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Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*

John Borrows

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Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia

Abstract

In *Delgamuukw v. British Columbia*, the Supreme Court of Canada issued its long-awaited judgment on the status of Aboriginal title under section 35(1) of the Constitution Act, 1982. The decision was regarded as highly significant because it seemed to fundamentally alter the law of Aboriginal rights. This article suggests that while the case has somewhat positively changed the law to protect Aboriginal title, it has also simultaneously sustained a legal framework that undermines Aboriginal land rights. In particular, the decision's unreflective acceptance of Crown sovereignty places Aboriginal title in a subordinate position relative to other legal rights. This article examines how this result defeats the Court's own requirements for a just settlement with Aboriginal peoples. This review proceeds through exploring the Supreme Court's treatment of Aboriginal pleadings, evidence, content and proof of title, Aboriginal self-government, and the extinguishment of Aboriginal title in the *Delgamuukw* case. In investigating these issues, this article concludes by illustrating how a more rigorous application of the rule of law to the Crown in its dealings with Aboriginal peoples could generate greater equality and justice for Aboriginal peoples in their relations with the Canadian state.

Keywords

Indigenous peoples--Land tenure; Canada

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SOVEREIGNTY'S ALCHEMY: AN ANALYSIS OF *DELGAMUUKW* v. *BRITISH COLUMBIA*®

BY JOHN BORROWS*

In *Delgamuukw v. British Columbia*, the Supreme Court of Canada issued its long-awaited judgment on the status of Aboriginal title under section 35(1) of the *Constitution Act, 1982*. The decision was regarded as highly significant because it seemed to fundamentally alter the law of Aboriginal rights. This article suggests that while the case has somewhat positively changed the law to protect Aboriginal title, it has also simultaneously sustained a legal framework that undermines Aboriginal land rights. In particular, the decision's unreflective acceptance of Crown sovereignty places Aboriginal title in a subordinate position relative to other legal rights. This article examines how this result defeats the Court's own requirements for a just settlement with Aboriginal peoples. This review proceeds through exploring the Supreme Court's treatment of Aboriginal pleadings, evidence, content and proof of title, Aboriginal self-government, and the extinguishment of Aboriginal title in the *Delgamuukw* case. In investigating these issues, this article concludes by illustrating how a more rigorous application of the rule of law to the Crown in its dealings with Aboriginal peoples could generate greater equality and justice for Aboriginal peoples in their relations with the Canadian state.

Dans *Delgamuukw c. Colombie-Britannique*, la Cour Suprême du Canada a émis son jugement, longuement attendu, sur le statut du titre des Aborigènes dans la section 35(1) de la *Loi constitutionnelle de 1982*. La décision a été perçue comme étant hautement significative parce qu'elle semblait changer fondamentalement la loi sur les droits des Aborigènes. Cet article suggère que la décision ait en quelque sorte positivement changé la loi pour protéger le titre des Aborigènes, tandis qu'il a aussi maintenu en même temps un cadre légal qui mine les droits territoriaux des Aborigènes. L'acceptation irréfléchie de la décision de la souveraineté de la Couronne, place le titre des Aborigènes dans une position subordonnée par rapport aux autres droits légaux. Cet article examine comment ce résultat défait les propres exigences de la Cour pour un règlement équitable avec les Aborigènes. Cet examen procède à explorer la façon dont la Cour Suprême traite les affaires Aborigènes, les preuves, le contenu et la preuve de titre, le gouvernement des Aborigènes, et l'anéantissement du titre des Aborigènes dans la décision de *Delgamuukw*. En examinant ces questions, cet article tire des conclusions en illustrant comment une application plus rigoureuse de la force de la loi à l'égard de la Couronne dans son traitement avec les Aborigènes pourrait engendrer une égalité plus grande et une justice pour les Aborigènes dans leur rapport avec l'état canadien.

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* Associate Professor, Faculty of Law, University of Toronto. The author thanks Gordon Christie, Shin Imai, Michael Jackson, Patrick Macklem, June McCue, Kent McNeil, Natalie Oman, and Desmond Sweeney for their helpful comments on earlier drafts of this article.

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I. INTRODUCTION

In *Delgamuukw v. British Columbia*,¹ the Supreme Court of Canada considered the Gitksan and Wet'suwet'en peoples'² claim to Aboriginal title and self-government over approximately 58,000 square kilometres of land in (what is now called) northwestern British Columbia.³ Both nations have lived in this area as "distinct people" for a "long, long time prior to [British assertions of] sovereignty."⁴ For millennia, their histories have recorded their organization into Houses and Clans in which hereditary chiefs have been responsible for the allocation, administration, and control of traditional lands.⁵ Within these

¹ [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw (S.C.C.)*].

² The Wet'suwet'en are an Athabaskan-speaking people, and the Gitksan are associated with the Tsimshian language group. Their territories are located in or near village sites on the Skeena, Babine, and Bulkley Rivers: see Gisday Wa & Delgamuukw, *The Spirit in the Land* (Gabriola, B.C.: Reflections, 1989) at 1-20 [hereinafter *Spirit in the Land*].

³ See A. Jeffrey, "Remove Not the Landmark" in F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, B.C.: Oolichan Books & The Institute for Research on Public Policy, 1992) 58 at 61, where the hereditary chief summarized their action as follows: "The Gitksan people feel we have absolute title and ownership to our land."

⁴ *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4th) 185 at 278 (B.C. S.C.), McEachern C.J. [hereinafter *Delgamuukw (B.C. S.C.)*].

⁵ For a description of these histories, see *Delgamuukw (S.C.C.)*, *supra* note 1 at 1071-72:

The adaawk and kungax of the Gitksan and Wet'suwet'en nations, respectively, are oral histories of a special kind. They were described by the trial judge ... as a "sacred 'official' litany, or history, or recital of the most important laws, history, traditions and traditional territory of a House." The content of these special oral histories includes its physical representation totem poles, crests and blankets. The importance of the adaawk and kungax is underlined by the fact that they are "repeated, performed and authenticated at

Houses, chiefs pass on important histories, songs, crests, lands, ranks, and properties from one generation to the next.⁶ The passage of these legal, political, social, and economic entitlements is performed and witnessed through Feasts. These Feasts substantiate the territories' relationships.⁷ A hosting House serves food, distributes gifts, announces the House's successors to the names of deceased chiefs, describes the territory, raises totem poles, and tells the oral history of the House. Chiefs from other Houses witness the actions of the Feast, and at the end of the proceedings they validate the decisions and declarations of the Host House. As such, the Feast is an important "institution through which the people [have] governed themselves,"⁸ and it confirms the relationship between each House and its territories.⁹ As observed by the trial judge, McEachern C.J. of the British Columbia Supreme Court:

The spiritual connection of Houses with their territory is most noticeably maintained in the feast hall, where, by telling and re-telling their stories, and by identifying their territories, and by providing food or other contributions to the feast from their territories, they remind themselves over and over again of the sacred connection that they have with their lands.¹⁰

important feasts." ... At those feasts, dissenters have the opportunity to object if they question any detail and, in this way, help ensure the authenticity of the *adaawk* and *kungax*. Although they serve largely the same role, the trial judge found that there are some differences in both the form and content of the *adaawk* and the *kungax*. For example, the latter is "in the nature of a song ... which is intended to represent the special authority and responsibilities of a chief" However, these differences are not legally relevant for the purposes of the issue at hand. It is apparent that the *adaawk* and *kungax* are of integral importance to the distinctive cultures of the appellant nations. At trial, they were relied on for two distinct purposes. First, the *adaawk* was relied on as a component of and, therefore, as proof of the existence of a system of land tenure law internal to the Gitksan, which covered the whole territory claimed by that appellant. In other words, it was offered as evidence of the Gitksan's historical use and occupation of that territory. For the Wet'suwet'en, the *kungax* was offered as proof of the central significance of the claimed lands to their distinctive culture.

⁶ See A. Mills, *Eagle Down is Our Law: Witsuwit'en Law, Feasts, and Land Claims* (Vancouver: UBC Press, 1994).

⁷ The point about territories having relationships can be explained by reference to the world view of Aboriginal peoples, as evidenced in the structure of Aboriginal languages. For example, in Ojibway, and many other Aboriginal languages, there is no division on the basis of gender, as in French. Rather, the division is along animate/inanimate lines. If one speaks an Aboriginal language, he or she must identify certain things in the world as animate (such as rocks, animals, trees) that are not considered as such in the English language. Since many things are by their nature animate (and have agency), they can have relationships. See generally J. Borrows, "Living Between Water and Rocks: First Nations, Environmental Planning and Democracy" (1997) 47 U.T.L.J. 417.

⁸ *Delgamuukw v. British Columbia* (1993), 104 D.L.R. (4th) 470 at 608 (B.C. C.A.), Lambert J.A. [hereinafter *Delgamuukw* (B.C. C.A.)].

⁹ *Ibid.*

¹⁰ *Delgamuukw* (B.C. S.C.), *supra* note 4 at 233.

The first known European to contact the Gitksan and Wet'suwet'en peoples was William Brown, a Hudson's Bay Company trader who established a fort on Lake Babine in 1822. He described these people as "men of property"¹¹ and possessors of lands who regulated access to their territory through a "structure of nobles or chiefs, commoners, kinship arrangements of some kind and priority relating to the trapping of beaver in the vicinity of the villages."¹² Writing in his journal in 1823, Brown observed that the chiefs claimed an exclusive right to certain tracts of land, and would not allow anyone to hunt upon them. In this regard, the trial judge in *Delgamuukw* accepted the evidence of Arthur Ray, who said:

When the Europeans first reached the middle and upper Skeena River area in the 1820s they discovered that the local natives were settled in a number of relatively large villages. The people subsisted largely off their fisheries which, with about two months of work per year, allowed them to meet most of their food needs. Summer villages were located beside their fisheries. Large game and fur bearers were hunted on surrounding, and sometimes, on more distant lands. Hunting territories were held by "nobles" on behalf of the lineages they represented and these native leaders closely regulated the hunting of valued species. The various villages were linked into a regional exchange network. Indigenous commodities and European trade goods circulated within and between villages by feasting, trading and gambling activities.¹³

This piece of evidence, among others, persuaded the trial judge that Aboriginal people had "been present in parts of the territory, if not from time immemorial, at least for an uncertain, long time before the commencement of the historical period."¹⁴

However, despite finding an historic and contemporary Aboriginal presence in the areas, McEachern C.J., in a much criticized judgment,¹⁵ dismissed the Gitksan and Wet'suwet'en's claims to

¹¹ A.J. Ray, "Fur Trade History and the Gitksan-Wet'suwet'en Comprehensive Claim: Men of Property and the Exercise of Title" in K. Abel & J. Friesen, eds., *Aboriginal Resource Use in Canada: Historical and Legal Aspects* (Winnipeg: University of Manitoba Press, 1991) 301 at 303.

¹² *Delgamuukw* (B.C. S.C.), *supra* note 4 at 281, McEachern C.J.

¹³ *Ibid.* at 278-79.

¹⁴ *Ibid.* at 281.

¹⁵ See D. Culhane, *The Pleasure of the Crown* (Burnaby, B.C.: Talon Books, 1998); D. Monet & A. Wilson, *Colonialism on Trial: Indigenous Land Rights and the Gitksan and Wet'suwet'en Sovereignty Case* (Philadelphia: New Society, 1992); L.H. Pinder, *The Carriers of No: After the Land Claims Trial* (Vancouver: Lazara Press, 1991); Cassidy, ed., *supra* note 3; M. Asch & C. Bell, "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) 38; J. Cruickshank, "Invention of Anthropology in British Columbia's Supreme Court: Oral Tradition and Evidence in *Delgamuukw v. B.C.*" (1992) 95 B.C. Stud. 25; R. Fisher, "Judging History: Reflections on the Reasons for Judgment in *Delgamuukw v.*

ownership and jurisdiction. He held that “aboriginal rights, arising by operation of law, are non-proprietary rights of occupation for residence and aboriginal user which are extinguishable at the pleasure of the Sovereign.”¹⁶ As such, as Lamer C.J.C. noted, he “was not satisfied that they owned the territory in its entirety in any sense that would be recognized by law.”¹⁷ Chief Justice McEachern’s judgment rested upon the “proposition ... that aboriginal rights are ... dependent upon the good will of the Sovereign” and “existed at the pleasure of the Crown, and could be extinguished by unilateral act.”¹⁸ Consequently, he held that “aboriginal rights to the land had been extinguished [because] of certain colonial enactments which demonstrated an intention to manage Crown lands in a way that was inconsistent with [their continued existence].”¹⁹ In his view, the law “never recognized that the settlement of new lands depended upon the consent of the Indians.”²⁰ He therefore held that “the Crown with full knowledge of the local situation fully intended to settle the colony and to grant titles and tenures unburdened by any aboriginal interests.”²¹ Furthermore, he “rejected the ... claim for a right of self-government, relying on both the sovereignty of the Crown at common law, and what he considered to be the relative paucity of evidence regarding an established governance structure” among the people.²²

B.C.” (1992) 95 B.C. Stud. 43; J.R. Fortune, “Construing *Delgamuukw*: Legal Arguments, Historical Argumentation, and the Philosophy of History” (1992) 51 U.T. Fac. L. Rev. 80; M. Walters, “British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*” (1993) 17 Queen’s L.J. 350; and N. Oman, *Sharing Horizons: A Paradigm for Political Accommodation in Intercultural Settings* (Ph.D. Thesis, McGill University, 1997) [unpublished].

¹⁶ *Delgamuukw* (B.C. S.C.), *supra* note 4 at 416, McEachern C.J.

¹⁷ *Delgamuukw* (S.C.C.), *supra* note 1 at 1034, Lamer C.J.C.

¹⁸ *Ibid.* at 1033, 1037.

¹⁹ *Ibid.* at 1038.

²⁰ *Ibid.* at 1037.

²¹ *Ibid.* at 1038.

²² *Ibid.* at 1035. In “The Fire Within Us” in Cassidy, ed., *supra* note 3, 53 at 56, Satsan (Herb George), former speaker for the Office of the Hereditary Chiefs, wrote: “We view this judgment for what it is—a denial and a huge misunderstanding and ignorance of the First Nations across this country. It is a failure to recognize the First Nations of this country for what they are and who they are—the First Nations of this land, the owners of this land.” By relying on assertions of British sovereignty to diminish and dispossess Gitksan and Wet’suwet’en rights to land, McEachern C.J. continued a trend imbricated in the very bedrock of western European legal thought. His reasons for judgment employed ancient discursive practices that recognized prior Aboriginal presence on the land, but denied this fact any attendant legal protection. Paul Tennant, a leading political scientist of Aboriginal issues, observed in his article “The Place of *Delgamuukw* in British Columbia History and Politics—And Vice Versa” in Cassidy, ed., *ibid.*, 73 at 81-82 [hereinafter “The Place of *Delgamuukw*”] that “the major political and historical significance of the *Delgamuukw* judgment is

The Gitksan and Wet'suwet'en appealed this decision to the British Columbia Court of Appeal. In a 3:2 decision, the appellate court upheld the trial judge's rejection of Gitksan and Wet'suwet'en claims to ownership and jurisdiction, though it recognized lesser Aboriginal sustenance rights. In dealing with the claim to ownership, Justice Macfarlane, writing for the majority, stated: "I think the trial judge properly applied correct legal principles in his consideration of the plaintiff's claim to ownership."²³ Thus, the Court of Appeal left undisturbed McEachern C.J.'s finding that Aboriginal land rights were non-proprietary in nature and a burden on the Crown's underlying interest. Furthermore, in upholding the trial judge's decision concerning jurisdiction,²⁴ Justice Macfarlane wrote:

I think that the trial judge was correct in his view that when the Crown imposed English law on all the inhabitants of the colony and, in particular, when British Columbia entered Confederation, the Indians became subject to the legislative authority in Canada ... The division of governmental powers between Canada and the provinces left no room for a third order of government.²⁵

Having failed to persuade the lower courts to recognize Aboriginal ownership and jurisdiction in their territories, the Gitksan and Wet'suwet'en appealed their case to the Supreme Court of Canada. In its decision, the Supreme Court did not substantially depart from the previous courts' reliance on assertions of British sovereignty in grounding its discussion of Aboriginal title. The Court found that "Aboriginal title is a burden on the Crown's underlying title."²⁶ Furthermore, it did not specifically recognize or affirm Gitksan and Wet'suwet'en ownership or jurisdiction over their territories. Despite this failure to question underlying Crown title, the *Delgamuukw* decision generated a great deal of commentary concerning its perceived "blow to the legacy of colonialism."²⁷ This controversy is somewhat perplexing, given the judgment's conservative foundation; yet both supporters and critics of Aboriginal rights have argued that this decision shows the Court's "willingness to make new law and to adapt traditional legal

indeed that it embodies the traditional white views ... based squarely on the cognitive framework and belief system that underlie and maintain the traditional white views."

²³ *Delgamuukw (B.C. C.A.)*, *supra* note 8 at 498, Macfarlane J.A.

²⁴ For commentary on the jurisdictional aspect of this judgment, see B. Freedman, "The Space for Aboriginal Self-Government in British Columbia: The Effect of the Decision of the British Columbia Court of Appeal in *Delgamuukw v. British Columbia*" (1994) 28 U.B.C. L. Rev. 49.

²⁵ *Delgamuukw (B.C. C.A.)*, *supra* note 8 at 520.

²⁶ *Delgamuukw (S.C.C.)*, *supra* note 1 at 1098, Lamer C.J.C.

²⁷ P. Barnsley, "New Trial Ordered in *Delgamuukw* Case" *Windspeaker* (January 1998) 2.

concepts to changing cultural demands.”²⁸ For example, the Gitksan chief negotiator Mas Gak (Don Ryan) stated:

This is a judgment the Gitksan people have worked towards since the first European entered our traditional territory over 130 years ago In this case the Supreme Court came down on the side of justice. We are extremely happy for all First Nations people in B.C., in Canada and around the world.²⁹

Herb George, speaker for the Wet'suwet'en chiefs and Vice Chief of the Assembly of First Nations, echoed Ryan's sentiments.³⁰ People within the communities also seem to see the decision as a “new beginning” that changes their legal position in relation to Canada.³¹ In a similar vein, critics of the judgment have expressed their opinion that the Court has fundamentally altered the law of Aboriginal rights.³² As such, it has been labelled “a breathtaking mistake”³³ that is said to “undermine all Crown title in the province,”³⁴ and “shows a reckless disregard for public opinion and popular sovereignty.”³⁵ For example, Mel Smith observed:

²⁸ K. Hamilton & G. McKinnon, “Some Evidence No Longer Needs to be ‘Literally True’” *The Vancouver Sun* (18 December 1997) A19.

²⁹ Cited in Barnsley, *supra* note 27 at 2.

³⁰ Satsan (Herb George) stated the following in J. Aubry, “‘Major Victory’ on Land Claims” *The [Montreal] Gazette* (12 December 1997) A1: “It’s a great day for aboriginal people across Canada. We were given a diamond for Christmas instead of a lump of coal.”

³¹ See L. Grindlay, “Native Bands Rejoice at Top Court’s Ruling” *The Vancouver Province* (12 December 1997) A4; and A. Purvis, “Our Home and Native Land” *Time* (22 December 1997) 18. Other Aboriginal people also expressed the opinion that this decision was a fundamental change. Chief Joe Mathias of the First Nations Summit, an organization representing a majority of First Nations in British Columbia, expressed his opinion that the decision is a major change, stating in Barnsley, *supra* note 27 at 2, that it “restores the rule of law and justice for First Nations.”

³² For example, Preston Manning, leader of the official opposition in the House of Commons, wrote about the Supreme Court’s decision in *Delgamuukw* in “Parliament, Not Judges, Must Make the Laws of the Land” *The Globe and Mail* (16 June 1998) A21:

In that decision the court, after two days of hearings, completely reversed the direction of a decision by the Supreme Court of British Columbia that was made by that court after 384 trial days and the most exhaustive inquiry into the history and meaning of aboriginal title ever conducted in that province.

³³ G. Gibson, “The Land-Claims Ruling is a Breathtaking Mistake” *The Globe and Mail* (16 December 1997) A21.

³⁴ *Ibid.* Trevor Lautens, in “How to Make Indian Land Claims Go Away” *The Vancouver Sun* (28 February 1998) A23, reported that Mel Smith, former constitutional advisor to British Columbia governments in the 1980s, said that the Court “drastically undermined the Crown ownership of 94 per cent of the land mass of B.C.”

³⁵ T. Morely, “A Distant Court, an Imprudent Decision” *The Vancouver Sun* (20 December 1997) A21.

In sum, in aboriginal cases we are no longer to be governed by the rule of law grounded on common law principles ... True, if certain strict criteria are met, settlement and resource development can continue to take place in the province but only if compensation is paid for past as well as future "infringements." What price the City of Vancouver and every other city, town, village, hamlet and resource tenure in the province? The court has ignored completely what the assertion of British sovereignty over the territory in 1846 really means.³⁶

A detailed inspection of the judgment makes it clear that commentators on both sides have misapprehended the depth of the Court's reliance on assertions of British sovereignty to ground their analysis of Aboriginal title. If Aboriginal title must be established by reference to "the time at which the Crown asserted sovereignty over the land subject to that title,"³⁷ as the Supreme Court suggests, it is not easy to see how the decision departs from its colonial heritage. To examine this conundrum, a closer reading of the case is in order.

An examination of the case in a way that highlights the persistence and effects of the Crown's assertion of sovereignty may not be welcome in contemporary British Columbia for many reasons. Supporters of Aboriginal title might not find it helpful to have a detailed analysis of the case point out weaknesses in their advancement of rights, as Aboriginal organizations and advocates have been trying to change conventional approaches to land claims by highlighting the more positive aspects of the judgment. A discussion of the case's deficiencies may fuel federal and provincial recalcitrance and entrench what some regard as counterproductive, long-established patterns of dealing with Aboriginal title. On the other hand, unveiling the judgment's internal inconsistencies may invite Aboriginal peoples to be more demanding of their federal and provincial counterparts. A focus on the Court's continued reliance on non-consensual colonial assertions of Crown sovereignty may not help apologists for the status quo and those who pursue objectives that continue to infringe Aboriginal title. Indeed, the judgment's sustenance of the deep dispossession of Aboriginal peoples sets Canadian land tenures in British Columbia on a questionable foundation. Thus, a cataloguing of how Crown sovereignty permeates the Court's comprehension of Aboriginal title may not find many supporters. Nevertheless, a full understanding of the judgment requires that the Court's own words be thoroughly scrutinized. The Court

³⁶ M.H. Smith, Letter to the Editor, *The Globe and Mail* (7 January 1998) A15. For further understanding of Smith's perspective, see M.H. Smith, *Our Home or Native Land? What Governments' Aboriginal Policy is Doing to Canada* (Toronto: Stoddart, 1996).

³⁷ *Delgamuukv (S.C.C.)*, *supra* note 1 at 1097 [emphasis omitted].

identifies section 35(1) of the *Constitution Act, 1982*³⁸ as having a “noble purpose,”³⁹ ending Aboriginal injustice suffered “at the hands of [the] colonizers.”⁴⁰ This finding must be placed beside the Court’s holdings that simultaneously sanction and permit the colonization of British Columbia.

II. COLONIAL ORIGINS OF SOVEREIGNTY

Aboriginal peoples were a substantial majority of the population in the newly formed province of British Columbia when it entered Confederation in 1871.⁴¹ Despite overwhelming numerical strength, they did not participate in the province’s creation. Most Aboriginal peoples continued to live within their own governments on their lands, as they had done for centuries, with little regard for British assertions of sovereignty. In these circumstances, the words of United States Supreme Court Justice John Marshall are worth recalling:

It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.⁴²

How, then, under such circumstances, did the Aboriginals become “subject to the legislative authorities in Canada” as the Court of Appeal indicated?⁴³ Is it because, as McEachern C.J. suggested, they “became a conquered people, not by force of arms, for that was not necessary, but by an invading culture and a relentless energy with which they would not, or could not, compete”?⁴⁴ Or did this so-called subjection occur because

³⁸ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution Act, 1982*].

³⁹ *R. v. Côté*, [1996] 3 S.C.R. 139 at 174 [hereinafter *Côté*].

⁴⁰ *Ibid.* at 175.

⁴¹ Aboriginal peoples were still in the majority in the province in 1881, ten years after union: see C. Harris, *The Resettlement of British Columbia: Essays on Colonialism and Geographical Change* (Vancouver: UBC Press, 1997) at 140. There were 26,849 Indians, 4,195 Chinese, and 19,069 settlers of European origin.

⁴² *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 at 543 (1832) [hereinafter *Worcester*].

⁴³ *Delgamuukw (B.C. C.A.)*, *supra* note 8 at 520.

⁴⁴ *Delgamuukw (B.C. S.C.)*, *supra* note 4 at 342.

of historic and continuing assertions of British and Canadian sovereignty through unjust and discriminatory laws?

In 1872, when Aboriginal peoples outnumbered the settler population approximately 4:1 in the province,⁴⁵ and more than 15:1 on the north coast,⁴⁶ one of the new province's first legislative acts was to exclude Indians from voting.⁴⁷ This same government continued to uphold previously prejudicial laws that denied Indians fee simple title to pre-empted lands taken up through settlement, a right freely granted to non-Aboriginal people in British Columbia.⁴⁸ Furthermore, this government did not acknowledge any legal interest of Aboriginal peoples over lands they traditionally or contemporaneously used and occupied. As a result, the province surveyed extremely small and inadequate reserves for Indians,⁴⁹ and it would not recognize any broader Aboriginal title to land.⁵⁰ When Aboriginal peoples in British

⁴⁵ This ratio is projected from Wilson Duff's figures: see W. Duff, *The Indian History of British Columbia: The Impact of the White Man*, vol. 1 (Victoria: Provincial Museum of Natural History and Anthropology, 1964) at 42-45.

⁴⁶ See Harris, *supra* note 41 at 138. The proportional representation of Aboriginal to non-Aboriginal people was even greater in Gitksan and Wet'suwet'en territory prior to Confederation. There was no land alienation prior to 1871, and while some miners, missionaries, and traders lived among them in small numbers at this time, it was not until the early 1900s that the first farmers settled there: see *Delgamuikw* (B.C. S.C.), *supra* note 4 at 343.

⁴⁷ See *An Act to amend "The Qualification and Registration of Voters Amendment Act, 1871,"* 1872 (B.C.), 35-38 Vict., No. 39, s. 13.

⁴⁸ See *An Ordinance further to define the law regulating the acquisition of Land in British Columbia*, 1866 (B.C.), 29 Vict., No. 24, s. 1, which provided:

The right conferred ... on British Subjects, or aliens ... of pre-empting and holding in fee simple unoccupied, and unsurveyed, and unreserved crown lands in British Columbia, shall not (without the special permission thereto of the Governor first had in writing) extend to or be deemed to have been conferred on ... any of the Aborigines of this Colony or the Territories neighbouring thereto.

A further amendment passed by the Legislative Council on 22 April 1870 extended the denial to "any of the Aborigines of this Continent."

⁴⁹ See British Columbia, *Papers Connected with the Indian Land Question, 1850-1875* (Victoria: Government Printer, 1875) at 42, where Joseph Trutch, a policy advisor to the British Columbia government between 1864 and 1871, wrote that

[t]he Indians regard these extensive tracts of land as their individual property; but of by far the greater portion thereof they make no use whatever and are not likely to do so; and thus the land, much of which is either rich pasture or available for cultivation and greatly desired for immediate settlement, remains in an unproductive condition—is of no real value to the Indians and utterly unprofitable to the public interests. I am, therefore, of the opinion that these reserves should, in almost every case, be very materially reduced.

⁵⁰ See "Report to the Government of British Columbia on the Subject of Indian Reserves" in *ibid.*, 1 at 11, where Trutch, in denying Aboriginal title in British Columbia, observed that "the title of the Indians in the fee of the public lands, or any portion thereof, has never been acknowledged by

Columbia repeatedly tried to challenge this mistreatment, the province responded by further diminishing their land rights and their political rights.⁵¹ The federal government eventually followed suit by amending the *Indian Act*,⁵² making it virtually illegal to raise such matters before the courts.⁵³ The exclusion of Aboriginal peoples from democratic participation in British Columbia through the passage of these corrupt laws should be a paramount consideration when there are claims that Aboriginal peoples are subject to Canada's legislative authority.

III. THE LEGAL PROBLEM

In *R. v. Sparrow*, the Supreme Court directed that "the aboriginal perspective itself on the meaning of the rights at stake"⁵⁴ must be taken into account. An important question in this context is whether the authority of an imposed, obstructionist, and unrepresentative government should be recognized as legally infringing or extinguishing any jurisdiction⁵⁵ that Aboriginal peoples possess. With this approach, is the assertion of British sovereignty over Aboriginal peoples in British

Government, but, on the contrary, is distinctly denied."

⁵¹ See P. Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: UBC Press, 1990) at 96-114 [hereinafter *Aboriginal Peoples and Politics*].

⁵² Section 141 of the *Indian Act*, R.S.C. 1927, c. 98 reads:

Every person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from any Indian any payment or contribution or promise of any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band, shall be guilty of an offence and liable upon summary conviction for each such offence to a penalty ...

⁵³ See B. Titley, *A Narrow Vision: Duncan Campbell Scott and the Administration of Indian Affairs in Canada* (Vancouver: UBC Press, 1986) at 59.

⁵⁴ [1990] 1 S.C.R. 1075 at 1112 [hereinafter *Sparrow*].

⁵⁵ See *Delgamuukw (B.C. S.C.)*, *supra* note 4 at 473, where McEachern C.J. stated:

It is inconceivable, in my view, that another form of government could exist in the colony after the Crown imposed English law, appointed a Governor with power to legislate, took title to all the land of the colony and set up procedures to govern it by a Governor and Legislative Council under the authority of the Crown. In addition, in my view, the enactment of the *British North America Act, 1867*, and adherence to it by the colony of British Columbia in 1871, which was accomplished by Imperial, Canadian and colonial legislation, confirmed with the establishment of a federal nation with all legislative powers divided only between Canada and the province. This also clearly and plainly extinguished any residual aboriginal legislative or other jurisdiction, if any, which might have existed in the colonial period.

Columbia, as *R. v. Van der Peet* asks, a “morally and politically defensible conception of aboriginal rights”?⁵⁶ Does the decision, as *R. v. Côté* cautions, perpetuate “historical injustice suffered by aboriginal peoples at the hands of [the] colonizers”?⁵⁷ Is *Delgamuukw* consistent with the Court’s own standard of upholding the “noble and prospective purpose of the constitutional entrenchment of aboriginal and treaty rights in the *Constitution Act, 1982*”?⁵⁸ If assertions of sovereignty operate as they have throughout western European legal thought, should we wonder, as the Australian High Court asked in *Mabo v. Queensland [No. 2]*,⁵⁹ whether such an unjust and discriminatory doctrine can continue to be accepted?

This article questions the Court’s unreflecting acceptance of the Crown’s assertion of sovereignty over Aboriginal peoples in British Columbia. It maintains that the Court’s assumption of Crown sovereignty “risks undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect the distinctive cultures of pre-existing aboriginal societies.”⁶⁰ This danger flows from the case despite its extraordinarily progressive attempt to recognize and facilitate Indigenous legal pluralism within Canada. *Delgamuukw*’s continuation of imperialism’s legacy in the face of its own language, which promotes morality and justice, reveals these internal conflicts. Despite its positive features, there are many ways in which the case’s treatment of sovereignty negatively influences Indigenous peoples’ ability to question the taking of their lands. This article examines these implications to show that the Court’s use of “sovereignty” defines the terrain on which Aboriginal peoples must operate if they are going to dispute the Crown’s actions in Canadian courts. To illustrate this point, this article analyzes the Supreme Court’s treatment of the following issues in *Delgamuukw*:

A. Do the pleadings preclude the Court from entertaining claims for aboriginal title and self-government?

⁵⁶ [1996] 2 S.C.R. 507 at 547 [hereinafter *Van der Peet*], citing Walters, *supra* note 15 at 413.

⁵⁷ *Côté*, *supra* note 39 at 175.

⁵⁸ *Ibid.*

⁵⁹ (1992), 175 C.L.R. 1 (H.C.A.) [hereinafter *Mabo*].

⁶⁰ *Côté*, *supra* note 39 at 175. To quote the words of Brennan J. in *Mabo*, *supra* note 59 at 42: “Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.”

B. What is the ability of this Court to interfere with the factual findings made by the trial judge?

C. What is the content of aboriginal title, how is it protected by s. 35(1) of the *Constitution Act, 1982*, and what is required for its proof?

D. Has a claim to self-government been made out by the appellants?

E. Did the province have the power to extinguish aboriginal rights after 1871, either under its own jurisdiction or through the operation of s. 88 of the *Indian Act*?⁶¹

The Court answers these five questions in ways that are troubling for Aboriginal peoples in British Columbia who are attempting to interrogate colonial assumptions. First, in regard to the pleadings, the Court's treatment of its own procedural rules consolidates the Crown's jurisdiction over Indigenous legal systems and subordinates them within the Canadian legal structure. Second, in considering the trial judge's factual findings, the Court subjects Aboriginal traditions to non-Aboriginal authentication through affirming its authority to be the final arbiter in the interpretation of facts, which are presented in a revised treatment of oral evidence. Third, the Court's definition of Aboriginal title undermines pre-existing Aboriginal land-use regimes through the substructural placement of Crown title. This result compels Aboriginal acceptance of, and reconciliation with, the colonization and development of their lands by other peoples, and it places the Crown in a superordinate position relative to Aboriginal peoples. Fourth, the Court's discussion of Aboriginal self-government holds Aboriginal sovereignty to stricter scrutiny and higher standards of proof than Crown sovereignty in violation of fundamental principles of the rule of law. Finally, the Court vests the federal Crown with authority to extinguish Aboriginal rights in a manner contrary to foundational precepts of Canadian constitutional law. This article explores these issues to illustrate the unexamined implications that flow from the Court's unreflective extension, and unquestioned acceptance, of Crown assertions of sovereignty.

A. Pleadings

The common law grew out of a society in which a bewildering diversity of courts, from a broad array of cultures, enforced various

⁶¹ *Delgamuukw (S.C.C.)*, *supra* note 1 at 1061, Lamer C.J.C.

bodies of law.⁶² Throughout the hills and hollows of England, there were courts of equity, market courts, manor courts, and university courts, along with county courts, borough courts, ecclesiastical courts, aristocratic courts, and other courts.⁶³ The common law's story is its expansion at the expense of other legal jurisdictions through the use of writs.⁶⁴ The great English historian F.W. Maitland observed that writs were the means whereby justice became centralized, whereby the king's court drew away business from other courts.⁶⁵ The common law in mediaeval England was a formulary system, developed around a complex of writs that a litigant could obtain from the Chancery to initiate litigation in the Royal Courts.⁶⁶ Each writ gave rise to a specific manner of proceeding or form of action, having its own particularized rules and procedures.⁶⁷ These "forms of actions" were the procedural devices courts used to give expression to the theories of liability recognized by the common law.⁶⁸ Through these writs, litigants elected their remedies in advance of trial, and they could not subsequently amend their pleadings to conform to the proof needed for the case or to meet the court's choice of another theory of liability.⁶⁹ If litigants did not select the proper writ for their action, they could not succeed in their claim.⁷⁰ This uniformity allowed for more centralized control of the

⁶² See P. Glenn, "The Common Law in Canada" (1995) 74 Can. Bar Rev. 261 at 265, 276. See also Sir M. Hale, *The History of the Common Law of England* (Chicago: University of Chicago Press, 1971) at 39-43.

⁶³ See J.H. Baker, *An Introduction to English Legal History*, 2d ed. (London: Butterworths, 1979).

⁶⁴ See F.W. Maitland & F.C. Montague, *A Sketch of English Legal History* (New York: Putnam, 1915) at 1-130.

⁶⁵ See F.W. Maitland, *The Forms of Action at Common Law* (Cambridge: Cambridge University Press, 1948) at 11.

⁶⁶ See Maitland & Montague, *supra* note 64 at 100-01.

⁶⁷ See M. Furmston, ed., *Cheshire, Fifoot and Furmston's Law of Contract*, 11th ed. (London: Butterworth & Co., 1986) at 2.

⁶⁸ *Blacks Law Dictionary*, 5th ed., s.v. "forms of action."

⁶⁹ *Ibid.*

⁷⁰ See A.K.R. Kiralfy, ed., *Potter's Historical Introduction to English Law and Its Institutions* (London: Sweet & Maxwell, 1962) at 293-97.

entire common law structure,⁷¹ and the sovereignty of the Crown expanded with the extension of the common law's jurisdiction.⁷²

In some respects, the issues in *Delgamuukw* show Canada, like England, to be a place with a bewildering diversity of legal systems, a broad array of cultures, and containing a variety of bodies of law. From the Maritimes to the mountains, there are laws of the Mik'Maq, Mohawk, Cree, Ojibway, Okanagan, Salish, Haida, Nisga'a, Gitksan, Wet'suwet'en, and other peoples. The story of the common law in Canada is its attempted expansion at the expense of these Indigenous legal jurisdictions.⁷³ Contemporary pleadings unwittingly perform a role similar to the ancient forms of action, as parties present written statements of factual and legal issues they believe the court can resolve. While today's pleadings are infinitely more flexible than mediaeval forms of action,⁷⁴ if a party does not frame its case properly, the court may refuse to resolve the issue before it by declaring a defect in the pleadings. The discipline this uniformity imposes on litigants incidentally extends Crown sovereignty through centralizing control of access to justice. In effect, pleadings become a "necessary passport to gain entry to the common law courts."⁷⁵ Acquiring such a visa is obligatory in disputing the justice of Crown dealings with Aboriginal peoples—the Crown does not recognize legal claims brought in any other way.⁷⁶ This

⁷¹ See M.H. Ogilvie, *Historical Introduction to Legal Studies* (Toronto: Carswell, 1982) at 70, 101, 106-07.

⁷² See S.F.C. Milsom, *Historical Foundations of the Common Law*, 2d ed. (Toronto: Butterworths, 1981) at 11-36.

⁷³ See, for example, J.Y. Henderson, "Micmaw Tenure in Atlantic Canada" (1995) 18 Dal. L.J. 196.

⁷⁴ The forms of action were abolished in the following Acts: *An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto*, 1833 (U.K.), 3 & 4 Will. IV, c. 27, s. 36; *An Act to amend the Process, Practice, and Mode of Pleading in the Superior Courts of Common Law at Westminster, and in the Superior Courts of the Counties Palatine of Lancaster and Durham*, 1852 (U.K.), 15 & 16 Vict., c. 76; and *Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict., c. 66.

⁷⁵ Ogilvie, *supra* note 71 at 70.

⁷⁶ In this regard Macfarlane J.A., delivering his reasons for judgment in *Delgamuukw* (B.C. C.A.), *supra* note 8, quotes A.V. Dicey, who wrote in *Law of the Constitution*, 10th ed. (London: Macmillan & Co., 1959) at 40 that "[t]here is no person or body or persons who can, under the English Constitution, make rules which override or derogate from an Act of Parliament, or which (to express the same thing in other words) will be enforced by the courts in contravention of an Act of Parliament."

border patrol of the Canadian legal imagination⁷⁷ is effective in further extending Canadian sovereignty over Aboriginal territories.⁷⁸

The extension of Canadian sovereignty over Aboriginal territories is witnessed in *Delgamuukw*, when the Supreme Court of Canada did not consider the specific merits of the Gitksan and Wet'suwet'en claims because of a defect in the pleadings. The Gitksan and Wet'suwet'en's pleadings originally put forth fifty-one claims on behalf of individuals and Houses, claiming ownership and jurisdiction over 133 territories.⁷⁹ The Court found that there were two changes in these pleadings from the trial to the appeal: the first was that claims for ownership and jurisdiction were replaced with claims for Aboriginal title and self-government; the second was that the individual claims by each House were amalgamated into two communal claims, one advanced on behalf of each nation. The Court found that the first change concerning the substitution of Aboriginal title and self-government was "just and appropriate" in the circumstances because the trial judge allowed "a *de facto* amendment to permit 'a claim for aboriginal rights other than ownership and jurisdiction.'"⁸⁰ The Court upheld the trial judge's ruling because "it was made against the background of considerable legal uncertainty surrounding the nature and content of aboriginal rights ...".⁸¹ However, the Court rejected the second change concerning the amalgamation of individual claims into collective ones because the

⁷⁷ See P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382.

⁷⁸ It should be remembered that the Gitksan and Wet'suwet'en voluntarily submitted themselves to the court's process when they drafted their pleadings and filed their statement of claim. As a result, some may assert that they could not take issue with consolidation of the common law's jurisdiction at the expense of Indigenous legal systems. However, it should also be noted that in framing their case, they were "seeking recognition of their societies [native and non-native] as equals and contemporaries": *Spirit in the Land*, *supra* note 2 at 21. In their opening statement, *ibid.* at 8-9, the chiefs expressed their position as follows:

In your legal system, how will you deal with the idea that the Chiefs own the land? The attempts to quash our laws and extinguish our system have been unsuccessful. Gisday Wa has not been extinguished ...

...

The purpose of this case then, is to find a process to place Gitksan and Wet'suwet'en ownership and jurisdiction within the context of Canada. We do not seek a decision as to whether our system might continue or not. It will continue.

⁷⁹ See *Delgamuukw* (S.C.C.), *supra* note 1 at 1061, Lamer C.J.C.

⁸⁰ *Ibid.* at 1062.

⁸¹ *Ibid.*

collective claims were seen to not be issues at trial.⁸² This finding seems rather formalistic and inflexible, given that the Court gave considerable importance to the connection that collective and individual claims are intertwined, for “the territory claimed by each nation is merely the sum of the individual claims of each House.”⁸³ It appeared that the forms of action the Gitksan and Wet’suwet’en pleaded had to be exact, even though the Court itself found there to be considerable legal uncertainty. The Court’s approach supported Maitland’s observation that “[t]he forms of action we have buried, but they still rule us from their graves.”⁸⁴ As such, the Court “reluctantly” concluded that the province had suffered some prejudice because the plaintiff’s change denied them “the opportunity to know the appellants’ case.”⁸⁵

It is interesting to note that in this historic case, which considers the wholesale territorial dispossession of two entire Aboriginal peoples, the *ratio decidendi* turns on the Court’s finding that the *province* suffered prejudice in considering this issue. There is something deeply troubling about having to recognize Crown assertions of sovereignty in framing a case to dispute the effect of these assertions. Given the imbalance in the parties’ financial and political resources, and the century-long denial of Aboriginal land and political rights in British Columbia, this sleight of hand is remarkable. In effect, the Court found that these peoples’ passport papers were out of order. They were not permitted to cross the border separating Gitksan/Wet’suwet’en legal systems and the common law because they had not followed proper procedures. Sovereignty’s extension is careful not to prejudice the Crown. In order to allow the province a better opportunity to know the plaintiff’s case, the Court ordered a new trial.⁸⁶

B. *Factual and Evidentiary Findings of the Trial Judge*

Canadian sovereignty is extended over Aboriginal peoples when courts receive and interpret “factual” evidence from Aboriginal litigants.

⁸² *Ibid.* at 1063.

⁸³ *Ibid.*

⁸⁴ Maitland, *supra* note 65 at 2.

⁸⁵ *Delgamuukw (S.C.C.)*, *supra* note 1 at 1063, Lamer C.J.C.

⁸⁶ As a result, everything else the Court wrote after this point in the judgment can be regarded as *obiter dicta* which, according to *Black’s Law Dictionary*, *supra* note 68 (*s.v.* “obiter dictum”), are “words of an opinion entirely unnecessary for the decision of the case. ... Such are not binding as precedent.”

For millennia, Aboriginal peoples created, controlled, and changed their own worlds through the power of language, stories, and songs. These words did not just convey meaning, they could also change reality, as Indigenous languages and cultures shaped their legal, economic, and political structures, and the socio-cultural relationships upon which they were built.⁸⁷ Many of these narratives were considered private property.⁸⁸ The restriction on their presentation and interpretation helped to ensure that the authority to adjudicate and create meaning remained within Aboriginal societies. When Aboriginal narratives are given to another culture to authoritatively judge their factual authenticity and meaning, Aboriginal peoples lose some of their power of self-definition and self-determination.⁸⁹

What constitutes a “fact” is largely contingent on the language and culture out of which that information arises.⁹⁰ The people who decide what a fact is define it from within the matrix of relationships they share with others.⁹¹ Non-Aboriginal judges do not usually share the same language and relationships as Aboriginal peoples. Variations between these groups help encode the same facts with different meanings depending on the culture.⁹² Therefore, the cultural specificity of facts may make it difficult for people from different cultures to concur. This discrepancy creates an enormous risk of misunderstanding and lack of recognition when one culture submits its facts to another

⁸⁷ See P. Petrone, *Native Literature in Canada: From Oral Tradition to the Present* (Toronto: Oxford University Press, 1990) at 9-12.

⁸⁸ *Ibid.*

⁸⁹ One lawyer has commented on this process in Pinder, *supra* note 15 at 11-12 as follows:

What counts as fact? What can sustain us?

With more and more sophisticated technology we have destroyed the stories. In court cases, we word search transcripts to reassemble the evidence; it doesn't resemble anything that was said, by anyone. We cut the words, even our written words, away from the environment, and hold them up as pieces of meaning, hacked up pieces of meaning.

As lawyers we don't have to take any responsibility to construct a world. We only have to destroy another's construction. We say no. We are the civilized, well-heeled, comfortable carriers of no. We thrive on it. Other races die.

⁹⁰ See L. Wittgenstein, *Philosophical Investigations*, 2d ed., trans. G.E.M. Anscombe (Oxford: Basil Blackwell, 1967) at paras. 154-55. Meaning and understanding of a fact, Wittgenstein writes, at para. 155, is “know[ing] how to go on.”

⁹¹ See M. Heidegger, *Being and Time*, trans. J. Macquarrie & E. Robinson (New York: Harper & Row, 1962) at 157.

⁹² See C. Taylor, *Philosophy and the Human Sciences* (Cambridge: Cambridge University Press, 1985) at 119, 121.

culture for interpretation.⁹³ In litigation, this problem is especially acute because factual determinations can vary significantly between judicial interpreters according to the judge's language, cultural orientation, and experiences.⁹⁴ In such circumstances, common law judges have had an especially difficult time understanding and acknowledging the meanings Aboriginal peoples give to the facts they present.⁹⁵ Anthropologist Robin Ridington observes these problems in the factual underpinnings of the trial judge's decision in *Delgamuukw*:

McEachern showed himself to be singularly blind to the unstated assumptions of his own culture. I suggest that a systemic and unacknowledged ethnocentric bias is, to use McEachern's own phrasing, "fatal to the credibility and reliability" of his conclusions. From my experience evaluating texts about a variety of cultures, McEachern's decision ... reveals a sub-text of underlying but unexamined assumptions upon which the more logical edifice of the judgment is constructed. In *Delgamuukw*, Mr. Justice McEachern revealed a world view and an ideology appropriate to a culture of colonial expansion and domination. The judgment is well suited to be an apology for that culture. It is not well suited to find a place where aboriginal law and Canadian law can reach a just accommodation.⁹⁶

In *Delgamuukw*, the Supreme Court's extension of the laws of evidence to accommodate Aboriginal traditions and histories is meant to counteract the difficulties found in McEachern C.J.'s factual findings.⁹⁷ The Court wrote that in "cases involving the determination of aboriginal rights, appellate intervention is ... warranted by the failure of a trial court to appreciate the evidentiary difficulties inherent in adjudicating aboriginal claims when, first, applying the rules of evidence and, second, interpreting the evidence before it."⁹⁸ These difficulties in applying

⁹³ See R. Rorty, "On Ethnocentrism: A Reply to Clifford Geertz" (1986) 25 Mich. Q. Rev. 525; A.A. An-Na'im, "Problems of Universal Cultural Legitimacy for Human Rights" in A.A. An-Na'im & F.M. Deng, eds., *Human Rights in Africa: Cross-Cultural Perspectives* (Washington: The Brookings Institution, 1990) 331.

⁹⁴ See R.F. Devlin, "Judging and Diversity: Justice or Just Us?" (1996) 20:3 Prov. Judges J. 4.

⁹⁵ See L. Mandell, "Native Culture on Trial" in S.L. Martin & K.E. Mahoney, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 358; J. Ryan & B. Ominayak, "The Cultural Effects of Judicial Bias" in *ibid.*, 346; and R. Ridington, "Cultures in Conflict: The Problem of Discourse" in W.H. New, ed., *Native Writers and Canadian Writing* (Vancouver: UBC Press, 1990) 273.

⁹⁶ R. Ridington, "Fieldwork in Courtroom 53: A Witness to *Delgamuukw*" in Cassidy, ed., *supra* note 3, 206 at 211-12.

⁹⁷ See *Delgamuukw* (S.C.C.), *supra* note 1 at 1079, where the Court says that "[t]he trial judge's treatment of the various kinds of oral histories did not satisfy the principles I laid down in *Van der Peet*. These errors are particularly worrisome"

⁹⁸ *Ibid.* at 1065, Lamer C.J.C. The challenges of receiving Aboriginal evidence were described by Lamer C.J.C., at 1068, quoting from C. McLeod, "The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking

Aboriginal evidence prompted the Court to direct judges to “adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts.”⁹⁹ They further wrote that oral histories should receive “independent weight” and be “placed on an equal footing with the types of historical evidence that courts are familiar with”¹⁰⁰ The Court justified this more liberal approach to Aboriginal evidence by noting that to do otherwise would “‘impose an impossible burden of proof’ on aboriginal peoples, and ‘render nugatory’ any rights that they have” because “most aboriginal societies ‘did not keep written records.’”¹⁰¹

However, the Court’s progressive instruction to adapt the laws of evidence to incorporate Aboriginal factual perspectives does not scrutinize Crown assertions of sovereignty. Aboriginal title and sovereignty are still diminished despite the Court’s extraordinarily fair and generous approach. For Indigenous peoples, the language and

Down the Barriers of the Past” (1992) 30 Alta. L. Rev. 1276 at 1279:

Many features of oral histories would count against both their admissibility and their weight as evidence of prior events in a court that took a traditional approach to the rules of evidence. The most fundamental of these is their broad social role not only “as a repository of historical knowledge for a culture” but also as an expression of “the values and mores of [that] culture.”

⁹⁹ *Delgamuukw* (S.C.C.), *supra* note 1 at 1067, Lamer C.J.C. In this regard the chief justice, citing his reasons for judgment in *Van der Peet*, also wrote, at 1065, that “courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards” that would be applied in private law cases [emphasis omitted].

¹⁰⁰ *Delgamuukw* (S.C.C.), *supra* note 1 at 1069. The Court’s adaptation of evidentiary standards finds parallels elsewhere in the jurisprudence. In the mid-eighteenth century, the courts drastically changed the rules of evidence to receive commercial and merchant customs and evidence for virtually the first time. The *Delgamuukw* case has been criticized by many in the business community for the new “uncertain” evidentiary standards it creates. It is interesting and somewhat ironic to note that the foundation of law protecting commercial transactions was as revolutionary in its time as the *Delgamuukw* case may appear to business today. Ogilvie, *supra* note 71 at 345, noted the radical evidentiary changes required to receive commercial customs into the common law:

Lord Mansfield can rightly be claimed to be the greatest justice in the common law and his influence on numerous branches of law is felt still today. He also incorporated the law merchant into the common law by ignoring the traditional procedural rules of the King’s Bench so as to allow for the expert evidence on mercantile practice heard by specially selected juries of commercial men from the City. Moreover, he did not feel compelled to equate the law merchant with feudal property law or to reinterpret it in that light, rather he accepted the evidence and adopted it into the body of the common law, transforming it into common or judge-made law at the same time.

Lord Mansfield’s ground-breaking treatment of evidence in commercial law sounds like Lamer C.J.C.’s treatment of Aboriginal evidence in *Delgamuukw*.

¹⁰¹ *Delgamuukw* (S.C.C.), *supra* note 1 at 1069, citing Dickson C.J.C. in *R. v. Simon*, [1985] 2 S.C.R. 387 at 408.

culture of law is not their own; legal interpretation of Aboriginal traditions and history is centralized and administered by non-Aboriginal people.¹⁰² Aboriginal peoples barely participate in the administration of this system, and they are certainly not in positions of control. Furthermore, the evidence they present to establish their case must not “strain ‘the Canadian legal and constitutional structure.’”¹⁰³ The justification for this approach is that Aboriginal rights must be reconciled with the Crown’s assertion of sovereignty over Canadian territory.¹⁰⁴ Once again, Crown sovereignty is the standard against which Aboriginal rights must be measured. Sovereignty disciplines and defines the terrain on which Aboriginal peoples must operate if they are going to dispute the actions of Canadian governments in Canadian courts.¹⁰⁵ Thus, even though the Court has made great efforts to ensure that the “laws of evidence [are] adapted in order that [oral histories and tradition] can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with,”¹⁰⁶ the fact that they must be reconciled with assertions of Crown sovereignty means that, in the end, this new standard risks “perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect the distinctive cultures of pre-existing aboriginal societies.”¹⁰⁷ Thus, there will be great difficulties for Aboriginal peoples in Canadian courts that receive and evaluate their evidence, for “judges, like all other humans, operate from their own perspectives.”¹⁰⁸ As

¹⁰² There are only sixteen Aboriginal judges in Canada, none of whom sit on an appellate court. For an article that explains the importance of Aboriginal control over traditional knowledge and culture, see G. Christie, “Aboriginal Rights, Aboriginal Culture, and Protection” (1998) 36 *Osgoode Hall L.J.* 447.

¹⁰³ *Delgamuukw (S.C.C.)*, *supra* note 1 at 1066, Lamer C.J.C.

¹⁰⁴ *Ibid.* at 1065-66.

¹⁰⁵ For a discussion of the connection between sovereignty, government, and discipline, see M. Foucault, “Governmentality” in G. Burchell, C. Gordon & P. Miller, eds., *The Foucault Effect: Studies in Governmentality* (London: Harvester Wheatsheaf, 1991) 87 at 102; more generally, see M. Foucault, *Discipline and Punish: The Birth of the Prison* (London: Penguin Books, 1991).

¹⁰⁶ *Delgamuukw (S.C.C.)*, *supra* note 1 at 1069, Lamer C.J.C.

¹⁰⁷ *Côté*, *supra* note 39 at 175.

¹⁰⁸ *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at 504, L’Heureux-Dubé and McLachlin JJ. [hereinafter R.D.S.]. Justices L’Heureux-Dubé and McLachlin similarly wrote, at 505, that judges in a bilingual, multiracial and multicultural society will undoubtedly approach the task of judging from their varied perspectives. They will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench.

illustration, the Supreme Court of Canada observed that “[i]n applying these principles, the new trial judge might well share some or all of the findings of fact of McEachern C.J.”¹⁰⁹

C. Conjuring Sovereignty: Content, Protection, and Proof of Aboriginal Title

In its section considering the content and proof of Aboriginal title, the Supreme Court of Canada wrote the following: “*Because it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at the time sovereignty was asserted.*”¹¹⁰ Sovereignty is pretty powerful stuff. Its mere assertion by one nation is said to bring another’s land rights to a “definite and permanent form;”¹¹¹ simply conjuring sovereignty is enough to change an ancient peoples’ relationship with their land. A society under sovereignty’s spell is ostensibly transformed, for use and occupation are found to be extinguished,¹¹² infringed,¹¹³ or made subject to another’s designs.¹¹⁴ How can lands possessed by Aboriginal peoples for centuries be undermined by another nation’s assertion of sovereignty? What alchemy transmutes the basis of Aboriginal possession into the golden bedrock of Crown title?¹¹⁵

The key words that unlock sovereignty’s power are of ancient origin. Practitioners of its craft can summon a tradition that reaches deep into the past.¹¹⁶ It flows from classical times¹¹⁷ through the

¹⁰⁹ *Delgamuukw (S.C.C.)*, *supra* note 1 at 1079, Lamer C.J.C.

¹¹⁰ *Ibid.* at 1098 [emphasis added].

¹¹¹ *Funk & Wagnalls Standard College Dictionary*, Can. ed., s.v. “crystallize.”

¹¹² See *Delgamuukw (S.C.C.)*, *supra* note 1 at 1116-17.

¹¹³ *Ibid.* at 1107-14.

¹¹⁴ *Ibid.* at 1088-91.

¹¹⁵ See M. Boas, *The Scientific Renaissance, 1450-1630* (London: Collins, 1962) at 178, where Paracelsus, a sixteenth-century German physician wrote that “[a]lchemy ... brings to its end that which has not come to its end.”

¹¹⁶ A brief intellectual background of the societies that developed this tradition is found in J.R. Hale, *The Civilization of Europe in the Renaissance* (Toronto: Maxwell Macmillan Canada, 1994) at 355-72.

¹¹⁷ The Greek didactic poet Hesiod, who recorded the economic, political, and legal values of the archaic period of Greek history, commented on the arbitrary fables and fictions of princes and nobles that dispossessed other peoples: see D.W. Tandy & W.C. Neale, *Hesiod’s Works and Days*, (Berkeley: University of California Press, 1996) at lines 202-12, where he wrote:

Renaissance.¹¹⁸ Political and legal ascendancy are conveyed to those who can conjure fictions that vindicate their claims of authority.¹¹⁹ In the

Now I will tell a fable to *basilees*, although they themselves perceive it. Thus the hawk addressed the speckle-necked nightingale, as he carried her very high in the clouds, keeping her snatched in his talons. She was weeping piteously, pierced by his curved talons; he addressed her haughtily: "Strange one, why do you scream? Now one who is much superior holds you. You will go wherever I myself carry you, even though you may be a singer. A meal I will make of you, if I see fit, or I shall let you go. Foolish is he who sees fit to set himself up against those who are better; he both loses the victory and suffers pain in addition to disgrace." So spoke the swift-winged hawk, the long-winged bird.

Ancient Rome also provides numerous examples of fictions that were used to deprive other nations of political and legal rights. The myth of Romulus and Remus endeavoured to absolve Romans from taking jurisdiction over Sabian and Etruscan peoples and lands: see I.S. Ryberg, trans., "Selections from Livy's History of Rome" in P. MacKendrick & H.M. Howe, eds., *Classics in Translation*, vol. 2 (Madison, Wis.: University of Wisconsin Press, 1980) 280 at 284-87. This myth bred power, and Rome expanded at the expense of other nations. In A.D. 14, Augustus recorded the raw fact of his nation's power: "I extended the frontiers of all those provinces of the Roman People which bordered nations not obedient to our command": C.F. Edson & C. Schuler, trans., "The Deeds of the Deified Augustus" in *ibid.*, 302 at 306. Eventually Rome's power was disseminated through law and was effective in controlling the rights of others. For one example, see J.P. Heironimus, trans., "Selected Letters of the Younger Pliny" in *ibid.*, 361 at 366-67 (Pliny to the Emperor Trajan).

¹¹⁸ See, for example, N. Machiavelli, "The Prince" in P.E. Bondanella & M. Musa, eds. and trans., *The Portable Machiavelli* (New York: Penguin Books, 1979) 77 at 82-84, 133-36 [hereinafter "The Prince"]; and N. Machiavelli, "The Discourses" in *ibid.*, 167 at 193-96, 200-01, 208, 210, 216, 314-16, 412-13. Machiavelli argued for the use of fictions in the affairs of state. In "The Discourses" he noted, at 216, that

[t]he auguries were not only ... the basis of the ancient religion of the pagans, but also the cause of the well-being of the Roman republic; thus, the Romans took more care of this institution than any other: they used the auspices in their consular meetings, in beginning their enterprises, in marching forth their armies, in fighting their battles, and in all their important actions, civil or military; never would they have set out on an expedition without first having persuaded their soldiers that the gods had promised them victory.

In the seventeenth century, Thomas Hobbes also identified the importance of fictions, and created the myth of the "Leviathan" to support the extension of civil authority over people: see R. Tuck, ed., *Leviathan* (Cambridge, Cambridge University Press, 1991) at 120, where he wrote:

The only way to erect such a Common Power, as may be able to defend ... is, to conferre all their power and strength upon one Man, or upon one Assembly of men, that may reduce all their Wills, by plurality of voices, unto one Will This is the Generation of that great LEVIATHAN, or rather (to speake more reverently) of that *Mortall God*, to which wee owe under the *Immortall God*, our peace and defence.

¹¹⁹ Plato wrote about the myth of the metals to explain why some people could claim rights and enforce laws over others in G.M.A. Grube, trans., *Plato's Republic* (Indianapolis: Hackett, 1974) at line 415a-c:

Socrates: [B]ut the god who fashioned you mixed some gold in the nature of those capable of ruling because they are to be honoured most. In those who are auxiliaries he has put silver, and iron and bronze in those who are farmers and other workers. ... Can you suggest any device which will make our citizens believe this story?

Glaucon: I can not see any way ... to make them believe it themselves, but the sons and later generations might

thirteenth century, Pope Innocent IV invoked sovereignty's oaths in the Middle East during the Crusades when he wrote:

[I]s it licit to invade a land that infidels possess or which belongs to them? ... [T]he pope has jurisdiction over all men and power over them in law ... so that through this power which the pope possesses I believe that if a gentile, who has no law except the law of nature ... does something contrary to the law of nature, the pope can lawfully punish him ... [I]f the infidels do not obey, they ought to be compelled by the secular arm ... ¹²⁰

Such words provided authority for asserting sovereignty and launching war over non-Christian peoples outside Europe.¹²¹ In the fourteenth century, papal bulls called up these same covenants as people sailed out from Portugal and Spain to cast their words on Africa and North America.¹²² Such assertions enabled Iberia's kings and queens to "discover" and "conquer" lands beyond the recognized borders of western Christianity.¹²³ To facilitate these purposes, in 1513 another manifestation of sovereignty's power was revealed in the *Requerimiento*, which was to be read aloud to peoples over which Spain intended to exercise control.¹²⁴ It stated the following:

Socrates: But let us leave this matter to later tradition. Let us now arm our earthborn and lead them forth with their rulers in charge. And as they march let them look for the best place in the city to have their camp, a site from which they could most easily control those within, if anyone is unwilling to obey the laws ...

¹²⁰ Pope Innocent IV, "Commentaria Doctissima in Quinque Libros Decretalium" in J. Muldoon, ed., *The Expansion of Europe: The First Phase* (Philadelphia: University of Pennsylvania, 1977) 191 at 191-92 [translated by author].

¹²¹ See J. Muldoon, *Popes, Lawyers, and Infidels* (Philadelphia: University of Pennsylvania Press, 1979). Similar assertions were also used by those who resisted the Christians: see M.M. Pickthall, *The Meaning of the Glorious Koran* (New York: New American Library, 1953) at 64, 72, 86, 139-44. An Islamic perspective on law (the Shari`ah) and war can be found in S.H. Nasr, *Ideals and Realities of Islam* (Boston: Beacon Press, 1966) at 31, 93-118.

¹²² See S.Z. Ehler & J.B. Morrall, eds. and trans., *Church and State Through the Centuries* (London: Burns & Oates, 1954) at 144-46, 153-59. See also F.S. Cohen, "The Spanish Origins of Indian Rights in the Law of the United States" (1942) 31 *Geo. L.J.* 1.

¹²³ See D.H. Getches, C.F. Wilkinson & R.A. Williams, eds., *Cases and Materials on Federal Indian Law* (St. Paul, Minn.: West, 1993) at 46.

¹²⁴ See L. Hanke, *The Spanish Struggle for Justice in the Conquest of America* (Philadelphia: University of Pennsylvania Press, 1949) at 34:

A complete list of the events that occurred when the Requirement formalities ordered by King Ferdinand were carried out in America, more or less according to the law, might tax the reader's patience and credulity, for the Requirement was read to trees and empty huts when no Indians were to be found. Captains muttered its theological phrases into their beards on the edge of sleeping Indian settlements, or even a league away before starting the formal attack, and at times some leather-lunged Spanish notary hurled its sonorous phrases after the Indians as they fled into the mountains.

On the part of the king, Don Ferdinand, and Doña Juana, his daughter, queen of Castile and León, subduers of the barbarous nations, we their servants notify and make known to you Of all these nations God our lord gave charge to one man called St. Peter, that he should be lord and superior to all the men in the world, that all should obey him Wherefore, as best we can, we ask and require that you ... acknowledge the Church as the ruler and superior of the whole world, and the high priest called Pope, and in his name the king and queen But if you do not do this or if you maliciously delay in doing it, I certify to you that with the help of God we shall forcefully enter into your country and shall make war against you in all ways and manners that we can, and shall subject you to the yoke and obedience of the Church and of their highnesses; we shall take you and your wives and your children and shall make slaves of them, and as such shall sell and dispose of them as their highnesses may command; and we shall take away your goods and shall do to you all the harm and damage that we can ... and we protest that the deaths and losses which shall accrue from this are your fault, and not that of their highnesses, or ours, or of these soldiers who come with us.¹²⁵

Documents such as the *Requerimiento*, numerous papal bulls, and other proclamations mingled to create a cant of conquest justifying assertions of sovereignty over others' lands.¹²⁶ The British and Americans in the seventeenth,¹²⁷ eighteenth,¹²⁸ and nineteenth¹²⁹ centuries chanted these historic rites to bring them forward into

¹²⁵ C. Gibson, ed., *The Spanish Tradition in America* (Columbia, S.C.: University of South Carolina Press, 1968) at 58-60.

¹²⁶ For a detailed study of this phenomenon in northeastern North America, see F. Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (New York: Norton, 1976).

¹²⁷ In *Calvin's Case* (1608), 7 Co. Rep. 1a, 77 E.R. 377 at 398 (K.B.), Lord Chief Justice Edward Coke observed:

[I]f a King come to a Christian kingdom ... he may at his pleasure alter and change the laws of that kingdom: but until he doth make an alteration of those laws the ancient laws of that kingdom remain. But if a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, there *ipso facto* the laws of the infidel are abrogated, for that they be not only against Christianity, but against the law of God and of nature

¹²⁸ *The Royal Proclamation, 1763* (U.K.), reprinted in R.S.C. 1985, App. II, No. 1, states:

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

¹²⁹ Chief Justice Marshall of the United States Supreme Court stated in *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 at 573-74 (1823):

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. ...

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. ... [T]heir rights to complete sovereignty, as independent nations, were necessarily diminished

contemporary jurisprudence.¹³⁰ Imperial courts participated too. In *St. Catherine's Milling and Lumber Co. v. R.*, a case from Ontario, Lord Watson wrote:

[T]he tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be "parts of Our dominions and territories" ... It appears ... to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.¹³¹

Sovereignty's incantation is like magic. Its mantra is "Aboriginal title is a burden on the Crown's underlying title."¹³² This mere assertion is said to displace previous Indigenous titles by making them subject to, and a burden on, another's higher legal claims.¹³³ Contemporary Canadian jurisprudence has been susceptible to this artifice.¹³⁴ In its section considering Aboriginal title, the Supreme Court declared that the Crown gained "underlying title" when "it asserted sovereignty over the land in question."¹³⁵ This announcement illustrates that, as in past centuries, sovereignty heralds the diminishment of another's possessions. In this respect, the decision echoes ancient discourses of conquest. Is this, as the Court requires of its jurisprudence, "a morally and politically defensible conception of aboriginal rights"?¹³⁶ Is the mere assertion of sovereignty an acceptable justification for the Crown's displacement of Indigenous titles?

It does not make sense that one could secure a legal entitlement to land over another merely through raw assertion. As Chief Justice Marshall of the United States Supreme Court once observed, it is an

¹³⁰ For an excellent discussion of this process, see R.A. Williams Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).

¹³¹ (1888), 14 App. Cas. 46 at 54-55 (P.C.) [hereinafter *St. Catherine's Milling*].

¹³² *Delgamuukw (S.C.C.)*, *supra* note 1 at 1098.

¹³³ See *Guerin v. R.*, [1984] 2 S.C.R. 335 at 378 [hereinafter *Guerin*]: "The principle of discovery ... gave ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians' rights in the land were obviously diminished."

¹³⁴ See *Sparrow*, *supra* note 54 at 1103, where the Court wrote: "[T]here was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown."

¹³⁵ *Delgamuukw (S.C.C.)*, *supra* note 1 at 1098.

¹³⁶ *Van der Peet*, *supra* note 56 at 547, citing *Walters*, *supra* note 15 at 413.

“extravagant and absurd idea.”¹³⁷ It is even less of a “morally and politically defensible” position when this assertion has not been a neutral and noble statement, but has benefited the Crown to the detriment of the land’s original inhabitants. As such, “it does not make sense” to speak of Aboriginal title as being a “burden” on the Crown’s underlying title. As “it does not make sense to speak of a burden on the underlying title before the title existed,”¹³⁸ Aboriginal peoples wonder how it “makes sense” that *Crown title* “crystallized at the time sovereignty was asserted.”¹³⁹ The Court might as well speak of magic crystals being sprinkled on the land as a justification for the diminution of Aboriginal occupation and possession. Crown title simply does not make sense to Aboriginal people (and one suspects to many non-Aboriginal people). The contemporary reliance on assertions of sovereignty seems to “perpetuat[e] the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect the distinctive cultures of pre-existing aboriginal societies.”¹⁴⁰ It causes one to wonder “whatever the justification advanced in earlier days” whether “an unjust and discriminatory doctrine of that kind can [any] longer be accepted.”¹⁴¹

In keeping with these observations, the Court recognized that its past decisions have not made much sense of Aboriginal title. It noted that “there has never been a definitive statement ... on the *content* of aboriginal title.”¹⁴² It also stated that its terminology has not been “particularly helpful,”¹⁴³ and that “the courts have been less than forthcoming.”¹⁴⁴ The Supreme Court’s recent contribution to clearing up this confusion was to characterize Aboriginal title as *sui generis*.¹⁴⁵ The Court described Aboriginal title as *sui generis* in order to distinguish

¹³⁷ In *Worcester*, *supra* note 42 at 544-45, Chief Justice Marshall noted that “[t]he extravagant and absurd idea, that the feeble settlements made on the sea coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man.”

¹³⁸ *Delgamuukw* (S.C.C.), *supra* note 1 at 1098, Lamer C.J.C.

¹³⁹ *Ibid.*

¹⁴⁰ *Côté*, *supra* note 39 at 175.

¹⁴¹ *Mabo*, *supra* note 59 at 67.

¹⁴² *Delgamuukw* (S.C.C.), *supra* note 1 at 1083 [emphasis in original].

¹⁴³ *Ibid.* at 1081.

¹⁴⁴ *Ibid.* at 1083.

¹⁴⁵ In characterizing the Aboriginal right in question (in this case, title) as *sui generis*, the Court continued a trend made explicit in *Guerin*, *supra* note 133. For further discussion of the *sui generis* nature of Aboriginal rights, see J. Borrows & L.I. Rotman, “The *Sui Generis* Nature of Aboriginal Rights: Does It Make a Difference?” (1997) 36 *Alta. L. Rev.* 9.

it from “normal” proprietary interests.¹⁴⁶ While many Aboriginal people would agree that a legal doctrine that diminishes Aboriginal rights in ancient territories is “abnormal,” the Court cast the doctrine’s distinctiveness in another light. It held that Aboriginal title is

sui generis in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, [Aboriginal title] must be understood by reference to both common law and aboriginal perspectives.¹⁴⁷

The Court found that “[t]he idea that aboriginal title is *sui generis* is the unifying principle underlying the various dimensions of that title.”¹⁴⁸

While the Court’s delineation of Aboriginal rights as *sui generis* by reference to Aboriginal perspectives is preferable to having them defined solely through a reliance on the common law,¹⁴⁹ these perspectives still have to be reconciled with British assertions of

¹⁴⁶ *Delgamuukw (S.C.C.)*, *supra* note 1 at 1081.

¹⁴⁷ *Ibid.* at 1081, Lamer C.J.C. The reliance on the *sui generis* nature of Aboriginal title affirms the Supreme Court’s earlier pronouncement in *St. Mary’s Indian Band v. Cranbrook*, [1997] 2 S.C.R. 657 at 667 [hereinafter *St. Mary’s*]: “[N]ative land rights are in a category of their own, and as such, traditional real property rules do not aid the Court in resolving” Aboriginal land rights cases. In applying the *sui generis* nature of Aboriginal land rights in the *St. Mary’s* case, the Court considered whether a portion of the reserve surrendered to the Federal Crown to construct an airport was absolute. The Band levied property taxes on Cranbrook because it believed the land on which the airport was built was still reserve land because it fell within section 83(1) of the *Indian Act*, R.S.C. 1985, c. I-5, as land surrendered “otherwise than absolutely”: *St. Mary’s, ibid.* at 661. The Band arrived at this position because the parties agreed at the time of surrender “that should at any time the said lands cease to be used for public purposes they will revert to the St. Mary’s Indian Band free of charge”: *ibid.* In rejecting the Band’s position, the Supreme Court held that the lands were surrendered absolutely. The Court arrived at this conclusion by looking at the “true purpose of the dealings” instead of the “formalistic and arguably alien common law rules” that the Band was relying on to advance its claim: *ibid.*, at 669. By looking at the intent of the parties at the time of surrender, rather than conventional property law rules, the Court found that the Band “intended to part with the airport lands on an absolute basis,” and thus denied their claim: *ibid.* It justified this approach by observing that the “*sui generis* nature of Native land rights means that common law real property principles do not apply to the surrender of Indian reserve lands”: *ibid.* at 664. Thus the band’s attempt to broaden its taxation power were defeated.

¹⁴⁸ *Delgamuukw (S.C.C.)*, *supra* note 1 at 1081. Various dimensions of that title include its inalienability except to the Crown, its source, and the communal nature of its holding. Inalienability is referenced to assertions of sovereignty because “[l]ands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown”: *ibid.* Its source is referenced to assertions of sovereignty because it “arises from possession *before* the assertion of British sovereignty”: *ibid.* at 1082 [emphasis in original]. Its communal nature is referenced to British sovereignty because “[a]boriginal title cannot be held by individual aboriginal persons,” which is a common law legal fiction created to ensure that only the Crown receives title from an Aboriginal nation: *ibid.*

¹⁴⁹ For a discussion of this principle, see J. Borrows, “With or Without You: First Nations Law (in Canada)” (1996) 41 McGill L.J. 629.

sovereignty. This reconciliation might not have been troubling had the Court recognized that Aboriginal legal and political rights could not be diminished without Aboriginal authorization.¹⁵⁰ However, the Court did not take this path. It chose to find that the “reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown”¹⁵¹ displaces the fuller pre-existent rights of the land’s original occupants. The Court noted that

[b]ecause ... distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), some limitation of those rights will be justifiable. Aboriginal rights are a necessary part of the reconciliation of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that reconciliation.¹⁵²

Thus, the Court’s approach to reconciliation forcibly includes non-treaty Aboriginal peoples within Canadian society and subjects them to an alien sovereignty, even though most have never consented to such an arrangement.¹⁵³ This inclusion subordinates Aboriginal sovereignty, and it limits the uses to which Aboriginal peoples’ land can be put. The implications of this approach deeply undermine original Aboriginal entitlements—on grounds none other than self-assertion!¹⁵⁴ The limitations placed on Aboriginal peoples without their consent are

¹⁵⁰ See D. Johnston, *The Taking of Indian Lands in Canada: Consent or Coercion?* (Saskatoon: University of Saskatoon Native Law Centre, 1989).

¹⁵¹ *Delgamuukw (S.C.C.)*, *supra* note 1 at 1107, citing Lamer C.J.C. in *R. v. Gladstone*, [1996] 2 S.C.R. 723 at 774 [hereinafter *Gladstone*].

¹⁵² *Delgamuukw (S.C.C.)*, *supra* note 1 at 1107-08, citing Lamer C.J.C. in *Gladstone*, *supra* note 151 at 774-75 [emphasis omitted].

¹⁵³ See Tennant, *supra* note 51 at 62, where the following observation made by the Nisga’a people in 1887 is cited:

The land was given to our fore-fathers by the great God above, who made both white man and the Indian, and our forefathers [*sic*] handed it down and we have not given it to anyone. It is still ours, and will be ours till we sign a strong paper to give part of it to the Queen.

¹⁵⁴ See R. Howse & A. Malkin, “Canadians are a Sovereign People: How the Supreme Court Should Approach the Reference on Quebec Secession” (1997) 76 Can. Bar Rev. 186 at 192, n. 22, where they observe the following:

If the constitution can only defend itself through self-assertion of its bindingness then this invites an opposite self-assertion of those who seek to reject the constitutional order as a whole, and the matter cannot but be resolved except through an implicitly violent struggle of wills. This is the dangerous and fateful implication of the positivistic approach [to constitutional interpretation].

reminiscent of the sorcery that declared that there has been “vested in the Crown a substantial and paramount estate, underlying the Indian title”¹⁵⁵ and that “the tenure of the Indians was ... dependent upon the good will of the Sovereign.”¹⁵⁶

The Supreme Court’s tautology does not adequately displace the trial judge’s finding that “authorities make it clear that such sovereignty exists not just against other ‘civilized’ powers but extends to the natives themselves None of them suggest that the Crown, upon asserting sovereignty, does not acquire title to the soil.”¹⁵⁷ At trial, McEachern C.J. spoke about the effect of Crown sovereignty as being “far more pervasive than the outcome of a battle or a war could ever be.”¹⁵⁸ He stated that “the events of the last 200 years are far more significant than any military conquest or treaties would have been,”¹⁵⁹ and he concluded that Aboriginal people “became a conquered people, not by force of arms, for that was not necessary, but by an invading culture and a relentless energy with which they would not, or could not, compete.”¹⁶⁰ The Court’s failure to explain or distance itself from the conventional justifications for the assertion of sovereignty demonstrates why reconciling Aboriginal perspectives with the common law is troubling for Aboriginal peoples. It is asking them to reconcile their perspectives with the pretence that mere Crown assertions of sovereignty have displaced underlying Aboriginal title. As current jurisprudence stands, Aboriginal peoples are being asked to harmonize their perspectives with the notion that they are conquered.¹⁶¹ Until the Supreme Court develops a

¹⁵⁵ *St. Catherine’s Milling*, *supra* note 131 at 55.

¹⁵⁶ *Ibid.* at 54.

¹⁵⁷ *Delgamuukw (B.C. S.C.)*, *supra* note 4 at 284, McEachern C.J.

¹⁵⁸ *Ibid.* at 285.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.* at 342. The United States Supreme Court expressed a similar sentiment when it wrote in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 at 289-90 (1955): “Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors’ will that deprived them of their land.”

¹⁶¹ In *Monet & Wilson*, *supra* note 15 at 196, Skanu’u (Ardythe Wilson-Gitksan) responded to such notions with the following observation:

[T]he reality is that, historically and to the present, we have been active in our resistance to be silenced and to be made invisible. The reality is that we have never given up, never sold, nor lost in battle, our ownership and jurisdiction to our territories. Our right and title is inherited from our ancestors who lived and governed themselves for thousands of years before Christopher Columbus emerged from his mother’s womb and drew his first breath. The reality is that *Delgamuukw vs. The Queen* is only one of the many

(persuasive) explanation for how the assertion of Crown sovereignty “crystallized” Aboriginal title, Aboriginal perspectives cannot be made to agree with such enchantments.¹⁶²

1. Restricting Aboriginal title

Conjuring Crown assertions of sovereignty validates the appropriation of Aboriginal land for non-Aboriginal people. It sanctions the colonization of British Columbia and directs Aboriginal peoples to reconcile their perspectives with the diminution of their rights. The Court’s invocation of Crown assertions, behind the cloak of sovereignty, endorses the infringement of Aboriginal rights in furtherance of legislative objectives that are “compelling and substantial”¹⁶³ to the “European colonizers.”¹⁶⁴ As such, the Court writes:

In the wake of *Gladstone*, the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad. Most of these objectives can be traced to the *reconciliation* of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty, which entails the recognition that “distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community” In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the

simultaneous activities undertaken by the Gitksan and Wet’suwet’en to protest the abuses of the Agents of the Crown since their first encroachment on to our territories. The reality is that our societies, our cultures and our systems are alive and well. They have sustained us through more than 150 of the darkest, most destructive years that our people have ever known and will continue to sustain us

¹⁶² Political events are contingent and so cannot be named or known in terms of existing conceptual categories: see L.J. Disch, “More Truth than Fact: Storytelling as Critical Understanding in the Writings of Hannah Arendt” (1993) 21 Pol. Theory 665 at 683:

In *Third Critique*, Kant introduces “crystallization” as a metaphor for contingency Crystallization describes the formation of objects that come into being not by gradual, evolutionary process but suddenly and unpredictably “by a *shooting together*, i.e. by a sudden solidification.” ... In calling totalitarianism “the final crystallizing catastrophe” that constitutes its various “elements” into a historical crisis, Arendt makes an analogy between contingent beauty and unprecedented evil [emphasis in original].

Could the Supreme Court’s acceptance of the Crown’s crystallization of title be analogized as an acceptance of an act of totalitarianism by the Crown, an evil that constitutes its various elements into a historical crisis? For further discussion of Arendt’s work, see L.J. Disch, *Hannah Arendt and the Limits of Philosophy* (Ithaca, N.Y.: Cornell University Press, 1994).

¹⁶³ *Delgamuukw (S.C.C.)*, *supra* note 1 at 1107, Lamer C.J.C.

¹⁶⁴ *Ibid.* at 1103.

kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.¹⁶⁵

Words, as bare assertions, are pulled out of the air to justify a basic tenet of colonialism: the settlement of foreign populations to support the expansion of non-Indigenous societies. Colonization is not pretty, when you look into it.¹⁶⁶ In reconciling Crown assertions of sovereignty with ancient rights stemming from Aboriginal occupation, the Court labels colonization as an “infringement” (as if the interference with another Nation’s independent legal rights were a minor imposition and at the fringes of the parties’ relationship). Calling colonization “infringement” is an understatement of immense proportions. While these “infringements” must be “consistent with the special fiduciary relationship between the Crown and aboriginal peoples,”¹⁶⁷ the effect of the Court’s treatment of “infringement” is to make Aboriginal land rights subject to the “colonizer’s” objectives.¹⁶⁸ In effect, the assertion of sovereignty places Aboriginal peoples in a dependent feudal relationship with the Crown.¹⁶⁹

¹⁶⁵ *Ibid.* at 1111 [emphasis in original]. In commenting on this paragraph in “New Directions in the Law of Aboriginal Rights” (1998) 77 Can. Bar Rev. 36 at 62, Catherine Bell has observed that the “fact that many of these objectives fall within provincial jurisdiction suggests that ‘how’ not ‘whether’ rights have been infringed, is the proper focus of future discussions between the parties.” For a critique of the infringement of constitutional Aboriginal rights, see K. McNeil, “How Can Infringements of the Constitutional Rights of Aboriginal Peoples Be Justified?” (1997) 8 Const. Forum 33.

¹⁶⁶ I am paraphrasing Joseph Conrad, who wrote, in D.C.R.A. Goonetilleke, ed., *Heart of Darkness*, 2d ed. (Peterborough, Ont.: Broadview Press, 1999) at 65, that “[t]he conquest of the earth, which mostly means the taking it away from those who have a different complexion or slightly flatter noses than ourselves, is not a pretty thing when you look into it too much.” The process of colonization was described by Machiavelli in “The Prince,” *supra* note 118 at 82-83:

Colonies do not cost much, and with little or no expense a prince can send and maintain them; and in so doing he offends only those whose fields and houses have been taken and given to the new inhabitants, who are only a small part of that state; and those that he offends, being dispersed and poor, cannot ever threaten him, and all the others remain on the one hand unharmed (and because of this, they should remain silent), and on the other afraid of making a mistake, for fear that what happened to those who were dispossessed might happen to them.

¹⁶⁷ *Delgamuukw* (S.C.C.), *supra* note 1 at 1108.

¹⁶⁸ “[B]oth the federal ... and provincial ... governments” can exercise this power: *ibid.* at 1107. For further critique of the Court’s test for infringement, see K. McNeil, *Defining Aboriginal Title in the 90’s: Has the Supreme Court Finally Got it Right?* (Toronto: Robarts Centre for Canadian Studies, 1998).

¹⁶⁹ The United States Supreme Court in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 at 26-27 (1831) observed:

They have in Europe sovereign and demi-sovereign states and states of doubtful sovereignty. But this state [Indian Nations], if it be a state, is still a grade below them all:

This dependent relationship, and the effects of sovereignty's assertion, are further illustrated by the Court's description of the content of Aboriginal title. It is, schizophrenically, "a right to the land itself"¹⁷⁰ that is held by the Crown for the use and benefit of the Aboriginal group.¹⁷¹ While Aboriginal peoples may use their title lands for a variety of purposes,¹⁷² the fact that this title is held by another places Aboriginal peoples in a position analogous to serfs, dependent on their lord to hold the land in their best interests.¹⁷³ Why should Her Majesty hold Aboriginal land, when Aboriginal peoples in British Columbia have not ceded this interest? Why should a legal fiction permit the Crown to dispossess original inhabitants of their radical title when the legal fact of Aboriginal possession has not been refuted?¹⁷⁴

While the Court was careful to note that "aboriginal title is not restricted to those uses which are elements of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right,"¹⁷⁵ the Court nonetheless restricted Aboriginal title in another related way. The Court found, quoting from *Guerin*,¹⁷⁶ that "the same legal principles governed the aboriginal interest in reserve

for not to be able to alienate without permission of the remainder-man or lord, places them in a state of feudal dependence.

¹⁷⁰ *Delgamuukw (S.C.C.)*, *supra* note 1 at 1096.

¹⁷¹ *Ibid.* at 1085-86.

¹⁷² *Ibid.* at 1083.

¹⁷³ Feudal tenure gave important rights to the lord, *vis-à-vis* the tenant, which are analogous to the Crown/Aboriginal relationship, as explained by Milsom, *supra* note 72 at 100:

Rights are dependent upon a lord seen as having total control of his lordship. A tenant is in by the lord's allocation. He can have no more by way of title, unless it is some obligation on the lord to keep him in, or to admit his successors. He cannot by his own transaction confer whatever title he has upon another: he can only surrender it to the lord who may then admit another. And he cannot by himself engage in dispute about the land: in principle, the lord must decide who is to be his tenant.

¹⁷⁴ See K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 107 [hereinafter *Common Law Aboriginal Title*], where McNeil refuted this assertion:

The fiction of original Crown ownership and grants was invented to explain how this feudal relationship arose. That is the fiction's purpose, and that is the extent of its application. The doctrine of tenures, thought capable at common law of giving the Crown a title to land in the event an estate held of it expired, cannot be used otherwise to claim lands which subjects possess.

¹⁷⁵ *Delgamuukw (S.C.C.)*, *supra* note 1 at 1087-88. For a critique of the restriction on Aboriginal rights by reference to Aboriginal pre-contact practices, see R.L. Barsh & J.Y. Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993; B.W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1997) 42 McGill L.J. 1011; and J. Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 Am. Indian L. Rev. 37.

¹⁷⁶ *Supra* note 133.

lands and lands held pursuant to aboriginal title.”¹⁷⁷ Aboriginal peoples will find little solace in the statement that “[t]he Indian interest in the land is the same in both cases.”¹⁷⁸ The similarity of reserve land and title land restricts Aboriginal title because “the nature of the Indian interest in reserve land” is “held by Her Majesty for the use and benefit of the respective bands for which they were set apart”¹⁷⁹ While the Court focuses on the similarity between title and reserves to demonstrate the “breadth” of uses for “any ... purpose for the general welfare of the band,”¹⁸⁰ its reasons ignore the fact that this similarity removes the underlying title from the land’s original inhabitants and vests this title interest in another. This dispossession demonstrates the feudal character of the Crown/Aboriginal relationship concerning land. Even though the content of Aboriginal title encompasses “the broad notion of use and possession ... which incorporates a reference to the present-day needs of aboriginal communities,”¹⁸¹ such use occurs within the context of the Crown’s radical position as lord over the land. The Court’s expansive description of the content of Aboriginal title for the “general welfare of the band”¹⁸² is betrayed by the narrow construction upon which it rests. It gives Aboriginal peoples broad rights over a limited, diminished interest in land.

The inherent limitation the Court finds attached to Aboriginal lands demonstrates the Crown’s feudalistic relationship to Aboriginal peoples. For example, the chief justice observed that the “content of aboriginal title contains an inherent limit that lands held pursuant to title cannot be used in a manner that is irreconcilable with the nature of the claimants’ attachment to those lands.”¹⁸³ This restriction significantly undermines Aboriginal title because it compels Aboriginal peoples to surrender their lands to the Crown if they want to use them for certain “non-Aboriginal” purposes. While the Court was anxious not to restrict Aboriginal land rights “to those activities that have traditionally been

¹⁷⁷ *Delgamuukw* (S.C.C.), *supra* note 1 at 1085, Lamer C.J.C.

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.*, citing section 18 of the *Indian Act*, *supra* note 147.

¹⁸⁰ *Delgamuukw* (S.C.C.), *supra* note 1, citing section 18(2) of the *Indian Act*, *supra* note 147.

¹⁸¹ *Ibid.* at 1085-86.

¹⁸² *Ibid.* at 1086.

¹⁸³ *Ibid.* at 1088.

carried out on it,"¹⁸⁴ it is difficult to read the Court's inherent limits in any other way.¹⁸⁵ The Court found that the nature of the group's attachment to lands "is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group" because of the "special bond" that makes the land part of the group's distinctive culture.¹⁸⁶ As a result, if occupation of Aboriginal land is established by reference to certain activities, the group cannot use the land "in such a fashion as to destroy its value for such a use."¹⁸⁷ In such instances, "[i]f aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so."¹⁸⁸ The unspoken hex of sovereignty places the Crown in the position of receiving and re-designating Aboriginal lands if they are used in nontraditional ways. Why does the Crown take this pre-eminent role here?¹⁸⁹ The fact that Aboriginal peoples would have to "alienate" or "surrender" their lands to the Crown to use them for these other purposes indicates that at some level the Court, despite its claims otherwise, is defining the content of Aboriginal title by reference to

¹⁸⁴ *Ibid.* at 1091. An example of the increased powers Aboriginal peoples might enjoy relative to participation and consultation in lands and resources is found in *Nunavut Tunngavik Inc. v. Canada (Minister of Fisheries and Oceans)* (1997), 149 D.L.R. (4th) 519 (F.C. T.D.), where the Minister of Fisheries and Oceans' allocation of fish was set aside because it did not conform to consultation requirements set out in the Nunavut Agreement. While this case may be distinguished from issues of title because consultation between the minister and the Aboriginal group was mandated by agreement, one might also find courts taking a similar stance relative to title given *Delgamuukw*'s strong requirement for Aboriginal participation where title is found to exist. If British Columbia courts were to review ministerial decisionmaking as the Federal Court did, then resource allocation and management in the province would eventually undergo substantial changes.

¹⁸⁵ For discussion of this point, see The Honourable Mister Justice D. Lambert, "*Van der Peet* and *Delgamuukw*: Ten Unresolved Issues" (1998) 32 U.B.C. L. Rev. 249 at 258-59.

¹⁸⁶ *Delgamuukw (S.C.C.)*, *supra* note 1 at 1089. The Court went on to add, *ibid.*, that these "elements of aboriginal title," referring to the traditional activities and use of the land by Aboriginal peoples, "create" the "inherent limitation on the uses to which the land, over which such title exists, may be put."

¹⁸⁷ *Ibid.* The Court said, *ibid.*, "[f]or example, if occupation is established with reference to the use of the land as a hunting ground" it cannot strip mine it. The Court continued, *ibid.*:

Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).

¹⁸⁸ *Ibid.* at 1091.

¹⁸⁹ When did Aboriginal peoples in British Columbia ever agree to the Crown being able to receive and redesignate their lands if they were used for "unauthorized" (as defined by non-Aboriginal courts) purposes?

traditional activities. Such definition makes Aboriginal title an inferior interest.¹⁹⁰ Establishing title by reference to specific practices is potentially inconsistent with the Court's later statement that "aboriginal title differs from other aboriginal rights ... , [which are defined] in terms of activities."¹⁹¹ If Aboriginal title confers "the right to the land itself,"¹⁹² then the Court's description of inherent limits in terms of activities may well place Aboriginal peoples in a legal strait-jacket concerning their uses, and the polity with which they deal with these interests.¹⁹³

Finally, the Court's test for the proof of Aboriginal title also demonstrates how the interest in land is defined by reference to assertions of Crown sovereignty. Non-Aboriginal sovereignty permeates the criteria Aboriginal groups must satisfy "to make out a claim for aboriginal title."¹⁹⁴ For example, in order to establish title, Aboriginal peoples have to prove that "(i) the land must have been occupied prior to *sovereignty*, (ii) if present occupation is relied on as proof of occupation *pre-sovereignty*, there must be a continuity between present and *pre-sovereignty* occupation, and (iii) at *sovereignty*, that occupation must have been exclusive."¹⁹⁵ Why should Aboriginal groups bear the burden of proving their title and the Crown be presumed to possess it through bare words? Could the Crown establish occupation of land prior to sovereignty? Could the Crown show continuity of occupation between present and *pre-sovereignty* occupation? Could the Crown show that at sovereignty its occupation was exclusive? The Court's mantra of Crown sovereignty is repeated over and over again as the measuring rod for the proof of Aboriginal title. This sceptre is waved at each stage of the Court's test to ensure that proof of Aboriginal occupancy reconciles prior Aboriginal occupation of North America with the assertion of Crown sovereignty.¹⁹⁶ Why should the Aboriginal group bear the burden of reconciliation by proving its occupation of land? After all, the Crown is the subsequent claimant. Why should the Crown not have to prove its

¹⁹⁰ The definition of Aboriginal rights according to traditional activities is criticized in articles by Barsh & Henderson, Morse, and Borrows: see note 175, *supra*.

¹⁹¹ *Delgamuukw (S.C.C.)*, *supra* note 1 at 1095.

¹⁹² *Ibid.*

¹⁹³ One can anticipate numerous judicial contests concerning the elements of Aboriginal title that prohibit its use "in a way that aboriginal title does not permit": *ibid.* at 1091.

¹⁹⁴ *Ibid.* at 1097..

¹⁹⁵ *Ibid.* [emphasis added].

¹⁹⁶ *Ibid.* at 1100.

land claims?¹⁹⁷ The Court's acceptance of assertions of Crown sovereignty ensures that the Crown does not have to meet this burden; it is not held to the same strict legal standard as Aboriginal peoples in proving its claims. This double standard is deeply discriminatory and unjust because it holds Aboriginal peoples to a higher standard in proving title, a standard that the Crown itself could not meet. The Crown does not have to meet any tests of occupation and exclusivity at the time of sovereignty;¹⁹⁸ the Crown gains its title through mere assertion. As the Court states, "[b]ecause it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at the time sovereignty was asserted."¹⁹⁹ Whatever the justification advanced in earlier days for relieving the Crown of this burden, an unjust and discriminatory doctrine of this kind can no longer be accepted.

The Court's approach should be contrasted with statements made in 1888 by the Nisga'a, neighbours of the Gitksan and Wet'suwet'en:

[W]hat we don't like about the Government is their saying this: "We will give you this much land." How can they give it when it is our own? We cannot understand it. ... They have never fought and conquered our people and taken the land in that way, and yet they say now that they will give us so much land—our own land. These chiefs do not talk foolishly, they know the land is their own; our forefathers for generations and generations past had their land here all around us; chiefs have had their own hunting grounds, their salmon streams, and places where they got their berries; it has always been so. It is not only during the last four or five years that we have seen the land; we have always seen and owned it; it is no new thing, it has been ours for generations. If we had only seen it for twenty years and claimed it as our own, it would have been foolish, but it has been ours

¹⁹⁷ The Court said, *ibid.* at 1101, citing *Common Law Aboriginal Title*, *supra* note 174 at 201-02 that, since at common law physical occupation is proof of possession, title "may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts for hunting, fishing or otherwise exploiting its resources." The Court further noted, citing B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 758, that "[i]n considering whether occupation sufficient to ground title is established, 'one must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed.'"

¹⁹⁸ In *Delgamuukw* (S.C.C.), *supra* note 1 at 1104, the Court wrote the following:

The requirement for exclusivity flows from the definition of aboriginal title itself, because I have defined aboriginal title in terms of the right to *exclusive* use and occupation of land. Exclusivity, as an aspect of aboriginal title, vests in the aboriginal community which holds the ability to exclude others from the lands held pursuant to that title. The proof of title must, in this respect, mirror the content of the right [emphasis in original].

¹⁹⁹ *Ibid.* at 1098.

for thousands of years. If any strange person came here and saw the land for twenty years and claimed it, he would be foolish. We have always got our living from the land ...²⁰⁰

D. *The Claim to Self-Government*

In its brief two-paragraph examination of self-government, the Court again revealed the effect of unreflectingly accepting final Crown sovereignty on its comprehension of the issues before it.²⁰¹ After relying on assertions of Crown sovereignty to ground Crown rights throughout the judgment, the Court did not extend to Aboriginal peoples equivalent, generous treatment concerning the effects of Aboriginal sovereignty. Relying on its earlier judgment in *R. v. Pamajewon*,²⁰² the Court reasserted that Aboriginal “rights to self-government, if they

²⁰⁰ David McKay, cited in *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313 at 319 [hereinafter *Calder*]. See also the statement of Nisga’a Gideon Minesque in 1915, which appears in *Calder* at 359:

[W]e have been living here from time immemorial—it has been handed down in legends from the old people and that is what hurts us very much because the white people have come along and taken this land away from us. I myself am an old man and as long as I have lived, my people have been telling me stories about the flood and they did not tell me that I was only to live here on this land for a short time. We have heard that some white men, it must have been in Ottawa; this white man said they must be dreaming when they say they own the land upon which they live. It is not a dream—we are certain that this land belongs to us. Right up to this day the government never made any treaty, not even to our grandfathers or our great-grandfathers.

²⁰¹ The case of *Tsawwassen Indian Band v. Delta (Corp.)* (1997), 149 D.L.R. (4th) 672 (B.C. C.A.) [hereinafter *Tsawwassen*] demonstrates that some courts seem more willing to interpret the common law and applicable legislation to harmonize the emergence of Indian self-government with existing Canadian governance. This development bodes well for those who are concerned with stability and certainty in any changes brought about through the expansion of Indian powers. *Tsawwassen* concerned the relationship between Indian bands and municipalities relative to taxation and the provisions of community services. Two bands separately invoked provisions of the *Indian Self Government Enabling Act*, R.S.B.C. 1996, c. 219 to tax land occupied by non-Aboriginal residents on their reserves. As a result, the municipalities that had provided services to the reserves sought to discontinue them. The court held that the municipalities could not discontinue these services without reasonable notice because of a common law duty imposed on them through their relationship with the bands. The municipalities’ common law duty was found in *Canada (Minister of Justice) v. Levis (Town of)*, [1919] A.C. 505 (P.C.), and was also grounded in the fact that the municipalities were dealers in public services, which gave them advantages over the bands in terms of control, experience, and long-held legislative power. The *Indian Self Government Enabling Act* was found not to have abrogated this duty; however, the court found in *Tsawwassen*, *ibid.* at 687 that these duties were not indefinite because it was “feasible for the Bands to eventually become self-sufficient with respect to the provision of services.” Since the band’s population and powers of governance made it possible for them to provide these services in the foreseeable future, the municipal duty to provide services could be severed through reasonable notice. The court remitted the question of what amounts to reasonable notice to the trial court.

²⁰² [1996] 2 S.C.R. 821.

existed, cannot be framed in excessively general terms.”²⁰³ The contrast in the Court’s treatment of Crown and Aboriginal sovereignty could not be more striking. The Court was quite willing to frame Crown rights to self-government in the most “excessive and general” of terms; simple utterances were sufficient to grant the Crown the widest possible range of entitlements to others’ ancient rights. On the other hand, detailed evidence concerning Gitksan and Wet’suwet’en sovereignty over specific people and territory (Houses, clans, chiefs, Feasts, crests, poles, laws, and so forth) was too broad to “lay down the legal principles to guide future litigation.”²⁰⁴ As a result, the Court held that the advancement of the Aboriginal right to self-government in the supposedly broad terms before it was not cognizable under section 35(1) of the *Constitution Act, 1982*.²⁰⁵ Is the Crown’s assertion of broad rights of Crown sovereignty any more cognizable, given its unexamined extension and unquestioned acceptance by the Court in this case? Where, in this treatment, is “equality before the law”?²⁰⁶

Given that Aboriginal peoples in British Columbia were not conquered and never agreed to diminish their governmental rights, Aboriginal sovereignty should be placed on at least the same, if not greater, footing as Crown sovereignty. It would be interesting to subject the Court’s treatment of Crown sovereignty to the same standards it expects for evidence of Aboriginal self-government. If this approach was followed, perhaps the same would be said of Crown sovereignty as the Court wrote of Aboriginal sovereignty:

The broad nature of the claim at trial also led to a failure by the parties to address many of the difficult conceptual issues which surround the recognition of [Crown] self-government. ... We received little in the way of submissions that would help us to grapple with these difficult and central issues. Without assistance from the parties, it would be

²⁰³ *Delgamuukw (S.C.C.)*, *supra* note 1 at 1114.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ The principle of equality before the law was explained in *Canada (A.G.) v. Lavell* (1973), [1974] S.C.R. 1349 at 1366:

“[E]quality before the law” ... is frequently invoked to demonstrate that the same law applies to the highest official of government as to any other ordinary citizen, and in this regard Professor F.R. Scott, in delivering the Plaunt Memorial Lectures on Civil Liberties and Canadian Federalism in 1959, speaking of the case of *Roncarelli v. Duplessis*, had occasion to say:

It is always a triumph for the law to show that it is applied equally to all without fear or favour. This is what we mean when we say that all are equal before the law.

imprudent for the Court to step into the breach. In these circumstances, the issue of [Crown] self-government will fall to be determined at trial.²⁰⁷

Of course, this statement was written as a commentary on Aboriginal sovereignty, not Crown sovereignty, and the Court was unwilling to “step into the breach” to consider the conceptual issues surrounding Aboriginal self-government. Why did the Court cross this divide so easily to recognize Crown self-government throughout the judgment? This discrepancy requires further explanation by the Court. The implications of the assertion of Crown sovereignty need to be more carefully scrutinized to assess the legality and justice of the non-consensual colonization of British Columbia. Without such an examination, the unequal treatment of Aboriginal and Crown sovereignty perpetuates historical injustices and therefore fails to respect the distinctive cultures of pre-existing Aboriginal societies in contemporary Canadian society.²⁰⁸

1. The Court’s range in reviewing sovereignty

In suggesting that the Court interrogate Crown assertions of sovereignty, a central question remains: are the courts permitted to engage in such an inquiry? The answer is yes; Canadian courts are not prevented from reviewing Sovereign acquisitions of new territory in cases dealing with Aboriginal title.²⁰⁹ The “Act of State” doctrine, which deals with this issue, was examined by the Supreme Court of Canada in the *Calder* case and was found not to apply. Justice Hall gave two reasons why it was inappropriate to extend the Act of State doctrine to cases dealing with Aboriginal title. First, “it has never been invoked in claims dependent on aboriginal title”²¹⁰ and, therefore, a finding that the Act of State doctrine applied to cases dealing with Aboriginal title would be unprecedented and unsupported by the jurisprudence. Second, the Act of State doctrine only deals with situations where a “Sovereign, in dealings with another Sovereign (by treaty of cession or conquest) acquires land.”²¹¹ British Columbia did not acquire Gitksan and

²⁰⁷ *Delgamuukw* (S.C.C.), *supra* note 1 at 1115.

²⁰⁸ For an examination of the unequal treatment of Aboriginal and non-Aboriginal sovereignty in the United States, see J.W. Singer, “Sovereignty and Property” (1991) 86 Nw. U. L. Rev. 1.

²⁰⁹ See *Calder*, *supra* note 200.

²¹⁰ *Ibid.* at 405.

²¹¹ *Ibid.*

Wet'suwet'en land by a treaty or conquest. Therefore, this doctrine would have no application in examining assertions of Crown sovereignty because the courts would not be reviewing or enforcing a treaty between two sovereign states, nor would they be reviewing a grant of title from a previously conquered sovereign.²¹² As such, the courts would be permitted to review the effects of the Crown assertion of sovereignty over non-treaty Aboriginal peoples in British Columbia.

In fact, overseeing the proper conduct of other branches of government is required of the courts as independent institutions, and of the judiciary as formed of individuals within these institutions.²¹³ Judicial independence has been guaranteed for centuries and is a cornerstone of English and Canadian constitutionalism.²¹⁴ Canadian courts are separate and autonomous from the Crown and the legislature; they do not function as the servants of the Queen or Parliament. They administer the rule of law, which is "superior and antecedent not only to legislation and judicial decisions but also to the written constitution."²¹⁵ The British Columbia Court of Appeal noted in *BCGEU v. British Columbia (A.G.)*²¹⁶ that judicial independence in England was won with the passage of legislation in 1701²¹⁷ that gave tenure to judges. This Act was

²¹² Some might contend, however, that the Act of State doctrine should be extended to prevent the Court from reviewing the very assertion of Crown sovereignty. This may be appropriate on the ground that such review (despite not being an issue of treaty of conquest) would nevertheless be a challenge to an Act of State. In support, they may cite the doctrine, cited in *Calder, supra* note 200 at 406, which is a "recognition of the Sovereign prerogative to acquire territory in a way that cannot be later challenged in a municipal Court." For those who make this argument, it should be remembered that the history of parliamentary democracy's development is its attempt to restrict and constrain the Crown's prerogative powers: see C. Hill, *The Century of Revolution, 1603-1714* (New York: Norton, 1980) at 34-74, 119-44, 222-41, 275-90. The extension of the Crown's prerogative to mere "assertions" may be a dangerous precedent that undermines the hard fought struggles to bridle Crown power.

²¹³ For commentary on the differences between institutional and individual independence of the judiciary, see the observations of R.J. Scott, "Accountability and Independence" (1996) 45 U.N.B.L.J. 27.

²¹⁴ See *R. v. Lippé*, [1991] 2 S.C.R. 114 at 139: "[J]udicial independence is critical to the public's perception of impartiality. Independence is the cornerstone, a necessary prerequisite, for judicial impartiality."

²¹⁵ L. Tremblay, *The Rule of Law, Justice and Interpretation* (Montreal: McGill-Queen's University Press, 1997) at 3.

²¹⁶ (1985), 20 D.L.R. (4th) 399 at 401 [hereinafter *BCGEU*]. Judicial independence also applies in Canada, as the Court noted at 402: "In inheriting a constitution similar in principle to that of the United Kingdom we have also inherited the fundamental precept that the courts represent a separate and independent branch of government."

²¹⁷ See *An Act for the further Limitation of the Crown and better securing the Rights and Liberties of the Subject*, 1700 & 1701 (U.K.), 12 & 13 Will. III, c. 2.

preceded by centuries of struggle with the executive and legislative branches of government. As Sir William Holdsworth, the distinguished British legal historian, has said:

The judiciary has separate and autonomous powers just as truly as the King or Parliament; and in the exercise of these powers, its members are not more in the position of servants than the King or Parliament in the exercise of their powers. ... The judges have powers of this nature because, being entrusted with the maintenance of the Supremacy of law, they are and long have been regarded as a separate and independent part of the constitution.²¹⁸

Judicial independence and the supremacy of law ensures that courts are free to question the actions of the other branches of government, if the law requires it, when an action is brought before them.²¹⁹ Presumably, the courts would be permitted to scrutinize Crown assertions of sovereignty and find them invalid if such proclamations did not comply with the rule of law.²²⁰ As an independent body, a court would not be barred from finding that the laws of Canada and British Columbia relating to Aboriginal lands and governance are beyond the reach of the Crown or Parliament if they do not comply with the rule of law, as expressed in the Constitution's principles or provisions.²²¹ To be more specific, if the court found that the Crown did not comply with the law in gaining underlying title and overriding sovereignty in British Columbia,

²¹⁸ Cited in *BCGEU*, *supra* note 216 at 401.

²¹⁹ See *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217 [hereinafter *Quebec Secession Reference*] at 258:

Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the *Charter*, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy.

²²⁰ It may be asked why the Court should even have this power as an alien political body on Aboriginal land. One answer to this question is that, in this case, Aboriginal peoples voluntarily brought their action to the Court and thereby vested this authority in them when they asked it to scrutinize such issues. As such, the plaintiffs were asking the Court to be a Court of law (not politics), to equally examine principles of law from Canadian and Gitksan/Wet'suwet'en societies, and to deliver a judgment based on these criteria.

²²¹ See *Reference Re Language Rights Under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1867*, [1985] 1 S.C.R. 721 [hereinafter *Manitoba Language Reference*]. For an excellent article examining the distinctions between constitutional principles and provisions in the rule of law, see P. Monahan, "Is the Pearson Airport Legislation Unconstitutional?: The Rule of Law as a Limit on Contract Repudiation by Government" (1995) 33 *Osgoode Hall L.J.* 411. For an alternative argument regarding the importance of the distinction between constitutional principles and provisions, see J.C. Bakan & D. Schneiderman, "Submission to the Standing Senate Committee on Legal and Constitution Affairs Concerning Bill C-22" [unpublished, on file with author].

it would have to hold that such assertions were “of no legal force or effect.”²²²

Readers may question whether individual judges would ever declare invalid the assertion of Crown sovereignty in British Columbia, despite being a legal, institutional possibility. Because of what is at stake in such a declaration, there would be an enormous temptation to do everything possible to avoid such an outcome. After all, it may be asked, who would respect the law and the judiciary if they arrived at this conclusion? Too many people may suffer. Not knowing the law or history, most would consider such a decision unreasonable, impractical, unrealistic, and unsound. Since very few people would probably understand the courts if they arrived at such a decision, there may be real concerns about whether such a declaration would bring the administration of justice into disrepute.

Yet, doesn't this line of inquiry only look at the issue from one side? Aboriginal peoples, and others who are puzzled by the wide effect of Crown assertions, might develop a greater respect for the judiciary. People who agree with the judiciary's invalidation of Crown title may understand the troubling history of Crown/Aboriginal relations, and they might see how suffering could be reduced through such a rule. These people would likely consider the decision to be reasonable, practical, realistic, and sensible. The decision may even enhance the reputation of the administration of justice as the courts apply the law in accordance with their highest principles. Therefore, despite the challenges a judge may encounter in questioning assertions of Crown sovereignty, the criteria that must be used to arrive at such a decision cannot be based on a numeric tally of public opinion.²²³ The judiciary is independent. Conclusions must be legally expressed. It is not appropriate for judges to use their power in any other way. While most judges would no doubt struggle with such a ruling, if they were led to such a conclusion (because they found in law that the effects of assertions of Crown sovereignty on Aboriginal peoples legally “did not make sense”) and they did not express it, the very integrity of the Canadian legal fabric would be undermined.²²⁴ If the judiciary is to take the Constitution, the rule of

²²² *Manitoba Language Reference*, *supra* note 221 at 753.

²²³ As the Supreme Court said in the *Quebec Secession Reference*, *supra* note 219 at 260: “Canadians have never accepted that ours is a system of simple majority rule.”

²²⁴ Adjudication by neutral judges is considered to be the most important benefit of civilization: see J. Locke, *The Second Treatise of Government* (New York: Macmillan, 1980) at 9-10. However, for a discussion of how a judge may never be compelled to arrive at a certain result because of the interpretive nature of law and the value-laden character of the judicial role, see D.

law, and their own office seriously, judicial independence mandates “impartial and disinterested umpires.”²²⁵ As such, any judge reviewing the assertion of sovereignty over Aboriginal peoples would be expected to do so in an impartial manner,²²⁶ without bias or predisposition to the result.²²⁷ The fair and equitable application of law demands strict adherence to this standard.²²⁸

Kennedy, “Toward a Critical Phenomenology of Judging” in A.C. Hutchinson & P. Monahan, eds., *The Rule of Law: Ideal or Ideology?* (Toronto: Carswell, 1987) 141.

²²⁵ W.R. Lederman, “Judicial Independence and Court Reform in Canada for the 1990’s” (1987) 12 *Queen’s L.J.* 385 at 397, n. 25.

²²⁶ See M.L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995) at 1, where Lamer C.J.C. observed:

The rule of law, interpreted and applied by impartial judges, is the guarantee of everyone’s rights and freedoms. ... Judicial independence is, at its root, concerned with impartiality, in appearance and in fact. And these, of course, are elements essential to an effective judiciary. Independence is not a perk of judicial office. It is a guarantee of the institutional conditions of impartiality.

For further discussions of impartiality and judicial independence, see also *Valente v. R.*, [1985] 2 S.C.R. 673 at 685; *R. v. Généreux*, [1992] 1 S.C.R. 259 at 283; *R. v. Beauregard*, [1986] 2 S.C.R. 56 at 69; *Liteky v. U.S.*, 510 U.S. 540 at 552 (1994), cited with approval in *R.D.S.*, *supra* note 108 at 528; and R.F. Devlin, “We Can’t Go On Together With Suspicious Minds: Judicial Bias and Racialized Perspective in *R. v. R.D.S.*” (1995) 18 *Dal. L.J.* 408.

²²⁷ In *R.D.S.*, *supra* note 108 at 529, Cory J. cited with approval *R. v. Bertram*, [1989] O.J. No. 2123 (H.C.J.), online: QL (OJ):

In common usage bias describes a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

²²⁸ This idea is illustrated in the fictive exchange between Sir Thomas More and William Roper in Sir Thomas More’s play, “A Man For All Seasons” in R. Bolt, *A Man For All Seasons: A Play of Sir Thomas More* (Toronto: Irwin, 1963) at 39:

More: ... What would you do? Cut a great road through the law to get after the Devil?

Roper: I’d cut down every law in England to do that!

More: Oh? ... And when the last law was down, and the Devil turned round on you—where would you hide, Roper, the laws all being flat? ... This country’s planted thick with laws from coast to coast—Man’s laws, not God’s—and if you cut them down—and you’re just the man to do it—d’you really think you could stand upright in the winds that would blow then? ... Yes, I’d give the Devil benefit of law, for my own safety’s sake.

2. Violations of the rule of law

Aristotle observed that “[r]ightly constituted laws should be the final sovereign”²²⁹ in any just political community. He argued that the rule of law (*dikaioyne*) is preferable to personal rule because law better distributes and combines moral virtue and important legal customs to make the members of a state just and good (*nomos*). The sovereignty of law could be threatened if “the law itself [had] a bias in favour of one class or another” or if the laws were “in accordance with wrong or perverted constitutions.”²³⁰ Does the Court’s reasoning in *Delgamuukw* threaten the sovereignty of law? Failure to question the Crown’s assertions (while strictly scrutinizing Aboriginal assertions) appears to create a bias in the law in favour of non-Aboriginal groups who rely on Crown assertions in Canada. The Court’s failure to interrogate Crown sovereignty also potentially perverts Canada’s Constitution. The *Constitution Act, 1982* proclaims that “Canada is founded upon principles that recognize the supremacy of God and the rule of law.”²³¹ Moreover, section 52(1) states that the Constitution is “the supreme law of Canada.” Did the Court in *Delgamuukw* respect the supremacy of the rule of law in the Constitution? In the *Manitoba Language Reference*, the Supreme Court of Canada recognized the supremacy of law over the government when it wrote:

The rule of law, a fundamental principle of our Constitution, must mean at least two things. First, that the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power. Indeed, it is because of the supremacy of law over the government, as established in ... s. 52 of the *Constitution Act, 1982*, that this Court must find the unconstitutional laws of Manitoba to be invalid and of no force or effect.²³²

²²⁹ E. Barker, ed., *The Politics of Aristotle* (New York: Oxford University Press, 1958) at 127 [translated by author].

²³⁰ *Ibid.* Throughout *Delgamuukw*, the Court reveals an internal conflict as it vests final sovereignty in both the Crown and the rule of law. This conflict threatens the sovereignty of law in Canada. The vesting of final sovereignty in the Crown may produce a bias in the law in favour of Canada’s non-Aboriginal population, which traces its rights to the Crown. Aboriginal peoples do not find their rights rooted in assertions of Crown sovereignty and thus could experience great difficulties in having their entitlements placed on an equal footing with those derived from the Crown. Furthermore, vesting final sovereignty in the Crown may pervert the Constitution and its expression regarding the rule of law, in which final sovereignty is placed.

²³¹ *Constitution Act, 1982*, *supra* note 38, Preamble.

²³² *Manitoba Language Reference*, *supra* note 221 at 748-49.

The Supreme Court of Canada's holding that the first principle of the rule of law is to preclude the exercise of arbitrary power is significant. This article has illustrated that the Crown's assertion of sovereignty, depriving Aboriginal peoples of underlying title and overriding self-government, is a blunt exercise of arbitrary power. It is arbitrary in the sense that, in British Columbia, it has been exercised at the sole discretion of non-Aboriginal governments without the participation or agreement of the land's original inhabitants, and it has resulted in the virtual devastation of their territories and communities.²³³

What could be more arbitrary than one nation substantially invalidating a politically distinct peoples' rights merely because that nation says it is so, all without an elementally persuasive legal explanation? Such an approach only assumes what it attempts to prove. The Crown's assertion of sovereignty diminishing Aboriginal entitlements is therefore also arbitrary in the sense that, at its core, it has been done without coherent reasons. The Court has not articulated how (and by what legal right) assertions of Crown sovereignty grant underlying title to the Crown or displace Aboriginal governance. The Crown's claim (upon the assertion of sovereignty) to possess lands that are not their own is wholly unsubstantiated by the physical reality at the time of their arrival. These "vague" and "unintelligible" propositions "do not make sense" under the rule of law because they are merely a raw act of arbitrary government expression.²³⁴ As one author states, "[t]he very essence of arbitrariness is to have one's status redefined by the state without an adequate explanation of its reasons for doing so."²³⁵ As a result, the assertion of Crown sovereignty over Aboriginal peoples in British Columbia violates the first principle of the rule of law and is unconstitutional.

The assertion of Crown sovereignty, and an accompanying denial of Aboriginal rights to self-government, also violates the second

²³³ For example, the non-recognition of Aboriginal title; the creation of small, inadequate reserves; the denial of the vote; the passage of anti-potlach laws; the denial of the right to pre-empt land, the replacement of systems of government through the *Indian Act*; the outlawing of land claims support; the horror of residential schools; and numerous other actions taken as a result of the Crown's assertion of sovereignty.

²³⁴ To understand how vagueness and unintelligibility relate to the rule of law, see *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 643: "A law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate." How does "crystallization" of Aboriginal title, which only assumes what the Crown aims to prove, provide sufficient guidance for legal debate on title?

²³⁵ R.L. Rabin, "Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement" (1976) 44 U. Chi. L. Rev. 60 at 77-78.

principle of the rule of law, which the Supreme Court described in the following terms:

Second, the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order. Law and order are indispensable elements of civilized life. ... As John Locke once said, "A government without laws is, I suppose, a mystery in politics, inconceivable to human capacity and inconsistent with human society" ... According to Wade and Phillips, *Constitutional Administrative Law* (9th ed. 1977), at p. 89: "... the rule of law expresses a preference for law and order within a community rather than anarchy, warfare and constant strife. In this sense, the rule of law is a philosophical view of society which in the Western tradition is linked with basic democratic notions."²³⁶

Failure to recognize that Aboriginal governments in British Columbia have maintained an actual order of positive and customary laws, which preserves and embodies general principles of their ancient normative structures, has led to near anarchy and constant strife within these communities. One only has to be passingly familiar with the encumbrances on Aboriginal governments to appreciate this fact. Aboriginal communities have suffered greatly because their governments have been oppressed.²³⁷ The Crown's suppression of Aboriginal governance denies these groups indispensable elements of law and order. It displaces Aboriginal peoples' "purposive ordering of social relations providing a basis upon which an actual [contemporary, culturally appropriate and effective] order of positive laws can be brought into existence."²³⁸ How there is any justification for such repression in the circumstances this article has described "is a mystery in politics, inconceivable to human capacity and inconsistent with human society." The denial of Aboriginal powers of governance is therefore

²³⁶ *Manitoba Language Reference*, *supra* note 221 at 749.

²³⁷ For a landmark report describing the encumbrances Aboriginal governments function within, see K. Penner, *Indian Self-Government in Canada: Report of the Special Committee* (Ottawa: Queen's Printer, 1983). Other accessible descriptions include H. Adams, *Prison of Grass: Canada from a Native Point of View* (Toronto: General, 1975); H. Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: M.G. Hurtig, 1969); J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1989); B. Richardson, ed., *Drum Beat: Anger and Renewal in Indian Country* (Toronto: Summerhill, 1989); B. Richardson, *People of Terra Nullius: Betrayal and Rebirth in Aboriginal Canada* (Vancouver: Douglas & McIntyre, 1993); and S.M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda, 1968-70* (Toronto: University of Toronto Press, 1981).

²³⁸ *Manitoba Language Reference*, *supra* note 221 at 750-51. For examples of how the Canadian government acted contrary to the rule of law in displacing Aboriginal peoples' own purposive ordering of their own laws and social relations, see Canada, *Report of the Royal Commission on Aboriginal Peoples*, vol. 1 (Ottawa: Canada Communication Group, 1996) (Co-chairs: R. Dussault & G. Erasmus) at 137-200, 245-604.

contrary to the second principle of the rule of law because it destroys orderliness within Aboriginal communities.

However, despite the disorder imposed on Aboriginal peoples by the assertion of Crown sovereignty, some would argue that the second principle of the rule of law must also consider the “chaos and anarchy” that would result if the Crown’s assertion was held to be invalid and of no legal force and effect. The Court would not tolerate a legal vacuum,²³⁹ nor would it tolerate a province being without a valid and effectual legal system.²⁴⁰ Since the Constitution would not suffer a province without laws, the Constitution would require that temporary validity, force, and effect be given to those rights, obligations, and other effects that have arisen under those laws until such time as the problem leading to the invalidity could be corrected.²⁴¹ In other words, despite the invalidity of British Columbia laws (because their arbitrary, non-legal foundation violates the first principle of the rule of law) the second principle of the rule of law would require (1) that Aboriginal normative orders be facilitated by recognizing Aboriginal powers of governance, and (2) that the province’s laws continue in effect until the parties correct the invalidity by grounding Crown title and sovereignty on a sound, substantiated legal foundation. Therefore, the next time the Court considers Aboriginal self-government in British Columbia, the second principle of the rule of law would require a recognition of Aboriginal self-government to enable communities to maintain and create law and order. It would further require that the Court declare British Columbia’s invalid laws operative until they could be fixed by the federal Crown, working with First Nations, to place Crown sovereignty in a workable, but proper, legal network.²⁴²

²³⁹ See *Manitoba Language Reference*, *supra* note 221 at 753.

²⁴⁰ *Ibid.* at 757.

²⁴¹ *Ibid.* at 768, where this rule was expressed as follows:

All rights, obligations and any other effects which have arisen under Acts of the Manitoba Legislature which are purportedly repealed, spent, or would currently be in force were it not for their constitutional defect, and which are *not* saved by the *de facto* doctrine, or doctrines such as *res judicata* and mistake of law, are deemed temporarily to have been, and to continue to be, enforceable and beyond challenge from the date of their creation to the expiry of the minimum period of time necessary for translation, re-enactment, printing and publishing of these laws. At the termination of the minimum period these rights, obligations and other effects will cease to have force and effect unless the Acts under which they arose have been translated, re-enacted, printed and published in both languages [emphasis in original].

²⁴² In order to enjoy the rule of law, both Aboriginal and non-Aboriginal peoples must live by legal frameworks that are extensions of themselves. A review of Canada’s law and history reveals that Aboriginal peoples have not enjoyed this recognition. Is this a form of despotism? Aboriginal

E. Extinguishment of Aboriginal Rights

As each section of this article has illustrated, the creation of British Columbia was based on a unilateral declaration of sovereignty by the Crown.²⁴³ Aboriginal peoples had their own governments and laws, and the Crown purported to arbitrarily change these pre-existing orders by granting themselves power to extinguish or infringe these ancient institutions. In *Sparrow*,²⁴⁴ the Court held that prior to the enactment of the *Constitution Act, 1982*, the federal government could extinguish Aboriginal rights without the consent of a group claiming the right.²⁴⁵ The final section of *Delgamuukw* confirmed this power.²⁴⁶ In *Delgamuukw*, the Court noted that section 91(24) of the *Constitution Act, 1867* vests the federal government with the exclusive power to legislate in relation to "Indians, and Lands reserved for Indians."²⁴⁷ This power was interpreted as "encompass[ing] within it the exclusive power to extinguish aboriginal rights, including aboriginal title."²⁴⁸ The Court

and non-Aboriginal peoples must be permitted to create structures that recognize the importance of both Aboriginal and Crown sovereignty in Canada. People will find greater dignity in laws that facilitate this objective. See C. Taylor, *Philosophical Arguments* (Cambridge, Mass.: Harvard University Press, 1995) at 187, where he writes:

In a despotism ... the requisite disciplines are maintained by coercion. In order to have a free society, one has to replace this coercion with something else. This can only be a willing identification with the polis on the part of the citizens, a sense that the political institutions in which they live are an expression of themselves. The "laws" have to be seen as reflecting and entrenching their dignity as citizens, and hence to be in a sense extensions of themselves. This understanding that the political institutions are a common bulwark of citizen dignity is the basis of what Montesquieu called "vertu" But it is quite unlike the apolitical attachment to universal principle that the stoics advocated or that is central to modern ethics of rule by law.

See the Nisga'a treaty for one possible model in creating this proper legal framework.

²⁴³ It was unilateral in the sense that Aboriginal peoples did not participate in its creation, and their political will in the matter was actively suppressed. For a discussion of the implications of unilateral assertions of sovereignty, see *Quebec Secession Reference*, *supra* note 219 at 264-66.

²⁴⁴ *Supra* note 54.

²⁴⁵ The Court noted in *Sparrow*, *ibid.* at 1099, that "[t]he consent to its extinguishment before the *Constitution Act, 1982*, was not required ... The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right." The Court has also suggested that, prior to 1982, negotiated treaty rights can be unilaterally modified without the consent of the Aboriginal group that claims the protection of the treaty: see *R. v. Badger*, [1996] 1 S.C.R. 771.

²⁴⁶ In *Delgamuukw* (S.C.C.), *supra* note 1 at 1115, the Court noted that "[r]ights which were extinguished by the sovereign before that time are not revived by [section 35(1) of the *Constitution Act, 1982*]."

²⁴⁷ (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

²⁴⁸ *Delgamuukw* (S.C.C.), *supra* note 1 at 1116.

arrived at its conclusion without ever questioning whether extinguishment was “a morally and politically defensible conception of aboriginal rights.”²⁴⁹ It simply assumed that “[i]n a federal system such as Canada’s, the need to determine whether aboriginal rights have been extinguished raises the question of which level of government has jurisdiction to do so.”²⁵⁰ The question of extinguishment is kept within the bounds of Crown sovereignty by only examining the interplay between federal and provincial powers in the Constitution.²⁵¹ In framing extinguishment in terms of a “need,” the Court implies that it deems the subordination of pre-existing governments as necessary to the construction of Canadian federalism. There is no critical examination of whether it is lawful, in the first place, for one nation to extinguish another’s rights without their democratic participation or consent, merely through a distant assertion of sovereignty. The Court’s formulation of this doctrine seemingly prevents questioning the legitimacy of acts that extinguished Aboriginal rights following the Crown’s assertion of sovereignty before 1982.

The limited scope of the Court’s inquiry is illustrated in the three questions it addresses concerning extinguishment. The questions are (1) whether the *province* had the jurisdiction to extinguish Aboriginal rights between 1871 and 1982;²⁵² (2) if the *province* was without jurisdiction in this period, whether it could extinguish title through laws of general application; and (3) whether a *provincial* law, which could not otherwise extinguish Aboriginal rights, might be given that power through referential incorporation. The Court only looked at the province’s role in extinguishment and answered each of these questions in the negative by holding that the provincial level of government had no power to extinguish Aboriginal rights. Nowhere did the Court explicitly comment

²⁴⁹ *Van der Peet*, *supra* note 56 at 547, citing *Walters*, *supra* note 15 at 413.

²⁵⁰ *Delgamuukw* (S.C.C.), *supra* note 1 at 1115.

²⁵¹ The submergence of Aboriginal jurisdiction within federal/provincial disputes is also found in other areas of Aboriginal rights jurisprudence: see M.E. Turpel, “Home/Land” (1991) 10 Can. J. Fam. L. 17.

²⁵² The Court expressed no opinion concerning extinguishment of Aboriginal title in British Columbia prior to 1871. Since there were numerous proclamations and ordinances prior to 1871 in this area (which some courts have interpreted as extinguishing Aboriginal title in British Columbia), the Court’s failure to address this question leaves a very wide door open for those who would claim that Aboriginal title in the province was extinguished before British Columbia entered Confederation.

on the participation and rights of Aboriginal peoples in this matter.²⁵³ Such a comment would have been more consistent with Aboriginal peoples' status as original occupants of the land, and more in harmony with the idea that it is they who would have to consent to any alteration of their legal status.²⁵⁴ For example, in addressing the first question, the Court held that the province could not establish jurisdiction to extinguish Aboriginal title because section 109 of the *Constitution Act, 1867* only gave British Columbia ownership of lands that belonged to them at the time of union in 1871. The Court stated that "[a]lthough that provision [section 109] vests underlying title in provincial Crowns, it qualifies provincial ownership by making it subject to the 'any interest other than that of the Province in the same.'"²⁵⁵ Therefore, since Aboriginal title lands are "any Interest other than that of the Province in the same," the province cannot extinguish title to these lands because section 91(24) gives the federal government jurisdiction over this interest.²⁵⁶ In addressing the second question, the Court held that the province could not establish jurisdiction to extinguish Aboriginal title through laws of general application because "provincial laws which single out Indians for special treatment are *ultra vires*, because they are in relation to Indians and therefore invade federal jurisdiction."²⁵⁷

²⁵³ The Supreme Court of Canada recently determined that band councils could grant long-term interests in reserve land, without extinguishing their rights in the parcel. In *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119 at 146, the Court found that under section 28(2) of the *Indian Act*, R.S.C. 1952, c. 149, bands have the authority to "grant limited indeterminate rights in reserve lands" without securing the consent of their membership.

²⁵⁴ For a case that demonstrates the role of Aboriginal consent in the alternation of their legal interests, see *Semiahmoo Indian Band v. R.*, [1998] 1 F.C. 3 (C.A.) [hereinafter *Semiahmoo*]. The Court's attention was focused on the Crown's fiduciary obligations that attached to surrenders of lands under sections 37 and 38 of the *Indian Act*, S.C. 1951, c. 29. In *Semiahmoo*, *ibid.* at 28, the Court found that the Crown had a "post-surrender" fiduciary duty to act in the best interests of the band, and that it had violated this duty when it failed to return land to the band when it requested it at a later date. *Semiahmoo* is significant because it demonstrates some courts' concerns regarding the Crown's treatment of Indian consent. For commentary, see B. Freedman, "*Semiahmoo Indian Band v. Canada*" (1997) 36 Alta. L. Rev. 218. See also E. Meehan & E. Stewart, "Developments in Aboriginal Law: The 1995-96 Term" (1997) 8 Supreme Court L.R. 1 at 4 (commenting on *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344).

²⁵⁵ *Delgamuukw (S.C.C.)*, *supra* note 1 at 1117.

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid.* at 1119. The Court continued, at 1120-21: "As a result, a provincial law could never, *proprio vigore*, extinguish aboriginal rights, because the intention to do so would take the law outside provincial jurisdiction." For further commentary on the jurisdictional implications of *Delgamuukw*, see N. Bankes, "*Delgamuukw*, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights" (1998) 32 U.B.C. L. Rev. 317.

Finally, in addressing the third question concerning extinguishment, the Court held that the province could not extinguish Aboriginal title through referential incorporation because section 88 of the *Indian Act*, which allows referential incorporation in some cases, “does not evince the requisite clear and plain intent to extinguish aboriginal rights.”²⁵⁸ One can see in this treatment the narrow bounds within which the Court’s discussion of extinguishment occurs. While the Court in this case finds that the provinces cannot exercise powers of extinguishment over Aboriginal title, this result does not mean that the Crown’s assertion of sovereignty cannot dispossess Aboriginal peoples of their ancient rights. This is still possible, as long as it is done by the proper manifestation of the Crown, which, in this instance, is the federal government.²⁵⁹

These wide powers of extinguishment illustrate the problem of unimpeded assertions of Crown sovereignty for Aboriginal peoples in British Columbia. This power “risks undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect the distinctive cultures of pre-existing aboriginal societies.”²⁶⁰ When an alien government gives itself the exclusive authority to extinguish the distinct rights of another people, without their consent, one wonders how this can be constitutionally justified. Such a result must be congruent with broader constitutional principles. In the *Quebec Secession Reference*, the Supreme Court of Canada identified some of these principles. It observed that in the Canadian “constitutional tradition, legality and legitimacy are linked.”²⁶¹ Any consideration of the extinguishment of

²⁵⁸ *Delgamuukw* (S.C.C.), *supra* note 1 at 1122.

²⁵⁹ The cases of *Haida Nation v. British Columbia (Ministry of Forests)* (1997), 153 D.L.R. (4th) 1 (B.C. C.A.) [hereinafter *Haida*]; *Halfway River First Nation v. British Columbia (Ministry of Forests)* (1998), 39 B.C.L.R. (3d) 227 (B.C. S.C.); and *R. v. Paul (T.P.)* (1998), 196 N.B.R. (2d) 292 (C.A.) demonstrate that Aboriginal peoples’ interest in their lands can affect the province’s use and management of that resource. For instance, in *Haida*, the Haida claimed Aboriginal title to a large area subject to a tree farm license. The issue was whether the Haida’s claim was capable of constituting an encumbrance within the meaning of section 28 of the *Forest Act*, R.S.B.C. 1996, c. 157. The British Columbia Court of Appeal held in *Haida*, *ibid.* at 5, that there was “no reason to doubt that, as a matter of plain or grammatical meaning, the aboriginal title claimed by the Haida Nation, if it exists, constitutes an encumbrance on the Crown’s title to the timber.” This case, coupled with *Delgamuukw*, demonstrates the significant impact that Aboriginal title could have on the use and management of provincial Crown lands.

²⁶⁰ *Côté*, *supra* note 39 at 175. The Court cites Brennan J. in *Mabo*, *supra* note 59 at 42: “Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.”

²⁶¹ *Quebec Secession Reference*, *supra* note 219 at 240.

Aboriginal rights should therefore review these broader principles to assess the legality and legitimacy of the Crown's assertion of sovereignty in British Columbia. The need for this wide examination is suggested by the entrenchment of Aboriginal rights in the Constitution. As the Supreme Court observed in *Sparrow*, "[s]ection 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown."²⁶²

1. Constitutional precepts

When courts exercise the authority given to them to question sovereign claims made by the Crown, their review must look to an oral tradition, "[b]ehind the written word," which is "an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles."²⁶³ The legality and legitimacy of extinguishment depend on these oral "fundamental and organizing principles,"²⁶⁴ which "are the vital unstated assumptions upon which the text is based."²⁶⁵ These precepts informing the constitutional text are (1) federalism; (2) democracy; (3) constitutionalism and the rule of law; and (4) respect for minorities.²⁶⁶ As "underlying constitutional principles" they "may in certain circumstances give rise to substantive legal obligations ... which constitute substantive limitations upon government action."²⁶⁷ The question for this section of the article is what these four constitutional principles would sustain, when considered together,²⁶⁸ relative to the legality and legitimacy of the extinguishment of Aboriginal rights prior to 1982. A brief examination of each doctrine reveals that Aboriginal peoples should be able to interrogate the

²⁶² *Sparrow*, *supra* note 54 at 1106, citing N. Lyon, "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall L.J. 95 at 100.

²⁶³ *Quebec Secession Reference*, *supra* note 219 at 247.

²⁶⁴ *Ibid.* at 240.

²⁶⁵ *Ibid.* at 247.

²⁶⁶ *Ibid.* at 240.

²⁶⁷ *Ibid.* at 249.

²⁶⁸ See *ibid.* at 248, where the Court wrote: "These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other."

implication that the Crown's assertion of sovereignty allows for the extinguishment of Aboriginal rights.

In discussing the first constitutional principle in the *Quebec Secession Reference*, the Supreme Court of Canada wrote that the federal system is only partially complete "according to the precise terms of the *Constitution Act, 1867*"²⁶⁹ because the "federal government retained sweeping powers which threatened to undermine the autonomy of the provinces."²⁷⁰ Since "the written provisions of the Constitution [do] not provide the entire picture"²⁷¹ of the Canadian federal structure, the Supreme Court observed that the courts have had to "control the limits of the respective sovereignties."²⁷² They have also had to facilitate "democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective," having regard to the diversity of the component parts of Confederation.²⁷³ This approach has resulted in shared political power in Canada between two orders of government—the provinces and the central government. Provincial power has been significantly strengthened under this interpretation. Applying these principles, would it not be possible to also regard the federal system as only partially complete with regards to Aboriginal peoples?²⁷⁴ Could it not be similarly argued that the "federal government retained sweeping powers" relative to Aboriginal peoples that "threatened to undermine the autonomy" of these groups? Furthermore, since the "written provisions of the Constitution does not provide the entire picture" in relation to Aboriginal peoples, could not the courts also "control the limits of the respective sovereignties" by distributing power to the Aboriginal government "thought to be most suited to achieving [a] particular societal objective"? If the courts can draw on unwritten principles of federalism to fill in "gaps in the express terms of the constitutional text"²⁷⁵ in order to strengthen provincial powers, why can they not do

²⁶⁹ *Ibid.* at 250.

²⁷⁰ *Ibid.*

²⁷¹ *Ibid.*

²⁷² *Ibid.*, citing *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733 at 741.

²⁷³ *Quebec Secession Reference*, *supra* note 219 at 251.

²⁷⁴ See B. Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations (1991) 36 McGill L.J. 309.

²⁷⁵ *Quebec Secession Reference*, *supra* note 219 at 249, citing *Reference Re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at 75.

the same to facilitate “the pursuit of collective goals by cultural and linguistic minorities”²⁷⁶ that comprise Aboriginal nations? Following the Court’s reasoning, the principle of federalism could be applied to question assertions of sovereignty that purportedly extinguished Aboriginal powers to function as an equal, integral part of the federal structure in Canada.

The next principle the courts could consider in assessing the legality and legitimacy of the extinguishment of Aboriginal rights prior to 1982 is democracy. In the *Quebec Secession Reference*, the Supreme Court held that “democracy has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day. ... [It] can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated.”²⁷⁷ The notion of democracy to which the Court referred²⁷⁸ includes the ideas of majority rule; the promotion of self-government; the accommodation of cultural and group identities; the popular franchise; and the consent of the governed. Does a unilateral extinguishment of Aboriginal rights, and a subsequent denial of a legal right to question this action, advance majority rule? (Aboriginal peoples were in the majority in British Columbia at the time rights could purportedly be extinguished.) Does it promote community self-government and accommodate aboriginal identities? (Aboriginal governments were overlaid by elected *Indian Act* governments, and individuals were subjected to ruthless assimilation policies.) Finally, does unilateral extinguishment secure the consent of the governed? (Aboriginal peoples in British Columbia have consistently resisted the extinguishment of their rights.) By applying these democratic notions, one may question whether the assertion of Crown sovereignty was a legally valid, or a legitimately effective, exercise of power such that it extinguished Aboriginal rights. Keeping this question in mind, one might consider the Court’s observation:

It is the law that creates the framework within which the “sovereign will” is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our

²⁷⁶ *Quebec Secession Reference*, *supra* note 219 at 252.

²⁷⁷ *Ibid.* at 253.

²⁷⁸ *Ibid.* at 253-56.

political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure.²⁷⁹

The Court here suggests that the Canadian Constitution must create a "framework" for, and a "legal foundation" upon which the sovereign will can be ascertained relative to Aboriginal groups' participation in federal structures. Aboriginal peoples in British Columbia have never had an opportunity to participate as traditional governments in the federal structure. They have not been a part of this "framework." Legally, this exclusion is most profound when it includes extinguishment. Morally, this exclusion is most repugnant when the assumption of extinguishment carries with it the germs of forced integration, assimilation, and cultural genocide. For many Aboriginal peoples, extinguishment is genocide.²⁸⁰ This is not a morally legitimate framework to embed in our constitutional structure; the principle of democracy cannot sanction such treatment.

The rule of law should also be placed beside federalism and democracy when considering the extinguishment of Aboriginal title. The Court observed that "[a]t its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs."²⁸¹ Extinguishment does not ensure this type of a society because it severely disrupts Aboriginal nations and causes deeply rooted resentment against the federal government. This resentment is translated into strained, adversarial relations, periodic blockades, and endless litigation, which leads to instability within the larger population. The consequences of this resentment could lead to dissension and violence if left unattended. While this state of affairs should be condemned in the strongest possible terms, if ever we arrive at this point, the doctrine of extinguishment

²⁷⁹ *Ibid.*

²⁸⁰ George Watts, chairman of the Nuu-chah-nulth Nation on Vancouver Island said the following in F. Cassidy, ed., *Reaching Just Settlements: Land Claims in British Columbia* (Lantzville, B.C.: Oolichan Books & The Institute for Research on Public Policy, 1991) at 22:

There is this term being tossed around about aboriginal title. Well, I even disagree with that term. ... What we have in our area is a name called Ha Houlthee, which is not aboriginal title. Ha Houlthee is very different from the legal term of aboriginal title. And you can't extinguish my title because it comes from my chief. You have to destroy us as a people if you want to extinguish our title. That is the only possible way to extinguish our title, to get rid of us as a people.

²⁸¹ *Quebec Secession Reference*, *supra* note 219 at 257.

could be considered one of its background causes because it represents a failure to fully extend the rule of law to Aboriginal peoples.

The failure of the Crown to protect Aboriginal peoples from the unilateral extinguishment of their rights prior to 1982 has failed them in at least three profound ways. First, there have been few safeguards for the fundamental human rights and individual freedoms of Aboriginal peoples for most of their history. This has resulted in their individual and collective lives being unduly "susceptible to government interference."²⁸² Second, in the creation of the province, the parties did not ensure that, as a vulnerable group, Aboriginal peoples were "endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority."²⁸³ This led to further vulnerability. Third, the political organization of British Columbia in Canada did not "provide for a division of political power"²⁸⁴ that prevented the provincial and federal governments from usurping the powers of Aboriginal governments. As such, non-Aboriginal governments usurped aboriginal authority "simply by exercising its legislative power to allocate additional political power to itself unilaterally."²⁸⁵ These transgressions of the rule of law illustrate the problems of founding a province on the unilateral extinguishment of Aboriginal title. It does not produce a stable, ordered, and predictable society. The courts must avoid such a conclusion.

Finally, in considering the legality and legitimacy of constitutional principles that relate to the extinguishment of Aboriginal rights, it should be recalled that the Court in the *Quebec Secession Reference* held that "the protection of minority rights is itself an independent principle underlying our constitutional order."²⁸⁶ Aboriginal rights must not be extinguished through unilateral action on the part of the Crown because this would fail to protect Aboriginal peoples from the majority in Canada. The application of extinguishment could also defeat the "promise" of section 35, which "recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments."²⁸⁷ Crown claims that they can

²⁸² *Ibid.* at 259.

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

²⁸⁵ *Ibid.*

²⁸⁶ *Ibid.* at 261-62.

²⁸⁷ *Ibid.* at 262.

extinguish Aboriginal rights on its authority alone does not seem consistent with the Court's observation that "the protection of minority rights was clearly an essential consideration in the design of our constitutional structure"288 One wonders how Canadians would respond if positions were reversed and Aboriginal peoples were vested with the exclusive power to extinguish non-Aboriginal rights. The courts must combine the principles of federalism, democracy, the rule of law, and the protection of minorities to assess the legality and legitimacy of the doctrine of extinguishment. Until this occurs, Aboriginal peoples will continue to critique the unjust application of Canadian law to their societies.

IV. CONCLUSION

This article has illustrated that the Court's decision in *Delgamuukw* is suffused with the Court's acceptance of a subsequent claimant's nonconsensual assertion of rights over a prior owner's land. The Court's ultimate sanction of colonization, subjugation, domination, and exploitation of Aboriginal peoples in British Columbia, despite its attempt to provide protections for Aboriginal peoples in this process, is not a "morally and politically defensible conception of aboriginal rights."²⁸⁹ It "perpetuat[es] historical injustice suffered by aboriginal peoples at the hands of [the] colonizers,"²⁹⁰ and raises a claim of a legal right to self-determination. As this article has argued, the Crown's creation of British Columbia can only be regarded as the effectuation of secession from the established political organizations in the area "without prior negotiations"²⁹¹ involving the nations and tribes who lived there. One might properly regard this act as placing Aboriginal peoples under "colonial rule," which led to "subjugation, domination and exploitation" and blocked their "meaningful exercise of self-determination."²⁹² In commenting on the right of self-determination in

²⁸⁸ *Ibid.*

²⁸⁹ *Van der Peet*, *supra* note 56 at 547, citing *Walters*, *supra* note 15 at 413.

²⁹⁰ *Côté*, *supra* note 39 at 175.

²⁹¹ This language appears in the *Quebec Secession Reference*, *supra* note 219 at 264.

²⁹² For the Supreme Court's discussion of similar issues in Quebec's claim of the right to secede based on the principles of self-determination, see *Quebec Secession Reference*, *supra* note 219 at 284-86. The exploitation and colonization of Aboriginal peoples occurred through, *inter alia*: the imposition of band councils over hereditary governments; the criminalization of their social, economic, and spiritual relations through the enactment of the laws against potlatch; the

the *Quebec Secession Reference*, the Supreme Court observed that it can be claimed in three circumstances:

[T]he international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.²⁹³

Aboriginal peoples may have an argument for self-determination on the authority of these principles if the Crown's assertion of sovereignty is not tempered in ways suggested in this article. Otherwise, Aboriginal peoples may be able to argue that they are colonial peoples, "inherently distinct from the colonialist Power and the occupant Power and that their 'territorial integrity,' all but destroyed by the colonialist or occupying Power, should be fully restored."²⁹⁴ Furthermore, Aboriginal peoples may be able to claim the legal right to self-determination by arguing that Canada's extinguishment of their rights has not

promote[d] ... [the] realization of the principle[s] of equal rights and self-determination of peoples ... bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle [of friendly relations], as well as a denial of fundamental human rights, and is contrary to the [Charter of the United Nations].²⁹⁵

Finally, Aboriginal peoples may claim the right to self-determination because the unilateral extinguishment of the rights prior to 1982, and their continued "blocking" from questioning this injustice, means the Canadian government does not represent "the whole people belonging to the territory without distinction of any kind."²⁹⁶ If

fragmentation of their territorial integrity through the denial and/or infringement of land rights and the creation of small, inadequate reserves; the century-long denial of the right to vote in federal and provincial elections; the traumatic removal of whole generations of children through residential schools and insensitive child welfare laws; and the restricted access to their traditional food sources through the imposition of discriminatory fishing and hunting licences.

²⁹³ *Ibid.* at 287.

²⁹⁴ *Ibid.* at 284-85, citing A. Cassese, *Self-determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995) at 334.

²⁹⁵ *Quebec Secession Reference*, *supra* note 219 at 285, citing the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res. 2625 (XXV), UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8082 (1970) 121 at 123-24.

²⁹⁶ *Quebec Secession Reference*, *supra* note 219 at 285, citing the *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights (14-25 June 1993), A/CONF.157/23 (12 July 1993) at 4 (I.2).

Finally, Aboriginal peoples may claim the right to self-determination because the unilateral extinguishment of the rights prior to 1982, and their continued “blocking” from questioning this injustice, means the Canadian government does not represent “the whole people belonging to the territory without distinction of any kind.”²⁹⁶ If Aboriginal peoples were able to show the force of any one of these arguments and establish that they were entitled to the legal right of self-determination, this could take them a great distance in undoing the “spell” of Crown sovereignty under which they currently function. Each party needs to more fully explore these issues and subsequently reconcile them through joint effort.

The Court recognized this trajectory, and the necessity of placing Aboriginal/non-Aboriginal relations on a different plane, when it concluded its judgment in *Delgamuukw*:

Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet* ... to be a basic purpose of s. 35(1)—“the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.” Let us face it, we are all here to stay.²⁹⁷

While the Court’s encouragement of negotiated settlements is promising for the resolution of the issues identified in this article, its observation that “we are all here to stay” does not tell us where “here” is. It is clear that if “here” is principally defined in relation to a reconciliation with magical assertions of Crown sovereignty, “here” will never be a place where Aboriginal peoples will feel at home. With this caution as a conclusion, it may be instructive to remember the 1884 statement of the Gitksan chiefs from Gitwangak:

In making this claim, we would appeal to your sense of justice and right. We would remind you that it is the duty of the Government to uphold the just claims of all peaceable and law-abiding persons such as we have proved ourselves to be. We hold these lands by the best of all titles. We have received them as a gift of the Creator to our Grandmothers and Grandfathers, and we believe that we cannot be deprived of them by anything short of direct injustice.²⁹⁸

²⁹⁶ *Quebec Secession Reference*, *supra* note 219 at 285, citing the *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights (14-25 June 1993), A/CONF.157/23 (12 July 1993) at 4 (I.2).

²⁹⁷ *Delgamuukw (S.C.C.)*, *supra* note 1 at 1124, citing *Van der Peet*, *supra* note 56 at 539.

²⁹⁸ *Monet & Wilson*, *supra* note 15 at 1.