# Common Law Origins of Aboriginal Entitlements to Land

BRIAN DONOVAN*

> "The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected."[1]

## I. INTRODUCTION

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

> Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Royal Proclamation of 1763,[2] the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means, and it does not help one in the solution of this problem to call it a "personal or usufructuary right." ... [T]hey are asserting ... that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished.[3]

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

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* Brian Donovan holds his LL.B. from the University of Toronto, his LL.M. from the University of Manitoba, and his DPhil from the University of Oxford. He has served as a law clerk to former Chief Justice Antonio Lamer and is a member of the Bars of Ontario and Alberta. This article is taken, with modifications, from the author's LL.M. thesis. The author gratefully acknowledges the invaluable assistance of DeLloyd J. Guth, Professor of Law and Legal History, and Director of the graduate studies program at the University of Manitoba's Faculty of Law. Thanks are also due to Michael Bodner of the Manitoba Law Journal for his painstaking editorial work in bringing this article to print.

1 See comments of Lord Denning, *Oyekan v. Adele*, [1957] 2 All E.R. 783 (P.C.) at 788.

2 *Royal Proclamation of 1763*, R.S.C. 1985, App. II, No. 1.

3 *Calder v. Attorney General of British Columbia*, [1973] S.C.R. at 328.

Upon their arrival, the English-speaking settlers imposed a new legal system upon these territories. Leave aside the pertinent question of whether unilateral assertions by the settlers could have been legally sufficient to supersede or extinguish the then-existing Native institutions. And leave aside arguments in search of a standard in law by which such colonial assertions generally might be deemed "legally sufficient". The analysis that follows addresses the question of what were, or should have been, the legal consequences of Aboriginal peoples' prior occupation by the terms of the very system of legal rules the settlers brought with them.

At a minimum, and irrespective of its particular content, a legal system should be consistent in the application of its own rules. If the legal system imposed by European settlers on what is now Canada has not respected Aboriginal entitlements even according to its own terms, then to this extent the system itself is seriously defective or has been misapplied. The question for analysis therefore becomes that of what the new legal system brought by the settlers required, by the application of its own rules, relative to the entitlements of Aboriginal peoples. The analysis that follows therefore will not address the equally cogent question of what the pre-existing systems of Aboriginal law contained with regard to entitlement, occupation, and use of land at the time of first European contact. Put simply, this article seeks to define the English settlers' rules for the land game; elsewhere I have already defined historically the degree to which such rules were or were not applied in Canada.[4]

In this analysis, it becomes necessary to examine the body of Imperial constitutional law and English common law that, for better and worse, has been received in all Canadian common law provinces and territories,[5] and, in the twenty-first century, constitutes the roots of the legal system now in effect in this country.[6] From these laws, a number of broad propositions can be deduced

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4 Brian Donovan, "The Evolution of Common Law Aboriginal Title in Canada" (2001) 35 U.B.C. L. Rev. 43.

5 For a comprehensive treatment of the formal reception of English law in Canada, see J. E. Coté, "The Reception of English Law" (1977) 15 Alta. L. Rev. 29. The Province of Quebec, of course, is an exception, at least in respect of the law of property and civil rights within the province because it received French law.

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

that ought to have governed the entitlements of Aboriginal peoples to land under Canadian law. In brief, the legal system brought by the English settlers, if applied even-handedly, should have produced the following startling results:

First, as a matter of Imperial constitutional common law, irrespective of the reception of English land law in Canada's common law jurisdictions, Aboriginal peoples' entitlements to land ought to have been recognized and given effect by the courts, in accordance with Aboriginal laws and systems of tenure, wherever these could be ascertained. The Crown's "radical" or underlying title to land in Canada did not signify that the Crown possessed any beneficial interest in the land that it was capable of granting free of pre-existing entitlements, nor was any fresh crown grant required to secure pre-existing Aboriginal entitlements.[7]

Secondly, where Aboriginal peoples were found to be in possession of land, the English common law presumption of seisin (flowing from possession) ought to have been applied by the courts, as against any other person who could not demonstrate a prior superior title to the land in question.[8] Common law rights flowed from possession of land. In the absence of a Crown grant, long possession should have been explained by the presumption of a fictitious grant from the Crown, or alternatively by a presumption that all competing interests had been extinguished by prescription.[9]

Finally, Aboriginal peoples in possession of land at the time of the assertion of British sovereignty ought, in many cases, to have acquired these lands in fee simple, the highest estate in land recognized by common law, by virtue of prescriptive rights against the Crown, established by statute in English law, and received in Canada by adoption,[10] based on their undeniably long-term occupa-

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

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

9 *Allen, ibid.* at 138.

10 *Regina v. McCormick* (1859), U.C.Q.B. 131; *Attorney General for New South Wales v. Love*, [1888] A.C. 679 (P.C.); *Emmerson v. Madison*, [1906] A.C. 569 (P.C.); *Hamilton v. The King* (1916), 54 S.C.R. 331 (S.C.C.); *Attorney General of Canada v. Krause* (1956), 3 D.L.R. (3d) 400 (Ont. C.A.). See the discussion of these authorities, *infra* note 167.

tion. These prescriptive rights would have ripened into full ownership prior to any modern litigation of land claims in respect of unceded territory.

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

## II. IMPERIAL CONSTITUTIONAL COMMON LAW

### A. Development of the Doctrine

Canadian judges and lawyers have become accustomed to conceive of "constitutional law" as law that is embodied in written documents constituting the structure and powers of governments, together with the judicial decisions that have interpreted these instruments. In fact, this is a highly incomplete conception of the content of constitutional law. During the period of British colonialism, there developed a common law of Imperial expansion, found in the decisions of English and colonial judges of the period. Not surprisingly, this body of law dealt, *inter alia*, with the legal consequences of the assertions of Crown sovereignty over increasingly large areas of the globe. In particular, legal principles were developed to take account of pre-existing legal systems in new territories that, although already inhabited, came under the "protection" of the Crown. These principles secured the regimes of property and civil rights of the Native inhabitants.

Indeed, the term "Imperial constitutional common law" remains something of a misnomer, as its roots in the common law predate any significant overseas expansion of empire by Great Britain. The general principle of the cases may be simply stated: upon the acquisition of a new inhabited territory by the Crown, whether by force of arms ("conquest")[11] or by the gradual incursion of British settlers ("settlement"),[12] the existing laws of the indigenous inhabitants of the new territory, and the property rights which those laws recognized, remained unaltered unless subsequently changed by the Sovereign by some legally permissible method.[13] For present purposes, the common law doctrine of the continu-

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11 *Campbell*, *supra* note 7.

12 *Freeman*, *supra* note 7.

13 The requirement of alteration by a legally permissible method was critical. Purported alterations to property rights made by any other method were legal nullities incapable of creating new property interests or destroying existing ones. In the case of territories acquired by conquest or cession, what constituted the "Sovereign" depended, in turn, upon how the new territory was to be governed. Prior to the granting of an assembly, alterations to pre-existing indigenous laws could be made by the Monarch acting by order in council under the Royal Prerogative; after the meeting, or even the promise, of an assembly, whether elected or appointed, the Monarch's power unilaterally to alter indigenous laws was at an

ity of indigenous property rights, together with the requirement of a legally permissible method for their extinction, are important. (It is true that Sir Edward Coke C.J. appeared to have believed that the same rule did not apply to the Crown's acquisition of "pagan" kingdoms,[14] but this view was later repudiated by Lord Mansfield as an "absurd exception" which probably had its origins in the "mad enthusiasm of the crusades."[15])

The important consequence of the doctrine was that civil obligations *inter se*, and in particular the systems of land tenure of the inhabitants of newly acquired territories, remained intact unless subsequently altered by the Sovereign by a legally permissible method. Most significantly, the preservation of indigenous interests in land, according to the indigenous laws under which they arose, where such laws could be ascertained, constituted an exception to the legal fiction under English law that all land ownership flowed ultimately from Crown grants.

An early example of the application of this principle arose in the legal aftermath of the English conquest of Ireland, an event that significantly antedated the idea of the "British Empire", as this term would popularly come to be used. Prior to that conquest, there prevailed in Ireland with respect to land tenure the system of "Tanistry", defined as "[a] system of succession (to real property) known in Ireland and also traced to the Barbarian laws of Europe whereby the eldest male member of the family, normally the deceased's eldest brother or a similar near relative, succeeded, in contrast to the feudal principle of succession by the eldest son."[16] By extra-judicial resolution in 1606, the system of Tanistry was abolished.[17] Not surprisingly, questions then arose as to the security of land titles that had originated under the pre-conquest system of tenure and succession.

In *Le Case de Tanistry*,[18] the Irish Court of King's Bench rejected the argument that, by virtue of the conquest, the Crown had come into legal (*i.e.*, beneficial) ownership of all Irish land. To produce this result, there would have had to be a record of the Crown having seized the land at the time of conquest and no such record existed. Consequently, where the Native Irish population had

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end, and such changes could only by made by the assembly or Parliament: *Campbell*, *supra* note 7.

14 *Calvin's Case* (1608) 7 Co. R. 1 [77 E.R. 377].

15 *Campbell*, *supra* note 7, at 1; *Cowp.* at 209 [98 E.R. at 1048].

16 *Oxford Companion to Law*, (Oxford: Clarendon Press, 1980): "Tanistry"

17 H. S. Paulisch, *Sir John Davies and the Conquest of Ireland: A Study in Legal Imperialism*, (Cambridge: Cambridge University Press, 1985) at 78; see also Francis Headon Newark, "The Case of Tanistry" 9 N. Ir. Legal Q. (1950–1952) 215.

18 *Le Case de Tanisty*, *supra* note 7.

been left in possession of land held under the old (*i.e.*, indigenous) tenure, Tanistry, their titles remained good; but further devolution of the land would occur under the new common law of succession introduced by the conqueror. The Crown acquired no more than a "paramount lordship" over (*i.e.*, the "radical title"[19] to) the Irish lands, with the exception of any land which it had seized as of record at the time of the conquest.

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

> Et p ceo, quant tiele Monarch Royall, que voet governer ses subjects per un just & positive ley, ad fait novell conquest de un realme, coment que ipso facto il ad le seignory paramount de touts les terres deins un realme, issint qu touts les terres sont tenus de luy mediate vel immediate, & il ad auxi le possession de touts les terres queux il voet actualment seiser & retainer en ses proper maines, pur son profit ou pleasure ... .
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> [Q]ue si tiel Conquerour receive ascun de les natives ou auntient enhabitants en son protection, & avow eux pur ses subjects, & permit eux de continuer lour possessions, & demourir en son peace & allegiance, q lour heirs serront adjudge eins per bon title, sans grant ou confirmation del Conqueror, & enjoyeront lour terres solonque les rules de la ley que le Conqueror ad allow ou establish, silz violent submitter eux memes a la ley que est allow ou establish per le Conqueror, & tener lour [terres?] accordat al rules de ceo, & ney autermt.[20]
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> [translation]
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> [A] royal monarch (who) hath made a new conquest of a realm, although in fact he hath the lordship paramount of all the lands within such realm, so that these are all held of him, mediate vel immediate, and he hath also the possession of all the lands which he willeth actually to seize and retain in his own hands for his profit or pleasure, and may also by his grants distribute such portions as he pleaseth ... yet ... if such conqueror receiveth any of the natives or antient inhabitants into his protection and avoweth them for his subjects, and permitteth them to continue their possessions and to remain in his peace and allegiance, their heirs shall be adjudged in good title without grant or confirmation of the conqueror, and shall enjoy their lands according to the rules of the law which the conqueror hath allowed or established, if they will submit themselves to it, and hold their lands according to the rules of it, and not otherwise.

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19 That is to say a bare legal title to which no beneficial interest necessarily attached.

20 *Le Case de Tanistry*, *supra* note 7, at *Davis* 40 [80 E.R. at 528]; the English translation is from *A Report of the Cases and Matters in Law, Resolved and Adjudged in the King's Courts in Ireland*(1762)78 ("Davies translation") at 110–111, as quoted in *Mabo and Others v. Queensland* (No. 2)(1992), 175 C.L.R. 1 (High Court). See also Shaunagh Dorsett, "Since Time Immemorial: A Story of Common Law Jurisdiction, Native Title and the Case of Tanistry" (2002) 26 Melbourne U.L. Rev. 15.

Consequently, just as landholdings created under the customary tenure of various English localities[21] were not disturbed by the Norman conquest of England, landholdings that arose under the Irish system of Tanistry were not extinguished by virtue of the change of sovereignty alone, nor even by the eventual abolition of Tanistry as the system of devolution, and no fresh grants from the Crown were required to secure them.

The same principle appeared to have been applied relative to landholdings in Wales after its final subjugation to the authority of the English king. In *Witrong v. Blany*,[22] a question arose as to whether a writ of *scire facias* ran in Wales. Chief Justice Hale found that it did, but only because the indigenous laws of Wales had been altered by Parliament after the conquest to permit this. In the absence of such express modification by Parliament, the old Welsh laws of partible inheritance would have prevailed.

Most significantly, Chief Justice Hale held that, while it had been competent for Parliament to enact special legislation altering the laws of Wales after the conquest, since these laws did not touch upon the landholdings of the Native Welsh inhabitants, no new grant from the English Crown was required to secure them:

> The main point whether *testatum sci. fa.* may issue into Wales, I hold it may well issue thither; at the common law it cannot be denied, that Wales is a distinct principality of distinct laws and language, only held of England in tenure, not in demean. So no writs could issue into Wales but 6 Ed. 1, by conquest and attainder of David and Lluellin Slaine, he had *vitae* and *necis potestatem*, and as 7 Co. 17, he might alter laws or dispose of the lands as he pleases, but there needs no new grant for admitting parties to continue in possession this of itself is a sufficient title to Christians but infidel kingdoms[23] having laws against the Decalogue, they are abolished by conquest, till new established.[24]

These early cases, decided well before the "Age of Empire", were instructive. The point was that Aboriginal peoples in North America were not the first na-

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[21] For instance, Gavelkind in Kent; Gavelkind was the indigenous Kentish system of land tenure at the time of the Norman conquest of England, identified as the rule of partible inheritance, under which land devolved equally upon all male children, or, failing a male line, upon all female children of the owner, in contrast to the Norman rule of male primogeniture: *Oxford Companion to Law* (Oxford: Clarendon Press, 1980), "Gavelkind." Kentish landholdings survived the conquest of England by the Normans, just as Irish landholdings survived both the conquest of Ireland by the English and the eventual abolition of Irish Tanistry as the Irish system of devolution.

[22] *Witrong, supra* note 7.

[23] Again, a dictum referable to the "absurd exception" made by Sir Edward Coke in *Calvin's case, supra* note 14.

[24] *Witrong, supra* note 7.

tions with distinct customs, institutions and systems of land tenure to fall under English sovereignty. They were preceded by centuries at least by, *inter alia*, the Kentish, Welsh, and Irish peoples. The general common law principle was clearly that the laws in force in a newly acquired territory at the time of its acquisition, especially those relating to land tenure, remained operative after the change of sovereignty. Landholdings created under that tenure were not even disturbed by abolition of the Native system of devolution under which they had come into existence.

It was, of course, open to Parliament to change the laws, but unless and until this occurred, the *lex loci* continued in force and indigenous land tenure was not abrogated or disturbed. Upon the change of sovereignty, the lands of the indigenous peoples were held of the Crown, but obviously not by virtue of any Crown grant.

*Campbell v. Hall*,[25] the case most frequently referred to as establishing the Imperial constitutional common law principle that the property rights of a conquered people are not affected by conquest, consequently had its roots in the common law well prior to any significant overseas expansion of the British Empire. *Campbell v. Hall* involved a dispute over a tax purportedly imposed by King George III on goods exported from the Colony of Grenada, which, like Quebec, had been ceded to the British by the *Treaty of Paris* in 1763. As in the case of Quebec, a prerogative enactment was made providing for the government of the new colony by an appointed local assembly. The King then purported to exercise the prerogative power again to impose a tax on sugar exports from the island, in order to bring its taxation structure for foreign trade into accord with that which prevailed in other Caribbean sugar islands already under the Crown's sovereignty. The plaintiff, a resident of the colony, disputed the validity of the new tax, on grounds that the indigenous laws of the island were unaffected by cession unless lawfully altered and that, by the order in council providing for a local assembly, the King had divested himself of his prerogative power to impose the tax.

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

> A great deal has been said, and many authorities cited relative to propositions, in which both sides seem to be perfectly agreed; and which, indeed, are too clear to be controverted. The stating some of those propositions which we think quite clear, will lead us to see with greater perspicuity, what

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[25] *Campbell, supra* note 7.

> is the question on the first point, and upon what hinge it turns. I will state the propositions at large, and the first is this:
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> A country conquered by British arms becomes a dominion of the King in the right of his Crown; and, therefore, necessarily subject to the Legislature, the Parliament of Great Britain.
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> The 2d is, that the conquered inhabitants, once received under the King's protection, become subjects, and are universally to be considered in that light, not as enemies or aliens.
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> The 3d, that the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning.
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> The 4th, *that the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there.* Whoever purchases, lives or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca or the Isle of Man, or the plantations, has no privilege distinct from the natives [emphasis added].[26]
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> The 5th, *that the laws of the conquered country continue in force, until they are altered by the conqueror: the absurd exception as to pagans, mentioned in Calvin's case, shews the universality of the maxim.* For that distinction could not exist before the Christian era; and in all probability arose from the mad enthusiasm of the Croisades (*sic*) ... [emphasis added].
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> The 6th, and last proposition is, that if the King (and when I say the King, I always mean the King without the concurrence of Parliament) has a power to alter the old and introduce new laws, he cannot make any change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put.[27]

In the result, Lord Mansfield found that the purported tax on exports constituted an unlawful derogation from property rights under the colony's existing laws, which could not be accomplished by the prerogative power. The sums of money collected there under, as the property of the island's inhabitants, were ordered to be returned to them. As will become apparent in the analysis that follows, a clear analogy should be drawn between the Crown's obligation to return property in the form of money (the fruits of the land) and its legal obligations relative to the land.

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[26] This proposition, while never rejected, has never been applied by Canadian courts in cases involving the land tenure of Aboriginal peoples.

[27] *Campbell, supra* note 7 at 1; Cowp. 208–210 [98 E.R. at 1047–1048].

The authority of *Campbell v. Hall* as part of Imperial constitutional common law, and hence as part of received Canadian constitutional common law, has not been doubted.[28] It established two fundamentally important propositions. First, the laws and property rights of the indigenous inhabitants of a conquered or ceded territory remained in force unless altered by competent legislation. No new grant from the Crown was necessary to confirm or vindicate existing land-holdings. Secondly, if competent legislation did alter existing indigenous laws, the same rules must apply equally to the property of all inhabitants of the territory, Natives and settlers alike.

In the context of the evolution of the law of Aboriginal title in Canada, the implications were therefore two-fold. To the extent that pre-contact Native laws and systems of land tenure were not altered by competent legislation, they remained in effect and should have been enforced by Canadian courts. To the extent that a new system of property law superseded pre-existing Native laws and systems of land tenure, Aboriginal peoples must enjoy its benefits equally with non-Aboriginal subjects.[29]

## B. Application of the Doctrine outside Canada

Well before significant British incursions into North America commenced, the common law required that indigenous property rights be respected, in accordance with indigenous laws and institutions in the inhabited territories which fell under British sovereignty.[30] The doctrine was applied frequently by English and colonial courts in cases that ought to have been considered binding by Canadian courts faced with similar situations. Many decisions of the Judicial Committee of the Privy Council arising out of land disputes in former British colonies with large Native populations were instructive.

In *Cook v. Sprigg*,[31] Sigcau, the sovereign despot of Pondoland, made certain grants of land to the plaintiffs, who were the appellants before Their Lordships' Board. It appeared that the laws of the Pondo people did not permit Sigcau, as despot, to make these alienations. In 1894, Pondoland was annexed to the Cape

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28 See *R. v. White and Bob* (1965), 52 W.W.R. 193 (B.C.C.A.).

29 The evolution of the concept of Aboriginal land title in Canada has respected neither of these legal principles. Instead, a succession of novel property rules has been crafted by the courts with application only to the claims of Aboriginal peoples. See Donovan, *supra* note 4.

30 It is perhaps necessary to qualify the common law rule to the extent of stating that indigenous systems of tenure rights were required to be respected if they could be ascertained: *Re Southern Rhodesia*, [1918] A.C. 211 (P.C.). See the discussion of this and related authorities, *infra*.

31 *Cook v. Sprigg*, [1889] A.C. 572 (P.C.).

Colony,[32] the government of which refused to recognize the grants. The plaintiffs brought an action against the Cape Colony government for recovery of the lands they had been granted.

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

> A considerable amount of evidence appears to have been given with the object of shewing that the rights purported to be granted were contrary to the native laws and customs prevailing in Pondoland when they purported to be granted; that Sigcau was a lawless despot; and that any rights purporting to be granted by him were subject to his arbitrary power to recall them at any moment. ...
>
> Their Lordships do not differ with the finding in fact by the Chief Justice that at the time that Sigcau executed the instruments in question he was the paramount chief of the Pondos, and that Sigcau understood perfectly well that he was purporting to grant such rights as the instruments which he executed purported to convey.[33]

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

The later case of *West Rand Central Gold Mining Company Limited v. The King*[34] arose out of the subsequent war between the South African Republic and Great Britain. The war was lost by the South African Republic, which then ceased to exist and was annexed to other British possessions in southern Africa. In the course of the war, the government of the Republic confiscated gold belonging to the plaintiffs for "safe keeping", ostensibly to be returned at the end of hostilities. In the result, the Republic ceased to exist and the plaintiffs sued

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[32] *Cape Colony Statutes*, 1894, c. 5.

[33] *Supra* note 31 at 577–578.

[34] *West Rand Central Gold Mining Company Ltd. v. The King*, [1905] 2 K.B. 391.

the Crown, as the Republic's sovereign successor, for recovery of the gold or its value.

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

> Lord Robert Cecil[35] argued that all contractual obligations incurred by a conquered state, before war actually breaks out, pass upon annexation to the conqueror, no matter what their nature, origin or history. He could not indeed do otherwise, for it is clear that if any distinction is to be made it must be upon grounds which, without depriving the liability of its character of a legal obligation against the vanquished State, make it inexpedient for the conquering State to adopt that liability as against itself. ...
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> The broad proposition which thus formed the basis of Lord Robert Cecil's argument almost answers itself, for there must have been, in all times, contracts made by States before conquest such as no conqueror would ever think of carrying out. Some illustrations will occur in the course of our subsequent remarks.
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> A country has issued obligations to such an amount as would wholly destroy the national credit, and the war, which ends in annexation of the country by another Power, may have been brought about by the very state of insolvency to which the conquered country has been reduced by its own misconduct. Can any valid reason be suggested why the country which has made war and succeeded should take upon itself the liability to pay out of its own resources the debts of the insolvent state, and what difference can it make that in the instrument of annexation or cessation of hostilities matters of this kind are not provided for?[36]

The plaintiffs' counsel had argued, on the basis of *United States v. Perchman*,[37] that the public liabilities of the conquered state should be honoured by the Crown. But in that case Marshall C.J. had simply said:[38]

> It is very unusual even in cases of conquest for the conqueror to do more than displace the Sovereign and assume dominion over the country. The modern usage of nations which has become law would be violated; that sense of justice and right which is acknowledged and felt by the whole civi-

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35 The plaintiffs' counsel.

36 *Supra* note 34 at 400–403.

37 *United States v. Perchman* (1833), 7 Peters 51 (U.S.S.C.).

38 *Ibid.* at 86.

> lized world would be outraged, if private property should be generally confiscated and private rights annulled. [39]

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

> It must not be forgotten that the obligations of conquering States with regard to private property of private individuals, *particularly land* as to which title has already been perfected before the conquest or annexation, are altogether different from the obligations which arise in respect of personal rights by contract. As is said in more cases than one, cession of territory does not mean the confiscation of the property of individuals within that territory[40] [emphasis added].

In consequence, there was no inconsistency between the repudiation by the Crown of the public liabilities of the conquered peoples' former government and the Crown's positive obligation to respect their perfected rights to property, particularly land, that had come into existence under that government.[41] And to the extent that "perfected rights" to land existed, they must have been perfected in accordance with the pre-existing indigenous laws, not the English law of property.

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

To this must be added one particular qualification. Constitutional common law preserved indigenous property rights upon a transition of sovereignty, provided that these rights could be ascertained by the court. The importance of this qualification can be discerned from the radically different conclusions reached by the Privy Council in the cases of *Re Southern Rhodesia*[42] and *Amodu Tijani v. Secretary, Southern Nigeria.*[43]

In *Re Southern Rhodesia*, a question arose as to ownership of unpatented lands falling within the territories of what are now the southern African states

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39 Compare Marshall C.J.'s statements with Lord Mansfield's 4th and 5th propositions in *Campbell*, *supra* note 7, with which they are consistent.

40 *Supra* note 34 at 411, *per* Lord Alverstone C.J.

41 The emphasis placed by Lord Alverstone C.J. on rights to land is particularly significant in the Canadian context.

42 *Supra* note 30.

43 *Amodu Tijani*, *supra* note 7.

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

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

> After a fashion, Lobengula's was a regular government in which the actual rule was his. He assigned to individuals "gardens" for their personal cultivation. Under a system of short tillage and long fallows no occupation lasted long, except, perhaps, that of the kraals themselves, which he apparently respected. The community was tribally organized. It had passed beyond the purely nomadic stage, though still remaining fluid. It practised a rude agriculture, chiefly of mealies. Its wealth was mainly in cattle, and of that wealth the great bulk belonged to the king.
>
> No principle of legitimacy attached to the dynasty of Lobengula. Though he succeeded his father and left sons, there was neither successor nor pretender to his throne. He had under him a kind of senate and a kind of popular assembly. He was expected to consult the council of *indunas* or chiefs in matters of moment. The assent of the assembled people added authority to his public acts, and to their resentment or superstition he sacrificed his *indunas* as evil counsellors or ministers.[44]

For a time in the 1880s, the Company carried out its activities in the region with the consent of Lobengula, who even purported to grant land and mineral concessions from time to time. In 1892, however, Lobengula's warriors attacked

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[44] *Supra* note 30 at 214–215.

a Company outpost and war ensued. In the hostilities that followed, Lobengula fled the country and eventually died of smallpox or tropical fever; in Lord Sumner's words, "King Lobengula's kingdom perished with him."[45] From this point, the territory appeared to have descended into a state of anarchy. The king, who had arbitrarily owned most of the kingdom's property, was gone. There was no indigenous civil authority to replace him.

Aware that the principles of *Campbell* required Native laws and property rights to be respected, the Privy Council searched for these without success. In language that by present-day standards seems embarrassingly Eurocentric and teleological, Lord Sumner attempted to evaluate the Native laws and property rights to which the common law required him to give effect:

> [I]t was necessary that the argument should go the length of showing that the rights, whatever exactly they were, belonged to the category of rights of private property, such that upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and foreborne to diminish or modify them.
>
> The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low on the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions of civilized societies. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case, it would make each and every person by a fictional inheritance a landed proprietor "richer than all his tribe." *On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law* [emphasis added].
>
> ... Lobengula's duties, if describable as those of a trustee,[46] were duties of imperfect obligation. Except by fear or force he could not be made amenable. He was the father of his people, but his people may have had no more definite rights than if they had been the natural offspring of their chieftain.
>
> This fact makes further inquiry into the nature of native rights unnecessary. If they were not in the nature of private rights, they were at the disposal of the Crown when Lobengula fled and his dominions were conquered.

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45 As *per* Lord Sumner, *ibid.* at 221.

46 This remark appears to have been made in response to an argument that, while Lobengula claimed personal ownership of most of the property of his people, he held this property in a capacity analogous to that of a trustee to the people's *cestui que trust*. This position was rejected, apparently because there was no evidence to support it. Certainly Lobengula's behavior was not subject to regulation or control in anything like the manner of a trustee.

> Whoever now owns the unalienated lands, the natives do not.[47]

The Privy Council was equally unable to assent to the proposition that the unpatented lands belonged to the Company. Almost by default, the Imperial Crown was found vested with the (apparently beneficial) title to the lands, and the Company was found to have acted in the capacity of a Crown agent for the purpose of granting land patents.

The society of the Matabele and the Mashona peoples was one in which it was not clear that the Native population enjoyed any property rights even under their own laws, except by the principle that the kingdom's wealth was owned by King Lobengula, and the property rights of his subjects (and, indeed, their very lives) were subject to his arbitrary largesse and forfeiture. In the Privy Council's opinion, this did not amount to a system of tenure capable of enforcement by the courts.

But *Re Southern Rhodesia* almost certainly represents the extreme case. In other decisions involving the land tenure of Aboriginal peoples, the Privy Council was easily able to discern systems of Native laws and land tenure, and could give effect to them in their own terms, notwithstanding that they differed radically from English real property law concepts.

In *Amodu Tijani v. Secretary, Southern Nigeria*[48] a cognizable system of Native laws and land tenure was found and given effect. The dispute arose out of the taking of lands belonging to Tijani, a White Cap Chief in Lagos, for public purposes. The legal question was the amount of compensation payable. The court of first instance found that, under the laws of Lagos, the value of the plaintiff's proprietary right was simply equal to the value of the nominal tribute paid to him by the Native communities that he licensed to use the land. The Privy Council disagreed and found that the lower court's ruling had been based on a fundamental misunderstanding of the indigenous system of land tenure that had prevailed in the vicinity of Lagos for hundreds of years, and which courts of common law were, by common law principles, bound to respect.

Viscount Haldane, delivering the decision of the Board, described the evolution and content of Lagosian law as follows:

> About the beginning of the eighteenth century the Island of Lagos was held by a chief called Olofin. He had parcelled out the island and some of the mainland among some sixteen subordinate chiefs, called "Whitecap" in recognition of their dominion over the portions parcelled out to them. About 1790 Lagos was successfully invaded by the neighbouring Benins. They did not remain in occupation, but left a representative ruler whose title was the "Eleko." The successive Elekos in the end became the Kings of Lagos, although for a long time they acknowledged the sovereignty of the King of the Benins, and paid tribute to him. The Benins appear to have interfered but

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47 *Supra* note 30 at 233–235.

48 *Amodu Tijani, supra* note 7.

> little with the customs and arrangements of the island. About the year 1850 payment of tribute was refused, and the King of Lagos asserted his independence. At this period, Lagos had become a centre of the slave trade, and this trade centre the British Government was determined to suppress. A Protectorate was at first established, and a little later it was decided to take possession of the island. The then king was named Docemo.[49] In 1861 he made a treaty of cession by which he ceded to the British Crown the port and island of Lagos with all the rights, profits, territories and appurtenances thereto belonging. In 1862 the ceded territories were erected into a separate British government, with the title "Settlement of Lagos." In 1874 this became part of the Gold Coast. In 1886 Lagos was again made a separate colony, and finally, in 1906, it became part of the colony of Southern Nigeria.[50]

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

> Their Lordships make the preliminary observation that in interpreting native title to land, not only in Southern Nigeria, but in other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases, the Sovereign has a pure legal estate, to which beneficial rights may or may not be attached.[51]
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> In India, as in Southern Nigeria, there is yet another feature of the fundamental nature of land titles that must be borne in mind. The title, such as

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[49] In fact, the incumbent King was of the House of Docemo, a distinction which later assumed considerable importance relative to Native ownership of property in *Oyekan*, *supra* note 1, discussed *infra*. The ownership of territory by noble Houses was not without precedent in Aboriginal systems of tenure in Canada. The plaintiffs in *Delgamuukw* represented various Houses of the Gitxan and Wet'suet'en peoples, which were alleged to be the appropriate land holding units under traditional Gitxan and Wet'suet'en tenures. See *Delgamuukw v. British Columbia* (1997), 153 D.L.R. (4th) 193 (S.C.C.).

[50] *Amodu Tijani*, *supra* note 7 at 406.

[51] *Ibid.* at 402–403. In other words, unlike the case of Lobengula, the "radical" title of the Sovereign might be no greater than the legal title of the trustee to its *cestui que trust*.

> it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of the community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which individual members are admitted to enjoyment, and even to a right of transmitting individual enjoyment as members by assignment *inter vivos* or by succession.
>
> Even when machinery has been established for defining as far as possible the rights of individuals by introducing Crown grants as evidence of title, such machinery has apparently not been directed to the modification of substantive rights, but rather to the definition of those already in existence and to the preservation of records of that existence.[52]

Viscount Haldane's description above was of a system of land tenure which was at the same time communal and based upon tribute payable to the White Cap Chiefs for usufructuary enjoyment. This system of tenure differed radically from the estates in land known to the contemporary English law of real property. Nevertheless, it was the duty of a common law court to give effect to it and to protect the entitlements to which it gave rise. Indeed, even Crown grants could not extinguish the existing Native tenure in favour of an individual to whom the grant was made. The Crown had no beneficial interest in the land, and it could not grant what it did not possess:

> In the light afforded by the narrative, it is not admissible to conclude that the Crown is generally speaking entitled to the beneficial ownership of the land as having passed to the Crown as to displace any presumptive title of the natives ... . A mere change in sovereignty is not presumed as meant to disturb the rights of private owners; and the general terms of a cession are prima facie to be construed accordingly. The introduction of the system of Crown grants which was made subsequently must be regarded as having been brought about mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive titles already existing.
>
> The Chief is only the agent through whom the transaction [i.e., the expropriation of the land for public works with compensation] is to take place, and he is to be dealt with as representing not only his own but the other interests affected.[53]

In the result, compensation was found to be payable on the basis of the value of the land to the entire usufructuary community which held the land of Tijani, and not simply an amount equal to the nominal value of the tribute which would be denied Tijani once the beneficial interest in the land passed to the Crown absolutely under the expropriation, with the consequent extinguishment of the usufruct held of him on the basis of that tribute. Since Native

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[52] *Ibid.* at 403–404; the principle that Crown grants of land are qualified by a variant of the maxim *nemo dat quod non habet* is considered *infra*.

[53] *Ibid.* at 407–408.

tenure survived, the value of the land was properly determined in accordance with Native rules and customs. The proceeds of the compensation were ordered to be paid to the individual members of the entire community using the land, in accordance with some estimate of their imputed beneficial interests.

The reason for the difference between the result in the *Southern Rhodesia* case and that in *Amodu Tijani* was clearly the possibility, in the latter case, of ascertaining a cognizable Aboriginal *lex loci* that, once understood, must be given effect at common law. The case of the lawless tyrant Lobengula was likely to be the radical and unusual one; in short, where an organized society had broken down into a state of anarchy in which a system of land tenure could not be ascertained. But if such a system was capable of judicial ascertainment, the principles of Imperial constitutional common law required its application. These observations were vital, because once Aboriginal systems of land tenure had been judicially understood—and it was the obligation of a common law court to attempt to understand them—the application of common law principles precluded the extinguishment of Aboriginal land titles even by Crown grants: *nemo dat quod non habet* [no one can give what one does not have].[54]

These common law principles have been applied in modern cases.[55] In *Oyekan v. Adele*,[56] there was a dispute over some Nigerian property, and Lord Denning found that Native systems of tenure trumped a Crown grant of the land made *ex facie* in fee simple. The dispute arose out of a purported Crown grant of the Royal Palace in Lagos made in 1870. The first Oba (King) of Lagos, Ado, ruled from 1630 to 1689. By the law of Lagos, the Oba was entitled to reside in the Iga Idunganram (Royal Palace). The Oba's office was not hereditary, and by the *lex loci* he was selected by the White Cap Chiefs and the heads of the important Houses in the region. Ado was of the House of Docemo, and by coincidence or influence all his successors were of the same House until the death of the Oba Falolu in 1949.

By the treaty of 1861 referred to by Viscount Haldane in *Amodu Tijani's* case, the ruling Oba ceded Lagos to Great Britain with a view to the suppression of the slave trade. In 1870, the Crown made a grant of the Iga to the then-Oba, a member of the House of Docemo. On its face, the grant conferred an

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[54] This is consistent with the decision in *Bristow*, *supra* note 7, where Lord Blackburn stated, at 665–666, that there is no common law principle by which the Crown is presumed to own the lands in which it has the "radical title". If the Crown pretends to beneficial ownership of land, it must prove its ownership in the same way as the subject. On this authority, as against Aboriginal claimants asserting an interest in ancestral lands, the Crown, and not Aboriginal claimants, should be at a distinct evidentiary disadvantage. On the novel principles typically applied by Canadian courts in the ascertainment of Aboriginal title, the reverse has usually been the case.

[55] They have been consistently ignored by the Canadian courts.

[56] *Supra* note 1.

interest in fee simple, capable of devolution at common law to the Oba's heirs. Upon the death of Falolu in 1949, the White Cap Chiefs selected a new Oba, Adele, who was not the candidate proposed by the House of Docemo and not the heir-at-law of Falolu. The House of Docemo then sued for possession of the Iga, relying upon the Crown grant in fee simple to the House of Docemo made in 1870.

When the case reached the Privy Council, Lord Denning, delivering the opinion of the Board, decided that, notwithstanding the Crown grant of the Iga to the House of Docemo, the Crown could only grant what it possessed, which, in this case, was the radical title to the Iga as qualified by the *lex loci*. According to that law, the chosen Oba was entitled to the Iga, irrespective of the fact that at the time of the grant the incumbent had been of the House of Docemo and that according to the English law of succession to real property the Iga would have devolved to the Oba Falolu's legal heirs. It was not open to the Crown by grant, a prerogative act, to alter or derogate from the local rights of property as determined by the local laws:

> Their Lordships find it fully established by the evidence and by the concurrent findings of the courts below that, before the Treaty of Cession, the Oba of Lagos by native custom had a right to live in the Iga. He had this right by virtue of office. On his death the Iga did not pass to his heirs or to his family but to his successor in office. It was the traditional home of the Obas where each of them lived.[57]

> Their Lordships are inclined to think that the only rights of the Oba which passed to the Crown [by the Treaty of Cession] were the rights which he possessed in his official capacity as Oba, and not those which he possessed in his private capacity.[58]

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

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

> In inquiring ... what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to ac-

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[57] *Ibid.* at 787.

[58] *Ibid.* at 789.

> quire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it; and the courts will declare the inhabitants entitled to compensation according to their interests, even though these are of a kind unknown to English law. Furthermore, if a dispute arises as to the right to occupy a piece of land, it will be determined according to native law and custom, without importing English conceptions of property law.[59]

Accordingly, the common law required the ascertainment and application of Native law. The common law rule was that while competent legislation could alter Native laws or extinguish Native land tenure, purported Crown grants of land, or other prerogative acts done in the absence of such legislation, took effect subject only to rights existing under extant Native laws and systems of tenure.[60] Prerogative acts could not of themselves create new property rights which the Crown did not previously possess, nor could they alter or extinguish property rights which Aboriginal peoples already possessed, in accordance with their own laws and systems of government.

## C. Questions of Proof

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

The practical qualification to the application of the rule was essentially evidentiary. In the *Southern Rhodesia* case the Privy Council found ownership of the unpatented lands to be in the Imperial Crown, but not because the Crown was presumed by law to possess any beneficial interest in unpatented lands adverse and superior to the title of the Native population. In contrast, the rights, if any, of the indigenous population were simply not ascertainable on the evidence, or at least the Privy Council was unable to ascertain them from the evidentiary record before it. It was unlikely that such situations would be frequent. Common law courts (but, typically, not Canadian courts) have been receptive to proof of Native laws of land tenure by traditional Native methods, principally

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[59] *Ibid.* at 788.

[60] The implications of this doctrine for Aboriginal land entitlements in Canada are potentially significant. Consider, for instance, the case of British Columbia, where (purported) Crown land grants have consistently been made in a situation in which Native tenure has never been legally extinguished, even putatively, and, indeed, where the legislature with territorial jurisdiction lacks the constitutional competence to effect a valid extinguishment: see *Delgamuukw*, *supra* note 49 at 267–273.

by the reception in evidence of oral histories by members of societies that possess oral rather than written traditions.[61]

For instance, in *Kobina Angu v. Cudjoe Attah*,[62] a dispute arose over the right to tribute claimed by the plaintiff in respect of land occupied by the defendant. Sir Arthur Channel saw no intrinsic difficulty in establishing the rights of the parties in accordance with Native land law through the oral proof of the content of that law in open court.

> The land law of the Gold Coast Colony is based on native customs. As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with the native customs until the particular customs have, by frequent proof in the Courts, become so notorious that the courts take judicial notice of them.[63] In the Gold Coast Colony the principal customs as to the tenure of land have now reached the stage at which the Courts recognize them, and the law has become as it were crystallized. There is little statutory law relating to land. There is no land registry. There is an Ordinance (No. 1 of 1895) as to registration, but it only provides for a registry of "instruments," giving priority to those that are duly registered. It has no real bearing on the present case ... .[64]

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61 The reception into evidence of oral histories to establish the content of Native systems of land tenure and territorial boundaries was not accepted in Canada prior to 1997, despite the ample common law precedent establishing the admissibility and probative value of this type of evidence: see *Delgamuukw*, *supra* note 49, and the prior authorities (which it neglected to mention) that had arrived at the same result half a century earlier: *Kobina Angu v. Cudjoe Attah* (1915) [1874–1928] P.C. Gold Coast; *Stool of Abinabina v. Chief Kojo Enyamadu*, [1953] A.C. 207 (P.C.), and the authorities cited at note 69, *infra*. Even in *Delgamuukw*, the Supreme Court of Canada referred to none of these authorities, and treated the probative value of evidence given by way of oral histories as if this was its own surprising discovery. In fact, as a matter of law there was nothing new or novel about it. What was surprising was the consistent and unexplained neglect of common law authorities relative to proof of Native tenure in other common law jurisdictions, which established both the admissibility and the probative value of oral accounts in the proof of indigenous systems of land tenure and property rights half a century or more before the Supreme Court of Canada's decision in *Delgamuukw*.

62 *Kobina Angu*, *ibid.* at 43.

63 Compare this with the rejection of the probative value of oral evidence of Native laws by McEachern C.J. at the trial level in *Delgamuukw*, *supra* note 49. One must assume that McEachern C.J. was either unaware of, or was unwilling to apply, the common law authorities with respect to the appropriate weight to be assigned to this kind of evidence.

64 *Kobina Angu*, *supra* note 61 at 44. This was hailed as a radical and innovative new development in *Delgamuukw*, when in fact there was nothing new about it in common law jurisprudence. In *Delgamuukw*, the Court omitted any reference to *Kobina Angu* or any related authorities.

In the case in question, the authority of a Chief's "linguist"[65] in establishing the content of Native customary law was accepted. Similarly, in *Stool of Abinabina v. Chief Kojo Enyamadu*,[66] a case involving a dispute over the ownership of land, Lord Cohen found that the trial judge had been in error in excluding all evidence of title other than evidence of "such positive and numerous acts within living memory sufficiently frequent and positive to justify the inference that he [the plaintiff] is the exclusive owner."[67] Sending the case back for a new trial in accordance with correct evidentiary principles, he said, "Both courts below failed to have regard to the evidence of history and tradition in this case *which, alone, if accepted, was sufficient to establish the appellant's title*"[68] [emphasis added].

These were not unique or isolated cases. Common law courts decided on numerous other occasions that in proof of Aboriginal title, "traditional" (*i.e.*, oral) evidence was not only admissible but might be determinative.[69] The consistent tendency as late as 1997 of Canadian courts to reject such evidence outright, and their continuing preference to ignore the authorities that established its admissibility, are difficult to account for in legal terms.

## III. CONCLUSIONS ON IMPERIAL CONSTITUTIONAL COMMON LAW

The common law authorities referred to in this section formed part of Canadian law,[70] irrespective of the various statutory enactments specifically adopting English domestic law to provide the rules for deciding disputes involving property and civil rights passed at various dates by Canadian common law provinces. As

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65 A Native officer described as "represent[ing] and speak[ing] for the Chief on ceremonial occasions, and [having] a somewhat extensive authority": *Kobina Angu*, *supra* note 61 at 46.

66 *Ibid.*

67 *Ibid.* at 210.

68 *Ibid.*

69 See *e.g. Abotche Kponuglo v. Adja Kodadja* (1933), 2 W.A.C.A. 24; *Nchirahene Kojo Ado v. Buoyemhene Kwado Wusu* (1936), 4 W.A.C.A. 96; *Ohene Tekyi Akyin III v. Kobina Abaka II* (1939), 5 W.A.C.A. 49 at 54; *Chief Kweku Dadzie v. Atta Kojo and Kojo Appeanya* (1940), 6 W.A.C.A. 139.

70 The *Royal Proclamation of 1763* introduced the entirety of English common law into the new British colony of Quebec. This must be taken to have included at least Lord Mansfield's six constitutional propositions in *Campbell* and the authorities that descend from that case. The reason for the subsequent statutory re-adoption of English common law relative to property and civil rights in Upper Canada [*Constitutional Act*, 1791 (U.K.), R.S.C. 1985, Appendix II, No. 3] was its previous exclusion from the original composite Colony of Quebec [*Quebec Act of 1774* (U.K.)].

part of the body of Imperial constitutional common law, they, as much as the Canadian *Charter of Rights and Freedoms*,[71] form part of the constitutional law of Canada. What were the implications of these principles for Aboriginal claims to land in Canada, and critically, why have they never been considered applicable when determining the entitlements to land of Canada's Aboriginal peoples?

First, it should now be evident that common law principles did not extinguish Aboriginal systems of land tenure; only competent legislation could do this.[72] Indigenous laws and systems of tenure remained in effect despite a change in sovereignty. The rule appeared to be the same whether the change in sovereignty came about by conquest[73] or settlement.[74]

Secondly, common law principles required the application of Native laws until these were altered by the legislature.[75] Crown grants of land could not extinguish Native tenure. Indeed, the Crown must prove its own title to the land it purported to grant in order for Crown grants to have had lawful effect.[76] In Canada, the only legislature competent to make alterations to pre-existing systems of Native tenure was the federal Parliament. Provincial laws purporting to alter or extinguish Aboriginal tenure encroached upon Parliament's jurisdiction under s. 91(24) of the *Constitution Act*, 1867, and consequently were *ultra vires*.[77]

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

72 *Supra* note 7.

73 *Ibid.*

74 *Freeman*, *supra* note 7. In this case, the Master (J. Stephen) stated that the true distinction was not between territories acquired by "conquest" or by "settlement" but, in contrast, between acquired territories in which, at the time of acquisition, there existed "any civil institutions and laws" and those in which there did not: 18 E.R. at 128. In the former case, the pre-existing laws and institutions of the indigenous inhabitants remained in force unless altered in some legally permissible manner, while in the latter case English law "followed" the settlers as their birthright and became the law of the territory. (The Master's opinion was affirmed by the Lord Chancellor [Lord Lyndhurst]: 18 E.R. at 137–143.) In consequence, only a people without any form of laws or institutions would automatically be subject to English law simply by virtue of the arrival of English settlers in the territory. No Canadian Aboriginal people ever existed in this condition and no Canadian court has ever been invited so to find, in fact or in law.

75 Lord Mansfield's 5th proposition in *Campbell*, *supra* note 7.

76 *Bristow*, *supra* note 7 at 655, *per* Lord Blackburn.

77 *Delgamuukw*, *supra* note 49 at 267–273, *per* Lamer C.J. It would appear also that since 1982 the competence even of the federal Parliament has been constrained by s. 35(1) of the *Constitution Act*, 1982, by which Aboriginal rights existing as of that date were "recognized and affirmed." *Quaere*, whether since 1982 there has existed in Canada any legally permissible method of extinguishing Aboriginal title other than consensual land claims agreements or constitutional amendment?

Crown grants of unpatented lands could not have the effect of extinguishing Aboriginal tenure.[78] Such grants were either ineffective, or were effective only to the extent of the beneficial interest in the land that the Crown actually had to convey. There was no legal presumption that the Crown's radical title to land vested in it a fee simple estate capable of forming the subject matter of a grant or, indeed, any beneficial interest in the land.[79] Consequently, a Crown grant of land in fee simple did not demonstrate that the Crown actually had the equivalent estate in land to convey; such conveyances took effect, if at all, subject to the extant systems of tenure of the Aboriginal population and the interests they recognized.[80]

The only qualification to the rule appeared to be that the pre-existing Native laws and systems of tenure must be ascertainable by evidence. There had never been any evidentiary impediment[81] to the proof of Aboriginal interests in land, *qua* Aboriginal laws, by "traditional" (*i.e.*, oral) evidence, led by Aboriginal peoples whose cultures had oral rather than written traditions.

Finally, it was open to Parliament[82] to change Aboriginal laws by competent legislation. But in the absence of a clear legislative intention to the contrary, the same legal rules must apply to all subjects equally. It has not legitimately been open to the courts to apply one set of rules to determine the proprietary entitlements of one segment of the population and another, more restrictive set of rules, to another group.[83]

In fact, in defining Aboriginal title to land Canadian courts have respected none of these principles. It is highly unlikely that, since the first assertion of British sovereignty until the present date they have been universally unaware of them. The explanation for this non-application of accepted legal principles probably requires an extra-legal, largely political study.

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78 *Oyekan*, *supra* note 1.

79 *Amodu Tijani*, *supra* note 7; *Bristow*, *supra* note 7.

80 *Oyekan*, *supra* note 1.

81 Except, interestingly, one created by Canadian courts. Consider the treatment of "traditional" evidence by McEachern C.J.B.C. [as she then was] in the trial judgment in *Delgamuukw*, *supra* note 49. Notwithstanding the common law authorities which impelled the opposite conclusion.

82 Subject, since 1982, to the constraints of s. 35(1) of the *Constitution Act, 1982*; *supra* note 77.

83 As *per* Lord Mansfield's 4th proposition in *Campbell*, *supra* note 7. The Canadian courts have consistently applied precisely this form of legally impermissible distinction in adjudicating Aboriginal common law land entitlements.

## IV. POSSESSION AS THE ROOT OF TITLE

### A. The Reception of English Law and the Possibility of a New Legal Order

As seen from the analysis of Imperial constitutional common law, Native property rights, *qua* Native (indigenous) laws and customs of land tenure and the interests they recognized, could not be affected except by competent legislation that brought into being a new regime of property rights. In the absence of such competent legislation, the common law required the ascertainment and application of the pre-existing Native law and the recognition of the interests it created. It was doubtful that any such competent legislation had ever been enacted in Canada. The Supreme Court of Canada has held that provincial legislation purporting to do so would be *ultra vires* the legislature[84] and while the federal Parliament has established reserves under the *Indian Act*,[85] it was by no means clear that the *Indian Act* applied to, or should apply to, lands in which Aboriginal peoples held interests *qua* extant Aboriginal systems of tenure.[86]

It is nevertheless true that the present law of real property in Canadian common law provinces and territories derived from the English common law relating to land. It is certainly correct to state that, at various dates and by various methods, all Canadian provinces (except Quebec) adopted the law of England as supplying the rules for decision-making in cases involving real property.[87] Thus, this body of law was, and remains, Canadian law that Canadian

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84 As per Lamer C.J. in *Delgamuukw*, *supra* note 49 at 267–273.

85 R.S.C. 1985, c. I-5.

86 Dickson J. equated the Aboriginal interest in common law title lands with the Indian possessory interest in reserves created under the *Indian Act*, [*Guerin v. The Queen* (1984), 13 D.L.R. (4th) 321 (S.C.C.)] but this view was neither supported by authority nor internally consistent, in that the fee simple in reserve lands was in the Crown by statute, whereas lands owned by Aboriginal peoples at common law, by definition, deprived the Crown of the fee. The two interests, by definition, cannot have been identical.

87 The dates of reception of English law and the modes of reception are as follows: Newfoundland and Labrador, 31 December 1832 as decided in *Young v. Blaikie* (1822), 1 Nfld. L.R. 283, a date apparently corresponding to the first meeting of the Legislative Assembly in the colony [an argument can be made that the correct reception date is actually much earlier than this, in that the statute 32 Geo. III, c. 46 (1792) established courts in the colony and directed them to apply English law]; Nova Scotia, 3 October 1758, as decided in *Uniacke v. Dickson* (1848), 2 N.S.R. 287; New Brunswick, 3 October 1758, by virtue of its annexation to Nova Scotia; Prince Edward Island, 7 October 1763, by virtue of the *Royal Proc*lamation of that date; Ontario, 7 October 1763, by virtue of the *Royal Proclamation*, and again on 15 October 1792, by virtue of the local statute 32 Geo. III, c. 1 (U.C.) after the colony's partition from Lower Canada in 1791 by the *Constitutional Act*, 31 Geo. III, c. 31 (Imp.); Manitoba, Saskatchewan and Alberta, possibly from 2 May 1670, by virtue of the *Hudson's Bay*

courts have been obligated to apply. While it was unclear how or why such adoptions could have the effect of altering or extinguishing pre-existing Aboriginal systems of land tenure,[88] it was pertinent, assuming that they could have had this effect, to consider how Aboriginal land claims should be decided by a consistent application of the English land law that all provinces except Quebec adopted.

In the course of this analysis, it will be important to recall Lord Mansfield's fourth proposition, as stated in *Campbell v. Hall*, that "the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions that arise there."[89] In consequence, if the correct legal position is that the reception of English law put an end to Aboriginal laws of land tenure, or if, on the evidence, the rules and customs of Aboriginal tenure cannot now be ascertained, then the common law should apply to Aboriginal claims for land in the same way and to the same extent that it does in the case of non-Aboriginal claimants. What outcomes would such an approach produce?

## B. The English Common Law of Property and Possession

Quite apart from limitation periods and prescriptive rights, at common law all title to land ultimately flows from possession. The basic principle has for centuries been that the person or persons in possession of land have a title good against all the world, unless an adverse claimant can demonstrate a prior, better title. Writing of the English common law of possession in the mid-nineteenth century, the period during which most Canadian provinces chose to receive the common law of real property, Lightwood noted:

> [T]he cases in which a possession is known to be adverse, and in which the possessor relies entirely on the Statute of Limitations to complete his title, are rare. In English law, all titles ... rest ultimately on possession, and the nature of the title is not altered by the fact that the present possession under it has been acquired by some recognized mode of transfer or devolution.

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*Company Charter* of that date which provided that English law was to apply in Rupert's Land; Manitoba later enacted local statute 38 Vict. c. 12, setting 15 July 1870 as the reception date for English law, and the subsequent enactments creating Saskatchewan, Alberta, the Yukon Territory and the North West Territory expressly preserved the reception date established by Manitoba; British Columbia, 1858, by virtue of local statute No. 7 of 1867. See, in general J. E. Coté, *supra* note 5; and, DeLloyd J. Guth and W. Wesley Pue (eds.), *Canada's Legal Inheritances* (Winnipeg: Canadian Legal History Project, 2001).

88 To the extent that the statutes of reception were passed by Provincial legislatures after Confederation they could not have extinguished existing Aboriginal title; we are told that provincial legislatures lack the constitutional competence to do so. To the extent that provincial legislation purports to do so it is, *pro tanto, ultra vires*: *Delgamuukw*, *supra* note 49, *per* Lamer C.J. at 267 –273.

89 *Campbell*, *supra* note 7.

> Such change of possession from one person to another, all holding under the same title, may have gone on for centuries, and, if this is known, the title is indefeasable. In the majority of cases, however, the title cannot be carried back for more than a comparatively short period, and the real guarantee of safety is the probability that any outstanding rights there may have been are barred.[90]

Indeed, the general principle was that "actual possession is taken to be also civil possession [*i.e.*, the type of possession from which an inference of ownership will be drawn by the courts]" unless otherwise explained by demonstration of some prior better right to possession in another.[91] Lightwood wrote, "The *jus possessionis* is the ownership *de facto*, and confers all the advantages of a *jus proprietas* as against strangers."[92]

Lightwood summarized the contemporary English law of possession of land:

> [The] statement of the cases enables us to carry somewhat further the summary which has already been given. Bare possession ... does not give a title to recover in ejectment; seisin in fee, although tortious, does give a title, and any possession, however short, is evidence of seisin in fee. But this is only evidence, and the presumption of seisin in fee arising from possession may be rebutted, positively, by showing some other interest in the possessor,[93] or negatively, by giving evidence of an outstanding fee, which has not been got in by conveyance or otherwise, or terminated by disseisin.[94]

If possession of land, even for a very short period, is evidence of seisin[95] in fee simple, then uninterrupted possession of land for hundreds, or even thousands of years, must constitute the strongest evidence of seisin.

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90 Lightwood, *Possession of Land*, *supra* note 8.

91 *Ibid.* at 26.

92 *Ibid.* at 76.

93 *I.e.*, that the possessor had some lesser interest than fee simple because he held his estate of another, which could not be true of Canada's original Aboriginal inhabitants prior to British sovereignty, at least vis-à-vis European settlers.

94 Lightwood, *Possession of Land*, *supra* note 8 at 121, *i.e.*, by showing a pre-existing superior title, which nobody could show as against Canada's Aboriginal inhabitants, there having existed prior to British sovereignty no power of record capable of creating any such interest.

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

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

After the transition of sovereignty a Crown grant of unpatented lands was ineffective if the beneficial fee simple to the land was not in the Crown to grant.[96] At the most, a Crown grant of unceded Aboriginal land made subsequent to the change in sovereignty would take effect only to the extent of the Crown's beneficial interest in the land, and would be faced squarely by the presumption of ownership in fee simple arising from actual prior possession by Aboriginal peoples. The Crown's "radical" title would thus be a naked title, devoid of any beneficial interest capable of forming the subject matter of a grant.

Lightwood's description of the English common law of possession and ownership of land is supported by major reported cases on the subject, none of which have been overruled, and most of which have been consistently followed by common law courts when resolving legal disputes relative to land.[97]

One may begin with the authority of *Stokes v. Berry*,[98] where Holt C.J. stated that:

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

While it was not clear from the report whether the Chief Justice was relying upon a prescriptive right, or simply upon the inference of ownership to be drawn from possession; in either case, Aboriginal peoples appear to have been in a unique position relative to the application of the principle he pronounced.

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[96] *Oyekan*, *supra* note 1; *Amodu Tijani*, *supra* note 7.

[97] But not in Canada, where the received common law of real property has been applied except in cases involving Aboriginal claims for ownership of land, in clear violation of Lord Mansfield's fourth proposition in *Campbell*, *supra* note 7.

[98] *Stokes v. Berry* (1699), Holt. K.B. 264 [91 E.R. 1044].

If "the possession of twenty years shall be a good title," *a fortiori* uninterrupted possession for hundreds of years should be a good title indeed.

The subsequent cases, however, made it even more clear that, without reliance upon limitation periods or prescriptive title, possession was *prima facie* evidence of ownership of land. In *Roe dem. Haldane and Urry v. Harvey*,[99] the defendant was in possession of property claimed by the plaintiff. It was not clear that the defendant could demonstrate any title in himself, and the plaintiff brought an action for ejectment relying upon his rights under two alleged predecessors in title, Haldane and Urry. The ultimate root of title had been in one Holmes, who devised the property to Haldane absolutely, subject to a life estate in one John Blatchford under whom the plaintiff did not claim. At trial, it was proved that Haldane had conveyed her estate to Urry, so that the plaintiff could not claim under her. As to Urry, the deed of conveyance was not produced. Consequently, the plaintiff could prove no prior interest through either of his supposed predecessors in title. In the result, the defendant's possession was left undisturbed and an estate in fee simple imputed to him, notwithstanding that it was unclear how he had got into possession in the first place.

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

> Lord Mansfield reasoned from the nature of an ejectment, and the course of proceeding upon it. He laid it down as a position, "that in this action, the plaintiff cannot recover, but upon the strength of his own title." He can not found his claim upon the weakness of the defendant's title. For, possession gives the defendant a right against every man who can not shew a good title.[100]

Aston J. concurred, saying, "In an ejectment, the party who would change possession must make out a title."[101] The principle stated was clear and is still applicable. Possession of property *simpliciter* gave the person in possession the right of ownership against any challenger who could not demonstrate a previous, better title. It did not matter whether the possessor could show any title in himself beyond the mere fact of possession.

Lord Mansfield reiterated this proposition in *Denn ex dim. Tarzwell v. Barnard*,[102] a complicated case in which the defendant was in possession of property and could not establish any good title to justify his possession. The plaintiffs,

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99 *Harvey, supra* note 8.

100 *Ibid.* at 2487 [98 E.R. 304]; that is, a title demonstrably better than that of the person in actual possession.

101 *Ibid*: If such a title is not demonstrated, then the fact of possession *per se* will be a sufficient title against all the world.

102 *Denn ex dim. Tarzwell v. Barnard* (1777), 2 Cowp. 595 [98 E.R. 1259].

however, could not demonstrate any title better than the defendant's. Lord Mansfield said:

> The defendant has not attempted to shew any title. The argument on behalf of the defendant has proceeded upon a supposition of a precise title set up. But I confess I do not see it in that light. The title is a possession for 20 years. ... If no other title appears, a clear possession of 20 years is evidence of a fee ... .[103]

The principles had not changed by the beginning of the nineteenth century. In *Peaceable dem. Uncle v. Watson*,[104] the defendant was in possession of property which appeared to be leased. The plaintiff, however, was unable to demonstrate that he held the property by his own title or through that of an ancestor, and was therefore nonsuited in his action for ejectment. Mansfield C.J. sitting in appeal said simply "The opinion [of the trial judge] is unanswerable. The ground of the rejection is this. Possession is *prima facie* evidence of seisin in fee simple." Lawrence J. concurred, stating that the plaintiff, in order to succeed, "*must first shew that the Defendant is in possession of the premises sought to be recovered, and next, that the Plaintiff has a better title*"[105] [emphasis added].

The case of *Asher v. Whitlock*[106] clearly demonstrated the principle that possession was *prima facie* evidence of ownership in its strongest form. One Williamson, an acknowledged trespasser, enclosed the land of another, built a house on it, and devised it to his wife for so long as she should remain unmarried, remainder to his daughter. After Williamson's death, his wife lived on the property with her daughter and married Whitlock, thereby terminating her own estate and crystallizing the contingent interest of her daughter. Both wife and daughter subsequently died, but Whitlock continued to live on the property. The daughter's heir-at-law brought an action for ejectment against Whitlock and succeeded on the strength of the daughter's interest under the will of Wil-

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[103] *Ibid.* at 597 [98 E.R. at 1260]; Lord Mansfield was not relying here upon prescriptive title acquired under any Statute of Limitations; he reached his conclusion solely on the basis of the common law inference of ownership which is drawn from possession of land. The case may therefore be distinguishable from *Stokes v. Berry*, *supra* note 98.

[104] *Watson*, *supra* note 8.

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

[106] *Asher*, *supra* note 8.

liamson. The court found that it did not matter that Williamson had not any title in himself, or even that he was an admitted trespasser, and concluded that his mere (admittedly wrongful) possession of the property created in him an interest in the land capable of devolution at law. Cockburn C.J. said "I take it as clearly established that possession is good against all the world except the person who can show a good title; and it would be mischievous to change this established doctrine."[107] Mellor J. concurred, saying, "The fact of possession is *prima facie* evidence of seisin in fee. The law gives credit to possession unless explained."[108]

The reason for examining these early cases in some detail, aside from the fact that they are still relied upon as correct statements of the common law of real property, is the historical fact that this was the state of the common law precisely at the points in time when European contact with Aboriginal peoples was made and competing claims first arose as to the proper ownership of large tracts of unceded land. In a common law court of the period, had these principles been applied to Aboriginal land entitlements in the same way as they were applied in disputes between non-Aboriginal litigants, the Aboriginal population should have been found to be the lawful owners of their ancestral lands by the very common law principles imported by the settlers.[109]

The common law of possession and the presumption of ownership that flows from it have not changed significantly since the early cases. If common law courts had considered them as correctly stating the law, the expected result would be their application to land disputes involving Aboriginal and non-Aboriginal claimants alike, in accordance with Lord Mansfield's fourth proposition in *Campbell v. Hall*.[110] In cases involving non-Aboriginal litigants, the principles appeared to be applied diligently.[111]

For instance, in *Perry v. Clissold*,[112] the plaintiff's predecessor enclosed and rented out vacant land. It was known at the time that he was not the true

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107 *Ibid.* at 5.

108 *Ibid.* at 6.

109 These common law principles have been expressly adopted in all Canadian common law jurisdictions, but no Canadian court has yet considered them applicable to Aboriginal claims for ownership of land. As Aboriginal peoples are "subjects" (citizens) in the meaning of Lord Mansfield's six propositions in *Campbell v. Hall*, the discrepancy is difficult to account for in legal terms.

110 *Campbell*, *supra* note 7. *Quaere*, whether section 15(1) of the *Canadian Charter of Rights and Freedoms*, specifically the sub-clauses requiring "equal protection" and "equal benefit" of the law, also dictates this result?

111 In cases of Aboriginal land claims they have consistently been ignored.

112 *Perry*, *supra* note 8.

owner, nor was the fee simple in the Crown. The true owner was simply unknown. Under the *Lands for Public Purposes Acquisition Act*,[113] the land was expropriated for the purpose of building a school. The responsible minister, however, refused to pay out the statutorily mandated compensation to Clissold's heir-at-law, on the ground that Clissold did not own the land and had not occupied it long enough to obtain a prescriptive title under the local statute of limitations. Clissold's heir-at-law brought an application for *mandamus* requiring the minister to pay.

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

> On the part of the Minister it was contended that, upon the plaintiff's own showing, Clissold was a mere trespasser, without any estate or interest in the land.
>
> Their Lordships are unable to agree with this contention.
>
> *It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner.* And if the rightful owner does not come forward and assert his title by process of law within the period prescribed by the Statute of Limitations applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title [emphasis added].
>
> Their Lordships are of opinion that it is impossible to say that no *prima facie* case for compensation has been disclosed ... or that the Governor, or responsible Ministers acting under his instructions, *should take advantage of the infirmity of anyone's title in order to acquire his land for nothing.* Even where the true owner, after diligent inquiry, cannot be found the Act contemplates payment of the compensation into Court to be dealt with by a Court of Equity[114] [emphasis added].

It would be difficult to conceive of a title to land more infirm than that of the claimant in *Perry v. Clissold*. Her "title" derived from that of an acknowledged trespasser upon land admittedly owned by someone else. As a trespasser, he had been in possession for less than the statutory period required to obtain even a prescriptive title by adverse possession. But this interest in the land, tenuous though it was, appeared at common law to be a compensable interest for the purposes of expropriatory legislation and, apparently, an interest in land capable of devolution or assignment.[115] One need hardly point out that the in-

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[113] 44 Vict. No. 16 (N.S.W.).

[114] *Perry*, *supra* note 8.

[115] On the principle set out in *Asher*, *supra* note 8, which was followed in *Perry*, *supra* note 8.

terest of Aboriginal peoples in their (unceded) ancestral lands must be considerably greater than was that of Clissold's successor.

Similarly, in the case of *Halifax Power Co. Ltd. v. Christie*,[116] the plaintiff claimed to be the owner of land which the defendant had been logging for many years previously. Its action for trespass and damages was dismissed, notwithstanding that the defendant could produce no deed nor prove any grant from the Crown. The Court of Appeal affirmed the judgment of Graham C.J., who had gone as far as to "presume" a deed in the case of a person who had been in possession of land for a long time uninterrupted, even though it would have been sufficient to ground title upon a prescriptive right:

> [A] purchaser of real estate must not trust merely to the papers and records but must enquire of the person in possession whether he claims to be the owner of the premises.[117]

> [A] person in proving his title need not trace it back to the Crown, but may trace it back to some one who has been in possession of the land. That has always been a useful thing, because, from loss of deeds and neglect to register, and looseness in the description of grants, the land marks having disappeared, a very large proportion of titles could not be traced back to the Crown.[118]

Once again, possession, rather than a grant from the Crown, was found to be the root of title to land. A Crown grant was not what gave rise to the right of possession and the consequent inference of ownership. In contrast, it was the lengthy and unchallenged possession of the land by the occupant from which ownership and, if necessary, a fictitious grant from the Crown, would be inferred.

The point that Crown grants might be fictitious, and were presumed upon finding a person in otherwise unexplained possession of land, was reaffirmed in *Allen v. Roughley*.[119] The case involved the administration of an estate. The testator's title to part of the lands involved could not be proved by purchase or a Crown grant, nor made certain by prescription under the locally applicable statute of limitations. The Australian High Court had no difficulty, however, in finding that the testator's possessory right, while unconfirmed by deed or grant and unperfected by time, was capable of devolution and, indeed, was probably an estate in fee simple. Dixon J. said:

> The inference appears to me to be plain enough that upon his death the testator was possessed of the land. Whatever may have been the infirmity of his

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116 *Halifax Power*, *supra* note 8.

117 Citing *Cunard v. Irvine* (1853), James Reports (Nova Scotia) 31.

118 *Halifax Power*. *supra* note 8 at 270 –271.

119 *Allen*, *supra* note 8.

> title ... if it amounted to no more than a possessory right, it devolved upon his trustees under the devise to them and was subject to the trusts of his will.
>
> In the first place, the principle that possession of real estate, or the reception of the rents or profits from the person in possession, is *prima facie* evidence of the highest estate in property, namely a seisin in fee, is a *rule of general application*. It relates to the possession of a party at any given point of time, present or past [emphasis added].
>
> If an existing possession is disturbed, the person in possession can sue the disturber as a trespasser. Proof that he is in possession confers upon him a good title against the whole world, except those who show a better title.[120]

Since the principle was stated to be a "rule of general application", then, *ex hypothesi*, it should apply to Aboriginal claimants in the same way. Fullagar J. concurred, stating, "The defendant is in possession, and therefore presumably entitled in fee simple.[121] ... It was once thought that a plaintiff who relied on possession must prove possession for at least twenty years; but it is now well established that proof of anterior possession for any period is sufficient to make a *prima facie* case."[122]

Kitto J. went further, stating:

> If A, then, is possessed of land, to say that is evidence of his seisin in fee means that his possession tends to prove the fact that a [Crown] grant of land has been made to him or to his predecessors, or that it has come to him or them by virtue of twenty[123] or sixty[124] years' possession. There is necessarily implied the further presumption that if anyone else has been in possession as owner within twenty years, then by conveyance or some other lawful means his title has been transferred.[125]

The common law of possession, and the title which flowed from it, had thus been constant in its principles from the earliest cases to the most modern. *Prima facie*, possession of land raised the presumption that the possessor had the

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120 *Ibid.* at 107–108, 115.

121 *Ibid.* at 128.

122 *Ibid.* at 130; significantly, Fullagar J. relied on the old common law authorities relative to possession and ownership as correctly stating the law in modern times: *Asher, supra* note 8; *Whale v. Hitchcock* (1876), 34 L.T. (N.S.) 136; *Dawson v. Pyne* (1895), 16 N.S.W.L.R. 116; *Richards v. Richards* (1731), 15 East. 293 [104 E.R. 855].

123 Referable to prescriptive rights to land by one subject as against another under the locally applicable statute of limitations.

124 Referable to prescriptive rights to land of the subject as against the Crown under the *Nullum Tempus Act*, 9 Geo. III, c. 16, and its successor legislation, discussed *infra*.

125 *Allen, supra* note 8 at 138.

"highest estate in property, namely a seisin in fee."[126] This was a "rule of general application."[127] The presumption was rebuttable only by a person who could show a prior, better title. Documents of land title were not determinative. If possession was otherwise unexplained, a Crown grant of the land to those in possession would be presumed, or, alternatively, the court would presume that all competing interests had been extinguished by the passage of time.

These principles have often been applied by Canadian courts in cases not involving the claims to land of Aboriginal peoples. Of course, in the case of Aboriginal peoples, the conscientious application of the same legal rules would frequently, if not always, elevate the rebuttable presumption of seisin into an essentially irrebuttable presumption of ownership in fee simple, in that no claimant could come forward with a title better than that of those already in possession, in whose favour a court would presumably be obliged to impute a fictitious Crown grant in fee simple. This probable result may account in large part for the unadmitted and selective non-application of the common law rules of real property by Canadian courts in determining Aboriginal entitlements to land. The production of a legal outcome disadvantageous to a particular minority group identified by ancestry is not, however, a legitimate reason for departure from property law rules of otherwise general application.

## V. PROOF OF POSSESSION

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

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

The continuing common law position relative to possession, both in the English cases expressly adopted as Canadian law and in cases arising out of purely domestic Canadian circumstances, can be simply stated. Persons are in possession of land if they are using the land in accordance with the types of uses which one would expect a reasonable person to make of the land at the time, given the nature of the land and the situation and needs of the persons using it.

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[126] *Ibid.* at 108, *per* Dixon J.

[127] *Ibid.*

Moreover, in the absence of contrary evidence, possession of part of a tract of land, as determined by reasonable use, raises a presumption that the whole of the contiguous land is also so possessed, provided it is of the same essential quality and nature, and capable of use in essentially the same manner.[128]

In *Curzon v. Lomax*,[129] a dispute arose over land (the true ownership of which was unknown). The defendant had been using the land, and the plaintiff claimed it. Lord Ellenborough C.J. found the defendant to be in possession of the land by virtue of the use he had made of it. He said:

> The question in the cause respected the right to the soil. The right to the soil was evidenced by acts of ownership exercised on it; not by presumptive evidence of property arising from supposed boundaries, the rights to which have never been ascertained by possession. In this case, every act of ownership that could be exercised had been done: the ponds had been fished, persons had been prevented from taking the soil, and a tree had been felled. That evidence of actual ownership must prevail against supposed unexercised rights.[130]

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

Similarly, in *Harper v. Charlesworth*,[131] the plaintiff was in the habit of going shooting for game on Crown land for a few months of each year when the game was plentiful. Another individual was in the habit of gathering grass from the land, but only with the plaintiff's permission. Bayley J. found that the evidence of shooting game and gathering grass was sufficient evidence of possession to entitle the plaintiff to succeed against the defendant in an action for trespass.

> The first question is, whether the plaintiff had any actual possession of the land where the trespass was committed. ... It appears to me that there was strong evidence to shew that there was actual possession in the plaintiff. The property belonged and the timber was reserved to the King; but every description of enjoyment was not exercised by the King, or by any person claiming under him. ... Now what was the land capable of yielding? It was

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[128] As *per* Lord Blackburn in *Bristow*, *supra* note 7 at 670; see also *Jones v. Williams*, 2 M. & W. 326 [150 E.R. 981].

[129] *Curzon v. Lomax* (1803), 5 Esp. 60 [170 E.R. 737] (K.B.).

[130] *Ibid.*, 170 E.R. at 738; consider this formulation in connection with the "evidence of actual ownership" constituted by the activities carried out by Aboriginal peoples on Crown lands, in contrast to the "supposed unexercised rights" of the Crown. In the present context the implication would appear to be inescapable that Aboriginal peoples were (and in many cases remain) in actual possession, in the common law sense, of the lands they occupied, whereas the Crown was (and is) not.

[131] *Harper v. Charlesworth* (1825), 4 B. & C. 525 [107 E.R. 1174].

> woodland, with rides on it, and there was a considerable quantity of game on it; and, therefore, it afforded to any person going there an opportunity of killing game. The plaintiff himself did not appear to have any other enjoyment of the land than that of shooting the game; he usually came about August and remained till November. Wallace had the grass, and he took it by licence, not from the Crown but from the plaintiff, and that licence did not vest the possession in Wallace, but was a privilege only which the plaintiff had conferred upon him. ... If the learned Judge had been desired to put the question to the jury, he could not with propriety have directed them to come to the conclusion that there was not an actual possession.[132]

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

In *Sherren v. Pearson*,[133] it was asked whether the isolated taking of trees from an unenclosed wilderness property, without the knowledge of the owner, was sufficient possession to attract the operation of the relevant local statute of limitations. Ritchie C.J. found that the defendant's activities were merely isolated acts of trespass rather than evidence of possession:

> In this case, then, there is nothing to indicate that the party at any time made an entry on the land with a view to taking possession of it under a claim of title or any open visible acts. There is no evidence of anything but isolated acts of trespass having no connection one with the other, no evidence of any open, visible continuous possession which might have been known, to the owner, but simply cutting without any open and exclusive possession.[134]

The case, however, was more significant for its negative findings. The isolated acts of trespass by the defendant were not sufficient to put the owner of the wilderness lands in question out of possession. Gwynne J., citing *Davis v. Henderson*,[135] noted at page 696, as follows:

> The term "possession" has no definite meaning. What is there to be done to constitute possession of wild land? If the rightful owner enters upon any part of it he enters in law upon the whole of it. ... Now how is wild land possessed? It is settled that it need not be enclosed—what better test can there be of its possession than the person whose possession is questioned should have used it just the same as any other owner uses his wild land. ... To require any more or greater possession than this will be to defeat the beneficial

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[132] *Ibid.* at 583–585 [170 E.R. at 1177–1178].

[133] *Sherren v. Pearson* (1887), 14 S.C.R. 581.

[134] *Ibid.* at 591.

[135] *Davis v. Henderson* (1869), 29 U.C.Q.B. 344–353.

> object of the statute of limitations, which was to secure peace and put an end to litigation by extinguishing these dilatory claims.

On these principles, it should be no impediment to Aboriginal claims that Aboriginal peoples possessed, in the common law sense, the land to which they claimed ownership, that the land was not enclosed in the European fashion, or that they did not frequent all the land at all times. Acts of ownership, commensurate with what uses the land would reasonably permit, sufficiently supported a claim for possession even of those parts of the land which were seldom or never frequented.

A situation involving even more slender "acts of ownership" was considered in *Kirby v. Cowderoy*,[136] another case involving possession of "wild" lands. The land in question was situated in British Columbia and had been mortgaged to the plaintiff by the defendant. The plaintiff never paid anything on account of principal or interest, and in order to preserve his security the defendant paid the annual taxes on the land. The land was located in the vicinity of New Westminster; and when, after the passage of time, it had acquired some marketable value, the plaintiff sought to exercise his right of redemption under the mortgage.

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

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

On the general subject of possession, the language of Lord O'Hagan in *The Lord Advocate v. Lord Lovat*,[137] cited with approval by Lord Macnaghten in *Johnson v. O'Neill*,[138] appeared to be applicable to the case. Possession:

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[136] *Kirby v. Cowderoy*, [1912] A.C. 599 (P.C.).

[137] *Lord Advocate, supra* note 8 at 288; this case involved possessory rights to a salmon stream. It was held that the fact of taking salmon regularly from some parts of the stream, infrequently from others, and possibly never from other parts, was sufficient evidence to constitute common law possession of the entire stream. The analogy to traditional Aboriginal uses of land is clear.

[138] *Johnson v. O'Neill*, [1911] A.C. 552 (H.L.).

> must be considered in every case with reference to the peculiar circumstances ... the character of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests; all these things, greatly varying as they must under various conditions, are to be taken into account in determining the sufficiency of a possession.[139]

Other cases could be examined,[140] but from those considered above the general characteristics of common law possession were quite clear. Possession was proven by showing acts of use that a reasonable owner would make of the land, given the land's characteristics, his situation, and what the land would yield. Enclosure was not necessary, particularly in the case of "wild" lands, where possession of a part raised a presumption of possession of all the contiguous, similarly situated land.

The uses or acts of ownership necessary to establish common law possession were sufficiently compendious to encompass the activities of Aboriginal peoples on the lands that Canada now comprises. One might safely concur with Baldwin J. of the United States Supreme Court in *Mitchell v. United States* where he said "[The Indians'] hunting grounds were as much in their actual possession as the cleared fields of the whites."[141]

## VI. CONCLUSIONS ON COMMON LAW POSSESSION AND OWNERSHIP

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

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139 *Ibid* at 602–603.

140 See *e.g. Halifax Power*, *supra* note 8 at 270 ["All that tends to prove possession as ownership of parts of the tract tends to prove such ownership of the whole tract."]; *Cadija Umma v. S. Don Manis Appu*, [1939] A.C. 136 (P.C.) [cutting grass on swampy land found to be sufficient evidence of possession]; *Wuta-Ofei v. Danquah*, [1961] 3 All E.R. 596 (P.C.) [erection of four pillars in accordance with Native custom found to be sufficient evidence of possession]; *Red House Farms (Thorndon) Ltd. v. Catchpole* (1977) E.G. 798 (C.A.) [shooting pigeons over unenclosed wild land found to be sufficient evidence of possession to ground a prescriptive title by adverse possession].

141 *Mitchell v. United States* (1835), 9 Peters 711 at 746 (U.S.S.C.).

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

Secondly, this common law possession raised a rebuttable presumption of seisin. But the presumption could only be rebutted by a person who came forward with a prior, superior claim to the land. A subsequent Crown grant will not suffice. In many, if not most cases, therefore, the presumption of Aboriginal title became irrebuttable. Moreover, the common law presumed that long occupation was explained by a (fictitious, if necessary) grant from the Crown, or by the probable expiry of all applicable limitation periods.[142] One would have expected Aboriginal claimants to be in a position to invoke both propositions to their advantage.

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

## VII. Prescriptive Rights Against the Crown

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

Two propositions must be borne in mind. First, the lands which now compose Canada became "Crown lands" upon the date of the assertion of British sovereignty. Whether any beneficial interest then attached to the Crown's radical title does not matter, because the analysis is unaffected even if the Crown did acquire such rights.[143] Secondly, the deliberate choice to receive English law as the rule for decisions in matters of real property entailed, in each case, the

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[142] As *per* Kitto J. in *Allen*, *supra* note 8 at 138.

[143] It is not correct, however, to state that the Crown acquired any beneficial interest in land simply by virtue of its underlying "radical" title: *Bristow*, *supra* note 7 at 665–666, *per* Lord Blackburn. If the Crown asserts a beneficial interest in land, it must prove this in the same manner as the subject. There is authority to the effect that the Crown did acquire a beneficial title to the vacant lands its subjects colonized, but lands already inhabited by Native populations could not properly have been classified as vacant: Kent McNeil, "The Onus of Proof of Aboriginal Title" (1999) 37 Osgoode Hall L. J. 776 at 778.

reception of English statutes of general application as of the date of reception.[144] In Canadian common law jurisdictions, including the Federal jurisdiction, the reception of English statutes included the statute 9 Geo. III c. 16 (1769) [*Nullum Tempus Act*][145] The original statute was brief enough to be reproduced here in its entirety:

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

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144 See Coté, *supra* note 5, for a comprehensive treatment of this subject.

145 The statute obtains its popular name from the Latin maxim *nullum tempus occurrit regi*, a reference to the common law doctrine that limitation periods did not run against the Crown. The *Nullum Tempus Act* statutorily abolished that doctrine in respect of land.

> sors, or Ancestors, Heirs, or Successors, or have or shall have stood *insurper* of Record within the Space of Sixty Years [emphasis added].

As is evident from the Act's language, its intent and purpose was to create a limitation period which would run against the Crown in its claims, *inter alia*, for land. In effect, a person or persons in peaceable possession[146] of Crown land for a period of sixty years obtained a statutory prescriptive title to the land as against the Crown, and the Crown's interest in the land was extinguished by the barring of its remedy. The *Nullum Tempus Act* became the law of the Canadian common law jurisdictions upon their various adoptions of English land law.[147] Its implications for Aboriginal ownership of land remain significant.

If, upon the reception date of English land law in a common law province, any persons (Aboriginal or otherwise) had been in occupation of Crown land for a period of sixty years, they obtained a prescriptive title in fee simple to the occupied land. In this connection it was pertinent that the correct characterization of land as "Crown Land" came about at the time of the assertion of British sovereignty, which might significantly pre-date the actual reception of English law.[148]

The significance of this somewhat obscure English statute for the determination of property rights, as between the Crown and subjects in Canada, is very real. It has been applied in many cases in different common law provinces in disputes over land between the Crown and non-Aboriginal citizens. For instance, in *Regina v. McCormick*,[149] one McKee had entered upon Crown land

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146 And possession may be peaceable even if it is tortious: *Perry*, *supra* note 8.

147 Some provinces subsequently re-enacted the sixty year limitation period binding the Crown in Right of the Province in actions for the recovery of land in their own limitation acts: New Brunswick; Ontario; Saskatchewan; Prince Edward Island. Other jurisdictions still have in force the original English legislation in effect at their reception dates: British Columbia; Alberta; Newfoundland; Manitoba; Nova Scotia; Northwest Territories. In the absence of any general federal statute, it would appear that the Federal Crown is still limited by the sixty year period established by the English *Nullum Tempus Act of 1769*. See J.S. Williams, *Limitation of Actions in Canada* (Toronto: Butterworths, 1980) at 170–173 ("Actions by the Crown").

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

149 *McCormick*, *supra* note 10.

and occupied it from 1789.[150] The occupation of the land by McKee and his successors was continuous up to the trial date in 1859. *Prima facie*, McCormick, as McKee's successor at law, had obtained title to the land in fee simple by prescription.

Robinson C.J. had no difficulty in deciding that the *Nullum Tempus Act* was part of the law of Upper Canada by virtue of the local statute 32 Geo. III, c. 1 (U.C.), by the operation of which the English law had been received.[151] He found against the defendant, however, on the dual grounds that the Crown could not have known of McKee's adverse possession and that of his successors, and, perhaps more significantly, because the lands in question were already subject to "Indian title". He reasoned:

> But for all that appears this island had not for sixty years been part of the organized territory of the province, in which the title of the original Indian inhabitants had been extinguished, or if the Indian title had been extinguished, the land may never have been surveyed and laid out by the Crown with a view to granting it.[152]

To the extent that the result seemed to have turned on the continuance of "Indian title" to the land, it is pertinent to ask what the result would have been had the action been brought by or on behalf of the Aboriginal population. On the Chief Justice's reasoning, the *Nullum Tempus Act* did not avail the defendant either because the lands never belonged to the Crown beneficially (because they belonged to the Indians) or because the defendant had never asserted that he intended to own the land adversely to the Crown, which the Indians did assert.[153]

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

151 *McCormick*, *supra* note 10 at 133.

152 *Ibid.* at 135; if the fact that the land had not yet been surveyed preparatory to the making of Crown grants formed part of the *ratio decidendi* for rejecting McCormick's claim, then the decision must be taken to have been overruled, *pro tanto*, by *Love*, *supra* note 10, which was expressly adopted as a correct statement of the law by the Supreme Court of Canada in *Hamilton*, *supra* note 10. Both decisions are examined, *infra*.

153 *Quaere*, why the plaintiff was not found to have acquired a prescriptive title against the Aboriginal population? The implication, although not clearly stated, may be that "Indian title" was not subject to defeasance by time under a civil statute of limitations. This is probably presently the correct position, in that Aboriginal title cannot be lost through time under provincial limitations acts. This is because provincial legislatures lack the constitutional competence to enact legislation extinguishing Aboriginal title: *Delgamuukw*, *supra* note 49 at 267–273. Attempts by provincial legislatures to do so, whether directly or indirectly, are *ultra vires*.

In *Attorney-General for New South Wales v. Love*,[154] one Keith had occupied unsurveyed Crown lands for more than sixty years prior to the filing of an Information of Intrusion[155] by the Attorney-General. Keith had conveyed the land to Love who, in turn, settled it in trust for himself for life, remainder to his wife in fee simple. The Supreme Court of New South Wales found the *Nullum Tempus Act* to have been in force in that state since the reception of English land law in the Colony in 1849, and affirmed the defendant's title in the following language:

> We feel convinced that there are hundreds of titles which, so far as the Crown is concerned, depend on this statute. If it were once supposed that the Crown had the power of putting any person who, or whose predecessors, had been in possession for sixty years to the proof of his documentary title, this would cause so much doubt and confusion in the transfer of property that we believe in many instances the value of certain properties would be deteriorated, and in some instances be rendered practically unmarketable. We entertain no doubt as to the Act being in force.[156]

The Attorney-General's appeal to the Privy Council was dismissed, the Lord Chancellor finding both that the *Nullum Tempus Act* was in force in the colony and that it did not matter that there was no record or survey of the Crown lands in question.[157]

In *Emmerson v. Madison*,[158] the plaintiff received a Crown grant of land in New Brunswick in 1895. The land had been in the possession of the defendant and his predecessors for the previous fifty-six years. The Supreme Court of New Brunswick found for the defendant in the plaintiff's action for ejectment, but the decision was reversed on appeal to the Privy Council. Sir Alfred Wills, delivering the opinion of the Board, said, "The period of occupation was some three or four years short of the time necessary under the *Nullum Tempus Act* to give a right as against the Crown by length of occupation."[159] The implication was that, had the Crown grant been made to the plaintiff some three or four years later, it would have been a nullity, because any beneficial interest the Crown might have had in the land would already have vested in the defendant

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154 *Love*, *supra* note 10.

155 The Information of Intrusion is the archaic name for the initiating process filed by the Crown to obtain the ejectment of a trespasser from Crown land: *Oxford Companion to Law* (Oxford: Clarendon Press, 1980), "Information (of Intrusion)": a writ "in the nature of the action for trespass *quare clausam fregit*, brought for any trespass on Crown land."

156 *Ibid.* at 681–682 (N.S.W.S.C.).

157 *Ibid.* at 683–686 (P.C.).

158 *Emmerson*, *supra* note 10.

159 *Ibid.* at 573–574.

by the operation of the statute. The Crown cannot convey by grant an interest in land which it never had, or has lost.

*Hamilton v. The King*[160] was a case in which the defendant's right had in fact crystallized as against the Crown by the passage of time. The appellant's predecessor (tortiously) took possession of Crown land in Ontario in 1832, and the land was held continuously by his successors until the Crown filed its Information of Intrusion in 1914. The Supreme Court of Canada concluded that Hamilton's possession had ripened into full ownership of the land by 1892, *i.e.*, sixty years after the original taking of possession by her predecessor and twenty-two years prior to the filing of the Crown's Information of Intrusion. Any beneficial interest of the Crown in the land had accordingly been extinguished. Idington J., relying upon Lightwood's *Treatise on Time Limitations*,[161] found that the Act not only barred the Crown's remedy but created a new estate in the occupant:

> The first clause in section 1 is negative and exclusive of the right of the King; the second is affirmative and establishes the estate of the subject. In effect, the second corresponds to sec. 34 of the R.P.L.A., 1833,[162] which extinguishes title as against which the statute has run. "These distinct clauses," said Blackburn M.R. in *Tuthill v. Rogers*,[163] "had objects perfectly different."
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> The first was a limitation to the suit, and barred the remedy of the Crown; the second, by confirming for all time thereafter the estate had or claimed by the subject and enjoyed for sixty years, against the Crown's title, barred and extinguished that title and transferred it to the subject.[164]

Idington J. further adopted *Attorney-General for New South Wales v. Love*[165] as correctly stating the Canadian position.[166] Consequently, the fact that occupied Crown land may be unsurveyed "wild" land had no bearing upon the operation of the statute or the interests in land it created.

The *Nullum Tempus Act*, or its provincial re-enactments in locally applicable statutes of limitation, has been part of Canadian law in each of the common law jurisdictions since their respective reception dates for the English law of

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[160] *Hamilton*, *supra* note 10.

[161] John Mason Lightwood, *The Time Limit on Actions: Being a Treatise on the Statute of Limitations and the Equitable Doctrine of Laches* (London: Butterworth, 1909).

[162] *The English Real Property Limitations Act* of 1833.

[163] *Tuthill v. Rogers*, 1 Jo. & La T. 36 at 62.

[164] *Hamilton*, *supra* note 10 at 360.

[165] *Love*, *supra* note 10.

[166] *Hamilton*, *supra* note 10 at 362.

property. Other cases could be cited.[167] The principal point, however, is that Canadian courts, while applying the statute readily in cases involving non-Aboriginal litigants, have never given any indication that Aboriginal land claims could be governed by the same principles of prescriptive title.[168]

Instead, the infinitely more onerous criteria of possession from "time immemorial"[169] or exclusive possession at the date of British sovereignty, which may be proven by continuous post-sovereignty occupation to the present date,[170] (as opposed to sixty years adverse possession *vis-a-vis* the Crown) have been the "prescriptive" criteria announced by the courts in respect of common law Aboriginal land claims. Two completely different sets of legal tests and evidentiary burdens have developed, each depending upon the ancestral identity of the claimants. Yet, a double standard has never been admitted, and again we must ask why.

## VIII. IMPLICATIONS AND CONCLUSIONS: THE *SUI GENERIS* TRAP

The mystery of this unadmitted but thinly veiled double standard in the jurisprudence of Aboriginal title must concern anyone who is also concerned with the rule of law and the law's equal application.

Professor McNeil has written:

> Any legal system that would accord a greater interest in land to a wrongdoer, after just ten years of adverse possession, than it would to Aboriginal peoples who have rightfully occupied and used lands for hundreds, or even thousands, of years, is not entitled to respect.[171]

One might suggest, *a fortiori*, that a legal system that consistently declines to apply its own rules to determine the entitlements of its original inhabitants and

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[167] For instance, *Attorney General of Canada v. Krause*, *supra* note 10, where the defendant and his predecessors, admittedly having been in occupation for longer than the prescriptive period, failed in their claim for title principally because their acts of occupation were too infrequent and intermittent to amount to possession of the land at common law. As indicated above, this would rarely be the case in respect of Aboriginal land claimants.

[168] The modern day repeal of the statute, or of its provincial re-enactments in locally applicable statutes of limitation, would have no bearing upon the present argument. The repeal could operate only prospectively, and would not extinguish prescriptive titles that had already crystallized prior to the repeal. This would include any land rights of Aboriginal peoples which had ripened into full rights of ownership.

[169] *Calder*, *supra* note 3.

[170] *Delgamuukw*, *supra* note 49.

[171] Kent McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?" (1997) 36 Alta. L. Rev. 117 at 138.

refuses to admit the existence of an offensive double standard, is wilfully and self-interestedly blind.

This unexpressed double standard has arisen whenever Aboriginal peoples have sought to recover land *qua* Aboriginals. The Supreme Court of Canada's decision in *Delgamuukw v. British Columbia*[172] is simply the double standard's most recent expression, in the context of land claims by the Gitxan and Wet'suet'en peoples. What might have been the outcomes of Aboriginal land claims litigation had the modern *sui generis* theory of Aboriginal title[173] not come into vogue after 1984? Presumably, land claims could have been pleaded in accordance with the common principles that the courts apply when adjudicating disputes over land not involving Aboriginal peoples. Arguably, nothing now prevents land claims from being asserted in this form, even in the aftermath of *Delgamuukw*, provided the claimants characterize themselves as stakeholders whose Aboriginality is only incidental to the claims advanced. For Aboriginal claimants, there might be significant advantages to such a strategy.

Suppose an Aboriginal group were to assert a land claim in terms of the generally accepted rules of Imperial constitutional common law or, alternatively, of the provincially adopted rules of the common law of real property, rather than accepting the special *sui generis* restrictions on Aboriginal title that the Canadian courts have crafted for them. Suppose, in other words, that an Aboriginal group asserted its claim on the footing that its members are interested parties who happen to be Aboriginal, rather than on the basis of their Aboriginality *simpliciter*. They would then be claiming the advantages of a "normal" common law property interest, irrespective of their Aboriginality. A case pleaded in such terms would force a court to confront squarely the double

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[172] *Supra* note 49; *Delgamuukw* provides the most recent indication of the Canadian courts' conceptions of Aboriginal title as an interest in land subject to a variety of restrictions which would never be considered applicable to the "normal" property interests of non-Aboriginal claimants. In *Delgamuukw* the Supreme Court of Canada concluded that Aboriginal title is subject to the combined restrictions of compulsory communality, inalienablilty other than to the Crown in right of Canada, and a variety of undefined restrictions upon use in cases where a proposed use would be incompatible with the historical Aboriginal connection to the land from which the Aboriginal title arises. None of these qualifications find any support in either the common law of real property or in constitutional common law.

[173] The Aboriginal interest in land was first described as *sui generis* by Dickson J. in *Guerin v. The Queen* (1984), *supra* note 86, as indicating a property interest governed by fundamentally different principles from those that apply to the "normal" property interest of non-Aboriginal citizens. The exact origin of the *sui generis* terminology is somewhat obscure, but it might have derived from a student note commenting on an American Indian land claim case published some months before the decision in *Guerin* was released: see Kimberly Ellwanger, "Money Damages for Breach of the Federal-Indian Trust Relationship after Mitchell II: *United States v. Mitchell*, 103 S. Ct. 2961 (1983)" (1984) 59 Wash. L. Rev. 675 at 687.

standards which the judiciary has set up relative to the land rights of one particular group within Canadian society.

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

## A. The Plaintiffs' Prescriptive Rights Against the Crown

Suppose the plaintiffs in *Delgamuukw* (the Gitxan and Wet'suet'en peoples) adduced evidence proving that they occupied the lands claimed when the Crown asserted sovereignty over the territories that now compose British Columbia by the Treaty of Oregon in 1846. At this point, the lands would have become "Crown lands", in the sense that, at common law, the Crown would have obtained a radical or allodial title to which no beneficial interest would necessarily attach. Suppose the plaintiffs proved, further, that they continued to occupy the claimed lands after 1846, that this occupation was known to the Crown, and that the Crown was aware that the plaintiffs claimed that they owned the land.[174] Acts of occupation upon which the plaintiffs might rely as evidence of possession might have included fishing, hunting, felling trees, gathering vegetation, building houses, and movement over the land and throughout its navigable waters. Such activities are legally sufficient to amount to possession at common law.[175]

It is a matter of public record that no Information of Intrusion was ever filed by the Crown. By virtue of the *English Law Ordinance*,[176] the English statute 9 Geo. III, c. 16 [*Nullum Tempus Act*] became the law of British Columbia, and was still in effect in that jurisdiction in 1906.

On the application of conventional legal principles, the conclusion would have been that, as of 1906, the Crown's beneficial interest (if any) in the land claimed by the plaintiffs was extinguished and a new statutory title in fee simple vested in the Gitxan and Wet'suet'en peoples as of that date.[177] Subsequent amendments to British Columbia legislation, limiting or precluding the acquisition of new prescriptive rights as against the Crown, could have no effect upon these rights, which had already ripened into full ownership of land by the passage of time.

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[174] The objection apparently taken in *McCormick*, *supra* note 10, would therefore have no application.

[175] See the discussion of acts of occupation sufficient to constitute common law possession, *supra* notes 126–138.

[176] S.B.C. 1857, c. 7.

[177] *I.e.*, upon the expiry of the statutorily prescribed sixty-year period following the assertion of the Crown's sovereignty by the conclusion of the *Treaty of Oregon*.

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

## B. The Plaintiffs' Common Law Right of Possession

At common law, prescriptive statutes and limitation periods aside, all ownership of property flows from possession. Possession amounts to full ownership unless otherwise accounted for by the existence of a prior, better title in another, or unless it is demonstrated that the interest of the person in possession constitutes some lesser estate in land. Lightwood noted, "Possession, however short, is evidence of seisin in fee."[178] Furthermore, Mellor J. remarked, "The law gives credit to possession unless explained."[179] Possession for hundreds or even thousands of years, *a fortiori*, constitutes the strongest possible evidence of seisin in fee.

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

The solution of the common law in cases of legally unexplained possession is the presumption of a fictitious Crown grant of the land to the persons found in possession, or alternatively the presumption that unencumbered title has vested in them by the running of the relevant limitation periods, against either the Crown or the Crown's grantee.[180]

In either case, in the event of a challenge to the plaintiffs' title, a court applying "ordinary" legal principles[181] should have found unencumbered ownership to be in the Gitxan and the Wet'suet'en as of 1846, by virtue of their otherwise "unexplained" possession. Whether this finding were achieved by means of a fictitious Crown grant to legitimate their "unexplained" possession or by the presumption that all relevant limitation periods had expired, so as to bar any adverse claims, would not matter. Once again, the plaintiffs would have acquired the benefit of a "normal" property interest and avoided falling into the *sui generis* trap.

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178 Lightwood, *Possession of Land*, *supra* note 8 at 121.

179 As *per* Mellor J. in *Asher*, *supra* note 8.

180 As *per* Kitto J. in *Allen*, *supra* note 8 at 138.

181 As opposed to the "special" principles which the judiciary has crafted when land claims are advanced by Aboriginal peoples *qua* Aboriginals.

## C. The Plaintiffs' Original Tenure Survived the Transfer to British Sovereignty

Suppose, finally, the plaintiffs proved that, at the time the British asserted sovereignty, the Gitxan and Wet'suet'en peoples had laws and systems of land tenure. Anthropological evidence and traditional evidence from oral history might have been adduced to show whether land and resources were owned privately, by groups of individuals, by Houses, as a community usufruct, or in some other manner depending upon the nature of the resource; whether the Houses recognized internal territorial boundaries *inter se*; and whether there existed an organized system (*e.g.*, the potlatch) for the periodic verification and validation of boundaries and entitlements. It appeared that the plaintiffs' laws of land tenure were recorded orally: the Gitxan *adaawk* and the Wet'suet'en *kungax*. These would have been admissible as evidence. There does not exist, nor has there ever existed, any common law impediment to the proof of customary boundaries and systems of land tenure by "traditional" (*i.e.*, oral) evidence.[182]

By the application of regular common law principles, the court should have found that, upon the transition to British sovereignty, the plaintiffs' tenure persisted *proprio vigore*, unless extinguished by legislation clear in its intent to do so.[183] As a matter of constitutional law, the provincial legislature lacked the competence to pass such legislation[184] and, as a matter of public record, none was ever passed by Parliament.

Since a provincial legislature cannot legislate to extinguish the plaintiffs' pre-existing Aboriginal system of tenure, (as this would be *ultra vires*), *a fortiori*, neither could provincial Crown grants made within the claimed territory have this effect. At their highest, any such grants would take effect subject to the plaintiffs' pre-existing tenure and the interests it recognized.[185] Moreover, since the Crown must prove its own title in the same manner as the subject, it would not, without evidence as to how the Crown came to acquire a beneficial interest in the claimed lands, have been legally available to the court to conclude that the Crown had any beneficial interest in the land capable of forming the subject matter of a grant.[186] Any purported Crown fee simple grant within the plaintiffs' traditional territories should therefore have been found to be a nullity: *nemo dat quod non habet*. Alternatively, purported Crown grants in fee simple might have

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[182] See *Kobina Angu*, *supra* note 61; *Stool of Abinabina*, *supra* note 61; and the authorities referred to *supra* note 69.

[183] *Campbell*, *supra* note 7; *Freeman*, *supra* note 7; *Calder*, *supra* note 3, as *per* Judson and Hall JJ.

[184] *Per* Lamer C.J. in *Delgamuukw*, *supra* note 49 at 267–273.

[185] *Oyekan*, *supra* note 1.

[186] *Bristow*, *supra* note 7 at 641; *Amodu Tijanii*, *supra* note 7.

taken effect only subject to the limitations imposed by the plaintiffs' pre-existing tenure, which might have given an absolute priority to the plaintiffs' occupation and uses, including the right to exclude the putative grantees.[187] The Crown's purported grantees might or might not have had a remedy in damages as against the Crown for the defective grants.

In the result, and once again, by the application of regular common law principles, the courts might have found that the Gitxan and Wet'suet'en peoples never lost their original title to their traditional lands, and that their inherent Aboriginal systems of land tenure and territorial boundaries persisted unaltered. In this case, the plaintiffs would have established a truly "*sui generis*" interest in the claimed land, but it would be *sui generis* in the real sense that it actually took account of an "Aboriginal perspective", and not the artificial and limited property interest conceived by the Supreme Court of Canada in *Guerin* and *Delgamuukw*, which is *sui generis* only in its limitations.

## IX. THE PROBLEM WITH "ABORIGINAL TITLE"

This article has sought to demonstrate that Aboriginal peoples have generally been unsuccessful in asserting proprietary claims to their ancestral lands because of a persistent but unexpressed double standard in the application of common law principles by Canadian governments and courts. The unspoken assumption[188] revealed in Canadian judicial decisions has been that two types of land ownership exist in Canada: "regular title" and "Aboriginal title". It has not been considered conceivable that these two forms of tenure could have the same incidents, be subject to proof in the same way, or be capable of the same variety of valuable uses. Yet no convincing explanation has ever been offered as to why Aboriginal claimants should not enjoy the full benefits of the common law.

The presumed abnormality[189] of Aboriginal property interests has not inured to the benefit of Aboriginal peoples in their quest for vindication of their proper legal entitlements to ancestral lands. The classification of their title as *sui generis* is simply the latest linguistic expression of the historical double standard. In short, it is a trap. It has not strengthened their claims but, in contrast, has placed extraordinary restrictions upon their entitlements, which would never be considered to be applicable or acceptable in the case of the property interests of other Canadians. It has reinforced the unspoken assumption that Aboriginal

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[187] As was the case in *Oyekan*, *supra* note 1.

[188] The assumption has now been given formal sanction: Aboriginal title is not a "normal property interest", as *per* Lamer C.J. in *Delgamuukw*, *supra* note 49 at 242.

[189] *Ibid.*

peoples have neither the full rights of Canadian citizenship nor the full and equal benefits of Canadian law.

It is high time that this thinly veiled double standard was purged from Canadian legal and judicial discourse. To achieve this would require abandonment of the now popular *sui generis* theory of Aboriginal title, with all the restrictions and limitations that accompany it, or, alternatively, recognition of truly *sui generis* interests in land actually based on surviving and ascertainable systems of original Aboriginal tenure. This course of pleading remains available for future land claims litigation.