNDRIP* or *ILO*

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[66] *Reference re Public Service Employee Relations Act (Alberta)* [1987] 1 SCR 313 [57] < http://www.canlii.org/en/ca/scc/doc/1987/1987canlii88/1987canlii88.html?autocompleteStr=reference%20re%20public%20service%20employee%20relations%20act&autocompletePos=1 >.
[67] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Maksteel Québec Inc* 2003 SCC 68 [73] < http://www.canlii.org/en/ca/scc/doc/2003/2003scc68/2003scc68.html?autocompleteStr=Quebec%20(Commission%20des%20droits%20de%20la%20personne%20et%20des%20droits%20de%20la%20jeunesse)%20v%20Maksteel%20Qu%C3%A9bec%20Inc%202003%20%20&autocompletePos=1 >.
[68] [1998] 2 SCR 217 < http://www.canlii.org/en/ca/scc/doc/1998/1998canlii793/1998canlii793.html?autocompleteStr=reference%20re%20secession&autocompletePos=1 >.
[69] ibid [22].
[70] ibid.
[71] *Re: Sound v Motion Picture Theatre Associations of Canada* [2012] 2 SCR 376, 2012 SCC 38 < http://www.canlii.org/en/ca/scc/doc/2012/2012scc38/2012scc38.html?searchUrlHash=AAAAAQBHUmU6ICBTb3VuZCB2IE1vdGlvbiBQaWN0dXJlIFRoZWF0cmUgQXNzb2NpYXRpb25zIG9mIENhbmFkYSAyMDEyIFNDQyAzOCAAAAAAAAQ&resultIndex=1 >.
[72] *Tessier Ltée v Quebec (CSST)* [2012] 2 SCR 3, 2012 SCC 23 < http://www.canlii.org/en/ca/scc/doc/2012/2012scc23/2012scc23.html?searchUrlHash=AAAAAQAeVGVzc2llciBMdMOpZSB2IFF1ZWJlYyAoQ1NTVCkgAAAAAAE&resultIndex=1 >.
[73] *R v Rodgers* [2006] 1 SCR 554, 2006 SCC 15 < http://www.canlii.org/en/ca/scc/doc/2006/2006scc15/2006scc15.html?autocompleteStr=R%20v%20Rodgers%20&autocompletePos=1 >.
[74] *Health Services and Support - Facilities Subsector Bargaining Assn. v British Columbia* [2007] 2 SCR 391, 2007 SCC 27 < http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/2366/index.do >.

169 when considering domestic law questions of the possible existence of Aboriginal rights.

Although, as noted above, there has been little such judicial consideration of these particular international instruments to date, there has at least been some. Article 35 of *UNDRIP* (at that time in draft form), Article 32 of ILO 169 and Article 24 of the draft Inter-American Declaration on the Rights of Indigenous Peoples were all cited by the Supreme Court of Canada in *Mitchell* in considering whether the Mohawks of Akwesasne had rights to move across the Canada-USA border.[75] More recently, *UNDRIP* and a number of other international conventions were cited in argument before the Federal Court by Amnesty International, the Assembly of First Nations and the Chiefs of Ontario in *First Nations Child and Family Caring Society of Canada v Canada (Attorney General)*.[76] In that case, which involved judicial review of the dismissal of a human rights complaint alleging discrimination in the provision of child welfare services to Aboriginal Canadians by the federal government when compared to the provision of such services to non-Aboriginal Canadians by provincial governments, the Federal Court stated its reasons for giving weight to those international covenants:

> The Supreme Court of Canada has recognized the relevance of international human rights law in interpreting domestic legislation such as the *Canadian Human Rights Act*. The Court has held that in interpreting Canadian law, Parliament will be presumed to act in compliance with its international obligations. As a consequence, where there is more than one possible interpretation of a provision in domestic legislation, tribunals and courts will seek to avoid an interpretation that would put Canada in breach of its international obligations. Parliament will also be presumed to respect the values and principles enshrined in international law, both customary and conventional.
>
> While these presumptions are rebuttable, clear legislative intent to the contrary is required….
>
> International instruments such as the *UNDRIP* and the *Convention on the Rights of the Child* may also inform the contextual approach to statutory interpretation….
>
> As a result, insofar as may be possible, an interpretation that reflects these values and principles is preferred….[77]

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[75] *Mitchell* (n 2) [81-83].
[76] 2012 FC 445 < http://decisions.fct-cf.gc.ca/en/2012/2012fc445/2012fc445.html >.
[77] ibid [350-354].

In sum, if an Aboriginal group should assert the existence of an Aboriginal right previously unknown to Canadian domestic law in the context of a legal dispute, then it may well be that one or more of the many provisions of international covenants such as *UNDRIP* and *ILO 169* will specifically support the existence of that right. Even to the extent that the working out of property rights within the Canadian legal system may be a particularistic exercise, these international instruments at least present important ideals.[78] In either event, Canadian courts should be willing to consider international instruments and give weight to their provisions in deciding whether previously unrecognized rights exist in Canadian domestic law.

f) International criticism regarding Canadian Aboriginal rights

Before leaving the topic of international law, it will be worthwhile to consider an additional aspect of its relationship to Aboriginal peoples and the Crown in Canada, namely that supervisory aspect that arises from Canada's membership in various international organizations. In addition to the United Nations, Canada – as noted above - also belongs to the Organization of American States, which in turn has subsidiary organs such as the Inter-American Commission on Human Rights ("IACHR") and the Inter-American Court of Human Rights, both of which are responsible for overseeing compliance with the OAS's *American Convention on Human Rights*. These various UN and OAS organizations have on more than one occasion criticized Canada for its treatment of its Aboriginal peoples – including on land issues specifically – either on their own initiative or as a result of complaints being put before them by Canadian Aboriginal groups.

In 2001, the United Nations Commission on Human Rights appointed a Special Rapporteur on the Rights of indigenous peoples. This individual reported on Canada in both 2004 and 2014. Both reports were critical of Canada in a number of respects, including with regard to its failure to address Aboriginal peoples' land rights. The 2004 report, for example, noted that:

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[78] Dwight Newman, 'Indigenous Title and its Contextual Economic Implications: Lessons for International Law from Canada's Tsilhqot'in Decision' (2015) 109 AJIL Unbound 215, 219 < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2718946&download=yes> accessed 31 January 2016. See also Brenda L Gunn, 'Overcoming Obstacles to Implementing the UN Declaration on the Rights of Indigenous Peoples in Canada' (2013) 31 Windsor YB Access Just 147.

> Ever since early colonial settlement, Canada's indigenous peoples were progressively dispossessed of their lands, resources and culture, a process that led them into destitution, deprivation and dependency, which in turn generated an assertive and, occasionally, militant social movement in defence of their rights, restitution of their lands and resources and struggle for equal opportunity and self-determination.[79]

Although the 2014 report commended efforts to arrive at comprehensive land claim settlements, it criticized aspects of the treaty negotiation process, noting that:

> Despite their positive aspects, these treaty and other claims processes have been mired in difficulties. As a result of these difficulties, many First Nations have all but given up on them. Worse yet, in many cases it appears that these processes have contributed to a deterioration rather than renewal of the relationship between indigenous peoples and the Canadian State.[80]

The 2014 report also specifically criticized Aboriginal peoples' inability to control resource development in their unsurrendered traditional territories:

> Finally, an important impact of the delay in treaty and claims negotiations is the growing conflict and uncertainty over resource development on lands subject to ongoing claims. It is understandable that First Nations who see the lands and resources over which they are negotiating being turned into open-pit mines or drowned by a dam would begin to question the utility of the process.[81]

The United Nations has also considered Canada's treatment of its Aboriginal peoples by way of the Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights. The most notable decision of this body respecting Canada is the *Lubicon Lake Band* case [82], in which a majority of the hearing panel ruled that infringements of the traditional territory of the Band by the oil and gas industry constituted a violation of Article 27 of the *International Covenant on*

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[79] Rodolfo Stavenhagen, 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Addendum: Mission to Canada' (United Nations Economic and Social Council, Commission on Human Rights, E/CN.4/2005/88/Add.3, 2 December 2004) 2.
[80] James Anaya, 'Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, on the situation of indigenous peoples in Canada' (United Nations Human Rights Council, A/HRC/27/52/Add.2, 4 July 2014) 16.
[81] ibid 16-17.
[82] *Lubicon Lake Band v Canada*, Communication No. 167/1984 (26 March 1990), UN Doc Supp No 40 (A/45/40) at 1.

Civil and Political Rights, in that by interfering with traditional subsistence activities it violated Band members' right "to enjoy their own culture".

While the Organization of American States also has a Special Rapporteur on Indigenous Peoples who can produce reports on her own iniative, the OAS' pronouncements on Aboriginal rights in Canada have arisen from its exercise of a complaints-driven hearing process. Topics have included the "Situation of the Right to Life of Indigenous Women and Girls in Canada", "Complaints regarding Missing and Murdered Indigenous Women and Girls in British Columbia, Canada", [83] a complaint by the Hul'qumi'num Treaty Group about loss of its member organizations' traditional lands, and a complaint by Grand Chief Michael Mitchell about alleged trade restrictions.[84]

It is conceivable that a search for new Aboriginal rights in Canada and the giving of effect to such new rights would help to resolve ongoing disputes, particularly those concerning land. If so, this might reduce international criticism of Canada's treatment of its Aboriginal peoples.

The failure to search for new rights

As was shown earlier in this chapter, Canadian courts have indicated that a "spectrum" or "continuum" of rights exists (although it has been suggested that these terms are somewhat misleading as analogies, given the non-linear relationship of the rights that may exist). Although those rights actually recognized by the Canadian courts to date have been largely limited to hunting and fishing rights and Aboriginal title, it would be possible for Aboriginal groups to assert previously unrecognized rights. Should they do so and make claims to those rights based upon the pre-contact "defining features" of

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[83] See Inter-American Commission on Human Rights, 'Missing and Murdered Indigenous Women in British Columbia, Canada' OEA/Ser.L/V/II, Doc. 30/14 (21 December 2014). Note that British Columbia commissioned an inquiry into this topic: Wally T Oppal, 'Forsaken: The Report of the Missing Women Commission of Inquiry (19 November 2012). In August 2016 a National Inquiry into Missing and Murdered Indigenous Women and Girls was announced by the federal government.

[84] The situation giving rise to the complaint were the same as those in *Mitchell v MNR*, [2001] 1 SCR 911, 2001 SCC 33, namely an assertion that Canadian tariffs and border controls violated the rights of the Mohawk plaintiff. The IACHR found that the complaint was not proven: *Grand Chief Michael Mitchell case (Government of Canada)*, Judgment of 25 July 2008, Inter-American Commission on Human Rights, Report No 61/08, Case 12.435.

their cultures, they would be able to find support for their claims in international covenants that could be relied upon by the courts in interpreting Canadian domestic law.

The obvious question this raises is, "If this is possible, why has it not been happening to date?" Why have Aboriginal groups and other involved parties not sought to establish the existence of new Aboriginal rights, particularly new Aboriginal land rights? Since the decisions in both *Marshall*; *Bernard* [85] and *Tsilhqot'in Nation* [86] appear to suggest that Aboriginal title will only exist in portions of groups' traditional territories, why have Aboriginal groups – or academics, or members of the Aboriginal law bar – not posed the question of what rights exist in the remainder of their traditional territories? Indeed, given that much of the discussion in this chapter has been about using international law as a source of new rights, why have those international bodies that monitor and report upon the status of Canada's Aboriginal peoples such as the United Nations Human Rights Committee[87] and the United Nations Special Rapporteur on the rights of indigenous peoples[88] seemed to content themselves with issuing what amount to report cards rather than suggesting that the problems of Canada's Aboriginal peoples might be partially attributable to the universe of Aboriginal rights recognized in Canada being too small?[89]

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[85] [2005] 2 SCR 220, 2005 SCC 43 < https://www.canlii.org/en/ca/scc/doc/2005/2005scc43/2005scc43.html?autocompleteStr=marshall%20bernard&autocompletePos=1 >.
[86] [2014] 2 SCR 256, 2014 SCC 44 < https://www.canlii.org/en/ca/scc/doc/2014/2014scc44/2014scc44.html?autocompleteStr=tsilhqot&autocompletePos=2 >.
[87] United Nations Human Rights Committee, 'Concluding observations on the sixth periodic report of Canada' (2015) CCPR/C/CAN/CO/6, 6-7.
[88] James Anaya, 'Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, on the situation of indigenous peoples in Canada' (United Nations Human Rights Council, A/HRC/27/52/Add.2, 4 July 2014).
[89] Since this entire thesis is written for the purpose of demonstrating the existence of only a single right – Aboriginal dominion – that is to date unrecognized in Canadian domestic law, it would clearly be beyond the constraints of this exercise to attempt to identify which of those rights that are recognized in UNDRIP and listed in the Appendix to this thesis are not recognized at all in Canada, which are recognized but not given full effect, and which are not recognized as "rights" but are nevertheless complied with. If, to choose one illustrative example, an attempt were to be made to consider whether Canada is compliant with the Article 16(1) right of Indigenous peoples "to establish their own media in their own languages", a right reflected since 1991 in the *Broadcasting Act* SC 1991, c 11, s 3, one would have to study a recent history beginning with the Inuktitut programming on the Canadian Broadcasting Corporation's Northern Service in the 1970s, through the 1981 approval of First Nations groups' own satellite radio network, the creation of a $40 million fund by the Government of Canada in 1983 for Aboriginal radio and television production, the 1999 creation of the Aboriginal Peoples Television Network, and the many radio stations currently operated by Aboriginal communities, and it would still be necessary to evaluate whether or not those measures were sufficient to meet the presumed goals of the Article 16(1) right.

All of those involved in the determination of Aboriginal rights will have reasons for not advancing new Aboriginal rights. The courts, for example, are generally limited to accepting or rejecting the arguments put to them by the parties that appear before them in adversarial, adjudicative proceedings, and cannot simply impose judges' own ideas.[90] The Crown appears to see its responsibility of protecting the interests of the entire population as requiring it to resist claims that advance the interests of the Aboriginal minority, so would be unlikely to actively advance any proposals for new Aboriginal rights. The Aboriginal plaintiffs' Bar and academics specializing in Aboriginal law may not feel at liberty to engage in a wide-ranging inquiry into new Aboriginal rights when Aboriginal groups have neither demanded nor approved any such inquiry. And as to Aboriginal groups themselves, it would be trite to observe that ordinary people are not expected to be lawyers; when the only Aboriginal land right known to Aboriginal groups to have been recognized by the courts is something called "Aboriginal title", it is not unreasonable for Aboriginal groups to presume that that phenomenon should correspond to their own notions about the nature of their relationship to their traditional lands. As well, it may be that many Aboriginal groups will have decided that their limited resources are better directed to other strategies for improving their members' lives rather than pursuing litigation to determine Aboriginal land rights, a quest that until 2014 had produced no results.

Moreover, it seems likely that the answer to the question could involve a number of factors. First, as noted earlier in this chapter, many of the indigenous rights that are stated to exist in international covenants are ones that are simply not in dispute in modern Canada or other liberal democracies. Even in cases involving subject areas where disagreement actually does exist between governments and Aboriginal groups, courts will not adjudicate upon issues they consider moot. In particular, the British Columbia Court of Appeal has held in *Cheslatta Carrier Nation v British Columbia* that the rule against issuing a declaration in the absence of a "live controversy" applies with even greater force in Aboriginal rights cases.[91] As noted by a number of commentators, this has made civil lawsuits to establish Aboriginal rights more difficult,

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[90] PG McHugh, 'Aboriginal Title: Travelling from (or to) an Antique Land' (2015) 48[3] UBCL Rev 793, 794.
[91] 2000 BCCA 539 [16-18] < http://www.courts.gov.bc.ca/jdb-txt/ca/00/05/c00-0539.htm >.

and has confirmed the pattern of Aboriginal rights being asserted most commonly in response to regulatory prosecutions.[92] Such routine fishing and hunting prosecutions are unlikely to result in the innovative exploration of new Aboriginal rights.

One factor of particular importance in explaining why there has been no search for new Aboriginal land rights could be linked to the fact that as long as Aboriginal title remains the only known Aboriginal land right, then disagreements regarding Aboriginal land rights will be a "zero sum game" characterized by "distributive" dispute resolution processes. That is, since Aboriginal title is the right to exclusive occupation, it can be seen as directly competing with either Crown title to unallocated lands or third party fee simple title. The quest for Aboriginal title is therefore "distributive" in that any lands that are held to be subject to Aboriginal title will be taken from the finite stock of lands that would otherwise continue to be subject to Crown or third party title, and merely determines the distribution of that resource. Distributive allocation of resources is well known to be characterized by positional behaviour and inflexibility. As stated by Adams:

> Positional tactics come naturally to us and characterize distributive bargaining. Distributive bargaining involves the division of a fixed quantity of resources where more for one means less for the other. Where this resource is money or can be translated into money, bargaining becomes dominated by greed and competitive tactics. Here we often see the imaginative use of commitment tactics: bargaining agents being given instructions that are "impossible" to change; a party pledging his reputation to a particular outcome….
>
> A commitment, however, carries with it the risk of establishing an immoveable position that goes beyond the ability of the other party to agree to it.[93]

It may be, therefore, that - at the risk of stating a tautology - it is the fact that no Aboriginal land rights other than Aboriginal title are known that prevents anyone from looking for Aboriginal land rights other than Aboriginal title. Rather than take the risk

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[92] Douglas C Harris, 'A COURT BETWEEN: Aboriginal and Treaty Rights in the British Columbia Court of Appeal'(2009) 162 BC Studies 159. See also Kerry Wilkins, 'Negative Capability: Of Provinces and Lands Reserved for the Indians' (2002) 1 Indigenous LJ 57, 109.

[93] George W Adams, *Mediating Justice: Legal Dispute Negotiations* (CCH Canadian 2003) 40-41. See also Gerald B Wetlaufer, 'The Limits of Integrative Bargaining' (1996) 85 Geo LJ 369, 370.

of losing strategic advantage by being the one that "blinks first", each of the parties may prefer to continue the current dynamic, despite the shortcomings associated with it.

If so, then it will be useful to recall that there is an alternative to zero-sum or distributive dispute resolution. This alternative, variously referred to as "non-zero-sum" or "transformative" dispute resolution or by one of a number of other terms [94], is generally considered to be preferable to zero-sum dispute resolution. It may be, then, that commencing the quest for new Aboriginal land rights could conceivably have the effect of transforming the current "win-lose" nature of Aboriginal land disputes into "win-win" situations in which the outcomes are seen as beneficial to all parties. A bigger "toolkit" of Aboriginal land rights might facilitate more sophisticated approaches to disputes over land and resources and allow for the accommodation of the legitimate interests of the parties to such disputes. The pragmatic arguments that could be mustered in justification of the exploration of one new Aboriginal land right, namely Aboriginal dominion, will be discussed in Chapter VIII.

[94] Adams (n 93) 30.

Chapter V: A New Concept of "Aboriginal Dominion"

In previous chapters, it has been shown that Aboriginal groups have consistently asserted that they have Aboriginal title to the entirety of their traditional territories. It has also been seen that in *Marshall*; *Bernard* [1] Aboriginal title was not found to exist in the claimed territories of the plaintiffs while in *Tsilhqot'in Nation* [2] Aboriginal title was found to exist over only a fraction – albeit a large fraction – of the territory claimed in the litigation, which in itself was only a fraction of the claimed traditional territory of the Tsilhqot'in. Since Aboriginal title is so far the only Aboriginal right that is recognized as a right concerning land itself, by one interpretation this could suggest that most Aboriginal groups throughout most of their traditional territories will have no sort of right to land at all. By this view, Aboriginal groups would instead have, at most, rights to conduct activities such as hunting or fishing or to otherwise use resources that may happen to be found on the lands within those traditional territories. Admittedly, the Supreme Court of Canada said in *Tsilhqot'in Nation* that "usufructuary" rights were what might be found in areas where Aboriginal groups made regular use of land but did not have exclusivity,[3] and in the Civilian tradition a usufruct is a real right; see, for example, articles 1120 to 1176 of the *Civil Code of Québec*.[4] The Court's language, however, seems suggestive of something less than that, though it has not provided any clarification of its actual intent.[5]

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[1] *R v Marshall; R v* Bernard [2005] 2 SCR 220, 2005 SCC 43 < http://www.canlii.org/en/ca/scc/doc/2005/2005scc43/2005scc43.html >.
[2] *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 256, 2014 SCC 44 < http://www.canlii.org/en/ca/scc/doc/2014/2014scc44/2014scc44.html?autocompleteStr=tsilhqo&autocompletePos=2 >.
[3] ibid [47].
[4] Arts 1120-1176 CCQ, particularly art 1125.
[5] To the extent that it is possible to use the term "usufructuary" in a colloquial sense - or perhaps in an overly literal sense - it appears likely that this is what the Court has done. That is, since a usufruct has the *usus* and *fructus* – rights to enjoyment and profits – of land, and since Aboriginal people are able to enjoy non-Aboriginal title lands, and to enjoy the profits of, for example, hunting on those lands, the Court might have thought that such use could appropriately be described as "usufructuary". This overlooks, however, the element of exclusivity which would normally characterize a usufructuary right; see the discussion of an actual usufructuary right, the liferent, in Chapter VII. Although Aboriginal people will often have an Aboriginal right entitling them to hunt, for example, over at least those unallocated Crown lands that were utilized by their ancestors, this will not normally be an exclusive right, in that non-Aboriginal people will also be entitled to hunt on those lands, albeit subject to restrictions such as the requirement for a hunting license that may not apply to Aboriginal people. Possibly Aboriginal hunting and fishing rights over non-Aboriginal title lands might be analogous to a form of servitude, though answering the question of whether a praedial benefit could be found or would even be necessary in the Aboriginal context is a difficult question to answer, and it "may be impossible to

Such a situation would seem unlikely to satisfy Aboriginal groups or to contribute to reconciliation. Even if an Aboriginal group holds Aboriginal title to some portion of its traditional territories and can harvest resources in other portions, the question remains outstanding of how it could possess no right whatsoever with regard to the other portions of what it understands to have been its exclusive traditional territory in pre-assertion of sovereignty times.

Even if s 35 of the *Constitution Act, 1982* did not exist and the Supreme Court of Canada had not interpreted it to set out a process for the recognition of modern Aboriginal rights, it would still be arguable that property law should be sufficiently adaptable as to recognize forms of title based upon the pre-existing patterns of use of Aboriginal peoples. That the body of judge-made law does and should evolve would perhaps be a trite observation. Such evolution comes about when changing social conditions require an adjustment to the existing law to bring it into accord with those changed conditions while not departing from a society's underlying legal values. If Canadian law respecting Aboriginal land rights is unsatisfactory, then of course it must develop and evolve. As famously stated by Lord St Leonards LC in *Dyce v Hay*:[6]

> … there is no rule in the law of Scotland which prevents modern inventions and new operations being governed by old and settled legal principles. Thus, when the art of bleaching came into use, there was nothing in its novelty which should exclude it from the benefit of a servitude or easement, if such servitude or easement on other legal grounds was maintainable. The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind. The law of this

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do this in the abstract": Douglas J Cusine and Roderick RM Paisley, *Servitudes and Rights of Way* (Scottish Universities Law Institute 1998) 116. See the discussion of the similar question with regard to the proposed right of Aboriginal dominion in Chapter VII. With regard to Aboriginal hunting and fishing rights, it seems quite possible that these are merely analogous to a *jus spatiandi*, one the enjoyment of which is limited to a particular group rather than to the public at large and is for subsistence activities rather than recreation. Note that while the Digest of Justinian recognized that "no one is debarred from entering on the seashore for the purpose of fishing" but did not make a similar observation about hunting, it seems likely that the categorization of things that "are common to all" that underlay the rule with regard to the former could also extend to the latter in the context of North American wilderness areas: Charles Henry Monro (tr), *The Digest of Justinian* (first promulgated 530 AD, 1904 OUP).

[6] (1852) 1 Macq 305, 312-313.

> country, as well as the law of Scotland, frequently moulds its practical operation without doing any violence to its original principles.[7]

While Chapter VII will relate the proposed right of Aboriginal Dominion to property law, the current chapter will instead use the formulaic approach described by the Supreme Court of Canada to establish that the right exists. This chapter will attempt to sketch out the nature of Aboriginal dominion as it is envisioned and to answer the most obvious questions about how it would function. As will be seen, the concept itself is very simple, though attempting to anticipate and answer all of the questions that could be posed about how it would work in practice would be more challenging.

One preliminary point should perhaps be addressed. Particularly for readers outside of Canada, it might seem as though the question to be answered at this point is whether a proposed new right should exist. Certainly much of the international law that was discussed in the preceding chapter could be interpreted as international bodies making normative or aspirational pronouncements about what rights indigenous groups should have, or about what rights they deserve to have. This could be characterized as a public law approach. In Canada, however, the legal question is not whether a right should exist but simply whether it does exist. Because s 35 of the *Constitution Act, 1982* recognizes and affirms the existing rights of the Aboriginal peoples of Canada, those peoples are free to go to court and argue that they already possess an existing right to which they wish the court to give effect. With regard to property rights, this could be said to transport what might in some other countries be a public law dispute into the realm of private law. Whether the right is a novel one, and whether or not its existence might be inconvenient to others arguably does not enter into the equation. Therefore even if in the following discussion of the proposed right of Aboriginal dominion some consideration is given to the benefits of the proposed right, readers should not lose sight of the main question: does the right exist?

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[7] Note that in Quebec as well there appears to be no "closed list" of servitudes or other real rights: Art 1119 CCQ. The question has, however, "spawned a great deal of debate": David Lametti, 'Rights of Private Property in the Civil Code of the Russian Federation and in the Civil Code of Quebec' (2005) 30 Rev Cent & E Eur L 29, 26.

A new Aboriginal land right: what is needed?

As was demonstrated in the previous chapter, the field of Aboriginal rights is not closed, so that it is at least conceivable that some Aboriginal right previously unknown to Canadian domestic law exists that would reconcile the needs of Aboriginal groups and other elements of society. In this, Aboriginal law is not so different from other legal fields, including in particular property law; consider, for example, that while a servitude right to park may not have existed in ancient times, this did not prevent the House of Lords from finding one could exist in the twenty-first century.[8] Indeed, since reconciliation has been identified by the courts as the central purpose of Aboriginal law, it would be a remarkable defect in the law if a mechanism that could achieve this purpose did not exist. Clearly, the Aboriginal right in question would have to be one that can exist to land throughout the entirety of Aboriginal groups' traditional territories, in contrast to Aboriginal title, which it appears will exist merely in parts of those territories.

Supposing this to be true, how would an Aboriginal group proceed if it wished to assert an Aboriginal right that has not previously been recognized, such as a land right respecting the entirety of its traditional territory that is something less than or at least different from Aboriginal title? The answer to this question can most conveniently be found in *R. v Sappier*; *R. v Gray*.[9] In these two companion cases, the Supreme Court of Canada considered claims of an Aboriginal right to harvest timber for domestic use that were raised in defence against charges of unlawful cutting of timber in New Brunswick. Mr. Sappier and Mr. Gray said that they had intended to use the timber for a number of domestic purposes, including building a house, building furniture, flooring, and firewood, argued that they had an Aboriginal right to harvest timber for personal use, and relied upon the pre-contact practice of harvesting timber to establish that right.

The Court set out a process for establishing an Aboriginal right. Because it was in the context of considering a defense raised in response to a prosecution, some of the

[8] *Moncrieff v Jamieson* 2008 SC (HL) 1. Note that the law continues to evolve, and it was subsequently held that there was no compelling reason why the servitude right of vehicular parking ought to be confined to an ancillary status, subordinate to a primary right of access: *Johnson, Thomas and Thomas (a firm) v Smith* 2016 GWD 25-456.
[9] 2006 SCC 54 < http://www.canlii.org/en/ca/scc/doc/2006/2006scc54/2006scc54.html >.

language the Court used is not as helpful as it might be in considering how to proactively assert an Aboriginal right, but the process would be essentially the same. A central point is that in order to be an Aboriginal right, an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right. The first step, then, would be to identify the precise nature of the applicant's claim to exercise an Aboriginal right, ie the claim that a modern right exists and was being exercised. In doing so, the focus is not on the resource that may be being used, but is on the activity related to that resource; this would – in the case of a resource harvesting right - often involve evidence of the harvesting, extraction and utilization practices engaged in with regard to the resource in the pre-contact era. As the Court stated:

> The goal for courts is, therefore, to determine how the claimed right relates to the pre-contact culture or way of life of an aboriginal society. This has been achieved by requiring aboriginal rights claimants to found their claim on a pre-contact practice which was integral to the distinctive culture of the particular aboriginal community. It is critically important that the Court be able to identify a practice that helps to define the distinctive way of life of the community as an aboriginal community. The importance of leading evidence about the pre-contact practice upon which the claimed right is based should not be understated.[10]

It may be noted in passing that while the importance of leading evidence about pre-contact practices should not be understated, neither should the difficulty of doing so. Even in British Columbia, where contact occurred centuries later than it did in eastern Canada, this will still involve trying to prove as fact occurrences that took place more than two hundred years ago. While the Court's approval in *Van der Peet* [11] of a flexible approach to evidence in Aboriginal rights cases and its specific approval in *Delgamuukw* [12] of the use of oral history evidence may have eased the burden of proof, it will still remain a difficult and expensive task that requires the marshalling of expert and lay witnesses and the introduction and interpretation of a multiplicity of archival documents.

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[10] ibid [22].
[11] *R v Van der Peet* [1996] 2 SCR 507 [68].
[12] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 [93-106].

To summarize, a pre-contact practice that is integral to the distinctive nature of an Aboriginal group can give rise to a modern Aboriginal right that relates to the pre-contact culture. The question, then, would be whether there was a pre-contact practice integral to the distinctive nature of Aboriginal groups that could give rise to a modern right that would allow them some degree of control over the entirety of their traditional territories rather than just those smaller parts where Aboriginal title might exist. Pre-contact Aboriginal groups, just like other societies throughout the world and throughout history, would have engaged in a myriad of practices. The challenge in this instance is to identify a practice that was both integral to the nature of those groups and relevant to control over large areas of land.

What custom, practice or tradition defines a territory?

The relevant pre-contact practice that will be relied upon here is predicated upon a simple observation: for any group that actually had a pre-contact territory, the fact of its possession of a territory by itself establishes that the group prevented or had the capacity to prevent other Aboriginal groups from coming into that territory and doing things that would be inconsistent with it being that group's territory. That is, any outside group attempting to enter into the group's traditional territory in order to reside, hunt, fish, gather plants or engage in other activities without permission or some shared understanding would be driven away or killed. Failing this, it would be meaningless to refer to a group as even having a "traditional territory"; instead, the area in which they existed would not be "their" territory, it would just be an area open to anyone to come in and extract the resources necessary for survival. No doubt there were some groups that had no identifiable territory, perhaps because they led a fully nomadic existence in pursuit of some type of unpredictably migratory wildlife resource; for most groups, however, this would not have been the case, and some sort of group identification with a defined territory would be possible.

Although this proposition may be self-evident, it is supported by evidence, such as that led in the *Tsilhqot'in Nation* trial. The representative plaintiff, Chief Roger William, for example, gave testimony that non-Tsilhqot'in groups might be allowed to engage in

certain activities in Tsilhqot'in traditional territory but that other activities or attempts at longer stays would not be tolerated. [13]

Could preventing others from entering into a group's territory and controlling their use of resources in the group's territory be considered integral to that group's distinctive culture, given the near-universality of this practice among human groups? It can be suggested that where a group has maintained control over activities in its territories – its home, in other words – doing so must be integral to that group's distinctive culture in two ways, one of them objective and the other subjective. First, since maintaining territorial integrity would constitute the precondition to a group's culture not being eradicated due to the group itself being extinguished, displaced or diminished, it could objectively be said to be the fundamental foundational element upon which the rest of a group's culture would rest. That is, it would make no sense if something that was necessary for a group to be able to retain its culture were not considered integral to that culture. Second, a group would certainly itself attach subjective importance to its home territory, [14] and would be likely to itself consider maintaining its exclusive control over its territory to be integral to its culture, and weight should presumably be given to the group's own perspective on this question. In many cases, groups will have origin stories that are set within their territories, and other stories by which they link themselves to particular geographic elements of those territories. While it must be acknowledged that the world may contain some truly homeless ethnocultural groups, whether as a result of diaspora events or otherwise, these must surely be rare exceptions to the normal pattern of specific groups being tied to specific geographic homelands. [15] While Fox has noted that the legal concept of "home" has received "surprisingly little attention", she does list "home as territory" and "home as identity" as two of her four values associated with the concept of home, both of which would resonate with the connections that Aboriginal groups often articulate when speaking of their relationships to their traditional territories. [16]

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[13] *Tsilhqot'in Nation v British Columbia* 2007 BCSC 1700 (Evidence, trial transcript, day 024, 11 September 2003) 11-12.
[14] Theano S Tekenli, 'Home As a Region' (1995) 85(3) Geographical Review 324. See also
[15] Robert B Anderson, Leo Paul Dana and Teresa E Dana, 'Indigenous land rights, entrepreneurship, and economic development in Canada: "Opting-in" to the global economy' (2006) 41 JWB 45, 46 < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2492882&download=yes> accessed 1 February 2016.
[16] Lorna Fox 'The Meaning of Home: A Chimerical Concept or a Legal Challenge?' 29(4) J Law & Soc 2002 580. See also Bernie D Jones, '*Garner v. Gerrish* and the Renter's Life Estate: Teaching a New

What modern right would result?

If the proposition stated above is accepted, and if a group's ability to maintain its broader territory - that area that the group reserves for its exclusive use but without physically occupying it – is indeed integral to its culture, then what modern right could arise from the pre-contact practice of preventing others from utilizing a group's traditional territory? Logically, this would also be some form of control over the resource use in the territory that would be inconsistent with the group's interests. That is, unlike Aboriginal title – the exclusive right to the land itself, which seems to attach only to lands subject to a narrow concept of "home" - which gives Aboriginal groups the right to use land themselves and to exclude others, this right of control would separate these two elements of use and control. As discussed in Chapter VII, such a separation is commonplace in Common Law and Civil Law systems. Since the pre-contact practice giving rise to the modern right would be the practice of saying "no" to outsiders attempting to utilize resources within the group's territory, the modern right should also constitute the ability to say "no" to others attempting to utilize the resources of the group's territory without the group's permission. It would allow Aboriginal groups – subject to the overriding sovereignty of the Crown and conflicting provisions of the *Constitution Act 1867* and *Constitution Act 1982* – to exercise a veto over resource use by others within the entirety of their traditional territories even though these were lands they did not physically occupy, just as their ancestors once exercised such a veto through force of arms. This right will be referred to here as a right of "Aboriginal dominion."

This term is chosen in part to signal that it is *dominium* rather than *imperium* that is under discussion, a form of property rather than an exercise of sovereign power. This is not to definitively state that an Aboriginal group could not control the use of its territory through the exercise of sovereign power or something like it, but rather to

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Concept of "Home"' (2010) 2 Faulkner L Rev 1, 29 as to the view of property law scholars that the home is "central to an individual's emotional and personal life"

suggest it would be easier to reconcile such control by means of a property right with existing jurisprudence. This distinction is discussed further in the next chapter.

To reiterate the basic concept, "Aboriginal dominion" can be defined as the right of Aboriginal groups to prohibit the use of natural resources, including land itself, within the entirety of their traditional territory.

Aboriginal dominion: how would it function?

To understand how the right of Aboriginal dominion would function, it might be useful to briefly recap how Aboriginal groups currently use the Crown's obligation to consult and accommodate them[17] to attempt to prevent particular kinds of resource development within their traditional territories in situations where they are relying upon Aboriginal rights or treaty rights. When a project proponent – say, for example, an oil or gas company wishing to build a pipeline – puts forward its proposal to construct its pipeline, statutory requirements for environmental assessment will be triggered, as well as the Crown's obligation to consult with and accommodate affected Aboriginal groups that is based upon either their treaty rights or their asserted but unproven Aboriginal title. The result will be a process, one that will probably involve studies, meetings and hearings, and Aboriginal groups will participate in that process. At the conclusion of the process, the Crown will make its decision about whether or not the project can proceed, and – depending upon that decision - the affected Aboriginal groups may be happy or unhappy, as may the other involved parties.

To reiterate, for both Aboriginal groups and those who choose to participate in the statutorily-mandated assessment processes, it is the Crown's need to make decisions about the proposed project that gives them an opportunity to participate in the decision-making procedure. These procedural opportunities are less than, and less useful than, a substantive right, and only come into existence because of the proposed decision-making by the Crown. If Aboriginal groups are unhappy with the procedure, they may

[17] As identified in *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511, 2004 SCC 73 and in *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* [2004] 3 SCR 550, 2004 SCC 74.

be able to challenge the result in court, and if successful could have the matter referred back to the decision-maker. Generally speaking, however, discontent with the substantive content of a government decision will not normally give rise to any remedy.

To be clear, Aboriginal groups that object to projects in their traditional territories that are located elsewhere than on Aboriginal title lands – and as set out in Chapter III, the only lands conclusively known to be Aboriginal title lands to date are those identified in the *Tsilhqot'in* decision – have no substantive right to simply say "no" to such projects; instead, they must rely upon the Crown's obligation to consult and accommodate them in order to have any say as to whether or not the projects proceed.

From the point of view of Aboriginal groups, it can easily be seen why this is unsatisfactory. Staying with the example of a pipeline, it might be that an Aboriginal group would know from the outset that it was opposed to the proposal for a new bitumen pipeline through its territory. The predicted results of a bitumen spill on fish stocks and drinking water quality might be so seriously detrimental to the interests of people that still pursue a subsistence lifestyle within a defined territory that no measures to mitigate the risk would be sufficient to address their concerns. Despite having a substantive concern, however, the group may have no substantive right, only a procedural one, and one which exists only with regard to the Crown rather than with regard to the company that proposes to build the pipeline or with regard to the rest of the world.

Contrast this with the situation of someone who has a substantive right, which in Canada in the non-Aboriginal context would often arise from owning land in fee simple. Generally speaking, if someone wants to use the land of a fee simple owner, that owner can simply say "no" without any need to justify that decision. In the Aboriginal context, Aboriginal title is closely analogous to fee simple title[18], and would provide a similar ability to control the use of the subject property. In the Common Law and Civilian systems, however, there also exist other forms of property,[19] and these also give the holders of those rights the ability to protect the enjoyment of their property

[18] See the discussion in Chapter VII as to whether Aboriginal title is most closely analogous to ownership, such as by fee simple, or to a usufructuary right, such as liferent.
[19] See Chapter VII for a listing and discussion of other forms of real property.

against those who might seek to interfere with it. As is discussed in Chapter VII, the proposed right of Aboriginal dominion could be seen as analogous to one of those forms of property, and would similarly give an Aboriginal group possessing it the ability to simply say 'no' to the hypothetical pipeline in the first instance. This ability would reflect a right analogous to the group's pre-contact practice of preventing or controlling the use by others of resources within the group's traditional territory. The group's right to prevent others from intruding to exploit the resources of their territory and committing certain types of trespass would not require justification and would be good against the world rather than just arising with respect to actions by the Crown. While the analogy that will be drawn in Chapter VII is to a negative easement, it may be noted in passing that positive servitudes also have an inherent negative aspect, in that, for example, one who has a right to a road can prevent others from building an obstruction across that road, and one who has a right to water can prevent others who have no such right from wasting the water.[20]

Many questions might fairly be posed about the details of how the proposed right of Aboriginal dominion might work in practice. Some, such as how this new right might be integrated with or taken into account with regard to existing consultation and environmental assessment processes, would depend upon decision-makers in federal, provincial and Aboriginal governments for their answer; it would be impossible to predict the exact outcomes of the deliberations of those individuals at this time, but it would be realistic to presume that pragmatic solutions to any difficulties could be arrived at. Some practical problems can be recognized even now, however, and should be acknowledged and discussed.

Practical considerations

Of the many questions that might be raised about how the right of Aboriginal dominion would work in practice, three are considered sufficiently significant to be discussed

[20] See, for example, *Couture c Dubé* 1989 CanLII 587 (QC CA) in which the right of view and the obligation of non construction granted constituted a valid positive servitude of view and a valid negative servitude *non altius tollendi*.< http://www.canlii.org/fr/qc/qcca/doc/1989/1989canlii587/1989canlii587.html?searchUrlHash=AAAAAQAUInBvc2l0aXZlIHNlcnZpdHVkZSIAAAAAAQ&resultIndex=1 >.

here in greater detail: what Aboriginal bodies would be able to assert this right; what sorts of intrusions or activities in groups' traditional territories could trigger the exercise of the right; and by what means might governments be able to overrule the exercise of this right?

a) What entities could assert the right of Aboriginal dominion?

Thinking about the proposed right of Aboriginal dominion may lead to the realization that the identity of the rights-holding group will frequently be uncertain. This, it must be emphasized, is not a problem that would be unique to the concept of Aboriginal dominion; exactly the same observation could be made about Aboriginal title, though the dearth of case law to date has meant that this uncertainty about the identity of the rights-holding groups has so far not been particularly problematic and has been glossed over in the case law. Conceivably, however, the exercise of the right of Aboriginal dominion might bring the issue into clearer focus, as discussed below.

As previously noted, Aboriginal rights have so far been asserted in the courts in one of two ways. First, an individual who has been charged with a regulatory offence such as hunting or fishing contrary to regulations will have raised as a defence to the charge the assertion that he or she is a member of an Aboriginal group that collectively possesses an Aboriginal right such as a hunting or fishing right and that that right poses a complete defence to the charge.[21] Second, civil litigation has been initiated by one or more members of an Aboriginal group in a representative capacity on behalf of all of the members of that group asserting one or more causes of action while relying on an asserted Aboriginal right as a basis for their claim or asking for a declaration of the existence of the right as one of the remedies sought.

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[21] Such an exercise of s 35 Aboriginal rights or treaty rights is frequently analogized to being a "shield" rather than a "sword". For an example in the context of hunting moose without a license, see *R v Shipman et al* 2004 ONCJ 51 (CanLII) [34] < http://www.canlii.org/en/on/oncj/doc/2004/2004oncj51/2004oncj51.html?searchUrlHash=AAAAAQAdYWJvcmlnaW5hbCByaWdodCBzaGllbGQgc3dvcmQAAAAAAQ&resultIndex=3 >. In this regard, it should be borne in mind that individuals are not the holders of Aboriginal hunting or fishing rights – which are held collectively – and that their hunting and fishing activities may be subject to regulation by their own Aboriginal collectivities: see, for example, *R v Lewis* [1996] 1 SCR 921 < http://www.canlii.org/en/ca/scc/doc/1996/1996canlii243/1996canlii243.html?searchUrlHash=AAAAAQAOImJhbmQgYnktbGF3cyIAAAAAAQ&resultIndex=2 >.

Even in the former of these two types of cases, questions will sometimes arise as to the ability of the party who asserts the Aboriginal right to do so, such as where a group might possess a particular right – the right to kill eagles in order to trade their body parts, for example[22] – but the ability of the individual defendant to assert that right cannot be established, as where their conduct has violated group norms. In cases where Aboriginal groups have sought declarations of their Aboriginal title, however, there have sometimes been disagreements about whether those groups can properly be the holders of the asserted Aboriginal title. In *Tsilhqot'in Nation*, for example, Canada and the Aboriginal plaintiffs argued successfully that the Tsilhqot'in as a whole would be the proper rights holder, while British Columbia argued that it should be a sub-unit of that larger group, namely the Xeni Gwet'in Band.[23] Another example can be found in the recent dispute[24] concerning the proposed construction of a liquefied natural gas plant near Prince Rupert, where there is disagreement between factions within the Lax Kw'alaams as to whether Aboriginal title is held by the Lax Kw'alaams as a whole or by one or more hereditary chiefs.[25]

The *Tsilhqot'in* case is illustrative of the fact that groups may be united in their desire to establish their Aboriginal title, even if they may not have plans as to the use they wish to make of their Aboriginal title lands. The Law Kw'alaams situation, on the other hand, is illustrative of a problem that could conceivably arise with regard to the exercise of the right of Aboriginal dominion, in that a decision to exercise a right to say "no" to resource development could reveal group disagreements about the identity of the group itself and about the legitimacy of its decision-making processes. That is, in order to exercise the right of Aboriginal dominion, a group would have had to make a decision to reject some activity that was proposed to take place within its traditional territory. How a group would do this merits some consideration.

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[22] eg *R v Joseph* 2012 BCPC 104 [12] < http://www.provincialcourt.bc.ca/canlii.php?search=Search+BC+cases&id=seymour&startDate=2011-02-28&endDate=2011-12-31 >.
[23] *Tsilhqot'in Nation v British Columbia* 2007 BCSC 1700 [437-472].
[24] *Helin v Attorney General of Canada*, Supreme Court of British Columbia, Vancouver Registry, No. S157675.
[25] Gordon Hoekstra, 'Lax Kw'alaams band council offers conditional support for Pacific NorthWest LNG terminal' (Vancouver Sun, 19 March 2016) < http://www.vancouversun.com/life/alaams+band+council+offers+conditional+support+pacific+northwest+terminal/11795149/story.html > accessed 19 August 2016.

To say that an Aboriginal group has the ability to make a legally enforceable statement prohibiting an activity from taking place within its traditional territory presupposes certain things, even aside from the currently unproven existence of a right of Aboriginal dominion. Obviously, the Aboriginal group that asserts the right must be the Aboriginal group that actually possesses the right. Determining the identity of the appropriate rights-holding group may not itself be easy, given that Aboriginal rights will have crystallized at the date of contact or assertion of sovereignty, hundreds of years ago in either case.

Clearly, if a group is capable of holding rights, including in this instance a real right, it must possess legal personality. Both the Common Law and Civil Law do, of course, recognize that various types of non-natural persons have legal personality, such as corporations, cooperatives, societies, and municipalities. While these sorts of entities invariably have charters or constitutions or standing orders that spell out exactly how they can make their decisions, it will often not be the case that the bodies that hold Aboriginal rights in Canada – which in many cases would be unincorporated associations – would have their decision-making processes similarly set out. Since Aboriginal rights are held collectively, however, decisions regarding those rights must be made by the appropriate collectivity, regardless of whether that group possesses a formal decision-making structure or process. This is suggested by the Supreme Court of Canada's decision in *Delgamuukw v British Columbia*:

> A further dimension of Aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual Aboriginal persons; it is a collective right to land held by all members of an Aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of Aboriginal title which is *sui generis* and distinguishes it from normal property interests. [26]

Uncertainty about which Aboriginal group will be the appropriate rights holder in any given instance will exist because of changes in group composition and location over

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[26] [1997] 3 SCR 1010 [115] < http://www.canlii.org/en/ca/scc/doc/1997/1997canlii302/1997canlii302.html >. For an example of the difficulties that arise in a litigation context when attempting to reconcile the nature of Aboriginal collectivities with the requirement that litigants have legal capacity, see also *Kwicksutaineuk/Ah-Kwa-Mish First Nation v Canada (Attorney General)* 2012 BCCA 193 < http://www.canlii.org/en/bc/bcca/doc/2012/2012bcca193/2012bcca193.html?autocompleteStr=Kwicksutaineuk%202012%20BCCA%20193&autocompletePos=1 >.

time. The necessity for identifying the contemporary Aboriginal group that is the proper rights holder has been adverted to by the Supreme Court of Canada in several cases, including *R v Powley* [27], which involved a successful claim to Aboriginal rights by a group of Métis, a long-established distinct Aboriginal culture of mixed European and Indian heritage:

> In addition to demographic evidence, proof of shared customs, traditions, and a collective identity is required to demonstrate the existence of a Métis community that can support a claim to site-specific Aboriginal rights. We recognize that different groups of Métis have often lacked political structures and have experienced shifts in their members' self-identification. However, the existence of an identifiable Métis community must be demonstrated with some degree of continuity and stability in order to support a site-specific Aboriginal rights claim…. [28]

It might be presumed that Indian bands which are created by the *Indian Act* [29] would be the obvious choice of collective entities to exercise Aboriginal dominion or other Aboriginal rights in most cases. While it might be thought, however, that *Indian Act* bands would at least have the advantage of constituting legal entities, there is doubt about what abilities and characteristics they actually possess. Bands are defined by the *Indian Act* as follows:

> "band" means a body of Indians
>
> (*a*) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,
> (*b*) for whose use and benefit in common, moneys are held by Her Majesty, or
> (*c*) declared by the Governor in Council to be a band for the purposes of this Act; [30]

Although Indian bands have elected chiefs and councils as well as powers that are certainly suggestive of legal personality, this is misleading. In *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, for example, the Federal Court of Appeal held that neither a band nor the collectivity of its

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[27] [2003] 2 SCR 207, 2003 SCC 43 < http://www.canlii.org/en/ca/scc/doc/2003/2003scc43/2003scc43.html >.
[28] ibid [23].
[29] RSC 1985, c I-5.
[30] ibid, s 2.

members constitute a legal entity.[31] As well as not constituting legal entities, *Indian Act* bands have the disadvantage as potential rights holders that they do not necessarily correspond to those traditional collectivities that would have existed prior to contact or the assertion of sovereignty. It is those bodies that case law suggests should be the modern rights holders, though it would presumably be possible for the right to descend to the band, just as either a legal right or a beneficial right in a trust can descend by succession. Even determining which traditional bodies should constitute modern rights holders, however, is not necessarily straightforward, as per the example of *Tsilhqot'in Nation*[32] mentioned above.

Some Aboriginal groups may have taken proactive steps to align their rights-holding bodies with bodies capable of making effective decisions. The Council of the Haida Nation, for example, has adopted a formal constitution [33] that seeks to unite traditional and modern Haida collectivities within one governmental structure. It has, moreover, sought by way of the "Haida Accord"[34] to gather unto itself the ability to assert all of the Aboriginal rights, including Aboriginal title, that would have previously accrued to individual Haida clans, the traditional sociopolitical entity of the Haida people.[35] Other Aboriginal nations have been less successful in reconciling their traditional and modern collectivities. The Nuu-chah-nulth Tribal Council is one collective body that had to leave it to a coalition of the individual Nuu-chah-nulth nations to pursue Aboriginal rights and title litigation, an endeavour in which they were handicapped by the inability of those individual nations to agree among themselves as to the boundaries between

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[31] 2001 FCA 67 [15] < http://decisions.fca-caf.gc.ca/en/2001/2001fca67/2001fca67.html >.
[32] (n 13) [437-472].
[33] < http://www.haidanation.ca/Pages/governance/pdfs/HNConstitutionRevisedOct2010_officialunsignedcopy.pdf > accessed 4 September 2013.
[34] < http://www.haidanation.ca/Pages/governance/pdfs/the_haida_accord.pdf > accessed 4 September 2013.
[35] *Quaere* whether the purported transfer of Aboriginal rights even to a related entity can be effective: *Anishinaabeg of Kabapikotawangag Resource Council Inc v Canada (Attorney General)* [1998] 4 CNLR 1 [11-14] < http://www.canlii.org/en/on/onsc/doc/1998/1998canlii14758/1998canlii14758.html?searchUrlHash=AAAAAQAadHJhbnNmZXIgYWJvcmlnaW5hbCByaWdodHMAAAAAAQ&resultIndex=1 >. Note also that even in the case of the Haida, a split between the traditional decision-making process as represented by hereditary chiefs and modern decision-making structures can still arise, as demonstrated by a 2016 ceremony in which two hereditary chiefs were purportedly stripped of their chieftainships because of their support for a pipeline project: Jeff Lee, 'Pipeline dispute exposes fault lines' (Vancouver Sun, 19 August 2016) < http://www.infomedia.gc.ca/ainc-inac/articles/unrestricted/2016/08/ain20168916609667_3.htm > accessed 19 August 2016.

them.[36] No doubt there will be other Aboriginal groups which have not made even preliminary steps in the direction of establishing modern entities that are suitable for asserting their collective Aboriginal rights.

Aboriginal rights-holding groups that do not have formal governing structures or procedures may have more difficulty exercising a right of Aboriginal dominion than those that do, but the difficulty would not be insurmountable. Aboriginal groups often have recourse to representative actions when they wish to utilize the court system.[37] That is, a chief or other individual will bring an action on his or her own behalf and on behalf of all of the other members of the group, and the onus is on a defendant to then challenge that individual's alleged ability to represent the group, should they choose to attempt to do so. It would seem that it should be possible for groups to use this mechanism to enforce their right of Aboriginal dominion, but it would also seem peculiar that a group should do so without having any mechanism by which to first advise a potential resource developer of its decision to forbid the development other than by commencing litigation. So, for example, a rights-holding Aboriginal group that was traditionally governed by a chief might have the decision to invoke the right of Aboriginal dominion made by that chief without any of the trappings of formal decision-making associated with European models. See, for example, Brian Slattery's views on this point:

> …while the doctrine of Aboriginal land rights governs the title of a native group considered as a collective unit, it does not regulate the rights of group members among themselves. Subject, always, to valid legislation, the latter are governed by rules peculiar to the group, as laid down by custom or internal governmental organs.[38]

There is no reason why decisions by chiefs or other traditional decision-makers should not be a legitimate method for invoking an Aboriginal right, including the right of

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[36] *Ahousaht Indian Band v AG of Canada* 2007 BCSC 1162 < http://www.courts.gov.bc.ca/jdb-txt/sc/07/11/2007bcsc1162.htm >.

[37] For a discussion, see *Pasco v Canadian National Railway Company* (1989) 56 DLR (4th) 404 < http://www.canlii.org/en/bc/bcca/doc/1989/1989canlii249/1989canlii249.html > affd sub nom *Oregon Jack Creek Indian Band v Canadian National Railway Co* [1989] 2 SCR 1069 < http://www.canlii.org/en/ca/scc/doc/1989/1989canlii4/1989canlii4.html >. See also *Kwicksutaineuk/Ah-Kwa-Mish First Nation v Canada (Attorney General)* 2012 BCCA 193 < http://www.canlii.org/en/bc/bcca/doc/2012/2012bcca193/2012bcca193.html?autocompleteStr=Kwicksutaineuk%202012%20BCCA%20193&autocompletePos=1 >.

[38] Brian Slattery 'Understanding Aboriginal Rights' (1987) 66 Can Bar Rev 727, 745.

Aboriginal dominion, with that right then being enforced through a representative action in the courts. Courts might, admittedly, have some concerns about how to establish the legitimacy of the resulting assertions of Aboriginal dominion made before them.

In summary on this point, the structures of Aboriginal societies may create some practical problems in the exercise of the right of Aboriginal dominion, particularly if the rights-holding entity at the time of contact or of the assertion of sovereignty does not correspond to a modern legal entity. These problems should not, however, preclude the exercise of this right.

b) What intrusions could result in the enforcement of Aboriginal dominion?

Unlike procedural rights, the right of Aboriginal dominion would not come into existence because of government action; it would already exist, but it would rarely need to be enforced or exercised. Practically speaking, however, since the modern right of Aboriginal dominion would be analogous to the pre-contact, pre-assertion of sovereignty practice of preventing other groups from using the natural resources within a group's territory, it would seem that the exercise of the modern right is most likely to result from any proposed extraction or alienation of natural resources, such as logging, mining, or the impounding of water for hydroelectric dams. Whether other types of activity within a group's traditional territory could prompt an exercise of the right of Aboriginal dominion may be less clear. This could be either because the activity is not a sufficiently material interference with the right as to merit judicial intervention, or perhaps because of the existence of some competing right.

With respect to the former, consider those types of economic development that depend not upon the extraction of existing natural resources, but upon the location of some new construction or facility. A new ski resort or a new pipeline may only require the removal of a relatively small number of trees and other resources, but would involve new construction on a scale that would dramatically alter the natural landscape and could have a serious effect upon wildlife. On the one hand, it is difficult to think of a pre-contact activity that could have been analogous to such forms of development

(though the "Chilcotin War" that was prompted in part by road construction in the immediate post-contact era might suffice [39]). On the other hand, however, it does seem self-evident that had any such physical invasions of Aboriginal groups' territories taken place, that they would have triggered action by those groups to remove them. Given that, proposals for new, large-scale construction projects within Aboriginal groups' traditional territories can be expected to be sufficient as to result in a judicial remedy based upon the exercise of the right of Aboriginal dominion.

Projects that pose a particularly great threat to the traditional lifestyles of Aboriginal peoples would more clearly merit judicial remedy. So, for example, activities that may make ground or surface water undrinkable, such as hydraulic "fracking" for natural gas extraction, or pipelines for the transportation of bitumen would be obvious choices for the exercise of the right of Aboriginal dominion.[40] To the extent that they can make groups' traditional territories unlivable, they pose as great a threat as armed invasion would have done in pre-contact times. And given the continuing importance of traditional subsistence lifestyles to many Aboriginal people, particularly those living outside of urban areas, the threats posed by such activities are more serious than they might be to urban residents.

Just as there are some activities that seem likely to support the exercise of a group's right of Aboriginal dominion, there are others that seem unlikely to do so. In the case of a relatively insignificant interference with the right, this might reflect the maxim *de minimis non curat lex*,[41] or a balancing of the right with the interests of competing rights-holders.[42] In particular, this would include activities that are themselves

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[39] *Tsilhqot'in Nation* (n 13) [271] < http://www.canlii.org/en/bc/bcsc/doc/2007/2007bcsc1700/2007bcsc1700.html?autocompleteStr=tsilh&autocompletePos=1 >.

[40] Litigation to protect the quality of received water in the face of polluting activities by others is common in both Common Law – where plaintiffs would act pursuant to riparian rights – and Civil Law jurisdictions. A case from Scotland in which the obligation of the proprietors of a servient tenement to not pollute may not have been dependent upon the warrandice – warranty – clause in the deed, but may have reflected an implied obligation not to pollute is *Dumfries and Maxwelltown Water-Works Commissioners v M'Culloch* (1874) 1 R 975, commented on in *Stair Memorial Encyclopaedia* Vol 9, para 450, n 22 and in Cusine and Paisley (n 5) 246.

[41] The law does not concern itself with trifles.

[42] For an example from Scotland, where the law has been codified by the *Title Conditions (Scotland) Act* 2003, see *Franklin v Lawson* 2013 SLT (Lands Tr) 81, in which Dr Franklin was able to obtain a variation of his title conditions to permit the construction of an extension despite the effect on Mr Lawson's view.

supported by competing constitutional values. The most obvious of these would be the free movement of individuals within Canada and their establishment of residences in places of their choosing. This right was at one time held by the courts to be protected by the federal jurisdiction over citizenship[43] and is now protected by s 6 of the *Canadian Charter of Rights and Freedoms*, which states in part:

> 6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
>
> (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
>
> a) to move to and take up residence in any province; and
>
> b) to pursue the gaining of a livelihood in any province. [44]

This provision itself reflects the guarantee in the *Universal Declaration of Human Rights* article 13 that "Everyone has the right to freedom of movement and residence within the borders of each State".[45] While it might be suggested that s 6 of the *Charter* protects the right to move between provinces rather than the right to move to particular locations within provinces, the purposive approach taken by the Supreme Court of Canada to date in its interpretation suggests that limits on movement within Canada more generally will be struck down. The implication in a province such as British Columbia, where almost the entirety of the province is subject to unresolved Aboriginal rights claims, is that there would be very few places to which people could move without intruding upon some group's traditional territory. Given that, the creation of new residential developments or of new businesses other than those that depend upon natural resource extraction therefore seem unlikely to result in the successful enforcement of the right of Aboriginal dominion, since the constitutional right to freedom of movement might otherwise be seriously undermined. Such a weighing of competing constitutional values should, of course, arrive at a different outcome where it is Aboriginal title – the right to exclusive use and occupation – rather than Aboriginal dominion that is on one side of the scale.[46]

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[43] *Winner v SMT (Eastern) Ltd*, [1951] SCR 887 < http://www.canlii.org/en/ca/scc/doc/1951/1951canlii2/1951canlii2.html >.

[44] *Canadian Charter of Rights and Freedoms*, s 6, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[45] UN General Assembly, *Universal Declaration of Human Rights*, article 13, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

[46] For a judicial consideration of such issues, see the Australian High Court's decision in *Gerhardy v Brown* (1985) 159 CLR 70 [40-41], a case in which it was alleged by an Aboriginal (but non-

In addition, it must be realized that many areas that came within the traditional territories of Aboriginal groups that still have unresolved Aboriginal rights and title claims are now contained within municipalities or other fully-developed areas. While far from certain, it seems possible that Aboriginal land rights would not continue to exist in such areas. As stated by the Alberta Court of Queen's Bench in *Papaschase Indian Band No. 136 v Canada (Attorney General)*:

> The Plaintiffs from time to time noted that Aboriginal rights and treaty rights are now protected by the Constitution, but those protections cannot be used to invalidate actions of government officials that occurred in the 19th century. The *Charter of Rights and Freedoms* does not have retroactive operation, or revive rights that were extinguished before 1982… At the time of these events, the concept of Parliamentary supremacy was firmly in place, and Parliament was able to vary Aboriginal or Treaty rights if it chose.[47]

As already noted, however, in those parts of Canada – such as most of British Columbia – where any purported extinguishment of Aboriginal rights was on the part of the provincial rather than the federal government, it may be that such attempts at extinguishment would have been ineffective.[48]

In summary, the exercise of right of Aboriginal dominion seems most likely to be successful when the extraction or use of natural resources is proposed on unalienated

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Pitjantjatjara) plaintiff that the granting of exclusive rights to a vast tract of land to the Pitjantjatjara people constituted racial discrimination contrary to the *Racial Discrimination Act 1975* (Cth), ss 9, 10. While acknowledging that freedom of movement does not generally extend to access to privately owned land, that it might in exceptional circumstances: "If, for example, the purpose and effect of vesting extensive tracts of land in private ownership and denying a right of access to non-owners was to impede or defeat the individual's freedom of movement across a State or, more relevantly, to exclude persons of a particular race from exercising their freedom of movement across a State, the vesting of ownership and the denial of access would then constitute an interference with freedom of movement and amount to racial discrimination within the meaning of the Convention." See also the commentary on this case in Kevin Gray, 'Property in Thin Air' (1991) 50(2) Cambridge LJ 252, 287-290.

[47] [2004] 4 CNLR 110 (Alta QB)[50] < http://www.canlii.org/en/ab/abqb/doc/2004/2004abqb655/2004abqb655.html >.

[48] Note, however, that colonial administrations may have had the ability to extinguish Aboriginal title prior to their respective colonies joining Confederation. If so, then in British Columbia extinguishing events could have occurred prior to July 20, 1871. One such event might have been the February 14, 1859 proclamation by the then Governor, Sir James Douglas, that: "All the lands in British Columbia, and all the Mines and Minerals therein, belong to the Crown in fee." See the review of this and other relevant colonial developments in *Reference Re: Offshore Mineral Rights* [1967] SCR 792, 797.

Crown lands, such as in cases of logging, mining, pipeline construction, or similar developments.

c) How could the Crown override Aboriginal dominion?

The Supreme Court of Canada has made it clear that Aboriginal rights are not inviolable. In *Sparrow*, the Court stated: "Rights that are recognized and affirmed are not absolute." [49] While the Court noted the ability of the federal government to legislate with regard to Indians, it went on to say that to reconcile that federal power with the federal duty toward Indians was "to demand the justification of any government regulation that infringes upon or denies Aboriginal rights."[50] The two-part test for justification as it was set out in *Sparrow* and subsequently modified in other cases requires: (1) that the infringement of the Aboriginal right must be in furtherance of a legislative objective that is compelling and substantial; and (2) an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and Aboriginal peoples.

Aboriginal rights can indeed be infringed by the Crown and frequently are. Aboriginal hunting and fishing rights, for example, are infringed by federal and provincial hunting and fishing regulations, with the result that the courts that are tasked with hearing prosecutions under those regulations have to evaluate the reasonableness of the resulting infringements. In *Sparrow*, as discussed in Chapter II, this involved a consideration of the length of net that could appropriately be used in salmon fishing.

It may be noted that governmental infringements of Aboriginal rights are usually incidental to governments' purposes in enacting laws of general application. That is, governments do not usually set out to deliberately infringe Aboriginal rights, but instead do so incidentally in the course of pursuing their legislative and policy goals. The situation, it will be argued here, is somewhat different with Aboriginal land rights, whether rights of Aboriginal title or Aboriginal dominion. Because no Canadian court had ever found that Aboriginal title actually existed in any specific location until the

[49] *R v Sparrow* [1990] 1 SCR 1075 < http://www.canlii.org/en/ca/scc/doc/1990/1990canlii104/1990canlii104.html >.
[50] ibid.

2014 decision in *Tsilhqot'in Nation* [51], there has been no occasion to consider the infringement of Aboriginal land rights in other than an abstract way. Prior to 2014, the most notable attempt by the Supreme Court of Canada to articulate how the infringement of Aboriginal land rights might occur and be justified was in *Delgamuukw*, in which the Court stated that the third of the implications of the constitutionalization of Aboriginal title it was obliged to consider was "…whether Aboriginal title, as a right in land, mandates a modified approach to the test of justification first laid down in *Sparrow* and elaborated upon in *Gladstone*."[52] In the majority judgment of La Mer CJ, the Court wrote at some length about justification of infringements of Aboriginal rights generally and of Aboriginal title specifically. Reviewing the "nascent" jurisprudence on justification, the majority confirmed that Aboriginal rights, including Aboriginal title, can be infringed by both the federal and provincial governments but that s 35(1) required that such infringements satisfy the test of justification. The first part of that test required that the infringement of the Aboriginal right must be in furtherance of a legislative objective that is compelling and substantial, while the second part of the test required an assessment of whether the infringement is consistent with the special fiduciary relationship between the Crown and Aboriginal peoples. The majority expressed the view that compelling and substantial legislative objectives that could justify the infringement of Aboriginal title might include the development of agriculture, forestry, mining, and hydroelectric power, general economic development, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims (which might raise the question of what legislative objectives would be left that would <u>not</u> justify the infringement of Aboriginal title!). The majority's description of the operation of the second part of the test with regard to infringement of Aboriginal title was vague and confusing, but did point to certain aspects of Aboriginal title – exclusivity, the right to choose the use to which land would be put, and its "inescapable <u>economic component</u>" (underlining in original) – apparently to suggest that the burden upon the Crown of satisfying the second part of the test might be significant. [53]

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[51] (n 2).
[52] (n 31) [2].
[53] ibid [160-169].

The Court gave further guidance on the infringement of Aboriginal title in *Tsilhqot'in Nation*.[54] It confirmed that governments can infringe Aboriginal rights conferred by Aboriginal title but only where they can justify the infringements on the basis of a compelling and substantial purpose and establish that they are consistent with the Crown's fiduciary duty to the group.[55] The Court also commented more specifically on how the Crown's responsibilities on the infringement of Aboriginal title would interact with its duty of consultation, stating:

> To justify overriding the Aboriginal title-holding group's wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown's fiduciary obligation to the group: *Sparrow*.[56]

For clarity and to sum up, then, the right of Aboriginal dominion cannot be an absolute right. Clearly, if Aboriginal title – that exists where both exclusivity and occupation are found – can be overridden, then Aboriginal dominion – which would exist where only exclusivity and not occupation are found – must also be subject to governmental override.

All of the foregoing might, however, be said to represent a substantive weighing of the importance of the Crown's purpose and conduct in infringing the Aboriginal right versus the importance of the Aboriginal right itself. Little, however, has been said about the appropriate process by which the Crown could infringe an Aboriginal property right. This might have simply reflected a tacit assumption that the Crown would most often infringe Aboriginal rights in the normal course of its operations, and that the courts would be assessing such infringements after the fact.

It is here submitted, however, that overlooked or at least unnoted is an additional consideration that should arise when the right that is to be infringed is an Aboriginal property right, such as either Aboriginal dominion or Aboriginal title. To understand

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[54] (n 2).
[55] ibid [18].
[56] ibid [77].

why some higher requirement should exist with regard to an Aboriginal land right that enjoys constitutional protection pursuant to s 35(1) of the *Constitution Act, 1982*, it may be useful to contrast what is necessary for the Crown to be able to take away property rights that do not enjoy constitutional protection through normal expropriation processes.[57]

In order for there to be a valid expropriation of property, there must be legislative authority that clearly permits that expropriation, plus there must be an element of necessity.[58] Although the *Constitution Act, 1867* does not explicitly give either the federal or provincial governments an express power of expropriation, both levels of government do have the ability to expropriate. The legislation by which they are able to exercise this authority includes the federal *Expropriation Act* [59] and similarly-named statutes in the various provinces. [60] It also includes provisions in a wide variety of other statutes and regulations, however, many of which authorize expropriation by governmental and non-governmental bodies. Oil and gas pipeline companies, for example, are able to use provisions for the "acquisition" of lands from even unwilling landowners pursuant to the *National Energy Board Act*.[61]

A tension exists between, on the one hand, the recognition that such powers are necessary and, on the other hand, the recognition of their extraordinary nature and of the need for them to be strictly limited. It has therefore been judicially stated in response to a challenge to the validity of the federal *Expropriation Act* [62] that:

> …a Government shorn of such a power would lack one of the essential attributes of sovereignty, one pertaining to the furtherance of Peace, Order, and generally speaking, to the good Government of the country…and to its Defence.[63]

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[57] See Gordon Christie, 'Who Makes Decisions Over Aboriginal Title Lands' (2015) 48 UBCL Rev 755, 783.
[58] A La Forest (ed), Anger & Honsberger *Law of Real Property* (3rd edn 2006) §31-70-10.
[59] RSC 1985, c. E-21.
[60] *Expropriations Act* RSO 1990, c E.26; *Expropriation Act* RSM 1987, c E190 (CCSM, c E-190); *Expropriation Act* RSNB 1973, c E-14; *Expropriation Act* RSA 2000, c E-13; *Expropriation Act* RSBC 1996, c 125; *Expropriation Act* RSY 2002, c 81; *Expropriation Act,*RSNWT 1988, c E-11; *Expropriation Act* RSPEI 1988, c E-13; *Expropriation Act* RSQ, c E-24; *Expropriation Act* RSS 1978, E-15; *Family Homes Expropriation Act* RSNL 1990, c F-1.
[61] RSC 1985, c N-7, ss. 77-78.1, 85-107.
[62] (n 64).
[63] *Shepherd v The Queen in Right of Canada* [1964] Ex CR 274, 278.

Academic commentary [64] and judicial commentary[65], however, both support the view that the expropriation procedures found in enabling statutes must be strictly complied with, a view that is also reflected in a decision of the Nova Scotia Supreme Court that gives strict construction to expropriation provisions [66] and adopts the remarks in an earlier English case:

> The powers are so large – it may be necessary for the benefit of the public – but they are so large and so injurious to the interests of individuals that I think it is the duty of every Court to keep them most strictly within those powers; and if there be any reasonable doubt as to the extent of their powers they must go elsewhere and get enlarged powers but they will get none from me by way of construction of their Act of Parliament.[67]

In addition to strictly construing expropriation powers, the courts have also created other safeguards for the benefit of those whose property is expropriated. The Exchequer Court of Canada, for example, noted that:

> The genius of the English common law is that no property should be taken from the subject by the sovereign power without proper compensation…the aim of the court is to work out principles which make for justice and seek to avoid the turning away of a bona fide suitor without remedy.[68]

Given the concern that the law has for protecting property rights that do <u>not</u> attract constitutional protection, it would seem that the only property rights in Canada that <u>do</u> attract constitutional protection – Aboriginal property rights such as Aboriginal title and Aboriginal dominion – could not enjoy any lesser protection and should certainly enjoy more. Were it otherwise, it would be difficult to avoid the implication that it was the Aboriginal identity of the rights holders that prevented their property rights from being accorded greater protection.

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[64] ECE Todd, *The Law of Expropriation and Compensation in Canada* (2nd edn, Carswell 1992) 27 and Robert G Doumani and Jane Matthews Glenn, 'Property, Planning and the Charter' (1989) 34 McGill LJ 1036, 1041.
[65] *Minister of Industry and Natural Resources v MacNeill* (1964) 49 DLR (2d) 190, 191 (PEISC).
[66] *Miller v Halifax Power Co* (1913) 13 DLR 844 (NSSC) 851.
[67] *Webb v Manchester and Leeds Railway Co*, 4 My & Cr 120.
[68] *Mackay v R* [1928] Ex CR 149 [7].

Since the ability to expropriate property normally depends upon explicit statutory authority, it would seem that infringement of an Aboriginal property right – with "infringement" really meaning some form of taking when it is in the context of a property right – should similarly at least require explicit statutory authority. This could mean that the general wording in statutes such as the *Expropriation Act* [69] or the *National Energy Board Act*[70] that permits the expropriation of property would have to be supplemented by statutory provisions that would explicitly authorize such takings. Although the blanket authority contained in such statutes is sufficient for the expropriation of non-constitutionally-protected property, it is questionable whether this would be the case where it is a constitutionally-protected Aboriginal property right that is at stake. Given that the Honour of the Crown is operative in the relationship between governments and Aboriginal groups, it could even be conceivable that the necessary statutory authority would have to be specific to each proposed infringement of an Aboriginal property right. That is, a provision in a statute that purported to broadly authorize the infringement of the rights of Aboriginal title and Aboriginal dominion might be struck down as overly broad, so that it might be that each particular infringement of an Aboriginal property right would have to be separately authorized.

In addition, since cases such as *Burmah Oil*, [71] *Belfast Corpn* [72] and *Manitoba Fisheries*[73] attest to the principle that compensation is required for the taking of property that is <u>not</u> subject to constitutional protection, it would seem that compensation for the infringement of a constitutionally-protected Aboriginal property right should certainly also be required, rather than merely being a possibility. This has, of course, already been observed by the Supreme Court of Canada in *Delgamukw*.[74] While valuing Aboriginal title might be relatively straightforward, it might be noted that valuing a novel property right such as Aboriginal dominion would be likely to be more difficult.

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[69] (n 64).
[70] (n 66).
[71] *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 (HL).
[72] *Belfast Corporation v OD Cars Ltd* [1960] AC 490, 523 (HL(NL)).
[73] *Manitoba Fisheries Ltd v The Queen* [1979] 1 SCR 101, 88 DLR (3d) 462, 467.
[74] *Delgamuukw* (n 31) [169].

The preceding discussion of how the Crown could override Aboriginal groups' exercise of their right of Aboriginal dominion should not be understood as suggesting that the Crown should pursue that option. At the most self-interested level, governments should realize that interfering with the property rights of any of their citizens can result in significant political costs, and that this may particularly be the case when the rights in question belong to groups that already have long histories of unfair treatment by governments. On a more principled level, if governments find that Aboriginal groups are so unconvinced of the economic benefits of proposed economic developments that a government override of their right of Aboriginal dominion is the only way for those developments to proceed, then that should certainly raise questions about the actual value of the developments. And on a pragmatic level, it seems very likely that allowing Aboriginal groups to freely exercise their rights of Aboriginal dominion will result in greater and more equitably-distributed economic benefits than would otherwise be the case, as will be discussed in the Chapter VIII of this thesis.

Chapter VI: Aboriginal Dominion and Sovereignty

As described in the last chapter, Aboriginal dominion is an Aboriginal right by which those Aboriginal groups that possess it would be able to prevent resource use and extraction activities within the whole of their traditional territories. Although this ability to say "no" to resource use and extraction has been proposed to exist as an appurtenance of an Aboriginal land right, it may be that some who contemplate it might consider that it seems not so much to be in the nature of a property right at all but rather to be an exercise of the sort of sovereign power that in modern times usually resides in the nation-state. That is, saying what can and cannot be done within a specified geographic area may seem more like an attribute of governing than it does like an exercise of the rights of a property owner. While it will be argued here that this is not the case - and indeed some would argue that it cannot be the case - the distinction between what might be referred to in legal shorthand as *dominium* and *imperium*[1] may admittedly be subtle in the case of Aboriginal rights and not one that either the courts or academic commentators have had to consider with any degree of rigour. Furthermore, any shortcomings in the analysis of the nature of Aboriginal rights in this regard may be compounded by the fact that some Aboriginal rights might not be in the nature of either a property right or a sovereign right, but would instead appear to be a sort of minority right that would be similar in some respects to those civil rights that protect citizens from the exercise of state power.

This chapter will attempt to resolve any confusion about whether Aboriginal dominion is indeed a form of property right rather than an exercise of sovereign power, and in doing so will attempt to bring a greater degree of clarity to the exact nature of Aboriginal rights more generally than may currently exist. It will begin with a general review of the two concepts and of the conceptual underpinning of rights more generally. Since the preceding chapter focussed on establishing the existence of

[1] Admittedly, these terms might not be an exact fit if applied directly to Aboriginal property rights in Canada, in that *dominium* sometimes refers to an exclusive right of property, whereas – as discussed in Chapter VII – there are other forms of property than outright ownership. Nevertheless, because the terms *dominium* and *imperium* are frequently used loosely in order to refer to property and sovereignty, respectively, they are so used here. See: *Jowitt's* (Daniel Greenberg (ed), *Jowitt's Dictionary of English Law*, vol 1 (3rd ed, Sweet & Maxwell 2010) 748, 1137; *Black's* (Bryan A. Garner (ed), *Black's Law Dictionary* (10th edn, Thomson Reuters 2014) 594, 871.

Aboriginal dominion as a type of Aboriginal property right, this chapter will pay more attention to the concept of sovereignty in order to, on the one hand, distinguish sovereignty and property as two concepts that are sometimes conflated when considering Aboriginal rights, and, on the other hand, to assert that even if Aboriginal dominion may seem to overlap into the exercise of sovereign power, that this would not be problematic for its proposed existence.

To put it another way, this thesis could generally be said to be based upon a belief that an effective way for Aboriginal people to protect their interest in their traditional lands is to work within what some might characterize as the "private law" framework that has been established by the courts and detailed in the preceding chapters. Some – and these are not mutually exclusive alternatives – might prefer a public law approach. One such public law approach would be that embodied in the international instruments that are discussed in Chapter IV, which could be characterized as attempting to prevail upon governments to "do the right thing" with regard to Aboriginal peoples. Another public law approach, however, might be to assert that Aboriginal groups should and do have the ability to themselves exercise governmental authority. This thesis does not in any way suggest that that approach is not a legitimate one, but this chapter could be interpreted as a note of caution about the comparative likelihood of success of that approach as opposed to the approach successfully pursued by Aboriginal groups in Canadian courts in recent years.

The nature of Aboriginal rights in Canada

While the Supreme Court of Canada recognized in *Guerin* that one type of Aboriginal right, Aboriginal title, is *sui generis*[2] – that is, unique – it has subsequently recognized that this is true of Aboriginal rights more generally.[3] To say that Aboriginal rights are *sui generis* may be commendable in one respect in that it avoids any need to pigeonhole Aboriginal rights and attempt to force them into the confines of non-Aboriginal

[2] *Guerin v The Queen* [1984] 2 SCR 335 < http://www.canlii.org/en/ca/scc/doc/1984/1984canlii25/1984canlii25.html?autocompleteStr=guerin%20&autocompletePos=1 >.
[3] *R v Sappier; R v Gray* 2006 SCC 54 [21] < http://www.canlii.org/en/ca/scc/doc/2006/2006scc54/2006scc54.html?autocompleteStr=r.%20v.%20sappier&autocompletePos=1 >.

concepts or perspectives, instead allowing for consideration to be given to the Aboriginal perspective. Doing so may also, however, excuse a certain sloppiness in thinking and analysis. After all, if something is *sui generis*, it would be easy to excuse not analyzing it too deeply or attempting to locate it in the context of other, possibly similar concepts. This chapter will, however, at least attempt to scratch the surface of Aboriginal rights as legal constructs, and a critique of the notion that Aboriginal property rights are *sui generis* will be provided in Chapter VII.

There may be, admittedly, a certain risk in theorizing about the exact nature of Aboriginal rights at this point in time, since: "'It is a capital mistake to theorize before one has data. Insensibly one begins to twist facts to suit theories, instead of theories to suit facts."[4] The data that is missing in this instance is that which might come from the identification of a greater range of Aboriginal rights than have been found to exist at present. Although, as has been noted in a previous chapter, the categories of Aboriginal rights remain open, those rights that have actually been identified in the century and a half since Canada was founded as a nation are essentially limited to hunting and fishing rights and Aboriginal title, with the latter so far having only been recognized once in any real world location. Even acknowledging that it is only in the third of a century since the adoption of the *Constitution Act, 1982* that the search for Aboriginal rights has taken on a sense of urgency, this is still a very short list, and one from which it will be difficult to reliably generalize.

Perhaps ironically, given that it had not even been found to exist in any identified location until recently, Aboriginal title is the Aboriginal right with the clearest conceptual underpinnings. It must surely be a property right[5], one that derives from the pre-contact presence of Aboriginal peoples in what is now Canada, and that entitles those Aboriginal groups that possess it to the exclusive occupation and use of land.

While the nature of Aboriginal title may be clear, is the same true of hunting and fishing rights and similar resource harvesting rights? Clearly these rights exist, but what sort of right is a fishing right, for example? One might presume – and at one time

[4] Arthur Conan Doyle, 'A Scandal in Bohemia' (1891).
[5] See the discussion of property rights in Chapter VII.

many did – that a right to fish in a particular area would be a subsidiary right arising from having Aboriginal title to that area. As discussed in an earlier chapter, this notion of Aboriginal title as a "bundle" of rights, however, has now been discarded.[6] Plus, it is clear that Aboriginal fishing rights can be established in areas where Aboriginal title has not been established.

Another way of thinking about Aboriginal hunting and fishing rights that might on first consideration appear to hold promise is that they could be in the nature of a *profit à prendre,* and indeed the British Columbia Court of Appeal in *British Columbia (Attorney General) v Andrew and Mount Currie Band* once mused that such might be the case.[7] That is, the Common Law recognizes that one person can have a right to take something from the property of another – a right to take the produce of the land – and Aboriginal rights to hunt or fish over land to which a group has not established Aboriginal title might seem at least superficially similar. Past attempts to argue that Aboriginal hunting and fishing rights exist on the basis of a claim to a *profit à prendre*, however, have been unsuccessful. In *James Smith Indian Band v Saskatchewan*,[8] for example, such a claim was rejected on several grounds, among them that no *profit à prendre* could arise by custom and usage at Common Law, that a provincial statute prevented a *profit à prendre* from arising by prescription, and that the overlapping fishing rights of different Aboriginal groups would create practical difficulties with the land registration system if the claim were accepted.

If not a *profit à prendre*, perhaps hunting and fishing rights might be analogous to some other Common Law right, such as a positive easement or servitude to allow the use of the land of another – usually the Crown – for the carrying out of a positive activity, ie hunting or fishing? While the relationship between Aboriginal harvesting rights and

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[6] *R v Adams* [1996] 2 SCR 821 < http://www.canlii.org/en/ca/scc/doc/1996/1996canlii169/1996canlii169.html?autocompleteStr=r.%20v.%20adams&autocompletePos=2 >; *R. v Côté* [1996] 3 SCR 101 < http://www.canlii.org/en/ca/scc/doc/1996/1996canlii170/1996canlii170.html?autocompleteStr=r.%20v.%20cote&autocompletePos=4 >.

[7] [1991] 4 CNLR 3 < http://www.canlii.org/en/bc/bcca/doc/1991/1991canlii5712/1991canlii5712.html > . Note that while the Nova Scotia Court of Appeal reasoned that Aboriginal title itself was in the nature of a *profit à prendre* (*R v Isaac* (1975) 13 NSR (2d) 460 (NSCA)), this would be inconsistent with subsequent binding jurisprudence.

[8] *James Smith Indian Band v Saskatchewan (Master of Titles)* [1994) 2 CNLR 72; app dis [1995] 3 CNLR 100 (Sask CA).

positive easements or other property rights has received almost no judicial attention[9] and cannot be considered in depth in this thesis, the relationship between Aboriginal rights and property law more generally is discussed in Chapter VII.

An alternative way of thinking about an Aboriginal fishing right could be that it is a type of civil right that protects against government oppression, albeit one that is only possessed by a defined group rather than by all citizens. That is, the need to justify one's fishing activities as being protected by a legal or constitutional right normally only arises as a result of attempts by the state to interfere with those activities, just as, for example, the need to justify one's right to be free from unreasonable search will normally only arise as a result of attempts by agents of the state to conduct such a search. The fact that the right is only possessed by particular groups rather than the entire population would not be an obstacle to it being viewed in this way; certain education rights protected under s 93 of the *Constitution Act, 1867* [10], for example, are only available to particular religious minorities. The idea that an Aboriginal right only has meaningful existence as a result of oppressive government action would probably not be well-received by Aboriginal groups, however, in that they are likely to believe that their rights to engage in activities such as fishing predate the arrival of Europeans and do not depend upon the assertion of Crown sovereignty for their existence. Also, saying that a right only exists when it is threatened would invoke unfortunate comparisons with the proverbial tree that make no sound when it falls if there is no one to hear it. Nevertheless, in practical terms it would be difficult to deny that Aboriginal fishing rights operate in ways that are – aside from the limited number of people who can claim their protection – virtually indistinguishable from the operation of constitutionally protected civil liberties.

Yet another way of conceptualizing an Aboriginal fishing right could be as a vestigial aspect of a sovereignty that the Aboriginal group holding it once enjoyed. In the United States, this view would be considered unremarkable.[11] In Canada, on the other

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[9] Note some unhelpful, passing discussion in *Burns Lake Indian Band v Fountain* 1996 CanLII 1247 (BCSC) [15-19] and in *R v Peeace* 1998 CanLII 13350 (SK PC) [61, 71].
[10] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91(24), reprinted in RSC 1985, App II, No 5.
[11] See, for example, Harry Bader, 'Who Has the Legal Right to Fish? Constitutional and Common Law in Alaska Fisheries Management' (University of Alaska Sea Grant College Program 1998) 9 < http://seagrant.uaf.edu/map/fishbiz/pubs/mab-49.pdf > accessed 14 January 2014. See also John H McClanahan, 'Casenotes – Indian Law – Tribal Sovereignty – Congress, Please Help Again – The

hand, the courts have until recently not even referred to the possible existence of Aboriginal sovereignty. Since understanding whether Aboriginal groups in Canada have previously been or currently are in any respect sovereign will be helpful in considering whether to take seriously any potential objections to Aboriginal dominion as perhaps involving the exercise of sovereign powers rather than property rights, it will be useful to consider the different legal histories of the concept of sovereignty in Canadian law and United States law. First, however, the broader concept of sovereignty will be examined.

The concept of sovereignty

While "sovereignty" is a term that the Supreme Court of Canada has unabashedly used with respect to the Crown in its judgments respecting Aboriginal rights, academics and other commentators perceive subtleties and uncertainties which courts may prefer to overlook. Bartelson, for example, initially appears to throw up his hands when it comes to defining the term:

> What is sovereignty? If there are questions political science ought to be able to answer, this is certainly one. Yet modern political science often testifies to its own inability when it tries to come to terms with the concept and reality of sovereignty; it is as if we cannot do to our contemporaneity what Bodin, Hobbes and Rousseau did to theirs. [12]

While the question might not seem to be such a difficult one, perusal of the literature certainly does reveal the variety of ways in which different writers employ the term and the way in which they adapt it to their own beliefs, goals or circumstances. To an Alaskan native rights advocate, sovereignty "…basically is the right of a people to be self-governing" and to be free from interference by the state government.[13] Writing from the perspective of an Australian Aboriginal academic, Watson considered sovereignty to differ depending upon whether it is Aboriginal sovereignty or that of the white, patriarchal state, with the former embracing diversity and focusing on inclusivity

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Cheyenne River Sioux Tribe Cannot Regulate Hunting and Fishing Because the Non-Indian Interest Controls. *South Dakota v. Bourland*, 113 S. Ct. 2309 (1993).' (1994) 29 Land & Water L Rev 505.

[12] Jens Bartelson, *A Genalogy of Sovereignty* (CUP 1995) 1, and see McClanahan (n 10), 509.

[13] Will Mayo, President of the Tanana Chiefs Conference, quoted in Barry Scott Zellen, *Breaking the Ice: From Land Claims to Tribal Sovereignty in the Arctic* (Lexington Books 2008) 97.

rather than exclusivity.[14] Laski[15] chose to consider questions of state sovereignty as illuminated by ecclesiastical history, including that of the Church of Scotland in the nineteenth century.[16] Hollis, on the eve of British entry into the European Community wrote of the Parliamentary sovereignty under which British citizens had lived since 1688.[17] Krasner makes a useful beginning by identifying four ways in which the term sovereignty has been used – international legal sovereignty, Westphalian sovereignty, domestic sovereignty, and interdependence sovereignty – before arguing that in the international system, strong states can pick and choose among the differing and contradictory rules that purport to define sovereignty in order to achieve their preferred results.[18] Hinsley warns that the history of the term is "full of pitfalls"[19], while Fowler and Bunck caution that the precise meaning of the term will often have to be derived solely from the context of the remarks in which it occurs.[20]

Since this thesis is being written in the discipline of law rather than philosophy or political science, the subtleties and distinctions raised by these authors may not be of significant, practical concern. And indeed, it can be seen that in at least one case – one not involving Aboriginal law – when the Supreme Court of Canada did make an effort to define sovereignty, it decided upon a definition that recognized both the international and domestic aspects of the concept, but did not allow itself to become bogged down in esoteric debate. *R v Hape*[21] was a criminal case involving searches in the Turks and Caicos that would have been excluded on *Charter* grounds had they taken place in Canada. The Court stated that:

> …"Sovereignty" refers to the various powers, rights and duties that accompany statehood under international law. Jurisdiction - the power to

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[14] Irene Watson, 'Settled and unsettled Spaces: Are we free to roam?' in Eileen Moreton-Robinson (ed), *Sovereign Subjects* (Allen & Unwin 2007) 20.
[15] Harold J Laski, *Studies in the Problem of Sovereignty* (Yale University Press 1917).
[16] ibid 27-68.
[17] Christopher Hollis, *Parliament and its Sovereignty* (Hollis & Carter 1973) vii, 176.
[18] Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press 1999) 3-4. Krasner's definitions might be paraphrased as follows: international sovereignty, practices associated with mutual recognition between states; Westphalian sovereignty, the exclusion of external actors from state structures; domestic sovereignty, the formal organization of political authority by which power is exercised within a state; and interdependence sovereignty, the ability of authorities to regulate the flow of goods, ideas and other commodities across state borders.
[19] FH Hinsley, *Sovereignty* (2nd edn, CUP 1986) 22.
[20] Michael Ross Fowler and Julie Marie Bunck, *Law, Power, and the Sovereign State: the Evolution and Application of the Concept of Sovereignty* (Pennsylvania State University Press 1995) 5
[21] 2007 SCC 26 < http://www.canlii.org/en/ca/scc/doc/2007/2007scc26/2007scc26.html >.

> exercise authority over persons, conduct and events - is one aspect of state sovereignty. Although the two are not coterminous, jurisdiction may be seen as the quintessential feature of sovereignty. Other powers and rights that fall under the umbrella of sovereignty include the power to use and dispose of the state's territory, the right to state immunity from the jurisdiction of foreign courts and the right to diplomatic immunity. In his individual opinion in *Customs Régime between Germany and Austria* (1931), P.C.I.J. Ser. A/B, No. 41, at p. 57, Judge Anzilotti defined sovereignty as follows: "Independence ... is really no more than the normal condition of States according to international law; it may also be described as *sovereignty* (*suprema potestas*), or *external sovereignty*, by which is meant that the State has over it no other authority than that of international law." (Emphasis in original)
>
> Sovereignty also has an internal dimension, which can be defined as "the power of each state freely and autonomously to determine its tasks, to organize itself and to exercise within its territory a 'monopoly of legitimate physical coercion'"….[22]

As discussed above, the Court's recognition here of both the international and domestic aspects of sovereignty is in line with academic thought upon the topic. Also significant with regard to the current inquiry is that for both international and domestic purposes, the Court ties sovereignty to statehood. That is, with regard to the international dimension of sovereignty, the Court says that "'Sovereignty' refers to the various powers, rights and duties that accompany statehood under international law", while with regard to the domestic dimension of sovereignty, the Court says that it "can be defined as "the power of each state" to do certain things [underlining added].[23] While this idea that sovereignty can only be possessed by states is at odds with the beliefs of some Aboriginal activists and academics that pre-colonial Aboriginal peoples were sovereign and may retain some or all of their sovereignty, it does have academic support. Hinsley, for example, contrasts those communities that accept the rule of a

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[22] ibid [41-43].

[23] For support of this view in international law, see *Island of Palmas Case (United States v Netherlands)* 2 UNRIAA 831, 858: "…native princes or chiefs of peoples not recognized as members of the community of nations…." See also *Cayuga Indians (Great Britain) v United States*, Reports of International Arbitral Awards, Vol VI, 173-190 22 January 1926: "Such a tribe is not a legal unit of international law. The American Indians have never been so regarded, 1 Hyde, International Law, para. 10. From the time of the discovery of America the Indian tribes have been treated as under the exclusive protection of the power which by discovery or conquest or cession held the land which they occupied. Wheaton, International Law, 838; 3 Kent, Commentaries, 386; Breaux *v.* Jones, 4 La. Ann. 141. They have been said to be "domestic, dependent nations" (Marshall, C. J., in *Cherokee Nation v. Georgia*, 5 Pet. 1, 17), or "States in a certain domestic sense and for certain municipal purposes" (Clifford, J., in *Holden v. Joy*, 17 Wall. 211, 142). The power which had sovereignty over the land has always been held the sole judge of its relations with the tribes within its domain."

state with those that do not. He argues that in a stateless society, authority relies on psychological moral coercion rather than force, and that a state imposes itself on a society as the instrument of a power that is alien to the natural ways of undeveloped societies.[24] The idea that there is a final and absolute political authority in the community would, he states, be simply irrelevant in a stateless society.[25] Since such final and absolute political authority is the essence of sovereignty, Hinsley reasons that sovereignty can only be possessed by states:

> …the rise of state forms is a necessary condition of the notion of sovereignty, of the idea that there is a final and absolute political authority in the community. In a stateless society this idea is irrelevant.[26]
>
> …It is in this sense that, while the emergence of the state as a form of rule is a necessary condition of the concept of sovereignty, it is not a sufficient condition of it. A community and its government must be sufficiently distinct, as they are only when the government is in the form of the state, before the concept of sovereignty is relevant.[27]
> …
> The concept of sovereignty will not be found in societies in which there is no state.[28]

Hinsley was not writing specifically in the context of North American Aboriginal peoples[29], and neither was the Supreme Court of Canada in *Hape*. The proposition in both of these sources that it is only states that can be sovereign is, however, useful if one seeks a morally defensible answer to the question of how European states acquired sovereignty in lands that were already occupied by Aboriginal nations. That is, given that Aboriginal groups and academics both regard the absence of institutions wielding coercive power as being one of the fundamental aspects of Aboriginal societies[30], it may be that one can acknowledge that Aboriginal territories were occupied rather than *terra nullius* while still acknowledging the legitimacy of Crown sovereignty if one can

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[24] Hinsley (n 19) 16. See also WH McConnell, 'The *Calder* Case in Historical Perspective' (1974) 38 Sask L Rev 88, 120.
[25] ibid 17.
[26] ibid.
[27] ibid 21.
[28] ibid 22.
[29] Hinsley does, however, include North American Aboriginal groups in his many examples. He proposes, for example, that the Cherokee transformed themselves from an aggregation of independent villages into a tribal state between 1730 and 1770 in response to pressures from neighbouring South Carolina: ibid 14.
[30] Mark D Walters, 'The Morality of Aboriginal Law' (2006) 31 Queen's LJ 470, 482. See also Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (OUP 1999), 53-60.

accept that the original occupiers simply did not possess a state form capable of exercising sovereignty. As discussed below, this would at least be analytically useful to anyone seeking some logical basis for the presumption by Canadian courts of the legitimacy of Crown sovereignty and – with the exception of passing references in *Haida* [31] and *Taku* [32] – the corresponding presumption that Aboriginal groups lacked sovereignty.

Sovereignty and Aboriginal peoples in Canadian law

Until very recently, Canadian case law as laid down by the Supreme Court of Canada[33] has not provided any reason to doubt that at least following the assertion of Crown sovereignty – the effectiveness of which cannot itself be challenged or interfered with by the courts [34]- sovereignty has resided exclusively in the Crown. This point was clearly stated in *R. v Sparrow*:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown….

In case after case[35], the Supreme Court of Canada considered questions of how to reconcile pre-existing Aboriginal occupation or rights with Crown sovereignty, but the

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[31] *Haida Nation v British Columbia* (Minister of Forests) [2004] 3 SCR 511, 2004 SCC 73 < http://www.canlii.org/en/ca/scc/doc/2004/2004scc73/2004scc73.html?autocompleteStr=haida&autocompletePos=1 >.

[32] *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* [2004] 3 SCR 550, 2004 SCC 74 < http://www.canlii.org/en/ca/scc/doc/2004/2004scc74/2004scc74.html?autocompleteStr=taku&autocompletePos=1 >.

[33] For an early case by a lower court that suggested a different direction, see *Connolly v Woolrich* (1867) 17 RJRQ 75, 84-87 (Que SC) in which Monk J said that the principles laid down in *Worcester* "admit of no doubt…the Indian political and territorial right, laws and usages remained in full force…."

[34] *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1 [31] < http://www.austlii.edu.au/au/cases/cth/HCA/1992/23.html >.

[35] See, for example: *R v Van der Peet* [1996] 2 SCR 507 [31, 36, 42, 50] < http://www.canlii.org/en/ca/scc/doc/1996/1996canlii216/1996canlii216.html?autocompleteStr=van%20der%20peet&autocompletePos=1 >; *Delgamuukw v British Columbia* [1997] 3 SCR 1010 [81-82] < http://www.canlii.org/en/ca/scc/doc/1997/1997canlii302/1997canlii302.html?autocompleteStr=delgamuu&autocompletePos=1 >; *Mitchell v MNR* 2001 SCC 33 [12] <

existence of that Crown sovereignty was taken for granted, and any notion of Aboriginal sovereignty was almost completely absent.[36] This is despite the fact that the Supreme Court of Canada did more than once[37] quote with approval a passage from *Johnson v M'Intosh* [38] that referred to Aboriginal sovereignty, namely that Aboriginal peoples' "…rights to complete sovereignty, as independent nations, were necessarily diminished…." In *Calder*, after quoting the passage, Hall J repeated the reference to the diminishment of Aboriginal peoples' own rights to sovereignty in his own words, but did not go so far as to explicitly endorse the notion of a pre-existing Aboriginal sovereignty. And although in *Delgamuukw*, the case at trial had involved what amounted to a claim of Aboriginal sovereignty, by the time the case reached the Supreme Court of Canada, that claim had evolved into one for self-government, and the Court held that it was impossible for it to determine whether that claim had been made out.[39] In *Mitchell*, there was discussion of possible shared sovereignty,[40] and even an analogy to a birch bark canoe and a ship travelling side-by-side in a river, each "sovereign of its own destiny"[41], but no explicit acknowledgment by the Court of Aboriginal sovereignty; at best, Binnie J for the minority stated that he would neither foreclose nor endorse the possibility of the existence of a right to internal Aboriginal self-government, a right that in the United States would be considered to be an expression of residual Aboriginal sovereignty.[42]

It was surprising, therefore, when the Court made references to Aboriginal sovereignty in *Haida* and *Taku* in such a casual fashion that readers could have presumed that this

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http://www.canlii.org/en/ca/scc/doc/2001/2001scc33/2001scc33.html?autocompleteStr=mitchell%20v%20mnr&autocompletePos=1 >.

[36] That the Court has viewed the status of Aboriginal groups as being different from sovereign states in this regard can be seen in both *Simon v The Queen* [1985] 2 SCR 387 < https://www.canlii.org/en/ca/scc/doc/1985/1985canlii11/1985canlii11.html > and *R v Sioui* [1990] 1 SCR 1025 < https://www.canlii.org/en/ca/scc/doc/1990/1990canlii103/1990canlii103.html?autocompleteStr=sioui&autocompletePos=1 > .

[37] See, for example: *Calder v Attorney General of British Columbia* [1973] SCR 313, 381 < http://www.canlii.org/en/ca/scc/doc/1973/1973canlii4/1973canlii4.html?autocompleteStr=calder&autocompletePos=1 >; *Guerin v the Queen* [1984] 2 SCR 335, 378 < http://www.canlii.org/en/ca/scc/doc/1984/1984canlii25/1984canlii25.html?autocompleteStr=guerin&autocompletePos=1 >; *Van der Peet* (n 33) [36].

[38] 21 US (8 Wheat) 543 (1823).

[39] *Delgamuukw* (n 35) [16, 170-171].

[40] *Mitchell* (n 35) [130, 134, 167].

[41] ibid [127].

[42] ibid [165].

was a concept so familiar as to require no explication or explanation. In *Haida*, McLachlin CJ wrote for the Court:

> Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims….Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s.35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and "[i]t is always assumed that the Crown intends to fulfil its promises" ….. This promise is realized and sovereignty claims reconciled through the process of honourable negotiation. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.[43] [underlining added]

It can be seen that in addition to referring to Aboriginal sovereignty, the passage refers to "assumed" Crown sovereignty. In the companion decision in *Taku*, the Court refers to Crown sovereignty even more disparagingly, calling it "*de facto*" – in contrast to *de jure* – Crown sovereignty:

> As discussed in *Haida*, the process of consultation may lead to a duty to accommodate Aboriginal concerns by adapting decisions or policies in response. The purpose of s. 35(1) of the *Constitution Act, 1982* is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty.[44]

This wording in *Taku* reflects a reference in *Haida* to the Crown's "*de facto* control of land and resources" that were formerly in the control of Aboriginal people.[45]

How great a jurisprudential shift were these passages intended to signal? On the one hand, they are isolated references that are at odds with the weight of existing jurisprudence. In the subsequent decade, the Court has not chosen to expand upon them, other than by quoting with approval Slattery in *Manitoba Métis Federation* [46] to the effect that:

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[43] *Haida* (n 31) [20].
[44] *Taku* (n 32) [42].
[45] *Haida* (n 31) [32].
[46] *Manitoba Métis Federation v Canada (Attorney General)* 2013 SCC 14 < http://www.canlii.org/en/ca/scc/doc/2013/2013scc14/2013scc14.html?searchUrlHash=AAAAAQALMjAxMyBzY2MgMTQAAAAAAQ >.

> . . . when the Crown claimed sovereignty over Canadian territories and ultimately gained factual control over them, it did so in the face of pre-existing Aboriginal sovereignty and territorial rights.[47] [underlining added]

On the other hand, it can safely be presumed that the Court does not choose its words carelessly and that it was not by accident that it dropped the phrase "Aboriginal sovereignty" into its reasons. Accepting this, some writers have attached very great significance to these passages. Walters refers to the passage quoted above from *Haida* as "one of the most important Canadian judicial statements on Aboriginal rights since 1982"[48] and argues that the recognition of Aboriginal sovereignty it represents is essential for genuine reconciliation.[49] Hoehn bases his entire thesis that the old "discovery" paradigm will be replaced by a new "sovereignty" paradigm on these passages.[50] Slattery also sees the decision as marking the emergence of a new constitutional paradigm governing Aboriginal rights, one that views s 35 as the basis of a "generative" constitutional order requiring the Crown to achieve a just settlement of Aboriginal claims through negotiation and treaty.[51]

With respect, and while acknowledging that these authors may ultimately be proven correct in their assessments, the wording in *Haida* and *Taku* currently constitutes too slender a reed to support the weight that they place upon it. It is, in particular, too early to know whether when the Court refers to the "sovereignty" of pre-contact Aboriginal groups, it intends that term to be understood in the same way as when it refers to the sovereignty of the Crown. If it does, then it would be difficult to know why Aboriginal groups that were sovereign before the Crown purported to assert its own sovereignty and that never entered into treaties would not be free to ignore the Crown and to disregard all attempts by the Crown to exercise its own authority within their territories. That is, if Aboriginal groups were sovereign before the assertion of Crown sovereignty, why would they not have remained fully sovereign, with the effect that since there

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[47] Brian Slattery, 'Aboriginal Rights and the Honour of the Crown' (2005) 29 SCLR (2d) 433, 436, quoted in *Manitoba Métis Federation*, ibid [67].
[48] Walters (n 30) 513.
[49] ibid 514.
[50] Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (University of Saskatchewan 2012).
[51] Brian Slattery, 'The Metamorphosis of Aboriginal Title' (2006) 85 Can Bar Rev 255, 285-286.

cannot be two fully sovereign entities in the same geographic area, Crown sovereignty would be a nullity? If the Crown's assertion of sovereignty is indeed merely *de facto* and not *de jure*, would the courts really participate in an ongoing, illegitimate exercise of naked power bereft of legal authority? No, it seems more likely that when the Court has referred to Aboriginal sovereignty, that it intended it to mean something less than or different from the sovereignty that nation-states exercise. For the moment, it might be suggested that Aboriginal sovereignty as envisioned by the Court must at least have amounted to what might loosely be termed being "in charge" within the boundaries of a group's traditional territory, regardless of whether a group exhibited all of the attributes associated with sovereignty in a nation-state. A more exact definition may be considered later, but for now the notion that Aboriginal groups could possess some form of Aboriginal sovereignty that it is possible to reconcile with Crown sovereignty will be sufficient. In order to consider an example that shows that this theoretical possibility can have real world application, it will now be useful to look at how Aboriginal sovereignty – at least in a narrow and defined sense of that term - continues to exist and function in the modern United States.

Aboriginal sovereignty in the United States of America

From the earliest beginnings of the United States, Aboriginal groups were seen as existing apart from either its national or state governments. Article 1, Section 8, Clause 3 of the United States Constitution, for example, states that "Congress shall have power…to regulate Commerce with foreign nations and among the several states, and with the Indian tribes…."[52] The judicial recognition in *Johnson v M'Intosh* [53] that Aboriginal groups had at one time possessed "…rights to complete sovereignty, as independent nations" has already been mentioned in this chapter, and that case was discussed at length in a previous chapter. While the case was important with regard to land rights, however, it was the other cases in the "Marshall trilogy" that clearly established the sovereign nature of Indian tribes within the United States.

[52] US Const art I § 8 cl. 3.
[53] *Johnson v M'Intosh* (n 38).

Cherokee Nation v Georgia [54] took place in the context of increased immigration to the United States in the early nineteenth century and the increasing pressure on governments to displace Aboriginal peoples from their lands in order to make those lands available for non-Aboriginal settlers. Ironically, the particular Aboriginal group involved – the Cherokee Nation – was one of the "Five Civilized Tribes", groups that had already taken major steps to transform their societies and accommodate them to the values of encroaching Euro-Americans. By the 1820s, a written syllabary of the Cherokee language had been adopted and was being taught in schools, quickly leading to high levels of literacy. An 1828 constitutional convention had resulted in a new governmental structure modeled upon that of the United States, with an elected chief, a bicameral council, a judicial system, and guarantees of rights entrenched in a written constitution. While it might be thought that these steps would have facilitated a smooth transition by the Cherokee into the mainstream of U.S. life, this was not the case. The discovery of gold on Cherokee lands in 1828 and the election of President Andrew Jackson in that same year on a platform that included moving the tribes westward presaged a conflict that eventually reached the United States Supreme Court. And while the Court established federal protection for Indian tribes against attempted infringements of their authority by the states, that did not prevent the eventual displacement of the Cherokees and their relocation via the "Trail of Tears".

The specific catalyst that drove the Cherokee to the courts was the passage by Georgia – followed by Alabama and Mississippi – of a series of laws intended to remove the Cherokee from their own lands. These laws provided for the redistribution of tribal lands to local counties, the voiding of native laws and customs, a prohibition against the testimony of natives against whites in court, and the confiscation of Indian property. As stated in Chief Justice Marshall's reasons for judgment, the Cherokee alleged that the laws "go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force."[55]

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[54] 30 US 1 (1831) < http://scholar.google.ca/scholar_case?case=6481524100903611909&hl=en&as_sdt=6&as_vis=1&oi=scholarr&sa=X&ei=kjEBU9HqGuW70AHL14DwBA&ved=0CCYQgAMoADAA >.
[55] ibid.

The argument made by the counsel for the Cherokee was that Georgia's laws could not apply to the Cherokee, since the Cherokee constituted a foreign nation. Chief Justice Marshall had no difficulty in recognizing that so much of the argument "as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful."[56] Where the majority of the Court had difficulty, however, was with the further question of whether the Cherokee constituted a foreign state. The majority of the Court held that they were not, and that instead Indian tribes should be termed "domestic dependent nations", with their relationship to the United States resembling that "of a ward to his guardian"[57]. Although the Cherokee might have taken some comfort from the dissenting minority decision of Justices Thompson and Story, who held that it was not possible to escape the conclusion that they were a sovereign state, the outcome was a loss for the Cherokee; based upon the finding that the Cherokee were not a foreign state, the majority of the court found that it did not have jurisdiction in the dispute, and denied the Cherokee's request for an injunction. At best, the case left open the future possibility of the Cherokee receiving federal protection against individual states in future disputes.

This was, in fact, what occurred in the third case in the "Marshall trilogy", *Worcester v Georgia.*[58] Missionaries Samuel Worcester and Elizur Butler deliberately violated the Georgia law that required all white people living on Cherokee lands to obtain a state license in order to do so. Accordingly, they were charged with the offence of 'residing within the limits of the Cherokee nation without a license,' and 'without having taken the oath to support and defend the constitution and laws of the state of Georgia', tried by a Georgia court and sentenced to four years of hard labour. They appealed to the US Supreme Court on the grounds that Georgia's laws did not apply on Cherokee lands. The substantive portion of the decision of Chief Justice Marshall began with a passage that established the underlying rationale for the recognition of Aboriginal sovereignty:

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other

[56] ibid.
[57] ibid.
[58] 31 US (6 Pet) 515 < http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=31&invol=515 >.

> and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre- existing rights of its ancient possessors. [59]

The continued existence of those pre-existing rights could be perceived, wrote Marshall, in the treaties entered into between the United States and the Cherokee, a close examination of which provided proof that "the United States considered the Cherokees as a nation".[60] Marshall further wrote that from the commencement of the existence of the United States, acts passed to regulate trade and intercourse with Indians treated them as nations, respected their rights and manifested a purpose to protect them, and that they considered Indian nations to be:

> …distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guarantied [sic] by the United States.[61]

This concept of Indian tribes having exclusive authority within their territorial boundaries was to be modified to some extent by subsequent case law, but has continued to demarcate the meaning of Aboriginal sovereignty in the United States. The most notable demonstration of this principle in the late nineteenth century was *Ex parte Crow Dog*.[62] Crow Dog and Spotted Tail were both leaders among the Lakota. When Crow Dog killed Spotted Tail, the crime was initially dealt with according to tribal custom by the tribal council, which required that he pay restitution to his victim's family. Subsequently, however, federal authorities removed Crow Dog from the reservation and prosecuted him for murder, for which he was found guilty and sentenced to hang. On appeal to the United States Supreme Court, Crow Dog acknowledged that he had broken Lakota law and was subject to punishment accordingly, but denied that the federal courts had any jurisdiction over Indian activities on the Lakota reservation. The Court agreed with Crow Dog's argument. More

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[59] ibid.
[60] ibid.
[61] ibid.
[62] 109 US 556.

specifically, it found that the specific wording of a statute that excluded from the jurisdiction of the United States crimes committed by one Indian against another in Indian country had not been impliedly repealed by the subsequent, more general wording of treaty or statute. The importance of the principle of Indian self-government was commented upon by Justice Miller for a unanimous Court:

> The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government by appropriate legislation thereafter to be framed and enacted necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life which it was the very purpose of all these arrangements to introduce and naturalize among them was the highest and best of all -- that of self-government, the regulation by themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs.[63]

Admittedly, it was only one year later in *United States v Kagama* that the Supreme Court held that despite the government's history of dealing with Indian tribes by treaty, that it was entitled to pass legislation governing them by virtue of its duty to "protect" them.[64] The far-reaching ambit of this decision could be perceived in 1903, when in *Lone Wolf v Hitchcock* the Court held that Congress' right to legislate with regard to Indian relations included the right to pass laws that violated treaties.[65] While these decisions had the effect of decreasing Aboriginal sovereignty vis-à-vis Congress, subsequent judicial decisions have further eroded Aboriginal sovereignty in other ways. *Oliphant v Suquamish Indian Tribe* [66] was of particular significance in this regard, in that it held that tribal courts had no inherent criminal jurisdiction to try and to punish non-Indians, and therefore could not assume such jurisdiction unless specifically authorized to do so by Congress. This decision clearly detracted from one of the basic principles of Aboriginal sovereignty in the United States, namely that unlike municipalities, which only have that authority that is specifically granted to them, Indian tribes have only lost that authority that is specifically withdrawn from them.[67]

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[63] ibid 568.
[64] 118 US 375 < http://supreme.justia.com/cases/federal/us/118/375/case.html >.
[65] 187 US 553 < http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=187&invol=553 >.
[66] 435 US 191 < http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=435&page=191 >.
[67] Sharon O'Brien, *American Indian Tribal Governments* (University of Oklahoma Press 1989) 200

Despite these cases that have whittled away at Aboriginal sovereignty in the United States, the basic principles established by the Marshall decisions have survived: that is, Aboriginal sovereignty survived the assertion of sovereignty by the British Crown and the later assumption of that sovereignty by the United States, and entitles Aboriginal groups to be self-governing within their territories.

Is the US model of Aboriginal sovereignty relevant to Canada?

To the extent that Aboriginal sovereignty in the United States can be described as an Aboriginal right to self-government within an Aboriginal group's territory, the recent case *Sga'nism Sim'augit (Chief Mountain) v Canada (Attorney General)*[68] offered the opportunity to determine whether such a right exists at law in Canada. The British Columbia Court of Appeal declined, however, to make such a determination:

> As will become clear, in my view, it is neither necessary nor desirable to decide in the context of this case whether or to what extent an inherent Aboriginal right to law-making and self-government exists in Canada or, more specifically, whether the right to self-government recognized by the Treaty is derived from an inherent Aboriginal right. In other words, it is unnecessary to opine on whether Williamson J. was correct to conclude that the distribution of legislative power in Canada was not exhaustively distributed by ss. 91 and 92 of the *Constitution Act, 1867,* or, if it was, whether an inherent right of law-making and self-government remains wholly or partially unextinguished.[69]

Surprisingly, the Court noted that it was common ground among all the parties – ie the Federal and Provincial Crowns, the House of Sga'nisim , and the Nisga'a Nation - that it was not necessary to determine whether any of the impugned treaty rights derive from an inherent Aboriginal right to self-government. What the preceding passage indicates, however, is that the question is an open one. That is, it is entirely possible that – just as in the United States – there survives an inherent Aboriginal sovereignty which gives Aboriginal groups the right to be self-governing within their respective territories. This possibility is, of course, consistent with the passages from *Haida* and

[68] 2013 BCCA 49 < http://www.courts.gov.bc.ca/jdb-txt/CA/13/00/2013BCCA0049.htm >.
[69] ibid [45].

Taku discussed above that also leave open the possibility of Aboriginal sovereignty in Canada.

That the existence or non-existence of an Aboriginal right to self-government has not been determined by the courts must be due at least in part to the existence of the Government of Canada's 1995 Inherent Right Policy.[70] This policy acknowledges, in fact, that the policy itself exists as an alternative to litigation, since the latter would be "lengthy, costly and would tend to foster conflict."[71] The policy recognizes the inherent right of self-government as an existing Aboriginal right under s 35 of the *Constitution Act, 1982,* and more specifically that Aboriginal groups possess that right "in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources."[72] While this wording suggests that the right of self-government[73] might be seen as being limited only to government of group members themselves, the policy does at least recognize the possibility of the exercise of Aboriginal jurisdiction or authority over non-members, albeit while requiring certain safeguards for the protection of those non-members[74] when self-government agreements are entered into.[75]

Two points should be noted about the possibility that Aboriginal sovereignty could continue to exist and be judicially recognized in Canada – at least where it had not been extinguished by treaty – by which Aboriginal groups would have a right of self-government within their territories, similar to the situation in the United States. First, an Aboriginal group's right to be "self-governing" does not necessarily equate to a right to govern only its own members. Admittedly, as noted above, in 1978 the United

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[70] Canada, Minister of Indian Affairs and Northern Development, 'Federal Policy Guide, Aboriginal Self-Government: the Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government' (Public Works and Government Services Canada, 1995) < http://landclaimscoalition.ca/pdf/Federal_Self-Government_Policy_Guide_1995.pdf >.
[71] ibid 3.
[72] ibid.
[73] See more generally Yale Belanger, ed, *Aboriginal Self-Government in Canada: Current Trends and Issues* (3rd edn Purich Publishing 2008)
[74] ibid 11.
[75] Of the 23 comprehensive claim agreements negotiated by the Government of Canada between 1975 and the time of writing, 16 include a self-government component. In addition, there are two stand-alone self-government agreements and one sectoral self-government agreement.

States Supreme Court in *Oliphant* held that Indian tribes could not apply their criminal laws to non-Indians in their territories, but even on that point the Court was split 6-2, with Chief Justice Burger and Justice Marshall issuing a strong and concise dissent.[76] There is no reason to presume that Canadian courts would hold that groups exercising a right to self-government within their territories as an aspect of their Aboriginal sovereignty could have no legal authority over non-Aboriginals within those territories.[77] Such a finding would be even less likely if it were civil rather than criminal authority that were being exercised, unlike in *Oliphant*. The second preliminary point to note is that if an Aboriginal group has a right to be self-governing within its territory as an aspect of its Aboriginal sovereignty, there is no reason to think that that territory would be limited to its reserves. Instead, it seems likely that for a group whose Aboriginal sovereignty had never been extinguished, that that sovereignty would continue to exist where it always had, namely throughout the entirety of the group's traditional territory. Since these traditional territories are in many cases very large and since there will in some provinces be no areas that are not part of some Aboriginal group's traditional territory, it can be seen that the reach of Aboriginal sovereignty could be considerable.

Conclusions regarding Aboriginal dominion and sovereignty

To return to the point of this inquiry into the nature of sovereignty and of Aboriginal sovereignty in particular, it had been suggested at the start of this chapter that the right to prohibit the use of natural resources, including land itself which has here been proposed to exist as a type of Aboriginal right – namely Aboriginal dominion – might

[76] *Oliphant* (n 66) [45]: "I agree with the court below that the 'power to preserve order on the reservation . . . is a sine qua non of the sovereignty that the Suquamish originally possessed.' … In the absence of affirmative withdrawal by treaty or statute, I am of the view that Indian tribes enjoy as a necessary aspect of their retained sovereignty the right to try and punish all persons who commit offenses against tribal law within the reservation. Accordingly, I dissent."

[77] With regard to the operation of Indigenous courts in Canada, see Karen Whonnock, 'Aboriginal Courts in Canada' (Scow Institute 2008) < http://www.scowinstitute.ca/library.html >, accessed 9 November 2016. See also Giuseppe Valiante, 'Akwesasne creates first court in Canada for and by Indigenous people' (CBC News, 2 October 2016) < http://www.cbc.ca/news/canada/montreal/akwesasne-indigenous-court-canada-1.3787969 >, accessed 9 November 2016. For a consideration of the largest tribal court system in the United States, see Raymond D Austin, *Navajo Courts and Navajo Common Law: A Tradition of Tribal Self-Governance* (University of Minnesota Press 2009).

possibly be seen by some as seeming more like an exercise of sovereign power than of a property right. Given that Canadian courts have afforded clear legal recognition to the continued existence of Aboriginal rights, including that particular property right named Aboriginal title, but that no other rights relevant to the exercise of this sort of veto have been recognized, it might have been further thought that if Aboriginal dominion were indeed an exercise of sovereignty rather than of property rights, that this would necessarily be fatal to its recognition. The preceding discussion of US and Canadian law would indicate, however, that this is not the case, and that even if Aboriginal dominion did represent an exercise of sovereign power that this would not preclude it being given effect by Canadian courts.

Given that, this might prompt the further question of why Aboriginal groups wishing to prevent proposed resource extraction projects or similar activities from taking place in their territories should not do so as an exercise of Aboriginal sovereignty rather than as an exercise of an Aboriginal property right. Or, to put it another way, why does this thesis propose that the law should recognize the ability of Aboriginal groups to say "no" to resource use as a property right rather than as an exercise of Aboriginal sovereignty? There are at least three points that could be raised in justification of this choice.

First, Canadian jurisprudence has taken a formulaic approach to the identification of Aboriginal rights by which it seems likely that Aboriginal sovereignty would be subsumed within the broader category of Aboriginal rights, rather than sovereignty constituting an overarching source of residual powers as in the United States. As discussed above, the formula for determining an Aboriginal right is based upon the identification of pre-Contact practices that were of central significance to Aboriginal groups' distinctive cultures. As argued in the preceding chapter, the ability of an Aboriginal group to establish the exclusive right of use to land and other natural resources within its traditional territory and to prevent others from using those resources within that territory would in most if not all cases have been fundamental to the fact that an Aboriginal group could exist at all as a distinct group. This should, by definition, result in the recognition of an Aboriginal right, one which in this case is concerned with real property, ie an Aboriginal property right. Even if an alternative case might be made for justifying Aboriginal dominion as existing as an incident of

Aboriginal sovereignty, this would not detract from its existence as a type of Aboriginal property right.

Second, Aboriginal rights are at least a known commodity, even if – as is suggested above and discussed in Chapter VII – the degree of analysis of their nature is somewhat lacking. Aboriginal sovereignty in Canada, on the other hand, so far consists of merely passing references by the courts and expressions of interest by academic commentators. Admittedly, it may eventually turn out to be the case that Aboriginal sovereignty becomes a more significant concept in Canada, and perhaps even one that is viewed as having an existence that differs from that of Aboriginal rights. This is far from a certainty, however, and for now, at least, it must be submitted that time and resources invested in investigating previously-unrecognized Aboriginal property rights is more likely to be productive than if it were instead directed to pursuing similar goals through the vehicle of Aboriginal sovereignty.

Third, to whatever extent Aboriginal sovereignty is perceived as existing in competition or in conflict with Crown sovereignty, it seems almost certain that Canadian courts would have to find that the former would be defeated by the latter. Since the courts derive their own authority from Crown sovereignty, they are hardly in a position to deny the legitimacy of Crown sovereignty, and it may be that this factor combined with the conceptual difficulties posed by notions of two sovereigns within one nation explains the fact that the term "Aboriginal sovereignty" had never even been used by Canadian courts until relatively recently. Even if its use by the courts does now signal a more sophisticated or nuanced approach to the distribution of power within the state,[78] it might still be advisable that in advocating for a new conceptual tool by which modern Aboriginal groups could affect control over their resources, that this not be presented as one which would put Crown and Aboriginal sovereignties in direct conflict. Instead, by arguing that Aboriginal dominion is a type of Aboriginal right similar in nature to recognized Aboriginal rights such as, in particular, Aboriginal title,

[78] As to the likelihood of such movement, consider Aleinikoff's assessment of the US situation: "…a constitutional law for the twenty-first century needs understandings of sovereignty and membership that are supple and flexible, open to new arrangements that complement the evolving nature of the modern state. Yet our constitutional law, at least as declared by the Supreme Court, is moving in the opposite direction, adopting wooden conceptions of sovereignty…." Thomas Alexander Aleinikoff, *Semblances of Sovereignty: the Constitution, the State, and American Citizenship* (Harvard University Press, 2002) 5.

Aboriginal dominion is thus contained within a framework by which it is already recognized that the Crown has a duty to accommodate Aboriginal interests, notwithstanding its sovereign authority.

Chapter VII: Aboriginal Dominion and Property Law

Chapter V of this thesis considered the formulaic approach taken by the Supreme Court of Canada to the identification of Aboriginal rights and applied this approach to demonstrate the existence of a previously-unrecognized right of Aboriginal dominion. If accepted by Canadian courts, this would be the second form of an Aboriginal interest in land[1] to be recognized, with Aboriginal title – the right to exclusive use and occupation of land - of course being the first. Having applied the judicially-created legal test, it might arguably be unnecessary to take the analysis and argument any further in this thesis. Failing to do so, however, would mean that the hypothesized right of Aboriginal dominion would share a weakness with Aboriginal title, namely that it would exist without any grounding in the rest of property law. That is, just as the Supreme Court of Canada has held that Aboriginal title is *sui generis*, so too would Aboriginal dominion be *sui generis*. This, it will be argued in this chapter, would be a mistake, in that it would continue to confine the law regarding Aboriginal peoples' property rights to a legal ghetto seemingly insulated from analysis and sharing no foundational principles with the property rights held by other peoples under other legal systems, such as the Common Law or Civil Law systems. A preferred approach will be the recognition that – like all peoples everywhere – Aboriginal people had and continue to have fundamental needs with respect to property, and that while this should certainly result in legal concepts that are tailored to their unique circumstances, the results should still be amenable to legal inquiry and examination. Further, such analysis may help to avoid an obvious anomaly, in that as soon as one recognizes the existence of two Aboriginal rights in real property, it becomes difficult to assert that they are both *sui generis*, since at the least it seems that – to analogize – they will have some shared DNA and be related to each other in some way. Should future investigation determine that other Aboriginal rights in real property exist – something which can only be considered in the most preliminary way at this time[2] – then of course

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[1] Previous chapters have quoted judicial decisions that refer to an Aboriginal "interest in land". The vagueness of this phrase is no doubt intended, since – as is argued in this chapter – the courts have shown a reluctance to go any further than necessary in setting out the legal characteristics of such an interest. That the Aboriginal interests – plural – in land are property rights will here essentially be taken as a given, with the real question to be answered being what sort of property rights they are.

[2] See also the brief discussion of Aboriginal hunting and fishing rights with regard to *profits à prendre* and positive easements in Chapter VI.

the likelihood that all such rights are interconnected rather than *sui generis* would be increased.

In particular, this chapter will attempt several things. It will suggest that the iterative, fragmented approach to the modern invention of Aboriginal law has resulted in certain flaws in the resulting jurisprudence, most notably with regard to the allegedly *sui generis* nature of Aboriginal rights. Second, it will show how the failure of the Supreme Court of Canada to explain the nature of Aboriginal title in terms of property law concepts that have elsewhere manifested in Common law and Civil law property law systems makes it impossible to state with confidence exactly what sort of rights accrue to those who hold Aboriginal title. Third, it will locate the proposed right of Aboriginal dominion within the universe of property law concepts, and will speculate about possible lines of future inquiry regarding other Aboriginal property rights. Fourth, it will consider one recognized characteristic of Aboriginal rights, including Aboriginal property rights, namely the collective nature of the rights-holding bodies, and will consider why a concept familiar in civil law systems,[3] the "law of persons",[4] should obtain different results for most Aboriginal peoples than it does for other peoples in other parts of the world.

The claimed *sui generis* nature of Aboriginal property rights

It will be argued below that not only are Aboriginal rights not *sui generis*, but that the Supreme Court of Canada's insistence that they are is half-hearted and unconvincing.

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[3] Although the concept is best known to Civil Law practitioners, the writings of Gaius on the law of persons has certainly influenced all Western legal systems in the past two millennia: William M Gordon and OF Robinson (trs), *The Institutes of Gaius* (Cornell University Press 1988). While there is little explicit acknowledgement of this in English-language Canadian jurisprudence, the subject matter of the law of persons is nevertheless a matter for judicial consideration. See, for example, *Canada (Attorney-General) v Cormier* (1984) 53 NBR (2d) 324; 7 DLR (4th) 565 < http://www.canlii.org/en/nb/nbqb/doc/1984/1984canlii3046/1984canlii3046.html?searchUrlHash=AAAAAQATInJvbWFuIGxhdyIgcGVyc29ucwAAAAAB&resultIndex=5 >. See also *Edwards v Attorney General for Canada* [1930] AC 124 (PC).

[4] "The Roman law of persons is defined as the body of rules concerned with the legal position of the human person (persona) comprising their rights, capacities and duties." George Mousorakis, *Fundamentals of Roman Private Law* (2012 Springer Berlin Heidelberg) 85.

To anyone familiar with Canadian jurisprudence, however, the suggestion that Aboriginal right need not be *sui generis* may seem to be simply and incontrovertibly wrong. After all, the Supreme Court of Canada could hardly have been more definitive in its insistence that Aboriginal rights constitute their own unique class,[5] as, for example, in the following passage by Lamer CJ in *St Mary's Indian Band v Cranbrook (City)*:

> I want to make it clear from the outset that native land rights are *sui generis*, and that nothing in this decision should be construed as in any way altering that special status. As this Court held in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, and *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, native land rights are in a category of their own, and as such, traditional real property rules do not aid the Court in resolving this case.[6]

Indeed, not only has the Court insisted that Aboriginal land rights are *sui generis*, it has failed to ever explicitly acknowledge that such rights – even including Aboriginal title – are a form of property at all. Despite its recent pronouncements, in fact, it seems that the Court has deliberately refrained from saying any more than it has to about the nature of Aboriginal title. This would certainly be consistent with what La Forest J (quoting Dickson J) for the concurring minority said in *Delgamuukw*:

> First, this *sui generis* interest in the land is personal in that it is generally inalienable except to the Crown. Second, in dealing with this interest, the Crown is subject to a fiduciary obligation to treat aboriginal peoples fairly. Dickson J. went on to conclude, at p. 382, that "[a]ny description of Indian title which goes beyond these two features is both unnecessary and potentially misleading". I share his views and am therefore reluctant to define more precisely the "right [of aboriginal peoples] to continue to live on their lands as their forefathers had lived"…. [underlining added] [7]

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[5] Though note McKay's view that despite what it claims, the Court really applies a Common Law test rather than a *sui generis* one: William R McKay, '*Marshall* Part 3: Are Aboriginal Rights Really *Sui Generis*' (2005) 20 Windsor Rev Legal & Soc Issues 81. For other criticisms of the *sui generis* approach, see Michael Ilg, 'Culture and Competitive Resource Regulation: A Liberal Economic Alternative to *Sui Generis* Aboriginal Rights' (2012) 62 U Toronto LJ 403, 409.

[6] [1997] 2 SCR 657 [14] < http://www.canlii.org/en/ca/scc/doc/1997/1997canlii364/1997canlii364.html >.

[7] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 [190] < http://www.canlii.org/en/ca/scc/doc/1997/1997canlii302/1997canlii302.html >.

While the Court may never have made an explicit statement that Aboriginal title is a form of property right, it does at least seem to have resiled from the earlier finding – explicitly stated by the Privy Council in *St. Catherine's Milling* in a ruling that was relied upon by many judges in subsequent cases – that Aboriginal title is a "personal and usufructurary right".[8] Further, the Court has more than once referred to Aboriginal title as a "proprietary interest"[9] and *Black's* defines a proprietary interest as "a property right; specif., the interest held by a property owner together with all appurtenant rights…."[10] Certainly, the characterization of Aboriginal title as the "right to exclusive use and occupation" of land [11] is reminiscent of Felix Cohen's definition that property is that to which can be attached the label "To the world: Keep off X unless you have my permission, which I may grant or withhold." [12] Exclusivity of a right – a known characteristic of Aboriginal title – is, of course, a feature that points to it being a property right. To quote from Lord Chancellor Halsbury in the Scottish appeal *Corporation of Glasgow v McEwan* in his criticism of the opinion given in the Court of Session and, in particular, the views expressed by the Lord President:[13]

> I cannot help thinking that proprietorship, if you are to attempt to describe it, must necessarily include the right of possession, the right of user, not limited in point of time, and not in itself limited in point of use. I will deal in one moment with what is suggested to be the restriction upon the use; but, speaking generally, I should say that a person who is entitled to exclude everybody else, and who is himself entitled to possess and enjoy a thing, must be, in any ordinary sense of the term, the proprietor. I should have regarded the hypothesis put by the Lord President as an outrage upon common sense, to suppose that the proprietor can be a person who has no right to the possession, who cannot use the thing, and that the person who is

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[8] (1889) 14 App Cas 46 < http://www.bailii.org/uk/cases/UKPC/1888/1888_70.html >.
[9] See eg *R v Van der Peet* [1996] 2 SCR 507 [115, 119] < http://www.canlii.org/en/ca/scc/doc/1996/1996canlii216/1996canlii216.html?autocompleteStr=van%20der%20peet&autocompletePos=1 >; *R v Marshall; R v Bernard* [2005] 2 SCR 220, 2005 SCC 43 [128] < http://www.canlii.org/en/ca/scc/doc/2005/2005scc43/2005scc43.html?autocompleteStr=marshall%20bernard&autocompletePos=1 >.
[10] *Black's Law Dictionary* (10th edn, Thomson Reuters 2014) 935.
[11] *Delgamuukw* (n 7) [117].
[12] F Cohen, 'Dialogue on Private Property' (1954) 9 Rutgers L Rev 357, 374. Bentham is to similar effect: "'Let no one, Rusticus excepted', (so we will call the proprietor) 'and those whom he allows meddle with such or such a field.'": Jeremy Bentham, *Of Laws in General* (Athlone Press, 1970), 177. See also Michael C Blumm, 'Why Aboriginal Title is a Fee Simple Absolute' (2011) 15 Lewis & Clark L Rev 975. See also Kevin Gray, 'Property in Thin Air' (1991) 50(2) Cambridge LJ 252, 294: "…the criterion of 'excludability' gets us much closer to the core of 'property' than does the conventional legal emphasis on the assignability or enforceability of benefits."
[13] (1899) 2F (HL) 25, 26.

> entitled to enjoy and is entitled to use it for all time is not the proprietor. I regard those two propositions, correlative as they are, as exhausting really the subject-matter in debate.

Admittedly, Aboriginal title as defined by the Supreme Court of Canada in *Delgamuukw* as including a prohibition on alienating or destroying the lands does not easily comport with a classic definition of ownership, namely:

> That which characterizes the right of ownership, that which distinguishes it from other real rights, is the power of disposing of the thing, by consuming it, by physically destroying it and by transforming its substance….All other real rights authorize those in whom they are vested to enjoy the thing of another in a more or less complete manner, but always with the obligation of preserving the substance….This brings out that these different rights never entail the *abusus*, which remains the characteristic quality of ownership.[14]

Reading the two preceding passages is likely to alert readers to the existence of an as-yet-unanswered question, namely: is Aboriginal title a form of ownership or does it come within the category of "other real rights", ie is it a usufructuary right?

Aboriginal Title: Property or Usufruct?

Reviewing the Supreme Court of Canada jurisprudence on Aboriginal rights and Aboriginal title, the trial judge in *Tsilhqot'in Nation* held[15] – and the British Columbia Court of Appeal agreed [16] – that Aboriginal title could no longer be characterized as a

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[14] Marcel Planiol and George Ripert, *Treatise on the Civil Law*, vol 1, part 2 (12th edn, Louisiana Law Institute 1959) 380. See also *Matamajaw Salmon Club v Duchaine* [1921] 2 AC 426, 432, in which – quoting with approval the Chief Justice of the Quebec Court of King's Bench – Viscount Haldane stated that a full right of property comprises a *jus utendi* [right of possession and enjoyment], *jus fruendi* [right to fruits or profits] and *jus abutendi* [right to abuse], and that having only the first two would constitute a usufruct.

[15] *Tsilhqot'in Nation v British Columbia* 2007 BCSC 1700 [478] < http://www.canlii.org/en/bc/bcsc/doc/2007/2007bcsc1700/2007bcsc1700.html?searchUrlHash=AAAAAQAmYWJvcmlnaW5hbCB0aXRsZSB1c3VmcnVjdHVhcnkgcHJvcGVydHkAAAAAAQ&resultIndex=4 >.

[16] *William v British Columbia* 2012 BCCA 285 [186] < http://www.canlii.org/en/bc/bcca/doc/2012/2012bcca285/2012bcca285.html?searchUrlHash=AAAAAQ

usufructuary right. While it would be impossible to disagree with those courts' observations about the direction in which the law had moved, it is also impossible to deny – however heretical it may now seem – that Aboriginal title resembles, at the very least, a usufructuary right. Why this is so and why it can nevertheless be argued that it is instead a right of property – ie ownership – may require a review of some very basic principles.

In the *Delgamuukw* decision of the British Columbia Court of Appeal, Lambert JA wrote:

> As Viscount Haldane said in *Amodu Tijani*… and Chief Justice Dickson said in *Guerin*… the use of common law land tenure concepts tends to obscure rather than assist an understanding of Indian title. It seems to me, even more so, that the use of the usufructuary concept, derived from Roman law, with which common law lawyers are usually entirely unfamiliar, does not provide any insight into aboriginal title and is indeed both inaccurate and misunderstood. [underlining added][17]

Although it is argued here that Common Law and Civil Law concepts can, in fact, assist in understanding Aboriginal property law, the judge was probably correct to state that Common Law lawyers are usually entirely unfamiliar with the usufructuary concept. Indeed, one might go further and suggest that lawyers in Canada's Common Law jurisdictions are – due to the adoption of the Torrens system in most Canadian jurisdictions – likely to be unfamiliar with many of the more esoteric aspects of property law more generally, since it would be rare for them to deal in practise with any form of property more exotic than a fee simple or a lease.

Given that, it might be useful to begin by noting that a usufructuary right is one which includes the property interests of *usus* – use or enjoyment – and *fructus* – the right to derive profit, such as by selling crops – but does not include *abusus* – the right to

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AmYWJvcmlnaW5hbCB0aXRsZSB1c3VmcnVjdHVhcnkgcHJvcGVydHkAAAAAAQ&resultIndex=2 >.

[17] *Delgamuukw v British Columbia* 104 DLR (4th) 470 (BCCA) [591] < http://www.canlii.org/en/bc/bcca/doc/1993/1993canlii4516/1993canlii4516.html?autocompleteStr=delgamuukw&autocompletePos=2 >.

destroy or alienate, as discussed in the quotation from Planiol and Ripert above.[18] Having only two of the three interests which together constitute outright ownership will, however, in most cases make no practical difference to the person who holds a usufructuary right to property rather than owning that property outright. To understand this – and to understand that the decision in *St. Catherine's Milling* may have created a misapprehension that a usufructuary right is one of little significance – it may be useful to look at the operation of a particular usufructurary right, namely the liferent.

Liferent – which as the name suggests is a real right normally for the life of the person holding it and is in that respect broadly analogous to a life estate under the Common Law – is that form of personal servitude in the law of Scotland and some other jurisdictions that gives the party entitled to it the all-embracing right to the *usus* and *fructus* relating to property that is actually owned by another. That owner – the fiar – is left with only the bare property, the *nuda proprietas*.[19] Further, liferent is the one form of personal rather than praedial servitude recognized by Scots law,[20] so that the person entitled to the right derives that entitlement personally rather than from the ownership of land that constitutes the dominant tenement. As a real right, it may be enforced by the dominant proprietor against the whole world,[21] and while such enforcement may usually be against the servient proprietor,[22] third parties may also be obliged by the holder of the right to submit to the exercise of the servitude.[23] To choose a very commonplace illustration of how a liferent may function, one need only imagine two neighbours, one holding a house and surrounding property by liferent and the other by ownership, but with no practical difference in their respective abilities to enjoy their homes and to feel complete security in doing so. What is the main difference between them?[24] The holder of the liferent cannot destroy the property, since that person does not possess the *jus abutendi* that would be an element of outright ownership.

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[18] (n 14).
[19] Phillip Hellwege, 'Enforcing the Liferenter's Obligation to Repair' (2014) 18 Edinburgh L Rev 1, 3.
[20] Douglas J Cusine and Roderick RM Paisley, *Servitudes and Rights of Way* (Scottish Universities Law Institute 1998) 41.
[21] ibid 484.
[22] ibid.
[23] ibid 388.
[24] This admitted oversimplification is not to deny that human experience and ingenuity give rise to legal problems and litigation specific to liferent. For a discussion of one particular area where such problems can arise, see Hellwege (n 19).

It takes little reflection to see why the courts previously characterized Aboriginal title as a usufructuary right rather than ownership. While pre-contact Aboriginal peoples inhabited lands, and while they harvested and traded in things found on those lands, they in many cases denied that land was even capable of ownership, let alone that they had the right to destroy it; this would seem to be more suggestive of liferent than of ownership. Indeed, even as the Supreme Court of Canada disavowed the notion that Aboriginal title was a usufructuary right, it introduced the requirement in *Delgamuukw* that Aboriginal title land "not be used in ways which are inconsistent with continued use by future generations of aboriginals"[25] and confirmed that "lands held by virtue of aboriginal title may not be alienated"[26] (except to the Crown), all of which might be interpreted as a plain language denial that Aboriginal title holders possess the *jus abutendi* [27]and a finding that the actual ownership of Aboriginal title land resides with the Crown. The fact that Aboriginal title is held by a collectivity rather than by an individual[28] would not be an obstacle to this view, since both natural and juristic persons can be involved with both dominant and servient tenements where there is a praedial servitude and since legal systems can adapt to allow personal servitudes to be held by non-natural persons.[29] While a usufructuary right that continues indefinitely – a liferent for successive generations – is prohibited in some legal systems such as by statute in Scotland, the approach in Canada toward encumbering property over time is not as strict.[30] Even the fact that no one could say when a usufructuary right held by an Aboriginal group came into existence could somewhat fancifully be said to be reminiscent of a similar uncertainty as to when the liferent held by the Sovereign's eldest son to the Principality of Scotland was created.[31]

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[25] *Delgamuukw* (n 7) [154].
[26] ibid [129].
[27] The question of whether the right to destroy is still accepted as a valid aspect of ownership either more generally or specifically in the context of Aboriginal property rights merits further consideration. Public policy grounds suggest it should not be, particularly with respect to property of cultural significance, which Aboriginal title certainly must be for those groups that possess it. See Lior Jacob Strahilevitz, 'The Right to Destroy' (2005) 114 Yale LJ 781. For a more sweeping criticism of underlying assumptions of the law regarding destruction of property, at least as those apply in North America, see Joseph L Sax, 'Ownership, Property, and Sustainability' (2011) 31 Utah Envtl L Rev 1.
[28] See Chapter V (n 28).
[29] Cusine and Paisley (n 20) 203.
[30] Alberta, British Columbia and Ontario, for example, have abolished by legislation the requirement that every estate or interest must vest within the perpetuity period.
[31] *Stair Memorial Encyclopaedia* 7.2(2)786.

Given that, why has the notion that Aboriginal title could be a usufructuary right fallen from favour? Other than the unfamiliarity of Common Law lawyers with usufructuary rights mentioned earlier, four factors will be suggested here, one of which is really a matter of perception, but three of which are of substance. First, while the finding in *St. Catherine's Milling* that the nature of the Aboriginal tenure was a "personal and usufructurary right"[32] may have been no more than an accurate statement of the nature of a usufructuary right such as liferent, the further wording that it was "dependent upon the goodwill of the Sovereign" was misleading. That wording may have given the impression that the Crown, as the holder of the underlying title, was in the position of a landlord who could arbitrarily evict his or her tenants upon a whim. This, of course, is not how liferent or other usufructuary rights function. The holder of the liferent has a right that is good against the owner (and against the world) and is not dependent upon the owner's goodwill. If Aboriginal title is a usufructuary right, then it is dependent only upon the goodwill of the Sovereign *qua* Sovereign; that is, the sovereign power of the state could certainly be used to extinguish Aboriginal title – just as it could be used to extinguish fee simple title or do virtually anything else – but this is not a function of the Sovereign's underlying property right, or in any way related to whether the right of the Aboriginal group is or is not usufructuary in nature.

The other three possible reasons that will be suggested here as to why the courts have moved away from the notion that Aboriginal title could be in the nature of a usufructuary right are more substantive in nature. First, if one compares Aboriginal title to fee simple title, it is obvious that they are very similar[33] in that both give a right to exclusive use and occupation, both burden the underlying title of the Crown, and indeed Aboriginal title is established by practices similar to those that would give rise to title at Common Law.[34] Given that, it would simply seem unfair – and some might

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[32] (n 8).

[33] See the discussion of "The Incidents of Aboriginal Title" at *Tsilhqot'in Nation v British Columbia* 2014 SCC 44 [73-76] < http://www.canlii.org/en/ca/scc/doc/2014/2014scc44/2014scc44.html?autocompleteStr=tsil&autocompletePos=1 >.

[34] *R. v Marshall; R. v Bernard* [2005] 2 SCR 220, 2005 SCC 43 [54] < http://www.canlii.org/en/ca/scc/doc/2005/2005scc43/2005scc43.html?searchUrlHash=AAAAAQAkZW5jbG9zdXJlIEFib3JpZ2luYWwgc2ltaWxhciBpbmRpY2lhAAAAAAE&resultIndex=2 >.

go so far as to judge it indefensible – that one form of title should confer complete ownership and one should confer only some of the attributes of ownership, regardless of whether or not it makes any practical difference to Aboriginal groups' ability to use and enjoy their Aboriginal title lands. Second, and obviously related to the first point, the suggestion that the Crown's underlying title with respect to Aboriginal title lands should be greater than its underlying title with respect to fee simple lands raises the question of how the Crown would have acquired that greater share of the rights respecting the Aboriginal title lands, and this is a question to which there is no obvious answer. Third, since a usufructuary right such as a liferent will normally exist for a single lifetime and Aboriginal title is intended – like freehold – to subsist indefinitely, it may be that the latter was considered the more accurate model in this respect. If so, it should be noted that servitudes and usufruct for successive generation are similarly not time-limited in this regard.

Although, as is discussed above, it might well meet the practical needs of Aboriginal peoples if Aboriginal title were to be held to be in the nature of a usufructuary right, these latter factors – plus the political unacceptability of such a finding in the twenty-first century – are here judged to outweigh them and to militate in favour of a ruling that Aboriginal title is a form of ownership. That said, the choice is ultimately one for the courts to make: is Aboriginal title a usufructurary right, which it certainly resembles, or is it a form of ownership with some unusual characteristics, such as the restrictions on alienation and destruction? Although the latter view is here judged preferable and more consistent with the Court's recent pronouncements,[35] the more important point is that there is a choice to be made, and that the courts should make that choice. They need not slavishly follow an exact model that exists in some other jurisdiction, but neither should they declare themselves unable to perform the sorts of analyses of this particular right as it relates to other rights that legal scholars have performed for thousands of years.

[35] (n 33).

If it is once acknowledged that Aboriginal title – as well, it is submitted, as Aboriginal dominion – is at least a form of real right – ie enforceable by the holder directly against the rest of the world – then the question must inevitably arise of why Aboriginal property rights should not be amenable to the same analysis as other similar rights that exist in non-Aboriginal contexts. Since the only apparent obstacle to analyzing Aboriginal property rights in the same way as other property rights is the Court's dictum that Aboriginal property interests are *sui generis*, a preliminary question that might usefully be answered is: what has the Court actually meant when it has said that Aboriginal property rights are *sui generis*? More specifically, when the Supreme Court of Canada has said that Aboriginal rights are *sui generis* – unique – did it actually mean to say that Aboriginal property rights bear no resemblance to concepts of property or the laws respecting property in other societies? As will be seen from the following excerpts from the Court's judgments, the Court would not appear to have intended to go quite so far, though what it actually meant by its reference to Aboriginal property rights as *sui generis* seems to have been somewhat malleable.

What the Court has meant by "*sui generis*"

First and most importantly, the Court seems to have said that Aboriginal rights have certain attributes or dimensions that – at least when taken together – are unique. So in *Delgamuukw* the Court said:

> The idea that aboriginal title is *sui generis* is the unifying principle underlying the various dimensions of that title. One dimension is its inalienability. Lands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown and, as a result, is inalienable to third parties. This Court has taken pains to clarify that aboriginal title is only "personal" in this sense, and does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a licence to use and occupy the land and cannot compete on an equal footing with other proprietary interests: see *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, at p. 677.
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> Another dimension of aboriginal title is its source. It had originally been thought that the source of aboriginal title in Canada was the *Royal Proclamation, 1763*: see *St. Catherine's Milling*. However, it is now clear that although aboriginal title was recognized by the *Proclamation*, it arises

> from the prior occupation of Canada by aboriginal peoples. That prior occupation, however, is relevant in two different ways, both of which illustrate the *sui generis* nature of aboriginal title. The first is the physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law….Thus, in *Guerin*, *supra*, Dickson J. described aboriginal title, at p. 376, as a "legal right derived from the Indians' historic occupation and possession of their tribal lands". What makes aboriginal title *sui generis* is that it arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward…. This idea has been further developed in *Roberts v. Canada*, [1989] 1 S.C.R. 322, where this Court unanimously held at p. 340 that "aboriginal title pre-dated colonization by the British and survived British claims of sovereignty" (also see *Guerin*, at p. 378). What this suggests is a second source for aboriginal title -- the relationship between common law and pre-existing systems of aboriginal law.
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> A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests. [36]

To summarize the preceding description of this attribute-based notion of why the Court claims that Aboriginal land rights are *sui generis*, it is because:

(a) they can be understood only by reference to both Common Law and Aboriginal perspectives;

(b) they are inalienable and cannot be transferred, sold or surrendered to anyone other than the Crown;

(c) they have their source in the prior occupation of Canada and therefore predate Crown sovereignty rather than being dependent upon it;

(d) they are held communally and cannot be held by individual Aboriginal persons.

Even if one were considering the Common Law system alone and not other non-Aboriginal property law systems, it can readily be seen that several of these attributes would not by themselves be unique. Considering first the assertion that Aboriginal land rights can be understood only by reference to both Common Law and Aboriginal

[36] *Delgamuukw* (n 7) [113-115].

perspectives, one need not delve very deeply into writings on property law more generally to realize how much intellectual exchange has occurred and continues to occur between different legal systems. Lawyers, judges and academics in England have never hesitated to draw upon Civil Law traditions in order to better understand the underpinnings of their own property law system, while those in Scotland have recourse to an even greater variety of legal traditions as needed. To say, therefore, that understanding Aboriginal property rights one must consider more than one legal perspective is really not to say much at all.

Second, the concept that some property rights are inalienable except to a particular person, in this case the Crown, is hardly novel. To refer once again to the Scottish appeal *Corporation of Glasgow v McEwan*[37], for example, Lord Chancellor Halsbury considered the right of the Corporation of Glasgow in the main water supply pipe from Loch Katrine and noted the limitations on the way in which the right could be transferred by the corporation. The Lord Chancellor rejected the notion that this prevented the right from being a right of property, observing:

> But it is said you have not the incident of proprietorship—you have not the right to sell, you have not the right to dispose of the thing you have got to anybody else. But, my Lords, why not? It is not that there is any qualification or reservation to the original proprietor of it which entitles him to have it back again if you do not use it; it is simply because the nature of the creature who by statute is permitted to have it and to keep it renders this creature incapable of using it for any other purpose than that for which the Legislature has incorporated that legal creature. That is no qualification of the right of proprietorship: it is a qualification of the mode in which the proprietor may dispose of it, or may use it, but it is no qualification in favour of the person to whom it originally belonged. [38]

This point is not unique to Scots law. Under the Common Law as it applies in Canada it would be entirely possible to constitute a right in land that is inalienable except to the Crown (even if there remains an argument that the Crown was never the original proprietor). For example a lease from the Crown could require the tenant not to assign or preclude assignment but might, however, permit a surrender to the Crown; such a

[37] (1899) 2F (HL).
[38] ibid 25-26.

limitation would be essentially identical to that found in relation to a usufructuary right such as liferent. An incontrovertible way of ensuring that a particular piece of immovable property would fall into this category of property that is inalienable except to the Crown would be for a statute to be enacted requiring that the property, if alienated, would be transferred to the Crown and to no one else. Even within the Common law or Civil law models as they currently exist clauses of pre-emption are possible by which the Crown (or other manifestation of the state) has a first chance to purchase if the owner wishes to sell. So, for example, while now in the United States the commercial easements held by utilities to lay pipes and string wires are assignable,[39] at one time they were not,[40] and in the United Kingdom – as per the preceding quotes from *Corporation of Glasgow v McEwan* – the corresponding right under the Common Law was not transferable and any such transfer under statute now requires permission.[41] That such restrictions can exist is hardly a novel observation, as demonstrated by Gaius (*floruit* 130-180 CE): "*Accidit aliquando ut qui dominus sit alienandae rei potestatem no habeat, et qui dominus non sit alienare possit.*"[42]

Casting further afield on this point, it might also be remembered that a property right may be held in trust or in a representative capacity, in which case a restriction on alienation may arise from the trust or the relationship of representation. So, for example, a person may own property and exercising the power of alienation inherent in the property right, transfer it to a trust. While the trust receives exactly the same property right, it is precluded from alienating it to anyone else because of the terms of the trust. The restriction on alienation in that case arises not from the nature of the property right – which is, of course, where the Court has so far located it with regard to Aboriginal title – but from extrinsic obligations or the identity of the rights holder.

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[39] Barlow Burke and Joseph A Snoe, *Property: Examples and Explanations* (3rd edn Aspen Publishers 2008) 29.
[40] J David Reitzel, Robert B Bennett and Michael J Garrison, *American Law of Real Estate* (South-western/Thomson 2002) 96. With regard to the transition, see Alan David Hegi, 'The Easement in Gross Revisited: Transferability and Divisibility Since 1945' (1986) 39 Vand L Rev 109.
[41] Under statute, transfer of the right is now subject to permission of the Director of Gas Supply: *Utilities Act 2000*, ss 41, 85. Note that Andolfatto points to restrictions regarding pensions and other social security rights, though *quaere* whether these rights are *in personam* rather than *in rem*: David Andolfatto, 'A Theory of Inalienable Property Rights' [2002] 2.2 J Polit Economy 110.
[42] "It sometimes happens that he who is owner cannot alienate and one who is not owner can." Gaius (n 3) 2, 62.

Given the Court's ruling in *Delgamuukw* [43] that Aboriginal title lands cannot be used in ways which are inconsistent with their continued use by future generations, the applicability of trust principles may merit future attention. [44] Such an inquiry could conceivably lead to a classification of Aboriginal title as a form of outright ownership held in a trust resembling an entail. The latter concept is one known to both Common Law and Civil Law systems, though some systems – for reasons reflecting the purported economic problems that characterize it – have taken steps to limit the creation and existence of entails.

In any event, the restriction on alienation as regards Aboriginal land really denotes nothing about the nature of the underlying right to Aboriginal land and, in particular, conveys nothing about whether the underlying Aboriginal right is explicable in terms of Common Law or Civil Law.

Turning to the point that Aboriginal land rights are supposedly *sui generis* in that they predate Crown sovereignty and therefore are not derived from the exercise of that Crown sovereignty, while this no doubt differs from the Common Law norm, this attribute obviously cannot be *sui generis* within western property law systems more generally, given the existence of non-Crown jurisdictions where land title is not dependent on Crown sovereignty. Furthermore, the continuing existence of property law rights that existed before the assertion of Crown sovereignty is not even unique within Common Law jurisdictions. A well-known example comes from Scotland. Unlike in the remainder of Scotland, the legal systems of the Orkney and Shetland islands were based in Norwegian law (known as "udal law") and, to this very day, much of the land there continues to be based on this Norwegian law,[45] including titles derived from rights which predate any establishment of Scottish sovereignty in the islands. The creation of a new Sovereign may thus be entirely compatible with the

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[43] (n 25).
[44] Note that since an Aboriginal rights-holding group is an unincorporated association, a trust for its benefit could come within the "anomalous" exceptions to the rule against inalienability. See *Re Endacott* (1959) [1960] Ch 232, 246. See also Donovan WM Waters, Mark R Gillen, Lionel D Smith (eds), *Waters' Law of Trusts in Canada* (4th edn, Carswell 2012) 688.
[45] See *Lord Advocate v University of Aberdeen* 1963 SC 533; 1963 SLT 361; *Shetland Salmon Farmers Association v Crown Estate Commissioners* 1991 SLT 166; *Sinclair v Hawick* (1624) M 16393.

retention of existing land rights.[46] Other examples are the retention of Roman Dutch law in South Africa even after the defeat of the Boer Republics by the British in the Second Anglo Boer War,[47] and the retention of Civil Law in Quebec following the British military victory and the 1763 Treaty of Paris. It is unlikely that any landowners in these Scottish island archipelagos or in South Africa or in Quebec would regard themselves as any less proprietors of their lands just because the origin of their title predates the establishment of sovereignty by a new power.[48] And since these examples demonstrate that the assertion of British sovereignty does not inevitably create a clean slate as regards property rights, the judicial assertion that an interest in land that predates British sovereignty makes Aboriginal property rights *sui generis* on this ground would also seem to be overbroad, at least. More importantly, it does not in any way assist in an understanding of those rights.

Finally, the idea that property rights can be held communally can be no surprise to anyone, and it is very rare that a legal system has declared that a property right can be held only by a single person. Married couples, families, friends, and even strangers, all are parties to various sorts of communal property ownership. Subsidiary real rights such as leases can be held by joint tenants. A praedial servitude is always owned when the dominant tenement is commonly owned. Indeed, if property could not be owned jointly, there would be no need for the concepts of property *pro indiviso* or property in common in the Scottish and English legal systems respectively. Quite apart from this, even where property is held by a single juristic person, a non-natural person such as a corporation or association may have shareholders or members. The exact nature of the group and individual entitlements arising from Aboriginal property rights are of interest and are discussed further below, but the mere observation of the communal nature of

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[46] See *Amodo Tijani v Secretary, Southern Nigeria* 1921 2 AC 399, 407 per Lord Viscount Haldane. This is mentioned in Chapter II above.

[47] J W Wessels, *History of the Roman Dutch Law* (African Book Company 1908) chapter 35. Note that although clause 5 of the 1902 Treaty of Vereenining preserved the use of the Dutch language in the courts, the Treaty did not specifically preserve the existing legal system.

[48] See Raymond Brazil, 'The High Court of Australia Recognises Native Title – The Mabo Decision: Restating Common Law' (1993) Austl Int'l L News 1: "In the acquisition of Empire, the English Crown has recognized the prior rights of the Welsh, the Irish and the Manx, the Dutch in New York and the French in Quebec, the Five Nations of the Iroquois and the Mohicans, the Ashanti, the Nigerians, the Banabans of Ocean Island, the Maoris and the Papuans. In Mabo v Queensland (No 2), the High Court determined whether the common law of Australia recognizes the rights of the Australian Aborigines and the Torres Strait islanders to their traditional lands."

those rights provides little support for the claim that they are *sui generis*.[49] Frankly, it may be that what the Court really should have said under this heading is that Aboriginal title can only be held for the benefit of Aboriginal people. Since many legal systems reserve special rights for special classes of persons – a tax exemption for church properties, for example – there is nothing extraordinary about Aboriginal people having a right that is unavailable to others.

The short conclusion is this: not one of the attributes listed by the Court as making Aboriginal property rights *sui generis* is itself *sui generis*. Further, most of the listed attributes relate not to the right, but arguably to the person holding the right. Arguably, then, the attribute-based description of Aboriginal property rights as being *sui generis* just means that they exhibit a combination of unusual attributes that taken together differ from the Common Law norm. One could, however, say exactly the same thing about other peculiar situations within the Common Law or Civil Law worlds whether it be "tenancy by the entirety" in some Common Law jurisdictions of the United States or "*tassaruf*" under the Civil Law system in Iraq,[50] since property law is invariably subject to adaptation to meet the needs of particular times and places.

Aside from the claim described above as to the *sui generis* nature of Aboriginal rights, however, the Court has also used "*sui generis*" in other contexts with regard to Aboriginal rights. When these are considered, it seems even less likely that the Court could truly have meant to suggest that Aboriginal property rights bear no resemblance to those recognized in the Common Law or other legal systems. In addition to the passage quoted from *Delgamuukw* above, for example, the Court extrapolated in that case from its more general remarks on this topic to hold that Aboriginal rights give rise

[49] Even more examples of communal land ownership could be found by looking at European legal concepts from earlier eras. One such example from Ireland would be the tenure known as "runland": John MacDermott, 'Law and Practice in Northern Ireland' (1953) 10 N Ir Legal Q 47, 49; Cynthia E Smith, 'The Land-Tenure System in Ireland: A Fatal Regime' (1993) 76 Marq L Rev 469, 473. In Saxon England, "folkland" may have been held in common: David A Thomas, 'Origins of the Common Law (A Three-Part Series) – Part II. Anglo-Saxon Antecedents of the Common Law' (1985) BYU L Rev 453,493; Fred P Bosselman, 'Limitations Inherent in the Title to Wetlands at Common Law' (1996) 15 Stan Envtl LJ 247, 275.

[50] See art 1169 ff of the *Iraqi Civ Code*. See also Dan E Stigall, 'From Baton Rouge to Baghdad: A Comparative Overview of the Iraqi Civil Code' (2004) 65 La L Rev 131, 150-151.

to a *sui generis* approach to evidence, saying that "[A]boriginal rights are truly *sui generis*, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of Aboriginal peoples."[51] Since by the date of its decision in *Delgamuukw* the Court had already discarded the approach of pigeonholing evidence by recognized exceptions to the exclusionary rules in favour of a "reliable and necessary" test, it is unclear why Aboriginal cases would require any departure from that principled approach, and it may simply be that the Court was "over-egging the pudding."

In *St. Mary's Indian Band v Cranbrook (City)*, after the assertion of the uniqueness of Aboriginal land rights quoted at the start of this chapter, the Court went on to ask and answer the question of what this really means:

> I want to make it clear from the outset that native land rights are *sui generis*, and that nothing in this decision should be construed as in any way altering that special status….
> …
> But what does this really mean? As Gonthier J. stated at paras. 6 and 7 in *Blueberry River*, *supra*, it means that we do not approach this dispute as would an ordinary common law judge, by strict reference to intractable real property rules….
>
> …
>
> This passage confirms that we do not focus on the minutiae of the language employed in the surrender documents and should not rely upon traditional distinctions between determinable limitations and conditions subsequent in order to adjudicate a case such as this. Instead, the Court must "go beyond the usual restrictions" of the common law and look more closely at the respective intentions of the St. Mary's Indian Band and the Crown at the time of the surrender of the airport lands.
>
> The reason the Court has said that common law real property concepts do not apply to native lands is to prevent native intentions from being frustrated by an application of formalistic and arguably alien common law rules. Even in a case such as this where the Indian band received full legal representation prior to the surrender transaction, we must ensure that form not trump substance.[52]

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[51] *Delgamuukw* (n 7) [82].
[52] *St. Mary's* (n 6) [14-16].

This passage would seem to provide the clearest indication of the Court's real reason for its repeated assertion that Aboriginal land rights are *sui generis*, namely a concern that the complex and exacting requirements of the Common Law of property should not be used to deny Aboriginal groups some form of right to their lands. That is, rather than attempt – and risk failing – to show that Aboriginal land rights could be recognized and given effect even within European property law systems, the Court may have judged it easier and safer to fall back on its insistence on the *sui generis* nature of those rights. If so, then the choice of a *sui generis* characterization of the right could be viewed as both understandable and commendable. That is, the Court could be said to have chosen an approach that is deliberately malleable, adaptable, able to deal with new scenarios, and therefore appropriate to a time when the law regarding Aboriginal rights is in transition. To this extent, it is an approach that could ultimately be beneficial to the judicial process and to the interests of both Aboriginal and non-Aboriginal Canadians.[53]

It is, on the other hand, disappointing that the Court would adopt a characterization of Common Law real property concepts – concepts for which in Canada the Court is itself the ultimate arbiter – as "formalistic" and "intractable" and ignore the flexibility that courts have shown as, for example, when they construe leases or easements in a commercial way.

In any event, if the Court's motivation for saying that Aboriginal rights are *sui generis* was indeed simply to require a more flexible approach to the recognition of those rights – as in *St. Mary's Indian Band* was explicitly the case with regard to the interpretation of land transfer documents – then this would hardly seem to be a serious impediment to any attempt to analyze those rights within the broader context of property rights more generally.

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[53] As a caution in regard to why the courts may now favour a *sui generis* approach, note Borrows' observation that "Distinctive European legal customs have sometimes been applied to First Nations as if there were no differences between cultures. More disturbingly, Canadian law has often been applied as if First Nations cultures were inferior to European law, legal institutions, and culture." John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (University of Toronto Press 2002), 4.

Finally, it should be noted that the Court's most recent assertion of the *sui generis* nature of Aboriginal rights appears to invent yet another ground for that assertion, arguably lending support to the view that the Court falls back on the description of Aboriginal rights as being *sui generis* when necessary to support its results. In *Tsilhqot'in Nation*, the Court stated that it is the "special relationship" between the Crown and Aboriginal groups that makes Aboriginal title *sui generis*. [54] The examples of particular classes of property owners who have "special relationships" with the Crown are, however, almost too numerous to mention, often arising from the vagaries of history. A particularly charming example is that of residents of four villages in the Scottish border region, "the King's Kindly Tenants of Lochmaben",[55] who were granted their unique form of landholding by a direct Royal grant as a reward for assisting Robert the Bruce in his defeat of the English army at Bannockburn in 1314 and whose rights existed until being assimilated to a property right in the 21st Century.[56]

Summing up this review of the jurisprudence on the supposed *sui generis* nature of Aboriginal rights, it would seem that despite the Court's repeated assurances that Aboriginal land rights are *sui generis*, there is little in any of its statements that would support the notion that those rights are truly unique. Further, some of the characteristics listed by the Court seem to indicate that the inquiry may need to be directed at the law of persons as much as the law of property. At most, it seems that Aboriginal land rights may not have exact analogues in the Canadian Common Law system but that each of their features is replicated elsewhere if one cares to look. This in turn suggests that property law – and the law of persons – as they exist under the Canadian Common Law system are sufficiently adaptable to admit of subtleties and

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[54] *Tsilhqot'in Nation* (n 33) [72].
[55] See *Kindly Tenants of Lochmaben v Viscount Stormont* (1726) M 1595; *Viscount Stormont v Henderson* (1732) 3 ER 578; (1732) 8 Bro PC 270; *Royal Four Towns Fishing association v Assessor for Dumfriesshire* 1956 SC 379; *Bell's Dictionary and Digest of the Law of Scotland* (7th edn, Bell & Bradfute 1890) 670; and John Carmont, 'The King's Kindlie Tenants of Lochmaben' (1909-1910) 21 Jurid Rev 323.
[56] *Abolition of Feudal Tenure etc (Scotland) Act* 2000 (asp 5) s 64; Kenneth GC Reid, *The Abolition of Feudal Tenure in Scotland* (Bloomsbury Publishing 2003) 10.22, 14.1.

enable a multilayered approach both to taxonomy of rights and to the resolution of competing claims to land, especially those that involve rights held by collectivities.

Looking elsewhere is, in fact, the approach that is recommended below in order to pursue a better understanding of the nature of Aboriginal property rights generally, and of the proposed right of Aboriginal dominion more specifically. While Canadian courts have may have implicitly brought a Common Law perspective to the identification of Aboriginal rights, even while distancing themselves from that perspective, recourse will be had to legal concepts that at least bridge the Common Law and Civil Law models.

Applying first principles to an analysis of Aboriginal property rights

The Court's unwillingness to apply Common Law or Civil Law property concepts to an analysis of pre-assertion of sovereignty Aboriginal peoples may not in itself be objectionable. The problem is that in choosing not to use the frameworks of those legal systems for an analysis, the Court has also largely chosen to avoid analyzing Aboriginal peoples' property rights at all. A better choice, it is submitted, would be to approach the analysis as one involving the needs and first principles that underlie systems of property law more generally. That the Court did not do this is perhaps unsurprising; a survey of the leading Common Law textbooks on property law reveals little to denote any recognition that real property law as contained within the Common Law and Civil Law systems is the product of their particular social milieux. There are, admittedly, passages that ground the Common Law of real property in the feudal system and others that refer to philosophical concepts of property, but little consideration of why Europeans and their inheritors have the property law systems we have as opposed to some other system or systems. As Blackstone noted:

> There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property… And yet there are very few that will give themselves the trouble to consider the original and foundation of this right. [57]

[57] 2 Bl Comm.

Like other writers[58], Blackstone did speculate about the origins of property, and like many other prominent writers, philosophers, and jurists – Locke [59], Rousseau [60], Hume[61], Morgan[62], and others – used the real or supposed practices of Aboriginal peoples to support his theories. While such writings are now sometimes criticized for being overly speculative and for serving as vehicles for propounding outdated views of national, class or racial superiority, aspects of their theories on how the concept of real property arose are not unreasonable. So, for example, it does seem logical as is proposed by a number of these classical writers that an agricultural society will require certainty as to the ownership of the soil upon which the agriculture is practised, but that this requirement would generally not exist in a society that was dependent primarily upon hunting for its livelihood,[63] since wild animals are mobile and hunters have to follow them rather than counting on them to be found in a particular spot.[64]

While philosophers and jurists may have provided the classical writings about the nature of legal systems, in the modern world, inquiries about non-Western legal systems will often fall within the field of legal anthropology, and there is a vast and rich subset of this field that deals with concepts of property. [65] While the best known

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[58] For a Scottish perspective, see Stair *Institutions* 159-178.
[59] John Locke, *Second Treatise (Essay Concerning The True Original, Extent, and End of Civil Government)* (first published 1689, Simon & Brown 2012). See also J Tully, 'Rediscovering America: the Two Treatises and Aboriginal Rights' in J Tully (ed), *An Approach to Philosophy: Locke in Contexts* (CUP 1993) 137-178.
[60] Jean-Jacques Rousseau, *The Social Contract* (first published 1762, Penguin Classics 1968).
[61] David Hume, *An Inquiry Concerning the Principles of Morals* (first published 1751, Macmillan 1957).
[62] Lewis H Morgan, *Ancient Society or Researches in the Lines of Human Progress from Savagery through Barbarism to Civilization (*Charles H Kerr & Co 1877) 511-512, 560-563.
[63] As Levmore puts it, "A few hunters need rough, or no, property rights when they work or compete in a vast forest, the argument might go, but intensive farming requires (and is encouraged by) well-worked-out private property rights." Saul Levmore, 'Two Stories About the Evolution of Property Rights' (2002) 31(2) J Legal Stud S421.
[64] Remarking upon this basic difference is not to suggest that Aboriginal people in Canada did not practice agriculture in pre-contact times; some did, and others engaged in forms of proto-agriculture, such as burning fields and forests to keep wild tubers free from competition by other encroaching types of vegetation. Neither does it imply that Aboriginal people in Canada did not recognize any form of exclusivity with regard to land; some did, recognizing at least a right to harvest the resources from a particular site, though the concept of actual ownership of the land would not have been necessarily concomitant to such a right. See Nancy J Turner, *Plant Technology of First Peoples in British Columbia* (Royal BC Museum 2010) 25; *Plants of Haida Gwaii* (Sono Nis 2010) 54-56; *Ancient Pathways, Ancestral Knowledge: Ethnobotany and Ecological Wisdom of Indigenous Peoples of Northwestern North America*, vol 1 (McGill-Queen's University Press 2014) 249-252.
[65] Sally Falk Moore, 'Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949-1999' in S Moore, (ed) *Law and Anthropology: A Reader* (Blackwell 2005) 362. See also Franz Von Benda-

example may still be Pospíšil's seminal writings on Kapauku Papuan laws of land tenure and his comparison of Kapauku and Tirolean laws of inheritance[66], there are many other works that attempt to draw meaningful comparisons between legal systems. In Canada, there is also a growing interest in what has been termed "Indigenous Law" – the legal systems of Indigenous peoples – in order to distinguish[67] this field of study from "Aboriginal Law" – ie that aspect of western legal systems that applies to Aboriginal peoples.[68]

What will be attempted below is different from these approaches. That is, there will neither be any attempt to expound a grand theory of the evolution of property rights into which both western and Aboriginal concepts can be slotted nor any attempt to investigate the actual pre-contact legal regimes of any of the hundreds of Canadian Aboriginal groups. Instead consideration will be given to property law concepts that are known to those familiar with Common Law and Civil Law and to whether they might reasonably be expected to correspond with the needs or practices of Aboriginal groups based upon generalized aspects of Aboriginal cultures and lifestyles. This exercise will, in effect, suggest that even without knowledge of the actual laws, beliefs or practices that any particular Aboriginal group would have had in pre-contact times, courts and others should be able to ask and answer the question "would property law concepts that were created or recognized in order to meet the needs of European agricultural societies – and to some extent industrial and post-industrial societies – have any analogues or applicability in pre-contact Aboriginal societies?" While particular attention will be given to the proposed right of Aboriginal dominion and its corresponding analogue in Civil Law and Common Law systems, at least a preliminary

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Beckmann, 'Anthropological Approaches to Property Law and Economics' (1995) 2.4 Eur J L & Ec 309, 310: "More than any other academic specialism, legal anthropologists have given attention to conditions in which property is subject to parallel, duplicatory (plural) legal regulation."

[66] Leopold J Pospíšil, *Anthropology of Law: A Comparative Theory* (2nd edn, Harper & Row 1971); *The Ethnology of Law* (Cummings 1978).

[67] This is not to suggest that these two systems can exist with neither taking cognizance of the other. As Webber notes, "…the initial recognition of indigenous rights to land must draw, at least implicitly, on indigenous law. The traditional owners cannot be determined unless one knows, by that law, who is entitle to exercise authority over the lands." Jeremy Webber, 'The Public-Law Dimension of Indigenous Property Rights' in Nigel Bankes and Timo Koivurova, eds, *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* (Hart Publishing 2013).

[68] See, for example, John Borrows 'Indigenous Legal Traditions in Canada' (2005) 19[1] Wash UJL & Pol'y 167. For an Australian perspective, see Nancy M Williams, *The Yolngu and their Land: A System of Land Tenure and the Fight for its Recognition* (Australian Institute of Aboriginal Studies 1986).

attempt will be made to identify other possible correspondences that might merit future investigation.

Situating Aboriginal dominion within the law of property

If the Supreme Court of Canada has failed to provide a detailed analysis of Aboriginal property rights that situates them within the field of property law more generally, it must be acknowledged that the fault does not lie entirely with the Court, or even with the litigation counsel who provide the Court with arguments. Instead, it may be that property law – at least as it is understood by non-academic Common Law practitioners – is itself not particularly concerned with underlying principles so much as with the recognition and application of familiar tools and models. Indeed the Common Law of property would seem to be a field in which it is particularly easy to focus so closely on the intricacies of particular legal rules and fact-based problems as to lose track of the broader principles that underlie them.

Lawyers from Civil Law jurisdictions might well say that the opposite is true in their approach, and that it is the emphasis on similarities between different legal systems that allows them to refer to a *Ius Commune* [69] that unites Western Europe and other Civil Law jurisdictions despite the multiplicity of individual legal systems. That perspective may make it easier to recognize that despite the differences between the laws or attitudes toward property that might be found in different nations or cultures, property law exists to facilitate the satisfaction of basic, human needs. Thus, a South African lawyer who has been a law professor in Scotland can observe that:

> The function of the law of things is to harmonize the numerous competing legal interests with regard to things. People everywhere and at all times hanker after things which are necessary for survival or valuable to enhance their status in the eyes of society. As a result of the demands placed on

[69] Smits, for example, says that the *Ius Commune Europaeum* existed from the reception of Roman Law to the great national codifications circa 1800, and that modern Europe faces the challenge of "breathing new life" into that system: Jan Smits, *The Making of European Private Law: Toward a Ius Commune Europaeum as a Mixed System* (Intersentia 2002) 5. See also John W Cairns and Paul J du Plessis (eds) *The Creation of The Ius Commune: From Casus to Regula*, vol 7 (Edinburgh University Press 2010).

> them, things became scarce and thus organized society enforces laws to control the competition for things and to guarantee the enjoyment of them.[70]

If people's need for property – and therefore their need for property law – is universal,[71] then it may be presumed that property law should show some degree of commonality from one system of laws to another, and that some property law concepts would be near-universal in their application. Some support for this proposition can be found in the concept of *numerus clausus*. At its most basic, this is the idea that the number of types of property recognized by law is fixed. A more colourful description has been provided by Peter Sparkes:

> What is meant by a *numerus clausus* has to be stated at a high level of generality if the definition is going to be used in making comparisons. The basic idea is simple that the categories of property rights should be fixed, that property rights have to be bought off the peg and at least cut to pre-ordained patterns whereas contracts can be bespoke and tailored to the needs of individual contracting parties. Defined in this vague way, the principle is, as Rudden wrote, axiomatic in all mature property systems. It is set at a level of generality broad enough to embrace almost all known systems in the European multiverse.[72]

Various arguments have been made to explain or support the concept of *numerus clausus*, such as efficiency, facilitating property transfers, precision as to the core meaning of "property", and caution about the long-term effects of difficult-to-abolish new property rights.[73] It is the very existence of the concept, however, that is of utility for this thesis. This is because the idea that all of the property needs arising in a society can be satisfied by a finite and relatively small number of property rights encompassed within the *numerus clausus* and that this is true not just in one society but in numerous societies must tend to suggest a certain degree of universality in some forms of property. If this is so, then the very existence of a defined list of property types may suggest that if a particular type of Aboriginal property right is hypothesized to exist, support for that hypothesis might be found by locating the analogue of that right within

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[70] CG Van Der Merwe, 'Things', in WA Joubert (ed), *The Law of South Africa* vol 27 (Butterworths 1987) 4. See also *Stair Memorial Encyclopaedia* (n 31) 165-166.

[71] Harris refers to the "ubiquity of property', noting that it is referred to in the oldest records and that few peoples studied by anthropologists have turned out to lack any conception of it, and labelling it a "legal and social institution governing the use of most things and the allocation of some items of social wealth": JW Harris, *Property and Justice* (OUP, 2006), 3.

[72] Peter Sparkes, 'Certainty of Property: Numerus Clausus or the Rule with No Name?' [2012] 3 ERPL 771.

[73] Bruce Ziff, *Principles of Property Law* (6th edn, Carswell 2014) 57.

the existing list. This will particularly be true to the extent that the *numerus clausus* principle transcends any single system of property law and is, as Sparkes suggests, broad enough to embrace the "multiverse".

Admittedly, the concept of *numerus clausus* is primarily associated with the Civilian tradition, where it is applied with differing degrees of strictness in different European nations[74] and also with varying degrees of strictness as regards individual real rights. The underlying principle that the law will not recognize new categories of property rights is, however, also of longstanding in the Common Law. In *Keppel v Bailey*,[75] for example, Lord Brougham LC dismissed an attempt by the shareholders of a railway to enforce a covenant against the purchasers of an iron works, holding that the covenant did not run with the land, saying that:

> …it must not, therefore, be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of the owner. It is clearly inconvenient both to the science of the law and to the public weal, that such a latitude should be given. There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets real and personal, to answer in damages for breach of their obligations. This tends to no mischief, and is a reasonable liberty to bestow, but great detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property, and to impress upon their lands and tenements a peculiar character which should follow them into all hands, however remote. Every close, every messuage, might thus be held in a several fashion, and it would hardly be possible to know what rights the acquisition of any parcel conferred or what obligations it imposed.[76]

This case is recognized in Canada, as elsewhere, by courts[77] and academic writers[78] for the proposition that there is a limited set of types of property right and that individuals

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[74] ibid 772. Note that even in jurisdictions that are rooted in the Civilian tradition, it can be difficult to know where to draw definitional lines when dealing with property and related rights. In Scotland, for example, the *Stair Memorial Encyclopaedia* states that "A definitive list of the real rights recognised in Scots law has never been attempted": *Stair Memorial Encyclopaedia* 18.1((2)4. Paisley lists nine real rights but with the caveat that "there is no absolute certainty" that they comprise the whole content of the Scots *numerus clausus*: Roderick RM Paisley, 'Real Rights: Practical Problems and Dogmatic Rigidity' (2008) 8 Edin LR 267, 269. Cusine and Paisley identify sixteen types of servitude in Scots law and express the view that it is still possible to create more: Cusine and Paisley (n 20) 35-37.

[75] (1834) 2 My & K 517, 39 ER 1042 [1824-34] All ER 10 (LC).

[76] ibid All ER 10, 19. To similar effect, see *Hill v Tupper* (1863) 2 Hurlst & C 121 per Pollock CB; *Stockport Wwks v Potter* (1864) 3 H & C 300, 314 per Wilde B, 321 per Bramwell B; *Charles v Barzey* [2003] 1 WLR 437 (PC) [11].

[77] See, for example, *Durham Condominium Corporation No. 123 v Amberwood Investments* (2002) 58 OR (3d) 481, 211 DLR (4th) 1 (CA).

[78] Ziff (n 73) 56; Thomas W Merrill and Henry E Smith, 'Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle' (2000) 110 Yale LJ 1.

cannot unilaterally or by mere agreement create new types.[79] To the extent that exceptions disprove the rule, however, any such assertion is likely to be overly broad; certainly Common Law property rules are subject to change[80], even to the extent that ingenious and determined parties may indeed successfully attempt to "invent new modes of holding and enjoying real property."[81] That said, however, a survey of the literature does at least reveal widespread academic application of the *numerus clausus* concept to the Common Law.[82] Gardner helpfully identifies the fourteen property rights that he says constitute the English Common Law *numerus clausus*,[83] namely:

(1) ownership

(2) leases

(3) mortgages

(4) easements

(5) restrictive covenants

(6) rights under trusts

(7) licenses coupled with an interest

(8) profits

(9) rentcharges

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[79] K Gray and S Gray, *Elements of Land Law* (5th edn, OUP 2009) 137.

[80] Harris notes of property that "Its complexity resides also in the fact that the package of elements it contains varies enormously in time and place and is nowhere static for long": Harris (n 71). On the other hand, the Common Law rule that a leasehold estate must from the outset have a fixed terminus was retained despite strong judicial dissatisfaction, showing the extent to which property law is at least resistant to change. See Kelvin FK Low, 'Certainty of Terms and Leases: Curiouser and Curiouser' (2012) 75(3) Mod L Rev 401. For an illustration of the uncertainty that can exist as to whether something is or is not even a form of property, see the discussion of the floating charge at Noel McGrath, 'The Floating Charge in Ireland after *Re JD Brian Ltd*' (2012) 35 Dublin ULJ 306.

[81] Legislative change will, in many instances, allow circumvention of difficulties that arise from the slow pace of change of the Common Law. For an illustration of rapid changes to property law necessitated by moving into an area – the American Great Plains – with geoclimatic conditions very different from those where the Common Law originated, see Terry L Anderson and PJ Hill, 'The Evolution of Property Rights: A Study of the American West' (1975) 18(1) J Law & Econ 163. As with most of the literature examining changes to property law over time, Anderson and Hill approach from the perspective of economics; see also Thomas W Merrill, 'Introduction: The Demsetz Thesis and the Evolution of Property Rights' (2002) 31(2) J Legal Stud S331.

[82] Sparkes (n 72) 773.

[83] Simon Gardner with Emily MacKenzie, *An Introduction to Land Law* (3rd edn, Hart 2012) 14-15.

(10) rights of entry

(11) estate contracts

(12) options and rights of pre-emption

(13) 'mere equities'

(14) home rights

Looking at the items in this list, it can be perceived that to a large extent they reflect what Van Der Merwe calls the "final development in the primitive system of property rights", namely the perception that "the use and enjoyment of a thing need not be restricted to only one person."[84] That is, "property", when that term is used with respect to real rather than personal property, is not necessarily the same as outright "ownership", and rather than referring to a unitary concept refers instead to one that can be fragmented on the basis of time, co-ownership, or the distinction between legal and equitable ownership.[85] It should be noted in passing that the content of the *numerus clausus* varies over time and between jurisdictions,[86] so that some types of property that would once have been part of a list of property rights – such as the estate tail in most Canadian provinces and territories[87] – have now been deleted from it.[88] Others – at least in some jurisdictions – have been added to the corresponding lists in those jurisdictions.[89]

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[84] Van Der Merwe (n 66) 4.
[85] A La Forest (ed), Anger & Honsberger *Law of Real Property*, §1:50 (May 2006).
[86] "…although standardization is a stable feature of property law, the particular list of forms and their internal substance have always been dynamic. Legal systems add and prune forms, tinkering with what the forms require while balancing mandatory rules with permissible private specialization. This management of standardization yields wonderful variety in the content of the list and in the substance of the forms at any given time and legal culture." Nestor M Davidson, 'Standardization and Pluralism in Property Law' (2008) Vand L Rev 1597, 1600.
[87] A La Forest (ed), Anger & Honsberger *Law of Real Property*, §5:70 (October 2008). If – as per the discussion below in this chapter - the courts should decide that the estate tail, with its restriction on alienability and its automatic passage from one generation to the next, is the closest analogue to Aboriginal title, then presumably the deletion of the estate tail from the list would have to be reversed!
[88] Michael A Heller, 'The Boundaries of Private Property' (1999) 108 Yale LJ 1163, 1176: "In Blackstone's time, the *numerus clausus* was much more numerous, populated with incorporeal hereditaments such as corodies and advowdsons that no longer exist."
[89] Anna di Robilant, 'Property and Democratic Deliberation: The *Numerus Clausus* Principle and Democratic Experimentalism in Property Law' (2014) 62 Am J Comp L [i]. See also Heller (n 55) 1176.

While it may be a valuable concept in Western property law systems, can the *numerus clausus* also provide a useful tool for thinking about Aboriginal property rights? No doubt some might say that even mentioning a concept such as a rentcharge in the context of pre-contact Aboriginal life is too absurd to contemplate, but such an objection would fail to recognize that the *numerus clausus* itself can and does develop to meet the changing needs of societies.[90] Consider, in this regard, two questions. First, if there is any validity to the assertion made above that property law reflects basic human needs rather than only culture-specific needs, should there not be at least some property rights contained within the *numerus clausus* that are also reflected in the modern rights that are based upon pre-contact Aboriginal experience? So, for example, it has been posited above that Aboriginal title is the Aboriginal analogue of what the Common Law terms freehold property, what Gardner simply refers to as "Ownership…the grandest of all rights"[91] (though acknowledging that it would instead be open to Canadian courts to choose a usufruct as the appropriate model). A second, two-part question is this: if a process of inquiry and analysis suggests the existence of an Aboriginal right previously unrecognized by Canadian domestic law, as is the case with regard to Aboriginal dominion, would not locating a corresponding right among those listed in the *numerus clausus* strengthen the case for the existence of that right and, if so, does this not merit at least looking at the list to see whether any of its elements corresponds with aspects of pre-contact Aboriginal life?

Since the focus of this thesis is the proposed right of Aboriginal dominion, most of what follows in this chapter will be devoted to finding support for the proposed right of Aboriginal dominion in property law. Given that, the useful question to ask is: if the *numerus clausus* defines the total universe of property rights, would Aboriginal dominion fall within or be analogous to one of those recognized rights? The answer submitted here is "yes", in that Aboriginal dominion could be said to be, or to be analogous to, a particular type of easement. While several objections to this assertion might immediately occur to those knowledgeable about models of property law existing

[90] "…legal systems standardize property law because regulating the variety of allowable forms provides platforms onto which property law's competing social and political goals can be engrafted onto private ordering." Davidson (n 86) 1601.
[91] Gardner and MacKenzie (n 83) 14

in Canada and elsewhere, it will be argued below that any such objections can be overcome. Following the argument on that point, very brief consideration will be given to whether any other property law concepts that are familiar in Western legal systems also have Aboriginal equivalents.

Prior to beginning the following discussion of the correspondence between the concept of Aboriginal dominion and that of the negative easement, it might be prudent to explicitly reiterate the purpose of the comparison. If Canadian courts were to accept that the proposed right of Aboriginal dominion exists, it would not matter whether or not it bears any resemblance to any form of property right that had ever been recognized by the Common Law, the Civil Law, or any other legal system. As discussed in this thesis, the courts have been adamant that Aboriginal right are *sui generis*, so there is no requirement to find any recognized precedent. Drawing a comparison between the concepts of Aboriginal dominion and of negative easements, however, may usefully illuminate the underlying commonality between different societies and their concepts of property, and may by doing so allow the courts to bring a level of analysis to Aboriginal property law issues that has previously been lacking. The discussion is <u>not</u> intended to suggest that Aboriginal dominion should only be recognized if it can fit within the exact confines of the Common Law requirements for a negative easement, and that is obviously not the case. Instead, the discussion could be considered a sort of thought experiment; by pushing on the recognized concept of the negative easement, just how comfortably – or uncomfortably – can Aboriginal dominion be made to fit within it?

<u>Aboriginal dominion as analogous to a negative easement</u>

Halsbury's defines an easement as follows:

> An easement is a right annexed to land to utilise other land of different ownership in a particular manner (not involving the taking of any part of the natural produce of that land[92] or of any part of its soil) <u>or to prevent the</u>

[92] Under the Common Law, such a taking would be a *profit à prendre*. See Chapter VII (n 7, 8).

> owner of the other land from utilising his land in a particular manner.[93] [underlining added]

The underlined portion of the preceding quote may here be considered with regard to what would be termed a "negative" servitude,[94] one which precludes a servient owner from exercising a right that would otherwise be inherent in the ownership of property, as, for example, a restriction as to the buildings that can be constructed on the property. This contrasts with a "positive" servitude which entitles the holder of the dominant tenement to exercise some right or privilege affecting the servient tenement, such as a right of way, a right to draw water,[95] a right of support, or a right to receive light or air through a defined aperture or channel.[96] Preventing the owner of other land from utilising that land for certain purposes, such as resource extraction, is clearly the essence of the proposed right of Aboriginal dominion as it has been described in earlier chapters of this thesis, so by this definition the correspondence between the concept of Aboriginal dominion and that of an easement – specifically, a negative servitude – will be readily apparent.[97] A slightly more detailed consideration of the characteristics of an easement, however, may seem to raise doubts about the equivalence of the two concepts:

> The essential characteristics of an easement are (1) there must be a dominant and a servient tenement; (2) the easement must accommodate the

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[93] *Halsbury's Laws* (4th edn 2003) vol 16(2) para 1.

[94] Note, however, that a positive easement as well as a negative one will have the effect of preventing some uses of land by the servient proprietor. As noted by Lord Scott of Foscote in *Moncrieff v Jamieson* (n 8), [54]: "Every servitude or easement will bar some ordinary use of the servient land. For example, a right of way prevents all manner of ordinary uses of the land over which the road passes. The servient owner cannot plough up the road. He cannot grow cabbages on it or use it for basketball practice. A viaduct carrying water across the servient land to the dominant land will prevent the same things. Every servitude prevents any use of the servient land, whether ordinary or otherwise, that would interfere with the reasonable exercise of the servitude. There will always be some such use that is prevented."

[95] Kenneth GC Reid, 'Property', *The Laws of Scotland: Stair Memorial Encyclopaedia*, Vol 18 (Law Society of Scotland/Butterworths 1993) 441.

[96] Law Commission, 'Easements, Covenants and Profits à Prendre: a Consultation Paper' (Consultation Paper No 186, 2008) 2.

[97] Admittedly, it may seem foolhardy to attempt to find support for the concept of Aboriginal dominion in another concept – the negative easement – which the courts regard with some apprehension. As noted by Dawson and Dunn, "As they [negative easements] represent an anomaly in the law because they restrict the owners' freedom, the law takes care not to extend them beyond the categories which are well known to the law." Ian Dawson and Alison Dunn, 'Negative easements – a crumb of analysis' (1998) 18(4) Legal Stud 510, 527. The grounds for this judicial caution should be less applicable in Canada, however, in that, first, it is already apparent that identifying Aboriginal property rights involves going beyond common law principles, and, second, the lands over which Aboriginal title is most likely to apply are large areas that are held as unallocated Crown land, so there is little danger of the creation of fractured, unknowable property interests.

> dominant tenement; (3) the dominant and servient owners must be different persons; and (4) the easement must be capable of forming the subject matter of a grant.[98]

Indeed, the legal constraints imposed when there is a strict interpretation of these traditionally-required characteristics of an easement should not be underestimated.[99] Whether all of these characteristics are indeed "essential" seems doubtful. Changes to property law to adapt to changing times and circumstances have already been noted elsewhere in this chapter, and the policy grounds that may support these characteristics are always capable of being defeated by competing policy grounds.[100] As noted by Harris, the Common Law has never lacked for "property-limitation rules" that subtract privileges and powers from land ownership interests, and where novel questions arise "the values taken to be inherent in ownership are set against other values, individual or social." [101] Supposing for the sake of argument these characteristics to actually be requirements, however, the necessity for dominant and servient tenements[102] and for the easement to be capable of forming a grant may initially seem to be at odds with the proposed right of Aboriginal dominion, since – like other Aboriginal rights – Aboriginal dominion is conceived as attaching inalienably to an Aboriginal group rather than to a particular piece of land. It might seem, therefore, that what is proposed would be analogous to an "easement in gross", something that was at one time not recognized as being capable of legal existence in some Common Law jurisdictions [103]

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[98] ibid 6.

[99] Robert Kratovil, 'Easement Law and Service of Non-Dominant Tenements: Time for a Change' (1984) 24(3) Santa Clara L Rev 649, 650.

[100] While some may believe that property law does not reflect policy choices, Lord Cooke in a nuisance case noted that "…if the common law of England is to be directed into the restricted path which in this instance the majority prefer, there may be some advantage in bringing out that the choice is in the end a policy one between competing principles." *Hunter v Canary Wharf Ltd* [1997] 2 All ER 426 at 456.

[101] Harris (n 71) 90.

[102] Subsumed within the traditional criterion of a dominant and servient tenement is the more specific requirement that an easement must "benefit the land". This requirement is, however, quite broad: "In order to benefit the land directly, the covenant need not relate to a physical benefit such as indoor plumbing. It is enough that the agreement in some way benefits the title or any interest therein, or directly benefits the estate or interest of the covenantee." Charles Evan Goulden, 'Covenants of Title Running with the Land in California' (1961) 49(5) Cal L Rev 931, 939. In finding that a covenant did not benefit the land in *Galbraith v Madawaska Club Ltd*, [1961] SCR 639, the Court reasoned that the covenant "…has nothing to do with the use to which the land may be put…." Clearly, the proposed right of Aboriginal dominion has everything to do with the use to which land may be put and would directly benefit the interest of whomsoever held the right.

[103] Supreme Court of Canada authority for this principle can be found in *Purdom v Robinson* (1899) 30 SCR 64, 72: "…there is not known to the law such an interest in land as an easement in gross." Courts have, however, noted that what may "technically" be an easement in gross can be lawfully created pursuant to statute: *McClure v Merritt (City of)* (1997) 43 BCLR (3d) 320.

(note, though, that this is no longer an issue in the United States[104] and has been circumvented by statute as needed in Canada and the United Kingdom, and furthermore that an easement in gross is really nothing more than a personal servitude which is readily capable of being grafted into legal systems on a piecemeal or general basis). Doubt about the ability of an Aboriginal group to benefit from an easement over the lands in their traditional territory might be reinforced by reference to *Alfred F Beckett Ltd v Lyons*.[105] That case posed the question of whether residents of County Durham had an easement that would allow them to collect and carry away sea-washed coal. The Court held that they did not, with Winn LJ stating that:

> …it does not seem to me that a reasonable hypothetical grantor and a reasonable hypothetical grantee would, at any time within living memory or before the beginning of legal memory, have chosen to vest such a right in any such wide and fluctuating body of persons…."[106]

It can easily be imagined that the membership of an Aboriginal group could – like the composition of the residents of County Durham – be wide and would certainly fluctuate over time. If this were the only case law on point, it might be thought that no support for the concept of Aboriginal dominion could be drawn from parallels to the concept of an easement. Fortunately, other case law can be found that is more closely on point and is more supportive. Two such cases from Scotland are *Smith v Archibald* [107] and *Maitland v Lees*.[108]

Denny and Dunpace is an area in the Forth Valley of Scotland. Local residents had, since time immemorial, maintained and drawn water from a well that was on private property. [109] Following the area having been made into a "police burgh", the police commissioners pursuant to the *Public Health Act* put a cover on the well for sanitary reasons and inserted a pump into it. The landowner, when he became aware of these steps brought legal action to "interdict, prohibit and discharge" the respondents and all

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[104] William Stoebuck and Dale Whitman, *Law of Property* (3rd edn, West Academic Publishing 2007) 440.
[105] [1967] Ch 449.
[106] ibid 483.
[107] (1880) 5 App Cas 489 HL (Sc).
[108] (1899) 6 SLT 296 OH.
[109] *Smith* (n 107) 499.

other persons from trespassing on his lands, and the case eventually made its way on appeal to the House of Lords. Concerning the pump and other additions to the well, the question arose, as stated by Lord Hatherley, "as to whether the Commissioners had any right to place it there at all." [110]

Of the three sets of reasons, Lord O'Hagan's say the least with regard to the topic considered here, in that he concentrated principally on whether the well constituted a "public well" as per the words of the statute, and did not direct his attention to the nature of the right being exercised by the inhabitants of Denny or those who were acting on their behalf. He would no doubt have considered it unnecessary to do so, since he expressed surprise that the case had made it to the House of Lords at all, in that many of the arguments made in the lower court on behalf of the landowner had been abandoned. With regard specifically to the questions of whether a servitude had been established and whether the inhabitants of an unincorporated village could exercise such a right, he noted of the proceedings in the court below:

> In the first place, the learned Judges there had to determine upon a lengthened contention, which resulted in a difference of opinion between themselves, whether or not the inhabitants of a village not constituting a corporation could have and exercise a right like this. But the Lord Advocate comes here and with the greatest propriety admits most frankly and reasonably that that contention cannot be maintained. There was another important question on which the Lord Ordinary gave an elaborate opinion, namely, the question as to whether a servitude was established upon the evidence in this case. Now, the Lord Advocate admits with the greatest frankness and freedom that that argument cannot be maintained; he admits that there was a servitude.[111]

Lord Hatherley went to some length to confirm that the ownership of the land itself where the well was found remained in the landowner.[112] He also confirmed, however, that with regard to the well there existed "rights which are in the inhabitants of the

[110] ibid 500.
[111] ibid 507.
[112] ibid 503-504.

district" and that the effect of the statutory provisions was simply to allow those rights to be exercised on their behalf by the Commissioners, as had in fact been done.[113]

Lord Blackburn's reasons are the most relevant to this thesis, in that he declared at the outset his wish to "look at that which I think is the real substance at the bottom of the whole question between the parties, namely, what was the right of the parties before ever there was any corporation, before the *Public Health Acts* or anything of the sort were passed." He first pronounced on the nature of the right – a right to draw water – and the fact that it could have been acquired by the inhabitants through their practice of drawing water:

> The people who used the water in this way were not a corporation like the corporation of a burgh or anything of that sort – they were the inhabitants of the neighbourhood. It is perfectly known to the law that there is a right which may be had in water, - the right *aquæhaustus*, - the right to get water for the purpose of drinking. Such a right may be given by grant to the owner of a tenement, or may be acquired by the owner of a tenement by sufficient user, the right to come and supply himself and the occupants of his tenement with water; that is not disputed at all.

He then pronounced upon the specific question of whether a body as ever-changing in composition as the inhabitants of a village could be capable of holding the dominant servitude:

> Then came the question, Can that right be acquired by such a fluctuating body as the portion of the public who live in *Denny* and its neighbourhood, they not being incorporated? Could that be done? Apparently at one time – perhaps I may say, at the present time – there seems to have been a good deal of puzzlement about that. Nobody, I think, disputes that every individual cottager, every owner of a cottage in *Denny*, might have acquired that right for himself and his cottage. Nobody, I think, disputes that every individual landowner there might, by means of his tenants, have acquired that right for himself. But as this well is used in substance and in fact by everybody, for everybody goes there, there would be an aggregate of those individual rights. I do not know what the state of the title is there, whether the property all belongs to one landowner, or whether it is divided, as many districts are, into a vast number of small village feus. In that case each would have the right for himself to draw the water, and the aggregate of them would form, in fact, the whole of the inhabitants of the parish, each

[113] ibid 503.

> individual having one right, though occupying, as in [*sic*] were, in fragments, each separately. [114]

Note that while Lord Blackburn acknowledged the possibility that individual landowners might each have a right of property forming a dominant tenement, he also acknowledged that he did not actually know the state of the title and did not seem to feel any necessity to strictly ground the finding of a right in the existence of any such dominant tenements. Admittedly, he did not go so far as to explicitly characterize the right found as a personal servitude; instead – encouragingly for the purpose of supporting the Aboriginal right hypothesized in this thesis – he seemed content to simply assume that the right could reside with "everybody" in Denny. Had he wished, the judge could perhaps have arrived at the same result in the case by holding that the actual right resided in only a subset of the residents of Denny, with the other residents having merely a right of enjoyment courtesy of the rights holder or holders;[115] again, however, the wording of the reasons clearly indicates that he went further and found the existence of a collective right.

It would appear that the provision of waterworks must have been a source of considerable friction in the nineteenth century, since similar questions arose in *Maitland v Lees*.[116] In that case, legal action was brought seeking that the chairman of the Water Trust of the village of Davidson's Mains be interdicted from entering on the complainer's lands to take steps concerning the waterworks. The argument made by the landowner that a community of feuars could not hold a dominant servitude was dismissed by the Court, which followed the decision in *Smith v Denny Police Commissioners*, observing that:

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[114] ibid 512.
[115] Bartholomaei Cæpollæ, *Tractatus de Servitutibus, Tam Urbanorum, Quam Rusticorum Prædiorum* (first published 1473-74, Marci-Michaelis Bousquet 1737) 22 2 < https://books.google.ca/books?id=VMpGAAAAcAAJ&pg=PA1&lpg=PA1&dq=tractatus+de+servitutibus,+tam+urbanorum,+quam+rusticorum+praediorum&source=bl&ots=5VYBQrNG7r&sig=NLuto8u-JUgAP7gsFyvv2G0GkUE&hl=en&sa=X&ved=0ahUKEwibpeHQzZLPAhWDJB4KHSRRCQMQ6AEIzAB#v=onepage&q=tractatus%20de%20servitutibus%2C%20tam%20urbanorum%2C%20quam%20rusticorum%20praediorum&f=false >. See (n 109) below.
[116] *Maitland* (n 108).

> The argument that the feuars here could not acquire this right of servitude is quite inconsistent with the decision of the House of Lords in the case of *Smith v. Police Commissioners of Denny* (7 R. (H.L.) 28), which (if one may say so without presumption) is entirely in accordance with principle, because a community of villagers, though they are not an incorporated body, yet either are or represent the proprietors of houses in the village, and I know of no reason why a single feuar in a village should not have capacity to acquire a servitude, his feu being the dominant tenement, and the body of feuars can be none the worse, so far as their legal position is concerned, merely on account of their number. I regard the respondent as being the representative of the feuars. [117]

Not only do these Scottish cases make it clear that a dominant tenement can be exercised by a collective body such as the inhabitants of a village, Scots law goes even further in regard to what can constitute a dominant tenement. While it is clear that the servient tenement must be represented by property in land, interests such as salmon fishings may in themselves constitute a dominant tenement that will ground such access rights as are required over adjoining land in order to be able to exercise the fishing rights.[118] This was implicitly recognized in the *Abolition of Feudal Tenure etc. (Scotland) Act 2000*, in that s 18(7)(c) made provision for the modernization of such rights.[119] Note also that salmon fishing rights are often owned by corporations, with the shareholders of those corporations – a group that fluctuates over time – enjoying the fishing while the ownership remains with the corporation. An alternative model is for the salmon fishing right to be owned by a trust with the fishing enjoyed by the beneficiaries of that trust; again, the membership of the group would vary over time, but in this case – as with an Aboriginal group – the membership would not be an incorporated body. Whether it is through a mechanism that is concerned with the nature of the property right itself, or through one that is concerned with the nature of the rights holder – ie the law of persons – it seems clear that the law offers means by which fluctuating groups of people can directly or indirectly exercise the rights associated with a dominant tenement.

What do these comparisons establish? First, the fact that the membership of an Aboriginal group will fluctuate over time cannot be sustained as an objection to the

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[117] ibid.
[118] Cusine and Paisley (n 20) 50, 504.
[119] < http://www.legislation.gov.uk/asp/2000/5 >.

group holding a right similar to an easement – ie Aboriginal dominion – over those lands within the group's traditional territory, any more than was the case for the villagers of Denny or of Davidson's Mains. Second, the fact that an Aboriginal group is not a legally incorporated body would not be an obstacle to the legal exercise of its rights in the nature of a dominant tenement, any more than was the case for the villagers of Denny or of Davidson's Mains. This would be consistent with the common practice by which the chiefs of Aboriginal bands initiate litigation on their bands' behalf through representative actions, much as the Police Commissioners defended a legal action on behalf of the villagers whose interests they represented. Third, if an Aboriginal group were to exercise a right that is similar to a negative easement by which it would be able to prevent certain otherwise lawful uses being made of the lands of its traditional territories – ie the servient tenement – then some might pose the question of whether there must be a dominant tenement, which could consist of land or of some other interest.

As has been mentioned above, easements in gross are no longer considered legally objectionable in the United States and have at least a limited recognition in Canada and the various parts of the United Kingdom, albeit on a jurisdiction-by-jurisdiction basis. It may be, therefore, that saying that an Aboriginal group can itself be the holder of a right that is analogous to a negative easement would no longer attract objections based upon the necessity for land that would constitute the dominant tenement. Despite that, it is still interesting to consider the question of what the dominant tenement would consist of if the proposed right of Aboriginal dominion operated in the strict, traditional nature of an easement. Or, to put the question in a way that is more suggestive of a possible answer: if Aboriginal dominion is analogous to an easement, and the servient tenement would consist of that part of an Aboriginal group's traditional territory in which the group <u>does not</u> have Aboriginal title, then what would constitute the dominant tenement? Put in this way, the answer that immediately suggests itself is that the Aboriginal group's dominant tenement in this analogy would consist of that part of the group's traditional territory in which the group <u>does</u> have Aboriginal title.[120] This,

[120] Note that since in this analogy the dominant tenement – the Aboriginal title lands – would be contained within the greater servient tenement – the Aboriginal dominion lands – this would satisfy a traditional requirement of easements, namely that the two tenements must be sufficiently close to each

it is submitted, would probably be the best answer. For most if not all Aboriginal groups that had a traditional territory and could therefore hold the proposed right of Aboriginal dominion, it seems virtually certain that they would hold Aboriginal title somewhere within that traditional territory. Even if Aboriginal title were to apply only to the hypothetical "postage stamp" sized areas that were the subject of criticism in the *Tsilhqot'in* trial decision[121] – areas such as village sites, burial grounds, or particularly advantageous spots for hunting or other resource gathering – such small and discrete parcels of land would still be sufficient to constitute the dominant tenement – provided, of course, that the dominant tenement received some benefit from the enforcement of the easement – and therefore to ground the easement-like application of Aboriginal dominion to the much greater areas of Aboriginal dominion lands. Of course, given the decision of the Supreme Court of Canada in *Tsilhqot'in*, in which the Court held that Tsilhqot'in Aboriginal title exists at least to an area of approximately 1,700 square kilometers, there is no need to presume that a group's Aboriginal title lands would necessarily be dwarfed by its Aboriginal dominion lands.

Admittedly, this aspect of the analogy might raise the question of how the existence of the servient tenement would benefit the Aboriginal group specifically in the enjoyment of the dominant tenement, since this may be a characteristic of this type of right.[122] An argument in reply to this question might perhaps point to the need for a "buffer" around the core territory, or perhaps to the Aboriginal dominion lands as constituting a hinterland necessary to preserve ecological integrity and natural purposes. Any such argument would have to draw support from the facts specific to particular group situations.

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other: *Bailey v Stephens* (1862) 12 CB (NS) 91. Note that the dominant and servient tenement need not actually be adjacent: *Re Ellenborough Park* [1955] 3 All ER 667.

[121] *Tsilhqot'in Nation v British Columbia* 2007 BCSC 1700 [1376] < http://www.canlii.org/en/bc/bcsc/doc/2007/2007bcsc1700/2007bcsc1700.html?searchUrlHash=AAAAAQAccG9zdGFnZSBzdGFtcCBBTkQgYWJvcmlnaW5hbAAAAAAB&resultIndex=3 >.

[122] See, for example, *Moncrieff* (n 8), 27: "[T]he owner of a house and garden could not acquire a servitude right to park cars on his neighbour's land in connexion with a business which he ran elsewhere since this would have nothing to do with his enjoyment of his house and garden."

If Aboriginal title lands are posited as the analogue to the dominant tenement in relation to the servient tenement of Aboriginal dominion lands in this exercise, it would have the advantage that the parallel between Aboriginal and Common Law property concepts would be quite clear. Drawing such a parallel is not an attempt to force Aboriginal rights into a foreign taxonomy; instead, it is an attempt to enable a dialogue and an analysis of how the law can best meet the needs of a particular set of citizens. The concept of praedial benefit that is found in both Common Law and Civilian notions of easement or servitude have a wide compass of possible benefits; it is quite possible that consideration of these could result in the recognition of benefits that have previously been unknown in Aboriginal contexts. Even though, as noted above, the dominant tenement in an easement does not have to be land,[123] it is certainly the more familiar and conventional arrangement (though it must be acknowledged that in Scots Law, the monopoly right known as a legal separate tenement – which can be a right to salmon fishing, a right to gather shellfish, a right to hold a fair, a right to ferry, or any of a number of other identified rights – is in that jurisdiction familiar and conventional, and can burden land, such as by requiring access in order to get to the salmon fishing). And identifying Aboriginal title lands as being analogous to the dominant tenement would mean that that interest would be held directly by the Aboriginal group that benefits from it.

Two other possibilities regarding the dominant tenement should at least be considered, however, even if only to dismiss them. First, because the effect of the *Indian Act* has been to create Indian bands and to establish reserves that are held for their benefit by the Crown, it might seem that a band's reserve lands should constitute the dominant tenement in relation to its Aboriginal dominion lands.[124] This would, however, seem unlikely to be satisfactory. Since reserves are held by the Crown in trust for Indian bands, this conception would mean that the dominant tenement would be held by someone other than the Aboriginal group in whom the right resides. Looked at in one respect, this might not seem problematic, since a right need not be exercised by the

[123] See, for example, *Middletweed v Murray* 1989 SLT 11.
[124] To take the analogy further, this could be argued to support the view that prior to the establishment of reserves, Aboriginal groups held lands in which the relationship of certain core lands to the remainder of their lands was in the nature of a "quasi-easement". For an example of a case considering this concept, see *Attrill v Platt* (1884) 10 SCR 425.

person who actually holds a servitude, but can be exercised by that right-holder's employee or guest or friend or doctor or others [125], so it is not inconceivable that Aboriginal people could exercise a right attached to land which the Crown holds for their benefit. It would therefore be the owner – the Crown, rather than the members of the Aboriginal group – that should be in the position of enforcing the right of Aboriginal dominion, which seems problematic first in that it would generally be the case that the Crown itself had authorized whatever resource developments threatened the integrity of the lands in question, and second in that this bears no resemblance to what actually happens at present. Admittedly, however, these objections could be overcome by a recognition that parties holding derivative real rights in a dominant tenement can enforce rather than merely enjoy their servitude or easement. An additional objection to this approach would be that modern Indian bands – the entities attached to reserves – will often not correspond to the collectivities that hold Aboriginal rights, with those rights-holding collectivities possibly consisting of smaller groups such as extended families or clans on the one hand, or much larger groups such as nations or linguistic groups on the other hand. This is a somewhat more difficult problem to deal with in the ambit of real rights, but could be accommodated by notions of delegation of authority to enforce and enjoy.

A second possibility to consider would be for the analogue to the dominant tenement to be something other than land. That is, if a salmon fishing right can constitute a dominant tenement in Scotland [126], could it be the case that something similar – Aboriginal hunting and fishing rights, for example – would appropriately constitute the analogue to the dominant tenement with respect to the servient tenement of Aboriginal dominion in the proposed comparison between European and Aboriginal land rights? This possibility would at least be worth further consideration, in that a group's Aboriginal hunting and fishing rights are likely to exist throughout its traditional territory and to therefore operate within exactly the same areas as the proposed right of Aboriginal dominion. Further, since protecting the environmental integrity of the larger geographic base might be seen as ancillary or even necessary to the exercise of the

[125] Bartholomaei Cæpollæ, *Tractatus de Servitutibus, Tam Urbanorum, Quam Rusticorum Prædiorum* (n 101).
[126] Or Quebec: see *Matamajaw Salmon Club* (n 14).

hunting and fishing right – ie if inappropriate resource development cannot be prevented, fish and game populations will diminish or disappear – the purposive link between the dominant and servient tenements would be clear. That is, just as a right of parking may be ancillary to a right of vehicular access[127] so might a right to hunt or fish imply an ancillary right to protect fish and game stocks; or, to put it conversely, just as a servient owner of land over which a road passes cannot plough it up or grow cabbages on it or use it for basketball practice [128], it might be that lands subject to Aboriginal hunting or fishing rights cannot be used for purposes that would result in the eradication of game and fish. An additional advantage would be that Aboriginal hunting and fishing rights have been the subject of so many judicial decisions arising from attempted prosecutions that there is a considerable body of law to draw upon when conducting any legal analyses.

Another distinction between the proposed right of Aboriginal dominion and the actual easements to which they are analogized in this chapter should also be noted in passing. This is that the constitutional protection afforded to the former means that much of the case law concerning the latter would be of little assistance for interpretive purposes. So, for example, the latter are normally – though not in all cases[129] – subject to modification by statute [130] whereas the former – since they are protected under s 35 of the *Constitution Act, 1982* [131] – would not be. Statutory provisions modifying easements exist in many jurisdictions, and there is plentiful case law that applies either those statutes or the Common Law when the owners of servient tenements attempt to prevent the exercise of rights of way that attach to the dominant tenement. Examples include cases in which the dominant tenement being used as a public park [132] or as a

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[127] *Moncrieff* (n 8) [26].
[128] ibid [54].
[129] See, for example, the *Title Conditions (Scotland) Act 2003*, s 90(3) of which includes servitudes as one of the types of "title condition" for which no application for variation may be made, but which proceeds to exclude some servitudes in particular situations.
[130] In British Columbia, for example, the *Property Law Act* [RSBC 1996] Chapter 377.
[131] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[132] *Granfield v Cowichan Valley* (1993) 79 BCLR (2d) 303; 31 RPR (2d) 303 < http://www.canlii.org/en/bc/bcsc/doc/1993/1993canlii2218/1993canlii2218.html?searchUrlHash=AAAAAQAgZWFzZW1lbnQgYW5kICJkb21pbmFudCB0ZW5lbWVudCIAAAAAAQ&resultIndex=1 >.

school [133] or a bathing beach [134] or a hotel [135] resulted in a degree of access that was argued to be unreasonable. In some of those cases, courts looked at the intentions of the parties at the time the easements were created, whereas in others they held that they could not do so. Again, because Aboriginal dominion would, like other Aboriginal rights, arise from the pre-existing occupation of land by Aboriginal groups, there would be no original intentions to be considered (though note that in some jurisdictions, including Scotland, servitudes constituted by prescriptive exercise are not regarded as involving any grant, fictional or otherwise), and the question of whether the effect on landholders was reasonable or unreasonable would seem to involve the same sort of balancing as would take place within the analytical framework of the justifiability of infringement of the Aboriginal right.

Pre-assertion of sovereignty practices, other property rights, and the law of persons

Of necessity, a study such as this one is limited in scope, and peripheral lines of inquiry – however tempting – must often be foregone in order to focus on the main thesis. In the current case, this chapter appeared to begin with the limited purpose of considering how a familiar concept in Western property law could be used to provide support for the proposed existence of the right of Aboriginal dominion. As it developed, however, the path of inquiry led to a criticism of the *sui generis* approach to Aboriginal rights and to an assertion that the universality of human needs should manifest in analogues or equivalencies between property law concepts in different property law systems. While this chapter focused on the proposed equivalency between Aboriginal dominion – the subject of this thesis – and the negative easement, readers may be left wondering whether the equivalency of these particular rights is a "one-off" or whether it points to the need for a complete review of the relationship between at least some of the property rights known to the Common Law and Civil Law systems and all of the Aboriginal property rights that might arise from pre-assertion of sovereignty practices of

[133] *Thornton v Little* (1907) 97 LT Ch 24 (Ch D).
[134] *Malden Farms Ltd. v Nicholson* (1956) 3 DLR. (2d) 236 (OCA) < http://www.canlii.org/en/on/onca/doc/1955/1955canlii117/1955canlii117.html >.
[135] *White v Grand Hotel, Eastbourne, Limited* [1913] 1 Ch 113 (ECA).

Aboriginal groups.[136] The answer suggested here is the latter, and a couple of fact situations will be briefly considered in order to at least highlight the possibility that additional Aboriginal property rights remain to be found by anyone who cares to look for them. In addition, before concluding this chapter, consideration will be given to why Aboriginal rights are presumed to vest in groups rather than in individuals and whether this must necessarily be the case. Both of these topics will suggest a need for courts and others to consider pre-assertion of sovereignty practices of Aboriginal groups in a more nuanced way than has previously been the case.

Take first the known phenomenon that different Aboriginal groups in what is now British Columbia would traditionally converge at the deltas of the great rivers in order to harvest and process the massive runs of anadromous fish that were so crucial to their winter survival, namely eulachon (a prized but not universally available catch) and the various species of salmon. Present in the same areas would be members of several different nations or linguistic groups. In at least some cases, the lands at the river deltas would be within the traditional territory of one such group, but individuals from another group might have an established summer village of buildings in which they would sleep and process their catch. At other times of the year, when that group had returned to its home territory, these buildings would be empty and might be used on an *ad hoc* basis by the group in whose traditional territory they were located. This raises the question: what modern Aboriginal right, if any would accrue to the group who were present only for the seasonal fish harvest? If one were to proceed on the assumption that the only Aboriginal property right that is known to exist and needs to be considered is Aboriginal title, then the only question is whether the seasonally-present group can establish Aboriginal title to the "postage stamp"-sized area where their summer buildings once stood that is in the middle of another group's traditional territory and may be hundreds of kilometres from its own traditional territory. If, on the other hand, one is prepared to look to Western legal systems for analogues that may apply, then one might arrive at the conclusion that the Aboriginal right that should actually be found to

[136] "What specific rights may in future be claimed is impossible to predict….": Karin Lehmann, 'Aboriginal Title, Indigenous Rights and the Right to Culture' (2004) 20 S Afr J on Hum Rts 86, 96. As to the need for rights to continue to develop rather than being constrained by an "historic straight jacket" see Robert Joseph, 'Frozen Rights? The Right to Develop Māori Treaty and Aboriginal Rights' (2011) 19 Waikato L Rev 117, 132.

exist is one akin to a positive easement or perhaps a licence coupled with an interest (that is, the seasonally-present group's right to possession or licence might normally have been revocable by the group in whose traditional territory they were present, but their having been allowed to construct buildings for summer use would raise an expectation – an "equity" in the Common Law system – that they should be allowed to stay[137]). A judicial determination of the actual answer would – just as with a similar dispute between non-Aboriginal parties – require a weighing of all of the evidence, but that would hardly be a reason not to engage in the inquiry.

Consider second the example of the Gustafsen Lake standoff that occurred in British Columbia in 2005. At the heart of this incident was a dispute between Aboriginal individuals who were using a site to perform the Sun Dance that was legally controlled by a rancher with licensed grazing rights. Although the rancher had originally given permission for the use of the site, that permission was withdrawn after several years. The eventual result was a month-long standoff between armed Aboriginal occupiers and the Royal Canadian Mounted Police supported by the Canadian Armed Forces, during which there were extensive exchanges of gunfire and at least one explosion. While it would be naïve to think that this incident involved nothing more than a dispute over property rights or to presume that the occupiers –who were not members of the local band – would necessarily have been found to possess any relevant Aboriginal rights, it does prompt the question of whether it might not be useful to investigate the possibility of Aboriginal property rights – again, analogous to a positive easement, a license coupled with an interest, or some other right known to Western legal systems – by which Aboriginal individuals would be entitled to engage in culturally important practices on lands where they have not established Aboriginal title.

While the two examples given above indicate the importance of giving careful consideration to the pre-assertion of sovereignty lifestyles, this is also true if one wishes to consider questions related to the law of persons and Aboriginal rights. That is, given that the point has frequently been made in this thesis that Aboriginal rights accrue to

[137] *Inwards v Baker* [1965] 2 QB 29, 36-37 (CA).

groups rather than individuals – since, frankly, that is what the Supreme Court of Canada and other courts have said – the question might well be asked whether there is any role for the law of persons with regard to Aboriginal rights. In this regard, again, it will be useful to consider some aspects of pre-assertion of sovereignty Aboriginal lifestyles and to offer some hypothetical examples.

First, although the review of the relevant jurisprudence in earlier chapters has shown that the courts have repeatedly held that Aboriginal rights are collective rights, it is simply not clear why they have arrived at that conclusion. It may be noted that even when the historical record has clearly indicated that territories were owned by individuals, as was the case for the chiefs of the peoples now known as Nuu-chah-nulth on the west coast of Vancouver Island, courts have chosen to construe that ownership as actually residing in the rights-holding collectivity that is judged to be the successor of the pre-assertion of relevant sovereignty collectivity. [138] This predisposition to seeing Aboriginal rights as collective means that there has been little or no attention to the question of whether any Aboriginal rights accrue to the individual rather than to the group.

Second, certain realities of Aboriginal life before the arrival of Europeans would, in fact, have had the effect of elevating the importance of the group rather than the individual with regard to resources, including land. Consider once again, for example, the situation of those Aboriginal groups in what is now British Columbia that depended upon salmon for their survival, particularly as food that could be stored for winter consumption. When a salmon run occurred, millions of fish would arrive essentially at once, and the ability to catch, clean, preserve and store a season's supply of fish in a very short time required the entire collectivity to function together, with every person doing his or her own job. Similarly, for the Aboriginal people of the plains, the process of hunting bison and then of processing the resulting meat from a number of 1,000 kilogram animals before it spoiled would have been a process in which coordinated,

[138] *Ahousaht Indian Band and Nation v Canada (Attorney General)* 2009 BCSC 1[227-8] < https://www.canlii.org/en/bc/bcsc/doc/2009/2009bcsc1494/2009bcsc1494.html?autocompleteStr=ahousaht&autocompletePos=1 >.

collective effort was required. For most groups – though admittedly not all, since some groups did practice agriculture – there would simply have been little point in any individual being able to point to a particular piece of ground and say "this belongs to me personally". While personalty – chattels – would have had meaning in pre-contact Aboriginal life, notions of real property – at least as between members of the same group – may have been completely alien.

Third, government policies of the late nineteenth and early twentieth centuries that had the stated purpose of facilitating the transition of Aboriginal people away from their group identities and into full membership in mainstream society resulted in a backlash that now makes a non-collective approach to Aboriginal rights almost unthinkable and certainly unlikely to be pursued through litigation. Enfranchisement, residential schools, the allotment of parcels of reserve lands to individuals, these are all now widely interpreted as part of a concerted attempt to eliminate collective identity. Any suggestion that Aboriginal rights might not all attach to the group rather than the individual may therefore be expected to encounter resistance.

Despite these factors, there are reasons to think that the question of individual Aboriginal rights, particularly property rights, at least merits consideration and further investigation. As discussed in earlier chapters, courts in the United Kingdom and a number of its former colonies have for centuries presumed that indigenous property right regimes have continued to exist following the assertion of British sovereignty unless the existing property rights are explicitly extinguished. That presumption of the continuing existence of property rights – not qualified as only group rights, but rights more generally – is the basis for the existence of Aboriginal property rights in Canada today. Judicial pronouncements that Aboriginal rights are held by the collective would seem therefore to reflect a judicial presumption that prior to the assertion of sovereignty, Aboriginal groups had no conception of individual rights, including property rights, and that all possible rights resided with the group. Such a presumption may originally have reflected philosophical writings or *a priori* reasoning about the nature of life in hunter-gatherer economies. Given the hundreds of different Aboriginal groups living in Canada, the diversity of ecological zones they inhabited, and the great

variety of ways in which human beings around the world have chosen to organize themselves and live their lives, however, it seems unlikely that Canada's Aboriginal peoples would have been entirely homogeneous in this regard. If, hypothetically, some Anishinaabe person were to advance on her own behalf a legal claim to a particular patch of ground upon which her great-grandmother and her ancestors to time immemorial had grown squash, corn, and beans, what legitimate basis would the courts have for saying that the individual right she claimed could not exist at law? Consider as well that the early history of colonial governments' dealings with Aboriginal peoples provides some basis for thinking that those governments may not have felt confidence that all rights resided with Aboriginal groups rather than with their individual members; the Great Peace of Montreal, [139] for example, was signed by about 1,300 Aboriginal individuals and the signing of the Niagara Treaty[140] was attended by almost 2,000 Aboriginal individuals. This arguably could be indicative of rights residing in the individual rather than in the group; indeed, one complaint about colonial and Canadian governments is that – for their own convenience – they imposed a system of chieftainships upon Aboriginal groups which had not previously been subject to any such system of governance.

The purpose of raising this question is not to suggest that rights do not reside with the group – in most cases, though perhaps not all, they do – but to suggest that more attention than can be given here might usefully be devoted to the exact nature of the relationship of the individual to the group and of the implications for the holding of Aboriginal property rights. To analogize a final time to European legal systems, it may be observed that in England and Scotland – unlike in North America – it is very common for people to bind themselves together for common purposes through unincorporated associations. While these entities have no independent legal existence and cannot themselves hold property rights, this has not prevented them from effectively pursuing their interests, as, for example, when trustees accomplish the

[139] Gilles Havard, *The Great Peace of Montreal of 1701: French-Native Diplomacy in the Seventeenth Century* (McGill-Queen's University Press 2001) 38. See also Alain Beaulieu, Francis Back, Roland Viau, *The Great Peace: Chronicle of a Diplomatic Saga* (Canadian Museum of Civilization 2001).
[140] John Borrows, 'Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government' in Michael Asch (ed), *Aboriginal and Treaty Rights in Canada* (UBC Press, 1997). See also David T McNab, *Circles of Time: Aboriginal Land Rights and Resistance in Ontario* (Wilfred Laurier University Press, 1999) 50.

purposes of a golf club. Without delving into the considerable body of case law that concerns these entities, it may at least be observed that the study of that case law in conjunction with careful consideration of the pre-assertion of sovereignty lifestyles of specific Aboriginal groups may prove useful as future disputes arise – as they inevitably must – about who can properly claim to exercise Aboriginal rights and the manner in which they can do so.

Summing up: Aboriginal dominion and easements

It was suggested at the start of this chapter that drawing parallels between Aboriginal rights and their analogues in European property law systems would be valuable for at least two reasons, namely easing the recognition of the admittedly novel proposed right of Aboriginal dominion and demonstrating that property law is a field characterized by underlying principles that transcend particular legal systems. It was then suggested that an easement would be the appropriate analogue in European legal systems for the proposed right of Aboriginal dominion. The ability arising from both Aboriginal title and an easement – ie a negative easement – for the holder of the right to restrict another's use of his or her land was suggested to be functionally the same right arising from and applied in the differing circumstances of two different societal structures. While it has not been suggested that there is an exact equivalence between the two, it has been shown that they are sufficiently similar that anyone looking for a European precedent or analogue for Aboriginal dominion could point to the easement.

As noted earlier, however, the insistence of the Supreme Court of Canada that Aboriginal rights are *sui generis* might have seemed to make the exercise of drawing parallels between Aboriginal rights and European legal concepts seem, at best, unnecessary. In response, all that had been submitted earlier was that a close reading of the Court's pronouncements on the *sui generis* nature of Aboriginal rights would not preclude such an endeavour. Having now shown the correspondence between Aboriginal dominion and easements, however, it may be possible to go further and to assert that the courts should themselves engage in similar analyses. Why should the courts take this approach rather than continuing to have recourse to the *sui generis*

characterization of Aboriginal rights? Two points at least can be made in support of this argument.

First, if there is indeed nothing new under the sun,[141] then for the courts to continue to insist otherwise with regard to Aboriginal rights is bound to ring false. Put charitably, when in recent decades the courts were handed the task of creating the modern law of Aboriginal rights following at least a century in which that task had been neglected, it is understandable that they would have wished to hedge their bets and assume that their new legal creations might be too fragile to resist rough handling. Put less charitably, on the other hand, a continued insistence that Aboriginal rights are *sui generis* seems like a cheat, a gloss put upon a creation that may depend more upon duct tape and number 8 wire than a sound legal construction. To the extent that it suggests that judges are just making up the law as they go along, it offends fundamental principles of law itself. As stated by Rennie J in *Martinez-Caro v Canada (Citizenship and Immigration)* [142] :

> The latter, the application of law, is the raw material of trials and motions, barristers and judges. But the law itself should be discernible and not subject to the luck or lack of luck depending which judge is assigned to hear the case. The law must be accessible, and so far as possible, intelligible, clear and predictable. The late Lord Chief Justice Bingham, in his book *The Rule of Law* (England: Penguin Group, 2010, at 39) points to a succinct statement by Lord Diplock:
>
> > Elementary justice or, to use the concept often cited by the European Court [of Justice], the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly available.

While this thesis is not intended as a general critique of the existing Aboriginal law jurisprudence, one need only compare the divergent results obtained on very similar facts in the Supreme Court of Canada's rulings in *Marshall; Bernard* [143] on the one hand and *Tsilhqot'in Nation* [144] on the other to conclude that the law has not been very

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[141] Ecclesiastes 1:9.
[142] 2011 FC 640 [49] < http://www.canlii.org/en/ca/fct/doc/2011/2011fc640/2011fc640.html?searchUrlHash=AAAAAQAca25vd2FibGUgY2VydGFpbiBwcmVkaWN0YWJsZQAAAAAB&resultIndex=10 >.
[143] *Marshall; Bernard* (n 7).
[144] *Tsilhqot'in* (n 33).

"predictable" with regard to Aboriginal rights. As to whether it is "intelligible" and "clear", surely the prospect of it achieving those characteristics could only be improved if courts made a greater effort to reconcile Aboriginal and non-Aboriginal property law concepts rather than continuing to emphasize the uniqueness of the former. This, after all, was what the decision in *Delgamuukw* seemed to advocate:

> I explained in *Van der Peet* that those [aboriginal] rights are aimed at the reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory. They attempt to achieve that reconciliation by "their bridging of aboriginal and non-aboriginal cultures" (at para. 42). Accordingly, "a court must take into account the perspective of the aboriginal people claiming the right. . . . while at the same time taking into account the perspective of the common law" such that "[t]rue reconciliation will, equally, place weight on each" (at paras. 49 and 50). [145]

While the concept of reconciliation will be discussed more generally in the next chapter, it will suffice at this point to assert that the reconciliation the Court advocates in this passage – ie the bridging of Aboriginal and non-Aboriginal cultures – could arguably best be served by illuminating the similarities between those cultures rather than their differences, and that this is a second reason for the courts to make the effort to analyze Aboriginal property rights in light of known property law concepts. In this regard, the exercise that has been undertaken in this chapter – showing that the proposed right of Aboriginal dominion can be analogized to the known European property law concept of the easement – serves not merely to provide extra support for the existence of the proposed right, but also to further that goal of reconciliation. That is, rather than accepting that Aboriginal law must remain a separate enclave populated by *sui generis* legal phenomena, this specific exercise in reconciling European and Aboriginal property law concepts may be hoped to have contributed to reconciliation more generally by illustrating how the same legal tools can be used to meet human needs in the context of different cultures. If so, it may be useful if courts in future need to consider whether additional Aboriginal property rights might exist. It may also be hoped this approach will contribute to the development of a unified body of Canadian law in which by the synthesis of Aboriginal law and European law concepts,

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[145] *Delgamuukw* (n 6) [81].

reconciliation can be seen to have been achieved rather than remaining merely aspirational.

Chapter VIII: Aboriginal dominion and reconciliation

The concept of Aboriginal dominion has so far been presented as simply the logical outcome of the application of jurisprudential principles established by Supreme Court of Canada to the phenomenon of pre-contact control by Aboriginal groups of the entirety of their traditional territories and particularly to resource use within those territories. The question of whether or not the recognition of the proposed new right of Aboriginal dominion would be a good thing has not been considered up to this point and could be argued to be irrelevant: *fiat justitia ruat caelum*.[1] This chapter, however, is premised upon the recognition that rights do not exist in a vacuum,[2] an observation that the courts have in recent years frequently repeated in the specific context of Aboriginal and treaty rights.[3] An attempt will be made, therefore, to answer the question of whether the recognition of the right of Aboriginal dominion is likely to contribute to greater societal good. This topic will be considered through the lens of "reconciliation", a concept that has been mentioned only in passing in earlier chapters. While some academics such as Taiaiake Alfred[4] and Jeff Corntassel *et al*[5]are highly critical of the concept of reconciliation as essentially a tool for co-option and assimilation of Aboriginal peoples [6], its embrace by the courts establishes it as the benchmark by which to assess any new concept in Aboriginal law. As will be seen below, however, the courts have not treated the concept of reconciliation with

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[1] Let justice be done though the heavens fall.
[2] See, for example: *R v Nikal* [1996] 1 SCR 1013 XCII < http://www.canlii.org/en/ca/scc/doc/1996/1996canlii245/1996canlii245.html?autocompleteStr=nikal&autocompletePos=1 >; *Ahousaht Indian Band and Nation v Canada (Attorney General)* 2013 BCCA 300 [31] < http://www.canlii.org/en/bc/bcca/doc/2013/2013bcca300/2013bcca300.html?searchUrlHash=AAAAAQANMjAxMyBiY2NhIDMwMAAAAAAB&resultIndex=1 >.
[3] See, for example: *R v Morris*, [2006] 2 SCR 915, 2006 SCC 59, 114 < http://www.canlii.org/en/ca/scc/doc/2006/2006scc59/2006scc59.html?searchUrlHash=AAAAAQALMjAwNiBzY2MgNTkAAAAAAQ&resultIndex=1 >; *R v Sioui* [1990] 1 SCR 1025 < http://www.canlii.org/en/ca/scc/doc/1990/1990canlii103/1990canlii103.html?autocompleteStr=sioui&autocompletePos=1 >; *R v Taylor and Williams* (1981), 34 OR (2d) 360 (CA) < http://www.canlii.org/en/on/onca/doc/1981/1981canlii1657/1981canlii1657.html?searchUrlHash=AAAAAQATMTk4MSAzNCBvciAoMmQpIDM2MAAAAAAB&resultIndex=1 >.
[4] Taiaiake Alfred, 'Restitution is the Real Pathway to Justice for Indigenous Peoples' in Gregory Younging, Jonathan Dewar and Mike DeGagné (eds), *Response, Responsibility and Renewal: Canada's Truth and Reconciliation Journey* (Aboriginal Healing Foundation 2009) .
[5] Jeff Corntassel, Chaw-win-is and T'lakwadzi, 'Indigenous Storytelling, Truth-telling, and Community Approaches to Reconciliation' (2009) 35(1) ESC 137.
[6] For a contrasting view, see Victoria Freeman, 'In Defence of Reconciliation' (2014) 27 Can JL & Jurisprudence 213.

consistency, so that it will be necessary to explore the concept in a general way prior to attempting to apply it.

Reconciliation: its general meaning

The term "reconciliation" has been used with great frequency in Canadian Aboriginal law, if not with perfect consistency or clarity. While the term as used today was only introduced into Canadian Aboriginal law in 1990 by the *Sparrow* decision, [7] a search of any Canadian legal database using the terms "Aboriginal" and "reconciliation" will produce results that include literally hundreds of reported judicial decisions. Knox proposes that "reconciliation" has come to include three different but closely-related concepts, namely: "reconciliation between human being and human being ("individual reconciliation"), reconciliation between legal systems ("legal reconciliation") and reconciliation between peoples ("social reconciliation")" [8], all three of which can be perceived in judicial use of this term. What can be said with confidence is that reconciliation, whatever it means, is not merely an important concept within the field of Aboriginal law but has instead been identified by the Supreme Court of Canada as the motivating principle for the entire field of Aboriginal law: "It is true, of course, that Aboriginal law has as its fundamental objective the reconciliation of Canada's Aboriginal and non-Aboriginal communities…." [9] Clearly, then, if Aboriginal dominion is to be a useful legal tool and is to contribute to the greater public good, it must be seen to contribute to reconciliation, and it will be argued below that if it were judicially recognized, it would do so.

Before looking at the treatment of reconciliation in Canadian Aboriginal law, however, it may be useful to begin by remembering that many nations and cultures have wrestled with reconciliation, usually in the context of attempting to come to terms with incidents and eras of violence and oppression in their pasts. Whether the process of

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[7] *R v Sparrow* [1990] 1 SCR 1075 < http://www.canlii.org/en/ca/scc/doc/1990/1990canlii104/1990canlii104.html?autocompleteStr=sparrow&autocompletePos=1 >.
[8] D Anthony Knox, 'Reconciliation in Canadian Law: The Three Faces of Reconciliation?' (McCarthy Tétrault, 10 July 2009) < http://www.mccarthy.ca/article_detail.aspx?id=4597 >.
[9] *Lax Kw'alaams Indian Band v Canada* (Attorney General) 2011 SCC 56 [12] < https://www.canlii.org/en/ca/scc/doc/2011/2011scc56/2011scc56.html?autocompleteStr=lax&autocompletePos=2 >.

reconciliation is one that is diffused throughout a society such as the *Vergangenheitsbewältigung* [10] by which Germans seek to come to terms with the Holocaust or is a defined, discrete process such as the South African Truth and Reconciliation Commission which held hearings from 1996 through 1998, the pursuit of reconciliation has become a prevalent phenomenon in recent decades.[11] This fact was reinforced when the United Nations proclaimed 2009 as the International Year of Reconciliation. [12] Hirsch *et al* identified forty-one truth and reconciliation commissions that had been in various stages of operation by 2006, of which more than half were established in the decade between 1996 and 2006, with six additional commissions in the drafting stages by 2008.[13] Most of these were responses to relatively recent incidents of violent conflict within nation-states, reflecting the view stated by Redekop and Ryba that "It is in the context of violent, deep-rooted conflict that reconciliation becomes the greatest challenge." [14] Others, however, including Canada's own Truth and Reconciliation Commission[15], are a response to what Redekop and Ryba refer to as "…policies of assimilation that not only deprive people of their

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[10] "*Vergangenheitsbewaltigung* is one concept that emerged from the atrocities of the Nazi era. In a real sense, this term actually does not exist outside of the German language. However, this term is now increasingly used by other countries and cultures; comparable concepts in other languages are nonexistent. The English phrase 'coming to terms with the past' most closely approximates this German term." Andreas Maislinger, 'Coming to Terms with the Past: An International Comparison' in Russell F Farnen (ed) *Nationalism, Ethnicity, and Identity: Cross National and Comparative Perspectives* (Transaction Publishers 1994) 170. See also the translation "mastering of the past" in Susanne Walther, 'Problems in Blaming and Punishing Individuals for Human Rights Violations: the Example of the Berlin Wall Shootings' (1993) 1 Eur J Crime Crim L & Crim Just 104.

[11] Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (WW Norton 2000).

[12] United Nations A/RES/61/17 < http://www.un.org/en/sections/observances/international-years/ >

[13] Michal Ben-Josef Hirsch, Megan MacKenzie and Mohamed Sesay, 'Measuring the impacts of truth and reconciliation commissions: Placing the global 'success' of TRCs in local perspective' (2012) 47(3) Cooperation and Conflict 386, 389 and see a 2015 estimate of "approximately forty" different truth commissions in Leigh Goodmark, '"Law and Justice Are Not Always the Same": Creating Community-Based Justice Forums for People Subjected to Intimate Partner Abuse' (2015) Revista Forumul Judecătorilor 20, 22.

[14] Vern Neufeld Redekop and Thomas Ryba, 'Deep-Rooted Conflict, Reconciliation, and Mimetic Theory', in Thomas Ryba (ed), *René Girard and Creative Reconciliation* (Lexington Books 2014) 1.

[15] The Truth and Reconciliation Commission of Canada was created pursuant to the Indian Residential Schools Settlement Agreement, the negotiated agreement by which a class action on behalf of former residents at church-run, state-supported schools was concluded. In the course of its five-year mandate, the Commission provided a forum for thousands of former students of Indian Residential Schools to tell the stories of their experiences. The final report of the Commission was released in June 2015 in four documents: Truth and Reconciliation Commission of Canada, 'Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada'; 'What We Have Learned: Principles of Truth and Reconciliation'; 'The Survivors Speak: A Report of the Truth and Reconciliation Commission of Canada'; and 'Truth and Reconciliation Commission of Canada: Calls to Action'. < http://www.trc.ca/websites/trcinstitution/index.php?p=890 >.

cultures but are an assault on the human spirit…." [16] While reconciliation has become the subject of much academic literature, [17] its meaning has been said to remain contested and at times confused. [18] In an attempt to develop a working definition of reconciliation, Hamber and Kelly reviewed a range of existing definitions, and while purporting to find them all "incredibly useful and informative" acknowledged that "many were wordy, complex and often quite inaccessible to the lay person."[19] Skaar, in the course of examining various definitions and concepts of reconciliation went so far as to state that "The aim is thus not to come up with a working definition of the concept, as I do not see the utility of aiming for one, universal definition." [20]

Hamber and Kelly, on the other hand, did at least come up with a working definition of reconciliation, namely that it is "the process of addressing conflictual and fractured relationships, and this includes a range of activities", adding that it "is a voluntary act that cannot be imposed." [21] They say that a reconciliation process generally involves five strands: (1) developing a shared vision of an independent and fair society; (2) acknowledging and dealing with the past; (3) building positive relationships; (4) significant cultural and attitudinal change; and (5) substantial social, economic, and political change. [22] While not positing a definition, Redekop and Ryba stated that reconciliation "needs to address hurts from the past, preferably in a way that involves making amends" and that concomitant goals to reconciliation are the building of relationships, healing from trauma, structural change and building a shared identity. [23]

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[16] (n 14).
[17] ibid 7.
[18] Brandon Hamber and Gráinne Kelly, 'Beyond Coexistence: Toward a Working Definition of Reconciliation', in Joanna R Quinn (ed), *Reconciliation(s): Transitional Justice in Postconflict Societies* (McGill Queen's University Press 2009) 286.
[19]ibid 291.
[20] Elin Skaar, 'Reconciliation in a Transitional Justice Perspective' (2013) 1 Trans J Rev Iss, Article 10. See, however, the contrasting view of Meierhenrich, who criticized the Truth and Reconciliation Commission of South Africa for failing to advance "a working definition of reconciliation, a definition that would have made it possible to measure progress in the realization of the commission's objective – the achievement of truth and reconciliation in the divided society." Jens Meierhenrich, 'Varieties of Reconciliation' (2008) 33 Law & Soc Inquiry 195, 216.
[21] Hamber and Kelly (n 18) 291. As to the non-existence of even a working definition of "reconciliation" in international law, see Larry May, '*Jus Post Bellum* in the Age of Terrorism: Remarks by Larry May' (2012) 106 Am Soc'y Int'l L Proc 332, 333.
[22] ibid 291-292.
[23] Redekop and Ryba (n 14) 7.

It might at first instance seem unlikely that "reconciliation" when used in this way could have much to do with the way that courts would use this same term, given courts' usual narrow mandate to adjudicate disputes. As will be seen below, however, while the Supreme Court of Canada may have sometimes used "reconciliation" in a much narrower sense with regard to Aboriginal law, its use of the term does sometimes – particularly more recently – come closer to the meaning encountered in the academic literature and in reference to truth and reconciliation commissions.

"Reconciliation" as used in Canadian Aboriginal law

The Supreme Court of Canada first used "reconciliation" in Aboriginal cases in the sense of showing the compatibility of legislative provisions that might have appeared on their faces to be incompatible. So in *Daniels v White*,[24] the Court considered how to reconcile the prohibition on hunting migratory game birds at certain times of the year under the *Migratory Birds Convention Act*[25] with an agreement (subsequently affirmed by the *Constitution Act, 1930* [26]) between the governments of Canada and Manitoba that "Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year" (underlining added).[27] And in *Sparrow* the Court pondered how the recognition and affirmation of Aboriginal rights by s 35(1) of the *Constitution Act, 1982* could be reconciled with Parliament's legislative power, and concluded:

> … federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights. Such scrutiny is in keeping with the liberal interpretive principle enunciated in *Nowegijick*, *supra*, and the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by *Guerin v. The Queen*, *supra*.[28] [underlining added]

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[24] *Daniels v White* [1968] SCR 517 < http://www.canlii.org/en/ca/scc/doc/1968/1968canlii67/1968canlii67.html?searchUrlHash=AAAAAQAdYWJvcmlnaW5hbCBBTkQgcmVjb25jaWxpYXRpb24AAAAAAQ&resultIndex=147 >
[25] RSC 1952, c 179.
[26] *Constitution Act, 1930*, 20 & 21 George V, c 26 (UK).
[27] ibid, Schedule 1, s 13.
[28] *R v Sparrow* [1990] 1 SCR 1075 < https://www.canlii.org/en/ca/scc/doc/1990/1990canlii104/1990canlii104.html?autocompleteStr=sparrow&autocompletePos=1 >.

The reasoning in *Sparrow* was followed in *Badger*, where the Court said that the "competing provisions" that had to be reconciled were those – both contained in constitutional documents – that allowed the province of Alberta to legislate with regard to hunting and those that guaranteed the hunting rights of Aboriginal peoples.[29]

In the same year as *Badger*, however, the Court handed down two decisions that accorded much greater importance to reconciliation and used that term in a broader sense. *Van der Peet* [30] was influenced by the Australian decision popularly known as *Mabo (No 2)* [31], a case concerning a dispute between the Meriam people and the Crown as to which possessed the title to the Murray Islands. All three sets of reasons in *Van der Peet* cite *Mabo*, with the majority decision in particular quoting a passage in which Brennan J states that "Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory." [32][underlining added in *Van der Peet*] From this, Lamer J for the majority reasoned in *Van der Peet* that "To base aboriginal title in traditional laws and customs, as was done in *Mabo*, is, therefore, to base that title in the pre-existing societies of Aboriginal peoples." [33] Thus, it followed that there was a need to reconcile Aboriginal laws and customs with Crown sovereignty. Lamer CJC for the majority used "reconciliation" in this sense as referring to the reconciliation of two apparently conflicting legal and constitutional forces, namely the sovereign powers exercised by the Canadian state and those unextinguished Aboriginal rights that had survived European contact and the assertion of Crown sovereignty:

> In my view, the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates aboriginal peoples from all other minority groups in Canadian

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[29] *R v Badger* [1996] 1 SCR 771 [14] < https://www.canlii.org/en/ca/scc/doc/1996/1996canlii236/1996canlii236.html?searchUrlHash=AAAAAQAGYmFkZ2VyAAAAAAE&resultIndex=3 >.
[30] *R v Van der Peet* [1996] 2 SCR 507 < https://www.canlii.org/en/ca/scc/doc/1996/1996canlii216/1996canlii216.html?autocompleteStr=van%20der&autocompletePos=1 >.
[31] *Mabo [No 2]* (1992) 175 CLR 1 < http://www.austlii.edu.au/au/cases/cth/HCA/1992/23.html >.
[32] ibid 59.
[33] *Van der Peet* (n 30) [40].

> society and which mandates their special legal, and now constitutional, status.
>
> More specifically, what s. 35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is acknowledged and reconciled with the sovereignty of the Crown. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown. [34]

Most of the two dozen references to reconciliation in the judgment (including the majority reasons of Lamer CJC and the minority reasons of McLachlin J and L'Heureux-Dubé J) are to the same effect, though McLachlin J does also refer to the decision of Lamer J as being concerned with the reconciliation in the sense of reconciling Aboriginal rights with other societal interests.[35]

The latter meaning was the one given more prominence in the companion case of *Gladstone*,[36] in which there were also decisions for the majority by Lamer CJC and dissenting opinions by McLachlin J and L'Heureux-Dubé J. While this case also contained references to the reconciliation of Aboriginal prior occupation with the sovereignty of the Crown, the discussion of reconciliation was principally in the context of the reconciliation of Aboriginal societies with Canadian society as a whole, particularly with regard to justifying Crown infringements of Aboriginal rights:

> Aboriginal rights are a necessary part of the reconciliation of Aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.
>
> The recognition of conservation as a compelling and substantial goal demonstrates this point. Given the integral role the fishery has played in the distinctive cultures of many Aboriginal peoples, conservation can be said to be something the pursuit of which can be linked to the recognition of the existence of such distinctive cultures. Moreover, because

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[34] ibid [30-31].
[35] ibid [306-307].
[36] *R v Gladstone* [1996] 2 SCR 723 < https://www.canlii.org/en/ca/scc/doc/1996/1996canlii160/1996canlii160.html?autocompleteStr=gladstone&autocompletePos=1 >.

> conservation is of such overwhelming importance to Canadian society as a whole, including Aboriginal members of that society, it is a goal the pursuit of which is consistent with the reconciliation of Aboriginal societies with the larger Canadian society of which they are a part. In this way, conservation can be said to be a compelling and substantial objective which, provided the rest of the *Sparrow* justification standard is met, will justify governmental infringement of Aboriginal rights.
>
> Although by no means making a definitive statement on this issue, I would suggest that with regards to the distribution of the fisheries resource after conservation goals have been met, objectives such as the pursuit of economic and regional fairness, and the recognition of the historical reliance upon, and participation in, the fishery by non-Aboriginal groups, are the type of objectives which can (at least in the right circumstances) satisfy this standard. *In the right circumstances*, such objectives are in the interest of all Canadians and, more importantly, the reconciliation of Aboriginal societies with the rest of Canadian society may well depend on their successful attainment. [single underlining and italics in original, double underlining added][37]

In subsequent cases, such as *Delgamuukw* [38] and *Tsilhqot'in Nation* [39], the Court has continued to use "reconciliation" in these two distinct ways (without apparently acknowledging that they are, in fact, distinct) to refer on the one hand to the legal and constitutional reconciliation of prior Aboriginal occupation with Crown sovereignty and to refer on the other hand to the reconciliation of Aboriginal societies with the larger Canadian society of which they are a part. The discussion of Aboriginal dominion in the preceding chapters of this thesis could be said to have been concerned with the former usage, in that the identification of a previously unrecognized Aboriginal right – and of Aboriginal rights in general – is part of the process of reconciliation, as stated in *Marshall; Bernard*.[40] What remains to be considered in this chapter is whether Aboriginal dominion can be a tool for achieving reconciliation in the latter sense, that of reconciling Aboriginal societies with the broader Canadian society.

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[37] ibid [73-75].
[38] *Delgamuukw v British Columbia* [1997] 3 SCR 1010 < https://www.canlii.org/en/ca/scc/doc/1997/1997canlii302/1997canlii302.html?autocompleteStr=delgam&autocompletePos=1 >.
[39] *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 256 < https://www.canlii.org/en/ca/scc/doc/2014/2014scc44/2014scc44.html?autocompleteStr=tsilh&autocompletePos=2 >.
[40] *R v Marshall; R v Bernard* 2005 SCC 43 [52] < https://www.canlii.org/en/ca/scc/doc/2005/2005scc43/2005scc43.html?autocompleteStr=marshall%20bernard&autocompletePos=1 >.

Aboriginal dominion and reconciliation of Aboriginal groups with Canadian society

There are at least four ways in which it could be suggested that the recognition of the right of Aboriginal dominion could contribute to reconciliation between Aboriginal groups and the broader Canadian society. First, by recognizing the existence of an Aboriginal right that would cover all of the land within any given group's traditional territory, the Canadian legal system would be brought into alignment with Aboriginal groups' own views that they possess at least some sort of right to all of their traditional territories rather than merely those portions where they can establish Aboriginal title. Second, the presumption of the existence of a legally-recognized right throughout an Aboriginal group's traditional territory would give Aboriginal groups a tool by which those forms of resource development most threatening to either traditional subsistence practices or important cultural values could be blocked, while more acceptable forms of resource development could be encouraged and accommodated. Third, the recognition of an Aboriginal property right throughout an Aboriginal group's traditional territory would allow the group to rely upon that right when entering into negotiations with governments and corporations that wished to engage in resource development within its territory, and conversely would allow those corporations and governments to make concessions to the group without facing accusations that doing so would constitute a gratuitous compromise of their shareholders' or citizens' interests. Fourth, by more firmly establishing Aboriginal groups' ability to safeguard their own interests and pursue their own self-determination, a recognized right of Aboriginal dominion could empower those groups and allow them to accept that reconciliation with the broader Canadian society need not mean compromising their own distinct identities and cultures.

The first of these three points is self-evident. Since it is undeniable that Aboriginal groups had traditional territories, it cannot be satisfactory to either Aboriginal groups or the Canadian legal and political systems if no mechanism exists by which to give recognition to the significance of those traditional territories. That is, if the territorial

boundaries recognized by Aboriginal groups and their neighbours[41] in pre-Contact times were of significance to those groups, it would be difficult to understand why they could have no legal significance now in terms of delineating areas where particular rights exist from those where they do not. To the extent that the right of Aboriginal dominion can constitute a mechanism to provide the necessary recognition, it would alleviate a point of tension that exists between Aboriginal groups and the broader Canadian society.

The second and third points may require some elucidation. With regard to the second point, that the recognition of Aboriginal dominion may allow Aboriginal groups to tailor their responses to resource development or extraction proposals to reflect the degree to which those proposals might, on the one hand, be desirable to the affected Aboriginal groups or might, on the other, be unacceptable based upon the threats that they pose or their conflict with traditional values, two examples might serve to show that such diverse responses do, in fact, arise.

The first example is sport hunting, an activity which provides economic benefits to those Aboriginal people who work as guide-outfitters.[42] Some forms of sport hunting, however, are considered unacceptable to some Aboriginal groups, such as bear hunting to the Aboriginal groups on the British Columbia coast, [43] so much so that one Aboriginal group purchased a hotel and the attached guide-outfitting business just to put an end to the practice. [44] It seems likely that the recognition of the right of Aboriginal dominion would lead to the exercise of that right to prevent bear hunting, while not interfering with commercial hunting for other species. A second example would concern the nuanced approach that Aboriginal groups take to fossil fuel pipelines proposed to pass through their traditional territories. The Carrier Sekani Tribal Council

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[41] This is not to suggest that Aboriginal groups will always agree among themselves as to where their boundaries lie. Nations, states and principalities throughout the world and throughout history have no doubt always been subject to boundary disputes, and Aboriginal groups were and are no exception.
[42] See, for example, the Cree Outfitters and Tourism Association < http://www.creetourism.ca/ >.
[43] Mark Hume, 'BC first nations ban trophy bear hunting' Globe and Mail (Toronto 12 September 2012) < http://www.theglobeandmail.com/news/british-columbia/bc-first-nations-ban-trophy-bear-hunting/article4541330/ >. Note that the Government of British Columbia has now announced an end to trophy hunting of grizzlies and to all grizzly hunting in the Great Bear Rainforest: Paula Baker, 'B.C. NDP government stopping contentious grizzly bear trophy hunt' Global News (14 August 2017) < http://globalnews.ca/news/3669625/b-c-ndp-government-stopping-contentious-grizzly-bear-trophy-hunt/ > accessed 14 August 2017.
[44] 'Halting the Hunt' Haida Laas (Old Massett February 2011) 5.

("CSTC"), for example, has indicated that it is not unilaterally opposed to the five natural gas pipelines that are proposed to traverse its traditional territory and that it is willing to enter into a comprehensive natural gas agreement with the Government of British Columbia[45], but that it wants "informed decisions about how to ensure that development does not compromise current and future generations requirements for a healthy environment and meaningful cultural practices".[46] With regard to the pipeline transportation of bitumen, on the other hand, the CSTC judges it too risky and is simply opposed to it.[47] Nearby Aboriginal groups take differing positions on natural gas pipelines, with the Nisga'a Nation approving a pipeline proposal[48] and the Lax Kw'alaams First Nation withholding approval for a pipeline and the accompanying $1.15 billion in benefits – $319,000 per band member[49] – that had been promised to it. Both the Nisga'a[50] and Lax Kw'alaams [51], however, are among the more than 130 Aboriginal groups that are opposed to the Northern Gateway bitumen pipeline proposal,[52] with a spokesperson for the Lax Kw'alaams saying "There's no amount of

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[45] 'Natural Gas Pipelines' (June 2014) < http://www.carriersekani.ca/current-issues/natural-gas-pipelines/ > accessed 27 September 2015.
[46] 'CSTC Releases Reports to BCEAO regarding natural gas pipeline' (6 October 6 2014) < http://www.carriersekani.ca/news/cstc-releases-reports-to-bceao-regarding-natural-gas-pipeline/ >.
[47] 'CSTC Remains Opposed to Enbridge: JRP Decision Puts All Other Projects at Risk' (20 December 2013 < http://www.carriersekani.ca/news/cstc-remains-opposed-to-enbridge-jrp-decision-puts-all-other-projects-at-ri/ > accessed 1 October 2015.
[48] Dirk Meissner, 'Nisga'a Nation signs LNG pipeline benefits deal with B.C.' (Canadian Broadcasting Corporation 21 June 2014) < http://www.cbc.ca/news/canada/british-columbia/nisga-a-nation-signs-lng-pipeline-benefits-deal-with-b-c-1.2844672 > accessed 28 September 2015.
[49] Christopher Donville and Rebecca Penty, 'BC First Nation Rejects $1.15 billion Petronas-led LNG deal: 'This is not a money issue'' Financial Post (Toronto 13 May 2015) < http://business.financialpost.com/news/energy/b-c-first-nation-rejects-1-15-billion-petronas-led-lng-deal-this-is-not-a-money-issue?__lsa=0e43-1d45 > accessed 28 September 2015. Note, however, that an agreement was subsequently reached: Gordon Hoekstra, 'B.C. government signs LNG benefits agreement with First Nations' (Vancouver Sun, 15 February 2017) < http://vancouversun.com/business/energy/b-c-government-signs-lng-benefits-agreement-with-first-nations > accessed 20 March 2017. Finally, however, the proponent cancelled the project: Nick Eagland, 'Petronas cancels $11.4-billion LNG project near Prince Rupert' (Vancouver Sun, 25 July 2017) < http://vancouversun.com/news/local-news/petronas-cancels-11-4-billion-lng-project-near-prince-rupert > accessed 14 August 2017.
[50]Nisga'a Lisims Government, 'NISGA'A LISIMS GOVERNMENT OPPOSES CONSTRUCTION OF THE NORTHERN GATEWAY PROJECT' (19 January 2012) < http://www.nisgaanation.ca/news/nisgaa-lisims-government-opposes-construction-northern-gateway-project > accessed 28 September 2015.
[51] Rebecca Penty and Jeremy Van Loon, 'Northern Gateway Plan B could see Enbridge shift end point for pipeline to B.C. port of Prince Rupert' Financial Post (Toronto 6 June 2014) < http://business.financialpost.com/news/energy/northern-gateway-plan-b-could-see-enbridge-shift-end-point-for-pipeline-to-b-c-port-of-prince-rupert?__lsa=5477-c6c4 > accessed 28 September 2015.
[52] West Coast Environmental Law Association, 'First Nations that have declared opposition to proposed Enbridge tanker & pipeline proposal' (31 December 2011) < http://business.financialpost.com/news/energy/northern-gateway-plan-b-could-see-enbridge-shift-end-point-for-pipeline-to-b-c-port-of-prince-rupert?__lsa=5477-c6c4 > accessed 28 September 2015.

money that would convince us to allow this pipeline to go through our territory".[53] The recognition of the right of Aboriginal dominion would allow Aboriginal groups that are flatly opposed to a particular type of resource development proposal – in this case the transportation of bitumen through their territories – to give legal effect to that opposition.[54]

Conversely, in those situations where a resource development or extraction proposal was one to which an Aboriginal group was not outright opposed, then recognition of the right of Aboriginal dominion would allow the group to use the possibility of the veto of the project as an asset for bargaining with the project proponents. This is the third of the three ways listed above by which the right of Aboriginal dominion could contribute to the reconciliation of Aboriginal groups with the broader Canadian society. It addresses a frequently-expressed complaint by Aboriginal groups of "…resource companies coming into a First Nations territory, interfering with the practice of Aboriginal and Treaty rights, accessing and taking natural resources and leaving without any compensation or benefits accruing to the impacted First Nation(s)."[55] This complaint reflects not only Aboriginal groups' perspective that they have or should have some right to control resources in their traditional territories, but also the high unemployment rates and other economic difficulties faced by Aboriginal people generally and more specifically by many Aboriginal groups in rural areas.[56]

At the broad, general level, the economic difficulties facing Aboriginal people can readily be demonstrated. The 2011employment rate for the Aboriginal working-age population, for example, was about 63%, much lower than the rate for non-Aboriginal individuals (76%), while the unemployment rate for the working-age Aboriginal

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[53] (n 47).
[54] As to Aboriginal groups current inability to do so, see Ibironke Odomosu-Ayanu, 'Indigenous Peoples, International Law, and Extractive Industry Contracts' (2015) 109 AJIL Unbound 220 < https://www.asil.org/blogs/symposium-international-indigenous-rights-financial-decisions-and-local-policy-indigenous> accessed 31 January 2016.
[55] Grand Chief Edward John, 'First Nations Perspective on Stewardship' (Guide Outfitters Association of BC International Wildlife Management Symposium II, Stewardship in Action 18 June 2014) 5 < goabc.org/pdfs/symposium2014/04Day1EdwardJohn.pdf > accessed 28 September 2015.
[56] As Borrows notes regarding similar problems in Australia, "Until Indigenous peoples enjoy equal outcomes in the areas of employment rates, income, educational rates, housing circumstances, criminal justice system involvement and life expectancy, there will be no practical reconciliation in Australia." John Borrows, 'Practical Reconciliation, Practical Re-Colonization?' (2004) Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies Issues Paper No. 27, 5.

population was more than twice the rate for other working age Canadians (13% versus 6%).[57] For status Indians, the unemployment rate was even higher (17%), higher still for Indians living on reserve (22%), and even higher for male Indians living on reserve, (26%).[58]

These very high rates of on-reserve unemployment are linked to other indicators of Aboriginal economic disengagement from the more prosperous mainstream of Canadian society. A 2013 study of child poverty, for example, found that Aboriginal children were two-and-a-half times as likely to live in poverty as non-Aboriginal children, and that the poverty rate for Aboriginal children was 40% and for status Indian children was 50%.[59] The poverty rates were even higher for Aboriginal children in some areas, with 62% and 64% respectively of the status Indian children in Manitoba and Saskatchewan living below the poverty line.[60] The same study noted that Aboriginal children trail non-Aboriginal children on virtually all indicators of well-being, including family income, educational attainment, crowding and homelessness, poor water quality, infant mortality, health, and suicide.[61] A 2015 report by the National Aboriginal Economic Development Board showed only modest improvements on these various social indicators for Aboriginal people generally, but with the gap between Indians living on reserve and the non-Aboriginal population actually increasing.[62] The 2013 study also pointed to the lack of Aboriginal participation in resource development projects in groups' traditional territories as one of the contributing causes of on-reserve poverty, though did also indicate that there has recently been some progress in that regard:

> Given the proximity of many reserves to resource extraction sites, particularly in the prairie provinces where status Indian child poverty is

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[57] Aboriginal Affairs and Northern Development Canada, 'Fact Sheet - 2011 National Household Survey Aboriginal Demographics, Educational Attainment and Labour Market Outcomes' < https://www.aadnc-aandc.gc.ca/eng/1376329205785/1376329233875 > accessed 28 September 2015.
[58] ibid.
[59] David Macdonald and Daniel Wilson, 'Poverty or Prosperity: Indigenous Children in Canada' (Canadian Centre for Policy Alternatives and Save the Children Canada 19 June 2013) 12 < https://www.policyalternatives.ca/publications/reports/poverty-or-prosperity > accessed 28 September 2015.
[60] ibid 16.
[61] ibid 19.
[62] National Aboriginal Economic Development Board, 'The Aboriginal Economic Progress Report 2015', 2 < http://www.naedb-cndea.com/ > accessed 28 September 2015.

> the highest, opportunities exist for better labour market integration as well as longer term revenue sharing agreements.
>
> Impact-benefit agreements are becoming more common when resource extraction overlaps with First Nation communities. These agreements between private industry and First Nations governments often specify that a certain proportion of the workforce for new extraction sites will come from First Nations communities and can provide an opportunity for employment.[63]

As noted, there is already some movement toward incorporating agreements between Aboriginal groups and industry in new resource development proposals,[64] whether involving promises of employment, social development proposals, the possibility of royalties or profit-sharing, or simply cash payments. Why would a recognition of the right of Aboriginal dominion increase the likelihood of industry entering into such agreements? To answer this question, it will be useful to consider what incentive industry has to enter into such agreements at this time or, to put it another way, what industry thinks it is purchasing or acquiring when it enters into such agreements with Aboriginal groups.

Other than in areas where treaties or – currently in the sole case of the Tsilhqot'in – judicial decisions have determined the existence of lands that are subject to some form of Aboriginal property rights, industry cannot know whether or not the site of a proposed development is one where such a right actually exists. At most, it is possible to know that an Aboriginal group has asserted Aboriginal title to a given area. If industry is prepared to provide compensation or economic benefits in response to such an assertion, is this because it has weighed the Aboriginal title claim and judged it likely to be valid? Or is it because industry takes an expansive view of the right of Aboriginal groups to control their traditional territories regardless of what the legality of their claims may be? Or, in the further alternative, is it because industry takes a progressive view of the need to acquire "social license" or otherwise recognizes that improving its corporate social performance is likely to improve its corporate financial

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[63] ibid 29.

[64] Richard H Bartlett, *Native Title in Australia* (2nd edn, LexisNexis Butterworths 2004) 732. See also William M Laurin and JoAnn P Jamieson, 'Aligning Energy Development with the Interests of Aboriginal Peoples in Canada' (2015) 53 Alta L Rev 453.

performance? [65] While these are possible explanations, it seems possible and perhaps probable that what at least some industry decision-makers believe themselves to be purchasing is simply peace. That is, given the history of Aboriginal groups engaging in various forms of direct action in recent decades, it may be that industry makes payments to or enters into agreements with Aboriginal groups solely for the purpose of preventing those groups from taking actions that will harm its interests. Viewed in a negative light, this could be interpreted as coercion or worse, and it is even conceivable that industry payments to Aboriginal groups or individuals made in such a situation could be considered corruption[66] or be held to contravene anti-bribery legislation, such as the US *Foreign Corrupt Practices Act*.[67]

Another possible explanation for industry's sometime willingness to make agreements with or payments to Aboriginal groups could be that even if industry perceives no legitimate interest to which it would voluntarily give weight, it recognizes that government – on which it depends for approvals of its projects – is required by the courts to consult with and accommodate Aboriginal groups, and that industry's own gestures toward Aboriginal groups are therefore intended to secure agreement between Aboriginal groups and government. That is, industry could be vicariously acting to satisfy the Crown's obligation to consult with and accommodate Aboriginal interests rather than acting to satisfy its own direct interests. Unfortunately, agreements between industry and Aboriginal groups are generally reputed to contain non-disclosure clauses which makes any analysis of such agreements highly speculative.

In contrast to these possibilities, the recognition of the right of Aboriginal dominion that would *prima facie* exist throughout all of Aboriginal groups' traditional territories would mean that – in addition to whatever other rights or interests Aboriginal groups might possess – they would have a real and definable interest that they could assert against all the world and to which industry and governments could justifiably give cognizance and weight in their decision-making. Some industry groups already

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[65] Marc Orlitzky, Frank L Schmidt, Sara. L Rynes, 'Corporate Social and Financial Performance: A Meta-analysis' (2003) 24(3) Organ Stud 403.
[66] *Ominayak v Penn West Petroleum* 2015 ABQB 342 [56]. See also Tony Fogarassy and KayLynn Litton, 'Consultation with Aboriginal Peoples: Impacts on the Petroleum Industry' (2004) 42 Alta L Rev 41, 72.
[67] 15 USC §§ 78dd-1, et seq < http://www.justice.gov/criminal/fraud/fcpa/statutes/regulations.html >.

perceive the value of empowering Aboriginal groups in this way, as evidenced by the report of the Boreal Leadership Council – a group that includes the TD Bank and the Suncor energy company among its members – recommending that the "free, prior and informed consent"[68] of Aboriginal groups should be a prerequisite to development within their traditional territories.[69] Such a change, it is submitted, would be an improvement over the current situation, in which Aboriginal groups' negotiations respecting resource development proposals are generally based upon asserted but unproven claims of Aboriginal title and the obligation that rests with the Crown but not with industry to consult and accommodate because of those claims. It may also be noted that where an Aboriginal group and industry were agreed on the positive value of a proposed development, that lands subject to Aboriginal dominion might have an advantage over lands subject to Aboriginal title[70], in that the Supreme Court of Canada has suggested that those lands possibly cannot be used for purposes "which are inconsistent with continued use by future generations of Aboriginals". [71]

Much of what has been noted in the preceding paragraphs would also support the fourth of the points listed at the start of this section as to how recognition of Aboriginal dominion could contribute to reconciliation. That is, if the recognition of Aboriginal dominion contributes in any way to the improvement of the dire economic state of some Aboriginal groups as detailed above, that would seem likely to lead to them feeling greater confidence about their own economic futures and their ability to pursue their own self-determination within the larger Canadian society. Such confidence, in turn, seems likely to empower them to accept that reconciliation does not mean abandonment of their own distinct identities. As admittedly speculative as this point

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[68] For a review of this concept, see Cathal Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: the Transformative Role of Free, Prior and Informed Consent* (2014 Routledge). See also Tara Ward, 'The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights within International Law' (2011) 10 Nw U J Int'l Hum Rts 54. See also Chapter V of this thesis.

[69] Boreal Leadership Council, 'Understanding Successful Approaches to Free, Prior, and Informed Consent in Canada. Part I.' (September 2015) < http://borealcouncil.ca/reports/understanding-successful-approaches-to-free-prior-and-informed-consent-in-canada/ > accessed 23 September 2015.

[70] Dwight Newman, 'Indigenous Title and its Contextual Economic Implications: Lessons for International Law from Canada's *Tsilhqot'in* Decision' (2015) 109 AJIL Unbound 215, 218 < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2718946&download=yes> accessed 31 January 2016. See also Kent McNeil, 'Aboriginal Title and the Supreme Court: What's Happening' (2006) 69 Sask L Rev 281, 286.

[71] *Delgamuukw* (n 38) [154].

may be, it is difficult to imagine how reconciliation could ever take place in the absence of that confidence.

Reconciliation, Aboriginal dominion, and the Nisga'a Final Agreement

A further way of considering whether the recognition of the right of Aboriginal dominion would contribute to reconciliation would be to compare the outcome of that recognition to the outcomes that have been arrived at through the negotiation of modern treaties. Since modern treaties have been voluntarily entered into by Aboriginal groups and by the federal and provincial governments, it may be supposed that they do amount to a form of reconciliation that is acceptable to both Aboriginal and non-Aboriginal Canadians. If, therefore, a parallel could be drawn between the outcome of a modern treaty and the intended outcome from the recognition of Aboriginal dominion, this would strengthen the argument that recognition of the existence of the right of Aboriginal dominion would contribute to reconciliation. As will be discussed below, an examination of the Nisga'a Final Agreement [72] – the first modern treaty in British Columbia – does, at least, show that the Agreement created a system by which: (a) the Nisga'a Nation has outright ownership of a core area; (b) the interest of the Nisga'a Nation in the much larger area that encompasses all of its traditional territory is recognized; (c) more specifically, the right of the Nisga'a Nation to be informed of resource development proposals in that larger territory and to participate in any resulting decision-making processes is recognized. While this is clearly less than an exact correspondence with the expected outcome of the recognition of the right of Aboriginal dominion, it will at least be worthwhile to explore those parallels that exist.

When the Nisga'a Final Agreement was signed in 1999, it was the first treaty to be signed by an Aboriginal group in British Columbia since Treaty 8 in 1899, a century earlier. In its preamble, it explicitly recognized the long history of the Nisga'a Nation's attempts to obtain resolution of the land question, including the 1913 Nisga'a petition to the Privy Council and the 1973 decision of the Supreme Court of Canada in *Calder v*

[72] Nisga'a Final Agreement, 1999 < http://publications.gc.ca/site/eng/9.698086/publication.html > ["the Agreement"].

Attorney-General of British Columbia.[73] The preamble also explicitly incorporated the goal of reconciliation:

> WHEREAS Canadian courts have stated that the reconciliation between the prior presence of Aboriginal peoples and the assertion of sovereignty by the Crown is best achieved through negotiation and agreement, rather than through litigation or conflict;
> WHEREAS the Parties intend that this Agreement will result in this reconciliation and establish a new relationship among them;…
> [underlining added] [74]

The Agreement is a large, comprehensive document, more than 250 pages in its published format with appendices that amount to almost double that, including chapters that deal with subjects as diverse as fisheries and fiscal relations. At the heart of the Agreement, however, is the creation of a regime of defined treaty land rights that take the place of the undefined Aboriginal land rights that the Nisga'a Nation would previously have possessed.

At the core of these is a 1,992 square kilometre parcel in the lower Nass Valley that comprises the "Nisga'a Lands". All of the lands within the boundaries of the Nisga'a Lands - with the exception of submerged lands, the Nisga'a Highway corridor, and certain other discrete interests [75] - are owned in fee simple by the Nisga'a Nation, with that being stated to be "the largest estate known in law". [76] Unlike with Aboriginal title lands, the Nisga'a Nation is free to dispose of the whole of its estate in any parcel of Nisga'a Lands to any person, and is also free to create lesser estates or interests, specifically including rights of way and covenants. [77] Indeed, the estate held by the Nisga'a Nation in Nisga'a Lands is stated not to be subject to any "condition, proviso, restriction, exception, or reservation set out in the *Land Act*, or any comparable limitation under any federal or provincial law." [78] In addition, neither Nisga'a Lands nor the Nisga'a Fee Simple Lands (discussed below) as defined in the Final Agreement

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[73] [1973] SCR 313 < https://www.canlii.org/en/ca/scc/doc/1973/1973canlii4/1973canlii4.html?autocompleteStr=calder&autocompletePos=1 >.
[74] Nisga'a Final Agreement (n 72) Preamble.
[75] ibid, ch 3, s 1.
[76] ibid, ch 3, s 3.
[77] ibid, ch 3, s 4.
[78] ibid, ch 3, s 3.

constitute "lands reserved for the Indians" under the *Constitution Act, 1867* or "reserves" under the *Indian Act*. [79]

In addition to the Nisga'a Lands, the Agreement also provides that the Nisga'a Nation owns the "Nisga'a Fee Simple Lands", which consist of the "Category A Lands" and "Category B Lands". These are a collection of smaller, site-specific parcels of land that are outside of the Nisga'a Lands but scattered throughout the larger Nass Area. The Category A Lands are eighteen former Nisga'a Indian reserves and certain adjacent lands, amounting to twenty-five square kilometres, while the Category B Lands are fifteen parcels of other lands amounting to two and one-half square kilometres. The main difference between Category A and Category B Lands is that the Nisga'a Nation owns all mineral resources on or under Category A Lands, free and clear of all estates, interests, charges, mineral claims, licences, and permits, while with regard to the Category B Lands it owns only the mineral resources on or under the lands that had previously been reserved to the provincial Crown under the *Land Act*. [80]

These lands – the Nisga'a Lands and the Nisga'a Fee Simple Lands – can now be said to be all of the lands to which the Nisga'a Nation has retained any form of ownership deriving from its pre-contact, pre-assertion of sovereignty occupation of territory. Of interest to this thesis, however, is that the Nisga'a Nation does retain a recognized interest in the much larger "Nass Area". This area, which corresponds to the traditional territory of the Nisga'a is approximately 27,000 square kilometres,[81] considerably more than ten times the size of the Nisga'a Lands. The Agreement recognizes that the Nisga'a Nation has lived in the Nass Area since time immemorial and that the Agreement defines the Nisga'a rights under s 35 of the *Constitution Act, 1982* that exist both inside and outside of the Nisga'a Lands.[82] Furthermore, the Agreement is said to define "the relationship of federal, provincial and Nisga'a laws, within the Nass Area" rather than just within the Nisga'a Lands. [83]

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[79] ibid, ch 3, s 10.
[80] [RSBC 1996] c 245.
[81] Nisga'a Lisims Government, 'Nass Area Strategy < http://www.nisgaanation.ca/nass-area-strategy-0 > accessed 28 September 2015.
[82] Nisga'a Final Agreement (n 72) Preamble.
[83] ibid.

The Agreement recognizes the ongoing interest of the Nisga'a Nation in the broader Nass Area in a number of ways. British Columbia, for example, must consult with the Nisga'a Nation in respect of planning and management of provincial parks in the Nass Area. [84] Information that is provided to federal or provincial departments regarding forest development plans in the Nass Area must also be provided to the Nisga'a Nation.[85] The Government of Canada must give notice to the Nisga'a Government of any entry to the Nass Area to carry out activities related to national defence or security.[86] Nisga'a citizens retain fish, aquatic plant and bivalve[87] harvesting rights throughout the Nass Area, at least pending the identification of Nisga'a entitlements to those fish and aquatic plants, [88] and the Nisga'a Nation – together with any other persons who may have Aboriginal harvesting rights – has the right to the entire oolichan fishery throughout the Nass Area. [89] In addition, there are many other references in the Agreement to fisheries management and harvesting throughout the Nass Area. Nisga'a citizens also have hunting rights that specifically include the right to harvest migratory birds throughout the Nass Area [90]

The explicit recognition of these rights respecting the larger Nass Area, as well as the many other detailed and explicit provisions that constitute the Agreement are important and necessary, since the Agreement has the effect that all of the existing s 35 Aboriginal rights of the Nisga'a Nation are replaced – "modified" to use the wording of the Agreement - with new treaty rights. Although the replacement of Aboriginal rights with treaty rights has generally been presumed to have been the effect of earlier treaties, the Agreement is explicit about this being the case for the Nisga'a Nation:

> **FULL AND FINAL SETTLEMENT**
>
> 22. This Agreement constitutes the full and final settlement in respect of the Aboriginal rights, including Aboriginal title, in Canada of the Nisga'a Nation.
>
> **NISGA'A SECTION 35 RIGHTS**

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[84] ibid, ch 4, s 119.
[85] ibid, ch 5, s 75.
[86] ibid, ch 6, s 118.
[87] ibid, ch 8, s 64.
[88] ibid, ch 8, s 53.
[89] ibid, s 62.
[90] ibid, ch 9, s 87.

> 23. This Agreement exhaustively sets out Nisga'a section 35 rights, the geographic extent of those rights, and the limitations to those rights, to which the Parties have agreed, and those rights are:
> a. the Aboriginal rights, including Aboriginal title, as modified by this Agreement, in Canada of the Nisga'a Nation and its people in and to Nisga'a Lands and other lands and resources in Canada;
> b. the jurisdictions, authorities, and rights of Nisga'a Government; and
> c. the other Nisga'a section 35 rights.
>
> **MODIFICATION**
>
> 24. Notwithstanding the common law, as a result of this Agreement and the settlement legislation, the Aboriginal rights, including the Aboriginal title, of the Nisga'a Nation, as they existed anywhere in Canada before the effective date, including their attributes and geographic extent, are modified, and continue as modified, as set out in this Agreement.
>
> 25. For greater certainty, the Aboriginal title of the Nisga'a Nation anywhere that it existed in Canada before the effective date is modified and continues as the estates in fee simple to those areas identified in this Agreement as Nisga'a Lands or Nisga'a Fee Simple Lands.

Although the courts have often been left to "fill in" provisions of earlier treaties to deal with circumstances not foreseen at the time of their drafting and their adoption by parties that were unequal in sophistication and power, the Agreement represents a detailed, considered blueprint that sets out how one Aboriginal group and the federal and provincial governments expect to go forward together into the future. As noted above, the general outline of that blueprint as it concerns land is that a central core of land and certain other site-specific parcels are owned outright by the Aboriginal group, while in the remainder of the group's traditional territory it continues to have the right to exploit natural resources – eg hunting and fishing – and to possess certain other rights of consultation and control with respect to the land and natural resources throughout that territory. These are the treaty rights that the Nisga'a now possess that replace their pre-existing Aboriginal rights.

At the risk of stretching the point, this does reflect what might be envisioned to follow from the recognition of the right of Aboriginal dominion. That is, the areas where the Nisga'a Nation now has fee simple title might be presumed to correspond – at least conceptually if not with regard to exact geographic boundaries – to what would

previously have been its Aboriginal title lands. The treaty rights to hunting and fishing throughout its traditional territory correspond, of course, to what were previously its Aboriginal rights to hunting and fishing throughout its traditional territory. And the various ongoing treaty rights to what might be termed "having a say" in the resource management of the Nisga'a traditional territory would correspond to the right to control resource use and development throughout that traditional territory pursuant to the proposed Aboriginal right of Aboriginal dominion.

The degree to which the Nisga'a Nation is able to affect or control resource use and development in the Nass Area outside of the Nisga'a Lands is admittedly less than what is proposed to be the case pursuant to the right of Aboriginal dominion. This difference, however, can be argued to reflect what the Nisga'a surrendered in exchange for the benefits received under the Agreement. Those benefits included one-time federal government payments of $253 million in 1999 dollars, a figure which encompassed a capital transfer of $196.1 million over 15 years, $11.8 million (shared with British Columbia) for the purchase of commercial fishing vessels and licences, $40.6 million over 5 years for transition and implementation activities, and $4.5 million for forestry transition activities.[91] British Columbia agreed to pay approximately $40 million to pave the Nisga'a Highway, while most of its other contributions were the value of the surrendered lands and the foregone value of timber revenues. In addition, both the federal and provincial governments incurred costs, such as the $3.1 million cost of surveying the Nisga'a Lands and the $30 million cost of purchasing third party interests. One of the side agreements to the agreement, the Fiscal Financing Agreement, also provided for annual transfers to the Nisga'a of over $32 million for the delivery of health, social, education and other services; most of this, however, was money which would already have been available to the Nisga'a under previously-existing *Indian Act* arrangements.[92]

Presumably, the Nisga'a Nation must have given up something in exchange for those benefits. Since it has retained or obtained outright ownership of the Nisga'a Lands and

[91] Mary C Hurley, 'The Nisga'a Final Agreement' (Law and Government Division, Parliamentary Information and Research Service, Library of Parliament, 2001) < http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb992-e.htm > accessed 28 September 2015.
[92] ibid.

Nisga'a Fee Simple Lands, it seems likely that what was given up was some interest in the Nass Area that lay outside of those lands. Assuming – while acknowledging the impossibility of actually proving – that the Nisga'a Lands and the Nisga'a Fee Simple Lands contain all of the lands where Nisga'a Aboriginal title was likeliest to have been found to exist, then what was given up in the rest of the Nass Area would not have been Aboriginal title. Since Nisga'a hunting, fishing and other resource gathering rights continue to exist throughout the Nass Area, it was not those rights that were given up. Arguably, then, what was given up was the difference between that higher degree of control of the land and resources that the right of Aboriginal dominion would have provided and that lesser degree of control over the land and resources that exists under the Agreement.

Accepting this hypothesis would suggest that recognition of the right of Aboriginal dominion can contribute to reconciliation in another way in addition to those that have been noted above. That is, in addition to creating an Aboriginal right that can be recognized as existing in the absence of treaties, it may also be useful in the process of actually arriving at treaties. If the right of Aboriginal dominion is indeed what was surrendered by the Nisga'a Nation as its contribution to the give-and-take of the treaty-making process, then it is conceivable that other Aboriginal groups as well might consider that the right of Aboriginal dominion could be surrendered throughout most of their traditional territories while still retaining – as did the Nisga'a Nation – outright ownership of a core block of territory and reduced rights to control and consultation throughout the remainder of their territories. For a group to be prepared to surrender its right of Aboriginal dominion as part of the treaty-making process, however, and for the Crown and the electorate that supports it to acknowledge that that does represent the Aboriginal group actually giving up something that should entitle it to compensation, it would no doubt be helpful if the right were to be judicially recognized in the first place.

Two final points should be made with regard to the relationship between the Nisga'a Final Agreement, Aboriginal dominion, and reconciliation before leaving this topic. First, while the focus in this chapter has been on those aspects of the Agreement that relate to land, the importance of other aspects of the Agreement, in particular those that relate to self-governance and the transition away from *Indian Act* control, should not be understated; the lack of further discussion of those provisions in this thesis is simply

because they are not as relevant to its subject matter. Second, while the Nisga'a Final Agreement was the first modern treaty negotiated in British Columbia, it is not the only one. Others that have been negotiated and ratified under the BC Treaty Process – which was created subsequent to the Nisga'a Final Agreement – now include the Maa-nulth First Nations Final Agreement, the Tsawwassen First Nation Final Agreement, the Yale First Nation Final Agreement, and the Tla'amin Final Agreement. Although the structure of these treaties reflects the precedent set by the Nisga'a Final Agreement, these treaties differ from it and from each other in some ways. In addition, Canada's first modern treaty – the *James Bay and Northern Quebec Agreement* – created a multi-tiered system of land rights similar to that in the Nisga'a Final Agreement.

Aboriginal dominion as part of a broader, ongoing process of reconciliation

In its 2015 report, the Truth and Reconciliation Commission of Canada discussed reconciliation at length, and said in part:

> The Commission defines "reconciliation" as an ongoing process of establishing and maintaining respectful relationships. A critical part of this process involves repairing damaged trust by making apologies, providing individual and collective reparations, and following through with concrete actions that demonstrate real societal change. Establishing respectful relationships also requires the revitalization of Indigenous law and legal traditions. [93]

Arguably, the judicial recognition of a new Aboriginal right that would exist throughout all of a given Aboriginal group's traditional territory would validate the group's belief that it had a right to all of that traditional territory, and that could either give the group an ongoing right of control over that territory or the ability to exchange that control for other benefits would contribute to "real societal change". Also arguably, acknowledging that such a group's belief in its right to its traditional territory should equate to some form of legal recognition could contribute to the "revitalization of Indigenous law and legal traditions".

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[93] TRCC, 'What We Have Learned' (n 15) 121 < http://www.trc.ca/websites/trcinstitution/index.php?p=890 > accessed 28 September 2015.

Despite the argument that has been made in this chapter that recognition of the right of Aboriginal dominion can contribute to reconciliation, however, it would be a mistake to exaggerate the extent of that contribution. At the risk of stating the obvious, the relationship between Aboriginal people and the rest of Canadian society, particularly the federal and provincial institutions of government, has been fraught with problems, many of them unrelated to questions of land. Even to the extent that steps can be taken to bridge the divide between Aboriginal and non-Aboriginal people, there will be those – both Aboriginal and non-Aboriginal – who would argue against taking them. In particular, there will be those who espouse the view that Aboriginal people should have no rights that are not held by all other Canadians,[94] and the recognition of any previously-unrecognized Aboriginal right will not find favour with them. More generally, the contribution that lawyers and judges can make to resolving complex social problems should not be overstated.

Still, the failure to resolve issues related to land and to give recognition to Aboriginal traditions respecting Aboriginal groups' control of their traditional territories can at least be acknowledged as one of those problems. And since the earlier approach of trying to ignore demands for exploration and recognition of Aboriginal rights, particularly property rights, has now been supplanted by modern attempts to explore those rights, the proposed right of Aboriginal dominion certainly offers one path for that exploration. Recognition of the right of Aboriginal dominion would admittedly be only one of many initiatives that are required in the pursuit of reconciliation, but it would also be a positive step toward addressing one of the most important and long-standing Aboriginal grievances and bringing the ideal of reconciliation closer.

[94] Larry N Chartrand, 'Re-Conceptualizing Equality: A Place for Indigenous Political Identity' (2001) 19 Windsor YB Access Just 243. See also Savannah Post, 'One Law for All: Reconciling Indigenous Rights and the Right to Equality before the Law (2016) 22 Auckland UL Rev 42. For an example of these values coming into conflict in a litigation setting, see *R v Kapp* [2008] 2 SCR 483, 2008 SCC 41.

Conclusions

In Canada, Aboriginal law is recognized as a distinct field within the law. There are textbooks on the subject, courses are offered in it at law schools, people attend conferences about it, and many lawyers – including the author of this thesis – practise it exclusively. It is a very broad field with many sub-fields, so that some lawyers confine their practices to, for example, land development on Aboriginal reserves, others to Aboriginal tax and business structures, and others – again, like the author of this thesis – specialize in litigation concerning Aboriginal rights and title. This thesis, however, was written at a university in Scotland, and the advisors, examiners, and administrators who were involved in its preparation and defence knew very little about Aboriginal law. The consequence has been that the perspectives those individuals brought to bear were very different from those that would have been encountered in a Canadian academic milieu. So, for example, an academic working in the field of minority rights perceived the thesis through the particular lens of that field of inquiry, despite the Supreme Court of Canada having stated that Aboriginal peoples are separate from all other minority groups in Canadian society.[1] Others familiar with the usual trajectory of social justice issues expressed puzzlement at what seemed to them to be an attempt to achieve social justice goals through "private law" mechanisms rather than the "public law" approach that is usually used to address such issues. Some whose expertise lay in property law have focused exclusively on the property law aspects of the thesis, despite the Supreme Court of Canada's reluctance – detailed in Chapter VII – to fully embrace a property law approach, and the Court's view of Aboriginal title as just one particular type of Aboriginal right. More generally, the implications of a legal system with an entrenched constitution – including entrenched Aboriginal rights – were difficult to grasp for those more familiar with a system where Parliamentary supremacy is not subject to domestic constraint.

The point of making this observation in these conclusions is not to disparage or complain, but to instead take advantage of the opportunity that is offered by the perspectives of these individuals. That is, if individuals holding doctorates in law ask

[1] *R v Van der Peet* [1996] 2 SCR 507[30].

questions and raise concerns about the subject matter of this thesis that would seem unexpected and puzzling to anyone knowledgeable about Canadian Aboriginal law, then one thing this illuminates is the degree to which Aboriginal law may have become opaque to those not practising it. If individuals with doctorates in law – albeit not specific to Aboriginal law – have difficulty grasping Aboriginal law concepts, then this suggests that laypeople who have no legal training whatsoever would be even less likely to grasp the legal topics that have been written about here, and – to the extent that they do – they might also question things that lawyers practising Canadian Aboriginal law simply take for granted. This in turn suggests that the questions raised by academics who have read this thesis may be indicative of stress points that currently underlie Canadian Aboriginal law, particularly as it relates to outstanding disputes over land.

Accepting that that is so, this concluding section will begin by addressing some of the specific questions that have been raised regarding this thesis. Generally speaking, these are all related to issues of why one segment of Canadian society should – as specifically proposed with regard to Aboriginal dominion in this thesis – have special rights that are not available to other Canadians, and to why they can and should use private property rights as a vehicle for pursuing their social goals.

Why Should Aboriginal People Have Any Special Rights At All?

In the late nineteenth and early twentieth centuries, it was widely presumed that the Aboriginal peoples of Canada would eventually wish to leave their own cultures behind and become indistinguishable from other members of mainstream Canadian society.[2] With hindsight, this presumption can be seen to have been gravely mistaken. Conversely, however, those mechanisms of government that contributed to the separation of Aboriginal people from the Canadian mainstream – mostly elements of the *Indian Act* – were eventually seen as heavy-handed, discriminatory, and paternalistic. By the 1960s, the result was two competing visions of how Aboriginal

[2] See, for example, *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, SC 1857 c XXVI.

people would go forward.[3] One, recommended by anthropologist Harry B Hawthorn in a 1966 report[4] commissioned by the Government of Canada was that Aboriginal peoples should be "citizens plus" who, in addition to possessing the normal rights and duties of citizens, would have certain additional rights as charter members of the Canadian community.[5] The other, embodied in the 1969 White Paper written by the Government of Canada,[6] would essentially have eliminated separate status for Aboriginal peoples. As then Prime Minister Pierre Trudeau stated:

> It's inconceivable, I think, that in a given society one section of the society have a treaty with the other section of the society. We must be all equal under the laws and we must not sign treaties among ourselves. [7]

Again, with the benefit of hindsight, it can be seen that the effect of the *Calder* decision, the constitutional entrenchment of s 35 of the *Constitution Act, 1982*, and the other developments related in the first three chapters of this thesis is that, legally if not socio-economically, Aboriginal people have indeed come to be recognized as "citizens plus". To debate whether or not that "should" have happened and whether Aboriginal people "should" be recognized as having special rights not available to other Canadians is absolutely pointless. The ship has sailed, the train has left the station, the bird has flown, the horse is out of the barn.

To the extent that the recognition of the right of Aboriginal dominion would more clearly delineate the special status of Aboriginal peoples, that is simply the next step in a legal progression that began half a century ago and has continued to gain momentum in the intervening decades.

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[3] Alastair Campbell and Kirk Cameron, 'The North', in Sheila Petty, Garry Sherbert, Annie Gérin (eds), *Canadian Culltural Poesis: Essays on Canadian Culture* (Wilfred Laurier University Press 2006) 159.
[4] HB Hawthorn (ed), *A Survey of the Contemporary Indians of Canada* Vols I and II (Indian Affairs Branch 1966-1967).
[5] The term "citizens plus" became better known when used in a document largely authored by Hawthorn in response to the Government of Canada's "White Paper": Indian Chiefs of Alberta, 'Citizens Plus' (Indian Association of Alberta 1970).
[6] Canada, 'Statement of the Government of Canada on Indian Policy' (Queen's Printer 1969).
[7] Pierre Trudeau, 'Remarks on Aboriginal and Treaty Rights' in Peter A Cumming and Neil H Mickenberg (eds), *Native Rights in Canada* (2nd edn Indian-Eskimo Association of Canada 1972), 331.

Why Use a "Private Law" approach?

Rights to land are, from a western legal European perspective, "property", and property law is seen as "private law".[8] "Public law", on the other hand, is the category to which a western legal perspective assigns matters such as protecting the rights of minorities, integrating Indigenous peoples into governmental decision-making processes, and governance more generally. To some scholars trained in western legal systems generally but not specifically in Aboriginal law, then, the expectation is that a thesis about Aboriginal rights should be about "public law", so that the use of "private law" property concepts can seem anomalous.

To those whose expertise lies specifically in Aboriginal law, however, the situation is just the opposite: when it comes to Aboriginal land rights, the tendency is to forget that those rights even have a public law aspect. In an article reminding readers of that public law dimension, however, Webber illuminates the false nature of the dichotomy, pointing out:

> … the necessity of taking these public-law dimensions into account when recognising and protecting indigenous rights, so that land rights and governance go hand in hand.[9]

In addition, no matter what characterizations others may assign to their rights, it is Aboriginal peoples themselves that get to choose how they exercise those rights, and in recent decades they have chosen to exercise at least that part of their rights that is specific to land much as any other land owner might, namely by using the courts to seek remedies for infringements of those land rights. Does this mean that Aboriginal peoples – again, just like non-Aboriginal people – will forego lobbying those in government to use their spending and legislating powers to address their problems? Of course not, but neither will they refrain from using private law remedies when those are the most appropriate tools for achieving their goals.

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[8] "Indigenous title is frequently discussed as though it were simply another kind of interest affecting land, slipped into the structure of Australian property law." Jeremy Webber, 'Beyond Regret: Mabo's Implications for Australian Constitutionalism" in Ivison D, Patton P and Sanders W (eds), *Political Theory and the Rights of Indigenous Peoples* (2000 CUP).

[9] Jeremy Webber, 'The Public-Law Dimension of Indigenous Property Rights' in Nigel Bankes and Timo Koivurova (es), *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* (Hart Publishing 2013) 79, 80.

Why Give a New Right of Aboriginal Dominion to Aboriginal Peoples?

It is certainly true that some rights are "given" in the sense that they are created by statute or contract or some other legal mechanism. Other rights, however, including civil rights such as, for example, the right to freedom of expression, are generally viewed as not having been explicitly created in that way. Most often, such rights are seen as having been created by natural law, and the courts are merely seen to be recognizing principles of natural justice by making explicit that natural law which is implicit in the Common Law.[10] The right to own property is generally believed to be one such right.[11]

In Canada, many rights are explicitly spelled out in the *Canadian Charter of Rights and Freedoms*.[12] Generally, such rights are seen as having been "guaranteed" by the *Charter* rather than created by it,[13] as is suggested by s 26 of the *Charter* itself. The notion that *Charter* rights were somehow "given" to Canadians by their beneficent governments is not really a part of serious political discourse.

On the other hand, the question is sometimes posed – as it was in response to this thesis – of why to "give" rights to Aboriginal peoples. This is despite the fact that s 35 of the *Constitution Act, 1982* explicitly states that the "existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed [underlining added]." An attempt at answering the question might therefore be as follows.

When in 1982 the Government of Canada and nine of the ten provincial governments agreed upon the adoption of a new, written constitution that would make explicit and guarantee many of the most fundamental and important concepts in Canada's governance, one of the provisions they included in that new constitution was that existing Aboriginal rights would be recognized and affirmed. They did that despite not

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[10] William Sternberg, 'The Origin of Human Rights' (1939) 24(1) Marq L Rev 1, 5.
[11] ibid.
[12] *Canadian Charter of Rights and Freedoms*, s 6, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[13] For examples of the Court referring to rights being "guaranteed" by the *Charter*, see, for example: *R v 974649* 2001 SCC 81 [39]; *R v Silveira* [1995] 2 SCR 297 [93]; *R v Prosper* [1994] 3 SCR 236 [45].

actually knowing what those Aboriginal rights were, but realizing that they would continue to be defined by the courts. Since that time, the courts have indeed continued to define which Aboriginal rights exist. To date, however, they have not had to answer the question of what Aboriginal right exists in areas where Aboriginal groups have exclusivity but not physical occupation at the date of the assertion of sovereignty. This thesis posits an answer to that question. It does not advocate for the "giving" to Aboriginal peoples of anything they do not already possess, but instead attempts to clarify what it is that they do possess.

What About the Effect of Aboriginal Dominion on Non-Aboriginal People?

A common metaphor for rights – although not one with which everyone agrees[14] – comes from trick-taking card games, namely that rights are "trumps".[15] A question posed in response to this thesis has been, "what about non-Aboriginal people, why should the proposed right of Aboriginal dominion 'trump' their rights?" The answer lies in the fact mentioned above, that elected federal and provincial governments chose to protect existing Aboriginal rights in Canada's constitution, and that those rights include property rights. By giving constitutional status to Aboriginal rights, governments – and by implication the electorates that put those governments in office – chose to make Aboriginal property rights "trumps".

The extent to which Aboriginal dominion may actually affect non-Aboriginal Canadians remains to be seen. On the one hand, it may institutionalize the need to obtain Aboriginal consent before engaging in mining, logging or other resource development, but – as detailed in Chapters V and VIII – this would to some extent merely confirm a trend which is already underway. Further, instead of seeing this as conflicting with their own rights and agendas, many non-Aboriginal Canadians would undoubtedly see Aboriginal groups as proxies for their own opposition to resource development, and would be likely to be grateful if Aboriginal groups had new grounds upon which to prevent some types of projects from proceeding.

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[14] Richard H Fallon, 'Individual Rights and the Powers of Government' (1993) 27(2) Ga L Rev 343.
[15] R Dworkin, 'Rights as Trumps' in Jeremy Waldron (ed) *Theories of Rights* (OUP 1984) 153. See also Dan T Coenen, 'Rights as Trumps' (1993) 27(2) Ga L Rev 463.

In any event, it should be remembered that the right of Aboriginal dominion, like all other rights, is not an absolute one. Because Aboriginal rights generally and Aboriginal property rights specifically – unlike any other form of property rights – are protected by the constitution and cannot be extinguished by either the federal government or the relevant provincial government, there was at one time uncertainty about whether such rights could even be lawfully infringed by either a federal or provincial government. The answer provided by the Court to that question was "yes", though it was not until the *Tsilhqot'in* [16] decision that this was applied to a situation where an Aboriginal property right – Aboriginal title – could actually be known to exist. The Court in that case saw the result of the framework it created as a "balance" that would preserve the Aboriginal right while permitting achievement of the goals of the polity as a whole, which in that case included effective regulation of the forests by the province.[17]

Final Thoughts

Complex social issues generally do not have "solutions". Such issues may be multi-dimensional, and will often involve the conflicting self-interests of different societal groups and deeply held concepts of identity, as well as cherished political and philosophical views.

While it is hoped that the preceding chapters have made the case for recognition of the right of Aboriginal dominion in a methodical way, a simpler case can be made: justice demands that recognition. As valid as all of the arguments made have been, including arguments about clarifying the nature of Aboriginal property rights and their place within property law more generally, and arguments about advancing the goal of reconciliation, the case for Aboriginal dominion is about the quest for justice. In this, it is part of the ongoing process that in recent decades has been manifested in the judicial decisions that have been discussed at such length in this thesis.

[16] *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 256, 2014 SCC 44.
[17] ibid [151].

Despite all of those decisions that have defined the modern law of Aboriginal rights, including Aboriginal title, it must be suggested that the current state of Aboriginal law respecting land is unsatisfactory. Aboriginal title is difficult and expensive to prove and seems likely to exist only in portions of Aboriginal groups' traditional territories. Hunting and fishing rights are useful to the extent that subsistence economies remain important in some areas and also in that they help to ground the Crown's duty to consult, but offer little assistance to those Aboriginal groups that would like to use their connections to their traditional territories to pursue greater economic prosperity. The Crown's duty to consult with regard to unresolved Aboriginal rights and title claims is a useful procedural tool, but is only indirectly applicable to third party resource development proponents and there is no guarantee that it will continue to operate indefinitely. The proposed right of Aboriginal dominion – and possibly other Aboriginal rights previously unrecognized in Canadian domestic law as well – has here been suggested as a way to expand and more fully develop legal thinking about Aboriginal people and their connection to their traditional territories.

Anticipating one final objection that could be made to the thesis set out here, namely that it merely constitutes a "prediction" of one way in which the law could develop, the reply would be that predictability is supposed to be a fundamental characteristic of the law. To reiterate what has been said above, the hypothesized existence of Aboriginal dominion flows from binding decisions of the Supreme Court of Canada and readily verifiable characteristics of Aboriginal societies. What has been proposed here is asserted to be the law, whether it is recognized as such or not. That said, however, it must be acknowledged that it is far from certain that the right of Aboriginal dominion will, in fact, ever be recognized in law.

Judges are not generally viewed as having a mandate to function as legal philosophers at large, or to operate as a third legislative chamber. They are not law reform commissions, empowered to propose whatever changes to the law seem to them to be good or wise. When they act of their own volition, they run a significant risk:

> When the people understand that a court is engaged in an essentially political act, weighing and compromising conflicting social and economic

> interests, the moral force of its decision, which alone compels compliance, will be diluted. [18]

Admittedly, the development of the entire field of Aboriginal law in the past half-century could fairly be termed a "political act", particularly the filling of what might otherwise have been the "empty box" of s 35 of the *Constitution Act, 1982*. In making the law in this area, however, the courts have woven their cloth almost exclusively from threads supplied to them by counsel for Aboriginal litigants on the one hand and the Crown on the other. Therein lies a problem which, while not exclusive to Aboriginal law, is certainly more serious than in other fields of law in which the consequences are less sweeping and the precedential legal history upon which courts can draw both longer and more helpful:

> …because proceedings are adversarial, not inquisitorial the role of the judge hearing a case is limited. Under the adversarial system, as a general rule it is for the parties to raise and rebut issues of law, and the role of the court is to adjudicate these issues. This has two related consequences. (i) A court will generally not raise issues itself. Courts 'react to particular litigants and not a larger problem.' (ii) A court will consider only the issues of law raised and the arguments raised and put by the parties themselves. Other parties are generally excluded, so consideration of the rule is only as thorough and as good as the arguments put before the court by the parties to the case. If they fail there is no backup. [19]

It would be only a slight over-simplification to say that the history of Aboriginal land rights litigation in Canada to date has been one of Aboriginal litigants arguing that Aboriginal title exists everywhere versus the Crown asserting an inability to recognize that Aboriginal title exists anywhere. While interveners have admittedly been allowed to make arguments at the appellate level, these have tended to amount to little more than "piling on" on one side or the other of this divide. Given the rarity of true *amici curiae* in Canadian courts, the courts have therefore had little to work with in crafting Aboriginal land rights.

The question this raises with regard to the recognition of the proposed right of Aboriginal dominion is whether future litigation is likely to follow the same pattern as

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[18] Hershel Shanks (ed) *The Art and Craft of Judging: The Decisions of Judge Learned Hand* (Macmillan 1968) 24.
[19] Christopher Enright, *Legal Technique* (Federation Press 2002) 160.

that which has been waged to date. Will Aboriginal groups judge it strategically better to seek the recognition of Aboriginal title exclusively throughout the entirety of their traditional territories, fearing that any recognition of an alternative form of land right might undermine their claims to the right of exclusive use and occupation conferred by a finding of Aboriginal title? Will the Crown judge it expedient to continue to confine its approach to Aboriginal land rights to saying, in effect, "prove it", rather than to arguing for something, namely the existence of a new right?

The answers to such questions cannot be known at this time. The arguments made in this thesis, however, do at least reflect a confidence that Canadian Aboriginal law has progressed to a point where a proposal for a new approach can be knowledgably weighed against the *status quo* and – if it is judged likely to make a positive contribution to reconciliation – be adopted.

Appendix: Rights Excerpted from the United Nations Declaration on the Rights of Indigenous Peoples

- "…the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law." (Article 1)

- "…the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity." (Article 2)

- "…the right to self-determination." (Article 3)

- "…the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions." (Article 4)

- "the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State." (Article 5)

- "…the right to a nationality." (Article 6)

- "…the rights to life, physical and mental integrity, liberty and security of person." (Article 7(1))

- "…the collective right to life in freedom, peace and security as distinct peoples…." (Article 7(2))

- "…the right not to be subjected to forced assimilation or destruction of their culture." (Article 8(1))

- "…the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned." (Article 9)

- "…the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature." (Article 11(1))

- "…the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains." (Article 12(1))

- "…the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons." (Article 13(1))

- "…the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning." (Article 14(1))

- "…the right to all levels and forms of education of the State without discrimination." (Article 14(2))

- "…the right to the dignity and diversity of their cultures, traditions, histories and aspirations…." (Article 15)

- "…the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination." (Article 16(1))

- "…the right to enjoy fully all rights established under applicable international and domestic labour law." (Article 17(1))

- "…the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary." (Article 17(3))

- "…the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decisionmaking institutions." (Article 18)

- "…the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities." (Article 20(1))

- "…the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security." (Article 21(1))

- "…the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions." (Article 23)

- "…the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals." (Article 24(1))

- "…the right to access, without any discrimination, to all social and health services." (Article 24(1))

- "…an equal right to the enjoyment of the highest attainable standard of physical and mental health. (Article 24(2))

- "…the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard. (Article 25)

- "…the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." (Article 26(1)

- "…the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired." (Article 26(2))

- "…the right to participate in this process (a process to adjudicate the rights of indigenous peoples pertaining to their lands and territories) (Article 27)

- "…the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent." (Article 28)

- "…the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources." (Article 29(1))

- "…the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions." (Article 31)

- "…the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources." (Article 32(1))

- "…the right to determine their own identity or membership in accordance with their customs and traditions." (Article 33(1))

- "…the right to determine the structures and to select the membership of their institutions in accordance with their own procedures." (Article 33(2))

- "…the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards." (Article 34)

- "…the right to determine the responsibilities of individuals to their communities." (Article 35)

- "…the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders." (Article 36(1))

- "…the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements." (Article 37(1))

- "…the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration." (Article 39)

- "…the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights." (Article 40)

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