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The Metamorphosis of Aboriginal Title

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THE METAMORPHOSIS OF ABORIGINAL TITLE

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Aboriginal title has undergone a significant transformation from the colonial era to the present day. In colonial times, aboriginal title was governed by Principles of Recognition based on ancient relations between the Crown and Indigenous American peoples. With the passage of time, this historical right has evolved into a generative right, governed by Principles of Reconciliation. As a generative right, aboriginal title exists in a dynamic but latent form, which is capable of partial articulation by the courts but whose full implementation requires agreement between the Indigenous party and the Crown. The courts have the power to recognize the core elements of a generative right — sufficient to provide the foundation for negotiations and to ensure that the Indigenous party enjoys a significant portion of its rights pending final agreement. However, the courts are not in a position to give a detailed and exhaustive account of a generative right in all its facets. This result can be achieved only by negotiations between the parties.

Le titre autochtone a considérablement évolué depuis l'époque coloniale. À cette époque, le titre autochtone était régi par les principes de reconnaissance de la common law sur la base des anciennes relations entre la Couronne et les peuples autochtones américains. Au fil des ans, ce droit historique est devenu un droit héréditaire régi par les principes de réconciliation. En tant que droit héréditaire, le titre autochtone existe sous une forme dynamique mais latente, que les tribunaux peuvent formuler partiellement, mais dont la définition valide doit faire l'objet d'une entente entre la partie autochtone et la Couronne. Les tribunaux disposent du pouvoir de reconnaître les éléments essentiels d'un droit héréditaire, suffisant pour constituer la base de négociations et garantir à la partie autochtone qu'elle bénéficiera d'une grande partie de ses droits en attendant l'entente finale. Cependant, ils ne sont pas en mesure de présenter de manière détaillée et complète tous les éléments d'un droit héréditaire. Ce résultat ne peut être atteint que par des négociations entre les parties.

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1. Introduction

Aboriginal title is a legal riddle wrapped in a constitutional enigma inside a moral conundrum.[1] Although the right has long been recognized in the courts, its fundamental nature is shrouded in doubt. We still do not know the answers to two basic questions. First, how should we *conceive* of aboriginal title: is it a customary right rooted in Indigenous law, a right under English common law, or a *sui generis* right? Second, what *practical consequences* does aboriginal title carry today: what concrete rights does it give to Indigenous peoples, and how do these rights affect the interests of third parties?

Underlying these questions is another basic issue, which arises from the need for *reconciliation* — identified by the courts as the fundamental objective of the modern law of aboriginal and treaty rights.[2] How does the need for reconciliation affect our conception of aboriginal title? How does it shape the practical consequences flowing from aboriginal title at the present day?

The conceptual problem is not a new one. It has deep roots in the jurisprudence, going back as far as the submissions of counsel in the classic case of *Johnson v. M'Intosh*,[3] almost two centuries ago. Nevertheless, for many years a certain conception of aboriginal title has prevailed in Canadian courts, giving rise to the hope that the main theoretical issues have been resolved.[4] That hope has been shaken with the recent decision of the Supreme Court in *R v. Marshall/R. v. Bernard*,[5] where the Court seems adrift in a conceptual sea, without benefit of star or compass.

Compounding the confusion is uncertainty over the practical consequences of recognizing aboriginal title. The courts are torn between a desire to right a great historical wrong — the unlawful dispossession of Indigenous peoples — and deep misgivings about doing so at the

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[1] To adapt Churchill's well-known remark.

[2] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388 at para. 1 [*Mikisew*].

[3] 8 Wheaton 543 (U.S.S.C. 1823) at 562-71 [*Johnson*]. For discussion of the arguments of counsel, see B. Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983) at 18-24 [*Ancestral Lands*].

[4] See *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313 [*Calder*]; *Guerin v. The Queen*, [1984] 2 S.C.R. 335 [*Guerin*]; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [*Delgamuukw*].

[5] [2005] 2 S.C.R. 220 [*Marshall/Bernard*].

expense of third parties and the larger society. These misgivings silently permeate the *Marshall/Bernard* decision and go far to explain its ambiguities.

In this paper, I try to resolve some of these problems. I review the three leading conceptions of aboriginal title — as a customary right, a right under English common law, and a *sui generis* right — and go on to suggest that only the *sui generis* approach does justice to the complexities of the subject. I then consider the practical implications of recognizing aboriginal title today and argue that we need to distinguish between *historical rights* and *generative rights*. Considered as an *historical right*, aboriginal title is governed by Principles of Recognition, which are traditional common law rules based on ancient dealings between the British Crown and Indigenous American peoples. Considered as a *generative right*, aboriginal title is governed by Principles of Reconciliation, which are emergent common law rules that envisage treaty settlements negotiated with the assistance of the courts. The paper begins with an exposition of the basic argument as a whole. It then considers in detail the argument's two main branches, dealing with the concept of aboriginal title, and its practical consequences today.

2. The Basic Argument

Aboriginal title has undergone important changes from the time of contact to the present day. When European adventurers and fishermen first began visiting North America, the Indigenous peoples of the continent were independent and sovereign entities, holding title to the territories they occupied under universal international law.[6] The title of Indigenous peoples to their territories was a function of their sovereignty, and it entailed both the exclusive right to the territory in question and exclusive jurisdiction over it. Under international law, this title had a uniform legal character, assigning the same basic rights to all Indigenous peoples alike. However, the manner in which sovereign title was implemented *internally*, within the group, obviously varied from people to people in accordance with their local constitutions and laws.

The small European colonies founded on the eastern shores of America gradually grew in population and influence, and by a complex

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[6] The basic argument is made in B. Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L.J. 681. The term "universal international law" is used advisedly. We need to distinguish genuinely universal law from certain European versions of that law that arbitrarily denied the sovereignty and rights of Indigenous peoples. For a concise historical overview, see S. J. Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) at 9-38.

series of events spread over several centuries the British Crown (and its successor the Canadian Crown) emerged as the factual sovereign of the territories that now make up Canada. As a result, the international title of Indigenous groups to their territories was transformed into a form of domestic title known variously as *native title*, *Indian title*, and *aboriginal title*.[7] This title has both a proprietary and a jurisdictional aspect in Canadian law. Here I will focus exclusively on its character as a land right.

Aboriginal title was the creature of a distinctive body of common law that was generated by the policies and practices of the British Crown in its intensive relations with Indigenous American nations during the seventeenth and eighteenth centuries. Aboriginal title was not a right known to English common law or any Indigenous system of law; it flowed from the distinctive set of rules that bridged the gap between English and Indigenous legal systems and provided for their interaction. This body of law passed into British colonial law – the largely common law system that governed the Crown's relations with its overseas colonies and furnished their basic constitutional frameworks.[8] In this manner it came to operate in all the nascent British colonies in America, and subsequently in Australia, New Zealand and other British possessions. This distinctive or *sui generis* body of law is known as the *common law of aboriginal rights*.[9]

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[7] This is not to say, of course, that Indigenous peoples do not also have certain rights under international law today; see generally Anaya, *ibid.*, c. 2-6.

[8] Classic works dealing with colonial law include G. Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence* (London: Reed and Hunter, 1814); C. Clark, *A Summary of Colonial Law* (London: Sweet, Maxwell, and Stevens and Sons, 1834); W. Forsyth, *Cases and Opinions on Constitutional Law* (London: Stevens and Haynes, 1869); K. Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens & Sons, 1966); D. P. O'Connell & A. Riordan, *Opinions on Imperial Constitutional Law* (Melbourne: Law Book Comp. Ltd., 1971).

[9] For a detailed account of this argument, see B. Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Can. Bar Rev. 196 at 198-206 ["Making Sense"], which draws in turn on Slattery, *Ancestral Lands*, *supra* note 3 at 35-36, and B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 736-41. For judicial consideration of the argument, see esp. *R. v. Côté*, [1996] 3 S.C.R. 139 at para. 49 [*Côté*]. For parallel approaches, see M. D. Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17 Queen's L.J. 350; J. Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall L.J. 623; J. Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill L.J. 629; J. Borrows & L. I. Rotman, "The

The term "common law" is used here in its general sense, to indicate a body of law developed by custom and usage and articulated in judicial decisions, rather than to designate the common law of England, which traditionally had no conception of aboriginal rights. As part of British colonial law, the common law of aboriginal rights was introduced automatically into British colonies upon their acquisition, irrespective whether their general legal systems were based on Indigenous law, English law, French law, Roman-Dutch law, or some other system.

The common law of aboriginal title recognized the exclusive title of an Indigenous group to the lands it traditionally occupied and controlled. There was no need for Indigenous occupation to conform to the requirements of English property law. In particular, rotating or seasonal use of territories for hunting, fishing, trapping, and gathering was accepted as a sufficient basis for aboriginal title. An Indigenous group was entitled to use its lands for whatever purposes it saw fit. It was not restricted to traditional uses but could adapt its practices to suit the new opportunities and needs occasioned by expanding horizons and societal changes. Aboriginal title was viewed at common law as co-existing with the ultimate or underlying title of the Crown. It could not be transferred to private parties but could only be ceded to or shared with the Crown by treaty.

This, then, was the original form of aboriginal title, as it existed in the period following the Crown's acquisition of factual sovereignty. Let us call this *historical title*, and the common law rules that governed it *Principles of Recognition*. However, since the time of Crown sovereignty, vast changes have occurred in the position of Indigenous peoples and the larger societies they form part of. Historical aboriginal title has not remained untouched by this upheaval. It too has undergone a metamorphosis, becoming what may be termed a *generative right* governed by *Principles of Reconciliation*. This sea change has come about through a transformation in the common law rules governing the subject — the common law being a supple instrument that adapts to and accommodates societal changes. It appears that the process has not been confined to Canada but has also occurred in other former British possessions with Indigenous populations.

Sui Generis Nature of Aboriginal Rights: Does It Make a Difference?" (1997) 36 Alta. L. Rev. 9; M. D. Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the *Constitution Act, 1982*" (1999) 44 McGill L.J. 711. For a thoughtful theoretical treatment of aboriginal title, see P. Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 76-106.

In Canada the change has been enshrined in section 35(1) of the *Constitution Act, 1982*, which provides that the existing aboriginal and treaty rights of the aboriginal peoples of Canada "are hereby recognized and affirmed."[10] I suggest that the word "recognized" has particular application to historical aboriginal rights, as governed by Principles of Recognition, while the word "affirmed" refers to their articulation as generative rights in modern times, under Principles of Reconciliation.

The nature of historical aboriginal title is illustrated by the *Royal Proclamation of 1763*,[11] which mirrors the common law of the period. The *Proclamation* was issued by the British Crown shortly after the cession of New France, which as claimed by the French Crown was an immense territory extending from the Gulf of St. Lawrence indefinitely westward toward the Pacific Ocean.[12] The *Proclamation* addressed a situation in which there were broad factual lines of division between settler communities and Indigenous peoples. The division was both territorial and political. British and French settlements were still relatively small and localized, concentrated along the eastern seaboard and riverbanks. The colonies were governed by their own systems of law and government, based on models imported from the mother countries. Although much of the vast hinterland was claimed by the British Crown, building on the pretensions of its French predecessor, in reality the interior was still largely occupied and controlled by independent Indigenous groups, living under their own laws and systems of government.

Addressing this situation, the *Proclamation of 1763* recognized that Indian nations living under the Crown's asserted protection had the exclusive right to any territories they possessed that had not been ceded to the Crown. The *Proclamation* envisaged that, when the English colonies needed further lands for settlement, the Crown's representative

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

[11] *Royal Proclamation of 7 October 1763*, in Clarence S. Brigham, ed., *British Royal Proclamations Relating to America* (Worcester, Mass.: American Antiquarian Society, 1911), 212 [*Proclamation*]. For a detailed discussion of the *Proclamation*'s scope and effects, see B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories* (D.Phil. thesis, Oxford University, 1979; reprint, Saskatoon: University of Saskatchewan Native Law Centre, 1979) at 191-349 [*Land Rights*].

[12] For discussion of French and English territorial claims, see Slattery, *ibid.* at 70-125, 175-90; K. McNeil, *Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations* (Saskatoon: University of Saskatchewan Native Law Centre, 1982).

would call an assembly of the Indian nation concerned and attempt to negotiate a land cession at an agreed price. In the absence of such a cession, the *Proclamation* prohibited colonial governments from granting or settling Indian lands and ordered the removal of any settlers who planted themselves on such lands. Private purchases of Indian lands were outlawed and Crown purchases were recognized as the only mode by which Indian lands could be made available for public use and disposition.

The *Proclamation*'s provisions reflect the common law principles that had crystallized after a century and half of dealings between Indigenous American peoples and the British Crown. Taken as a whole, these principles were reasonably well-adapted to the circumstances of eighteenth-century America. However, as time passed, they became increasingly inadequate to deal with the changed situation of Indigenous peoples and consequently underwent a significant transformation.

This change was precipitated by a number of factors. Most important by far was the fact that in some areas, such as in most of British Columbia, the local governments failed to negotiate valid treaties for the cession or sharing of Indigenous lands.[13] As the Crown gradually extended its effective rule, some colonial authorities started treating Indigenous homelands as if they were available for public use or disposition to private parties. Aboriginal title was ignored or actively suppressed. Aboriginal lands were granted away to private individuals without Indigenous consent, and Indigenous groups found themselves confined to small tracts of land known as "reserves."

The dispossession of Indigenous peoples was contrary to the common law and did not extinguish aboriginal title, in the absence of clear and plain legislation to that effect. However, the scope and practical effects of dispossession were so significant that as time passed the situation became increasingly difficult to reverse without severely affecting the interests of innocent third parties and the public at large. In the end, the remedy originally envisaged at common law — the

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[13] For accounts of this process in British Columbia, see R. Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890* (Vancouver: University of British Columbia Press, 1977); D. C. Harris, *Fish, Law, and Colonialism: The Legal Capture of Salmon in British Columbia* (Toronto: University of Toronto Press, 2001); C. Harris, *Making Native Space: Colonialism, Resistance, and Reserves in British Columbia* (Vancouver: University of British Columbia Press, 2002); D. C. Harris, *Land, Fish, and Law: The Legal Geography of Indian Reserves and Native Fisheries in British Columbia, 1850-1927* (PhD Thesis, Osgoode Hall Law School, York University, 2004).

expulsion of individuals who occupied unceded Indigenous lands — was no longer practicable on a large scale. Given this new reality, the common law did not remain idle but adapted to take account of the change in circumstances. The adaptation was shaped by three needs: to ensure the continuity of aboriginal title and its recognition in a modern form; to supply appropriate remedies for the wrongs visited on Indigenous peoples; and to accommodate public and private interests in the lands concerned. These needs gave rise to common law Principles of Reconciliation, which supplemented and modified the traditional Principles of Recognition applying at the time of Crown sovereignty.

The emergence of Principles of Reconciliation was governed by the overarching principle of the honour of the Crown. As McLachlin C.J.C. emphasized in the decision of the Supreme Court of Canada in *Haida Nation v. British Columbia (Minister of Forests)*, the honour of the Crown is always at stake in its dealings with Aboriginal peoples.[14] The principle is not a "mere incantation," but rather a "core precept" that finds its application in concrete practices:

> The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown"...[15]

The most important effect of this process was to transform historical aboriginal title from a *static right* to a *generative right*. By a generative right, I mean a right that exists in a dynamic but latent form, which is capable of partial articulation by the courts but whose full implementation requires agreement between the Indigenous party and the Crown. In effect, the courts have the power to recognize certain *core elements* of a generative right — sufficient to provide the foundation for negotiations and to ensure that the Indigenous party enjoys a significant portion of its rights pending final agreement. However, the courts are not in a position to give a detailed and exhaustive account of a generative right in all its facets. This result can be achieved only by negotiations between the parties.

More precisely, when a case involving generative aboriginal title arises, the court may do the following:

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[14] [2004] 3 S.C.R. 511 at paras. 16-17 [*Haida Nation*].

[15] *Ibid.* at para. 17, quoting *Delgamuukw*, *supra* note 4 at para. 186, which in turn quotes *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 31.

(1) recognize the historical title of the claimant group as it existed at the time of Crown sovereignty, as a baseline for modern negotiations;

(2) issue such orders as are necessary and appropriate to protect the historical title from further erosion and invasion, while taking account of existing private and public interests;

(3) recognize the right of the claimant group to use and possess certain portions of its historical territory, either immediately or after the lapse of a specified period of time;

(4) enjoin the parties to enter into negotiations aimed at defining the modern scope of aboriginal title, as a generative right.

A court should be flexible and creative in fashioning orders designed to achieve these ends, in keeping with its mandate to recognize and affirm aboriginal rights, both at common law and under section 35(1) of the *Constitution Act, 1982*.

This, then, is the basic thesis of this paper. The thesis has two major branches. The first defends a certain *conception* of historical aboriginal title, portraying it as a *sui generis* right at common law. The second addresses the *practical effects* of aboriginal title today; it distinguishes between historical title and generative title and argues that the latter is governed by Principles of Reconciliation. The remainder of this paper explains these two points in greater detail.

3. Conceptions of Aboriginal Title

There are three leading theories of aboriginal title. The first depicts it as a *customary right* rooted in the law and practice of particular Indigenous groups. The second views it as a *translated right* expressed in the categories of English property law. The third portrays it as a *sui generis right* grounded in ancient relations between the Crown and Indigenous peoples. I will review each of these conceptions, assessing their relative strengths and weaknesses.

A. Aboriginal Title as a Customary Right Rooted in Indigenous Law

This theory holds that aboriginal title arises from the customary legal systems of particular Indigenous groups. Because these legal systems differ from group to group, the character of aboriginal title also differs accordingly. There is no uniform "aboriginal title" as such. Aboriginal title is what may be called a *specific right*, rooted in the customary law

of each particular Indigenous group, as opposed to a *generic right*, whose character does not change from one Indigenous group to another.[16]

This conception of aboriginal title was adopted by Brennan J. of the High Court of Australia in *Mabo v. Queensland*,[17] where he said:

> Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.

According to this approach, aboriginal title comes in many different shapes and sizes, as many as there are Indigenous legal systems. Each Indigenous group has its own kind of aboriginal title, which may bear little resemblance to the title of other groups. To determine the character of a group's aboriginal title requires a detailed study of its land system under customary law.

It may be noted that this approach lends itself to the view that aboriginal title is the *sum* of a series of particular rights in relation to land, rights that correspond to the particular uses made by a group — the right to trap beavers, to gather blueberries, to mine copper deposits, and so on. By the same token, it allows for the *dismembering* of aboriginal title into its several parts, so that, for example, the right to hunt polar bears or the right to fish for salmon can be isolated from the other components of aboriginal title and viewed as a free-standing right. The problem here is to determine the level of abstraction at which these several rights should be stated. Does the right to hunt exist at large, or is it limited to certain species and times of the year? Is the right to exploit mineral deposits general in nature, or is it confined to particular substances, such as copper?

The strength of the customary conception of aboriginal title lies in its emphasis on the Indigenous origins of the right. Aboriginal title is nothing if not grounded ultimately in the actual use and occupation of lands by Indigenous peoples under their laws. It is the strong spiritual, legal, and material bonds that Indigenous peoples hold with their lands that animate aboriginal title and supply its underlying rationale.

Nevertheless, a little reflection shows that Indigenous customary law, taken alone, is inadequate to define the character of aboriginal title. There is the need for *higher order principles* to regulate the collective

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[16] On this distinction, see Slattery, "Making Sense," *supra* note 9 at 211-15.

[17] (1992), 107 A.L.R. 1 (H.C.Aus.) at 42 [*Mabo*].

aspects of aboriginal title, the interaction between the titles of different Indigenous groups, and the relationship between aboriginal title and the general legal system of the jurisdiction. Let us briefly consider some examples.

a) Conflicting Indigenous Claims

What happens when two Indigenous groups have conflicting claims to the same tract of land? Each group may be supported by its own customary laws, which may thus fail to resolve the dispute. We need a set of rules that rises above the laws of the contending parties and regulates their interaction. Although these overarching rules may draw inspiration from Indigenous legal systems, they are logically distinct from those systems and necessarily reflect a broader range of considerations.

b) Conflicting Claims between an Indigenous Group and a Private Party

A similar problem arises where an Indigenous group claims title to lands occupied by a private party holding a Crown grant. Under Indigenous law the claimant group may hold clear title, while under the general legal system the private party may be entitled to possession. Here again, higher order principles are needed to resolve the dispute. We might, of course, hold that Indigenous law should take precedence over the general law, or conversely that the general law should trump Indigenous law. However, even on this simple "choice of law" approach, we need a higher order rule to tell us which body of law should prevail.

c) The Crown's Relationship to Indigenous Lands

What rights, if any, does the Crown hold in lands covered by aboriginal title? This question cannot be answered simply by reference to Indigenous legal systems, which traditionally did not have a concept of the "Crown." Neither can it be answered simply by reference to English property law, which did not have a concept of "aboriginal title." Once again, overarching principles are needed to define the Crown's relationship to Indigenous lands. These principles will be governed by considerations that transcend the scope of purely Indigenous and English legal traditions, even if they may draw on these traditions.

d) Transfers of Indigenous Lands

May an Indigenous group sell or lease its lands to private parties outside

the group?[18] Which body of law determines the validity and effects of the transaction — the law of the Indigenous group or the law of the larger community? At a minimum, we need a conflictual rule to sort the matter out. However, a "choice of law" approach may not be sufficient here, because neither Indigenous law nor the general legal system may have rules that are well-adapted to the new situation. A special or *sui generis* rule may be needed to deal with it. Indeed, the history of relations between the Crown and Indigenous American peoples suggests that land transfers were governed by a distinctive body of law which incorporated elements of both Indigenous and English traditions and was moulded by considerations arising from the inter-societal context.

e) The Extinguishment of Aboriginal Title

Under what circumstances does aboriginal title cease to exist? While it is possible to argue that the answer depends on the customary laws of each specific Indigenous group, this approach ignores the problems arising from the multiplicity of Indigenous legal systems and the varying solutions they offer, and it underestimates the strength of the policy considerations favouring a uniform answer to the question.

It is interesting to note that, while Brennan J. in the *Mabo* case maintains that aboriginal title is grounded in the particular laws of Indigenous groups, he departs from this approach in dealing with the question of extinguishment, and holds that the matter is governed by a uniform rule that evidently owes little if anything to the laws of the Indigenous groups concerned.[19]

f) The Collective Title of the Indigenous Group as a Whole

What rights does an Indigenous group *as a collective entity* hold in the lands used and occupied by its members? According to the *Mabo* approach, the answer is supplied by the customary law of the specific Indigenous group in question, so that there will be as many forms of collective title as there are groups. What happens, however, when the customary law of a certain group does not attribute *any* collective title to the group as such but only recognizes the rights of particular individuals, families and lineages within the group? Does the law still attribute a collective title to the group as a whole? If so, where does the relevant law come from?

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[18] This was, of course, the question confronted by the United States Supreme Court in the landmark case of *Johnson*, *supra* note 3. For discussion, see Slattery, *Ancestral Lands*, *supra* note 3 at 17-38.

[19] *Mabo*, *supra* note 17 at 46-52.

These questions suggest the need to distinguish between the *internal* and *external* aspects of aboriginal title. Consider a parallel drawn from the international sphere. As noted earlier, the *external* sovereignty of an independent political entity is governed by uniform rules laid down by international law, which assigns to all such entities the same basic range of rights. Nevertheless the form that sovereignty takes *internally* differs from entity to entity, depending on their domestic constitutions. Similarly, it may be argued that the external aspects of aboriginal title are governed by uniform rules supplied by an overarching body of law. This body of law attributes a collective title to an Indigenous group as a whole, even if the group's internal legal system does not conceive of such a title, and even if it does not have any notion of "title" as such.

g) Summary

This survey suggests that aboriginal title is a more complex subject than we might think at first blush. Once we reflect on the external and collective dimensions of aboriginal title, we see the need for a body of uniform rules governing these matters. In other words, viewed externally, aboriginal title must be a *generic right* rather than a *specific right*, and the generic features of that right must be governed by a body of law that transcends the internal legal systems of Indigenous groups, even if the way in which aboriginal title operates within the group varies according to the group's particular laws. With this point in mind, let us turn to the second conception of aboriginal title, which lies at the other end of the theoretical spectrum.

B. Aboriginal Title as a Translated Right Held under English Common Law

This theory maintains that aboriginal title results from the application of standard categories of English property law to Indigenous customary practices. In effect, it seeks to *translate* Indigenous occupation and modes of land use into rights known to English law. So, for example, where an Indigenous group occupies certain lands it may hold a *fee simple estate* in those lands, if its mode of occupation is sufficient to meet the requirements of English law.[20] This estate is held of the Crown and gives the group the full benefit of the land and the right to transfer it. Presumably, if Indigenous occupation is not sufficient to establish the existence of a fee simple, it might give rise to some other right known to English property law, such as a *profit à prendre* — the right to use and derive profits from land belonging to another.

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[20] See K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989)

According to this conception, aboriginal land rights are not *specific* rights shaped by the customary laws of particular Indigenous groups, as the first theory argues. Rather they are *generic* rights known to English property law — a fee simple, a *profit à prendre*, an easement, and so on. The rights are generic in the sense that they have certain pre-established attributes which apply across the board, regardless of the laws of the Indigenous groups in question.

In one respect, the translation theory has an apparent advantage over the customary approach. All the questions raised in the last section concerning the collective and external aspects of aboriginal title are answerable by reference to the standard rules of English property law. So, for example, if aboriginal title is portrayed as a fee simple estate, we know whether or not it is transferable, what rights the Crown holds in relation to it, how it is extinguished, and so on. Whether the answers given by English law are sensible and appropriate to the situation of Indigenous peoples is another matter.

Indeed, this last consideration indicates one of the main weaknesses of this approach. There is the danger that, in translating Indigenous practices into English legal categories, something important will be *lost in translation*. English property law is an intricate and artificial system, which evolved in a particular historical context and reflects distinctive social values, arrangements, and institutions. In applying English rules, courts may unconsciously misconstrue and devalue the outlook and practices of Indigenous societies, especially those whose modes of life are foreign to European agricultural economies and involve seasonal hunting, fishing, trapping, and gathering.[21] At the extreme, this approach may lead courts to favour European over Indigenous perspectives, forcing Indigenous practices into the procrustean bed of English legal categories and rejecting modes of use and occupation that do not "fit."

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at 193-243 [*Common Law*]. Professor McNeil's thinking has evolved significantly since the publication of this book; see K. McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty", in *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) at 58 [*Emerging Justice?*]; K. McNeil, "The Post-*Delgamuukw* Nature and Content of Aboriginal Title", in *Emerging Justice?*, *ibid.* at 102-35 ["Post-*Delgamuukw*]; K. McNeil, "Self-Government and the Inalienability of Aboriginal Title" (2002) 47 McGill L.J. 473; K. McNeil, "Aboriginal Title and the Supreme Court: What's Happening?" (2006) 69 Sask. L. Rev. 281.

[21] See, nevertheless, the careful treatment in McNeil, *Common Law*, *ibid.* at 197-204.

The translation theory also has difficulty explaining the survival of Indigenous legal systems and their relationship to English property law. Either the theory assumes that Indigenous laws have been largely superseded by English law in this sphere, or it envisages that such laws survive as some sort of "local custom," whose interaction with English law is unclear and problematic. In effect, the theory must either discount the existence of Indigenous law or try to squeeze it into cracks in the edifice of English law.

Further problems arise from the approach's indifference to history, its failure to take account of the extensive land dealings between the Crown and Indigenous American peoples from earliest colonial times. This vast body of historical practice supports a conception of aboriginal title that does not sit well with the categories of English property law. It suggests, for example, that aboriginal title could not be transferred freely to private parties but could only be ceded to or shared with the Crown under a treaty to which the members of the Indigenous group gave their free assent.[22] This conception is at odds with English property law, which views fee simple title as freely alienable.

Finally, it may be noted that this approach works best in jurisdictions where English property law has been received. It is unclear how it operates in places where another legal system prevails, such as the province of Quebec, where the field of private law is governed by the *Civil Code*, whose roots lie in the old French law imported into the colony of New France. Presumably, under the translation theory, aboriginal land rights in Quebec must be converted into the categories of civil law or else fail to gain recognition.

For all these reasons, then, the translation theory seems an unsatisfactory alternative to the custom-based approach. While it gains a measure of uniformity and certainty, it does so at the cost of diversity and flexibility; just as the custom-based approach secures flexibility by sacrificing uniformity and clarity. What we need is a theory that maintains a balance between these competing values. With that point in mind, let us turn to the third approach.

C. Aboriginal Title as a Sui Generis Right at Common Law

As seen above, this theory maintains that aboriginal title is based, not on English law or Indigenous law, but on a distinctive body of common law that developed from relations between the British Crown and Indigenous

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[22] See Slattery, *Land Rights*, *supra* note 11 at 95-125, 357-61.

American peoples in the early centuries of colonization.[23] To recap briefly, this body of inter-societal law was absorbed into the system of colonial law that applied automatically to a British possession upon acquisition, regardless whether the local legal system was based on Indigenous law, English law, French law, or some other law. From its customary origins in colonial North America, the common law of aboriginal title migrated to other British colonies with Indigenous populations.

According to this theory, aboriginal title is not grounded in English property law, nor is it based on the customary laws of particular Indigenous groups. It is a distinctive form of title — a *sui generis* right — that gives an Indigenous group the exclusive right to possess and use its traditional lands for such purposes as it sees fit, subject to the restriction that the lands cannot be transferred to outsiders but may only be ceded to or shared with the Crown, which holds an underlying title to the land.

Viewed *externally*, aboriginal title is a uniform right, which does not differ from group to group. Viewed *internally*, it delimits a sphere within which the customary legal system of each group continues to operate, regulating the manner in which the lands are used by group members and evolving to take account of new needs and circumstances. In this respect, the *sui generis* conception of aboriginal title represents a blend of the diversity envisaged by the custom-based conception and the uniformity contemplated by the English-based conception. It argues that aboriginal title is a generic right in its collective and external aspects, but that it blossoms internally into a variety of specific forms, as determined by the customary laws of each Indigenous group.

In effect, this approach does not attempt to describe the detailed features of Indigenous land regimes, much less to translate them into categories of English law. Rather, it preserves for Indigenous peoples a sphere of autonomy, within which customary land laws are free to evolve and adapt. By the same token, the *sui generis* theory does not view aboriginal title as simply the sum of a series of particular rights, or contemplate the dismemberment of aboriginal title into a series of such rights. It views aboriginal title as an indivisible whole — an external framework or superstructure enclosing a sphere within which an Indigenous land regime may operate.

For all these reasons, I suggest that the *sui generis* conception of aboriginal title is the most balanced and appropriate of the theories

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[23] See references, *supra* note 9.

considered here. Indeed, as we will now see, its virtues have not gone unrecognized in the courts.

4. Judicial Adoption of the Sui Generis Theory

The *sui generis* theory has a lengthy judicial pedigree, which extends back to the celebrated trilogy of *Johnson v. M'Intosh*, *Cherokee Nation v. Georgia*, and *Worcester v. Georgia*, decided by the United States Supreme Court in the early nineteenth century.[24] The majority opinions in these cases were written by the Chief Justice, John Marshall, a jurist who was steeped in American colonial history and familiar with the question of Indian title.[25] While the decisions differ somewhat in emphasis and approach, they share a common conceptual framework.

Marshall C.J. argues that aboriginal rights emerged from the complex historical process whereby the Crown, its agents, and grantees gained sovereignty over Indian nations. This process varied greatly in character, sometimes proceeding gradually, through attrition and accommodation, sometimes more rapidly, through armed conflict or treaties. One way or the other, says the Chief Justice, Indian peoples ultimately assumed the status of domestic nations living under the Crown's protection.

He states, in a famous passage, that the Indian nations had always been viewed as "distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial," subject only to a restriction on relations with other European states.[26] He asserts that history furnishes no example, from the time of the first British settlements, of any attempt by the Crown to interfere in the internal affairs of the Indians, except to keep

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[24] *Johnson*, *supra* note 3; *Cherokee Nation v. Georgia*, 5 Peters 1 (U.S.S.C. 1831) [*Cherokee Nation*]; *Worcester v. Georgia*, 6 Peters 515 (U.S.S.C. 1832) [*Worcester*]. For detailed discussion, see Slattery, *Ancestral Lands*, *supra* note 3 at 17-38.

[25] The Chief Justice was the author of a five-volume biography of George Washington, which had a lengthy historical introduction reviewing the evolution of the British colonies in America: see J. Marshall, *The Life of George Washington*, 1st ed., 5 vols. (Philadelphia: C.P. Wayne, 1804-07). For Marshall's previous exposure to Indian title, see L. J. Priestley, "Communal Native Title and the Common Law: Further Thoughts on the Gove Land Rights Case" (1974) 6 Federal L. Rev. 150 at 170-71. For an excellent study of the historical context, see J. C. Burke, "The Cherokee Cases: A Study in Law, Politics, and Morality" (1968-69) 21 Stan. L. Rev. 500.

[26] *Worcester*, *supra* note 24 at 559.

out agents of foreign powers.[27] The King purchased the alliance and dependence of the Indians by subsidies, "but never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only."[28] Nevertheless, the typical Indigenous group in contact with the British eventually became dependent on the Crown for the supply of necessary goods and for protection from lawless intrusions into its country.[29] These and other factors operated so as to bind that nation to the Crown as "a dependent ally, claiming the protection of a powerful friend and neighbour, and receiving the advantages of that protection, without involving a surrender of their national character."[30]

Nevertheless, by the early nineteenth century, Indigenous peoples within the United States had reached the point where they could be described as "domestic dependent nations."[31] While retaining their internal autonomy, they were considered as being "so completely under the sovereignty and dominion of the United States, that any attempt [by external powers] to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility."[32] So, even after Indian nations had passed under the Crown's sovereignty they retained the right of internal self-government. That right did not originate in a grant from the Crown. It stemmed from the corporate status of Indian nations as autonomous entities, retaining a portion of the rights they had enjoyed when they were fully independent. In effect, the right of self-government was an inherent right rather than one granted by the Crown.

In the Chief Justice's view, the aboriginal right of self-government recognized by the United States was based on the right previously acknowledged by the British Crown in its relations with Indian nations under its protection. While the right assumed a particular character under the United States Constitution, many of its basic features were inherited from the British colonial era. As Marshall C.J. puts the matter:

> Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans; such her claims, and such her practical exposition of the charters she had granted: she considered them as nations capable of maintaining the relations of peace and war; of governing themselves,

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[27] *Ibid.* at 547.

[28] *Ibid.*

[29] *Ibid.* at 555.

[30] *Ibid.* at 552.

[31] *Cherokee Nation*, *supra* note 24 at 17.

[32] *Ibid.* at 17-18.

> under her protection; and she made treaties with them, the obligation of which she acknowledged.[33]

The Crown's acquisition of sovereignty brought with it what Marshall C.J. describes as a "complete ultimate title" to the soil, subject to an Indian "right of possession" that the Crown alone could acquire.[34] The Crown's title stemmed originally from the so-called principle of discovery, which held good only against other European states. It was a principle that regulated competition among the imperial powers that had agreed to it, not one that could affect the rights of the Indigenous occupants, who had not agreed to it. So long as the Crown's title existed merely in theory, as an incident of the principle of discovery, it remained dormant as regards the Indigenous peoples. However, once the Indian nations became subject to the Crown's factual authority, the title became operative against them.[35] The Crown's ultimate title coexisted with the Indigenous peoples' right of possession, which was a legal right, recognizable in the courts, and not dependent merely on policy or considerations of justice.

> They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it.[36]

In effect, then, Indigenous peoples have a right of occupancy which burdens the ultimate title of the Crown and gives them full beneficial use of the land — the right "to use it according to their own discretion." However, their power to dispose of the land freely is now confined to a right of alienation to the Crown. Aboriginal title is a collective title that vests in the nation as a whole. In its external and collective aspects it has a uniform character, which does not vary from one Indigenous group to another. However, within the group, its operation is governed by the specific laws of each group. Hence a person who purchases lands from the Indians within their territory holds his title under their protection and subject to their laws.[37]

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[33] *Worcester*, *supra* note 24 at 548-49.

[34] *Johnson*, *supra* note 3 at 603.

[35] *Worcester*, *supra* note 24 at 544.

[36] *Johnson*, *supra* note 3 at 574.

[37] *Ibid.* at 593.

The Marshall decisions proved highly influential in Canadian courts, where they were taken as a template for the view that Indian title was an inalienable "usufructuary right" which burdened the ultimate title of the Crown. This viewpoint was elaborated by Strong J. of the Supreme Court of Canada in the *St. Catharines Milling & Lumber Co.* case.[38] Although Strong J. dissented in the result in that case, his opinion has often been cited as a classic exposition of the subject.

Strong J. begins by summarizing Marshall C.J.'s account of British policy in the American colonies:

> It may be summarily stated as consisting in the recognition by the crown of a usufructuary title in the Indians to all unsurrendered lands. This title, though not perhaps susceptible of any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the crown itself, in whom the ultimate title was, in accordance with the English law of real property, considered as vested.[39]

Strong J. points out that the American authorities traced this doctrine to the era prior to the American Revolution, viewing it as a continuation of the principles of law or policy originally established by the British government in its American colonies and therefore identical to those that have continued to be recognized in British North America.[40] This traditional policy, derived from colonial times, has ripened in the United States into well-established rules of law, with the result that lands in the possession of the Indians are, until surrendered, treated as their rightful though inalienable property so far as possession and enjoyment are concerned. In other words, the *dominium utile* is recognized as belonging to the Indians though the *dominium directum* is considered to be in the United States.[41]

If this is true of Indian lands in the United States, asks Strong J., is it possible to suppose that the law is less favourable to the Indians in the dominions of the British Crown, the original author of the doctrine? In Canada the uniform practice has always been to recognize the Indian title as one that could only be dealt with by surrender to the Crown. Even if there were no legislation ordaining this rule, we ought to hold that it exists as a rule of the unwritten common law, which the courts are bound

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[38] (1887), 13 S.C.R. 577 [*St. Catharines*].

[39] *Ibid.* at 608; the sources of this view are identified at 610-12.

[40] *Ibid.* at 610.

[41] *Ibid.* at 612.

to enforce as such. The terms of the *Constitution Act, 1867*[42] must therefore be construed on the assumption that the territorial rights of the Indians were strictly legal rights that had to be taken into account in the distribution of proprietary rights between the federal and provincial governments.[43]

> To summarize these arguments, which appear to me to possess great force, we find, that at the date of confederation the Indians, by the constant usage and practice of the crown, were considered to possess a certain proprietary interest in the unsurrendered lands which they occupied as hunting grounds; that this usage had either ripened into a rule of the common law as applicable to the American Colonies, or that such a rule had been derived from the law of nations and had in this way been imported into the Colonial law as applied to Indian Nations; that such property of the Indians was usufructuary only and could not be alienated, except by surrender to the crown as the ultimate owner of the soil ...[44]

Three points in this analysis merit attention. First, Strong J. emphasizes that the origins of the doctrine of Indian title lie in principles and practices of the British Crown in its dealings with Indigenous American peoples in early colonial times and that these practices ripened into "a rule of the common law as applicable to the American Colonies." He makes it clear that he is referring, not to English common law in the narrow sense, but to a distinctive body of common law that emerged in the American colonies.

Second, Strong J. contemplates that the doctrine in question became part of "the Colonial law as applied to Indian Nations." By "Colonial law," he seems to mean the body of imperial common law that applied automatically to colonies acquired by the Crown and regulated their basic status and constitutional structure. As argued earlier, colonial law's adoption of the doctrine of aboriginal title explains how the doctrine spread beyond the area of its immediate origins and became applicable to British colonies generally, regardless of the nature of their local legal systems.

Finally, Strong J. describes Indian title as a "usufructuary title." In using this phrase, he is speaking analogically rather than literally. He has no desire to import the technical concept of "usufruct" from Roman law and the civil law. Rather, he has in mind the fact that Indian title, while protecting Indians in the absolute use and enjoyment of their lands,

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[42] (U.K.), 30 & 31 Vict., c. 3.

[43] *St. Catharines*, *supra* note 38 at 612-13.

[44] *Ibid.* at 615-16.

cannot be alienated except to the Crown, in whom the ultimate title is vested.[45]

When the *St. Catharines* case was appealed to the Privy Council, the Board adopted several features of Strong J.'s analysis.[46] In a series of terse remarks, Lord Watson characterized Indian title as a "personal and usufructuary right" which burdened the Crown's underlying title and could only be sold or transferred to the Crown. However, unlike Strong J., he seemed inclined to attribute the existence of Indian title to the *Proclamation of 1763* rather than the common law, and he stated enigmatically that the title was "dependent upon the good will of the Sovereign."[47]

Further clarity had to await the Privy Council's decision in *Amodu Tijani v. The Secretary, Southern Nigeria*.[48] In an illuminating judgment, Viscount Haldane warns of the need for caution in interpreting native title to land, not only in Southern Nigeria (where the case arose) but also in other parts of the British Empire. There is the tendency, he notes, to conceptualize native title in terms appropriate only to English legal systems. But this tendency has to be held closely in check. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as found in English law. A very usual form of native title is that of a "usufructuary right," which is a burden on the radical title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached. But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates. He remarks that the Privy Council has elsewhere explained principles of this kind in connection with the Indian title to reserve lands in Canada, and he refers to the *St. Catherine's* case.[49]

Viscount Haldane notes that there is another fundamental feature of native title to land that has to be borne in mind. The title may not be that of an individual, as is usual in England, but may be that of a community:

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[45] *Ibid.* at 608.

[46] *Sub nom. St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46 (P.C.) [*St. Catherine's*].

[47] *Ibid.* at 54-55.

[48] [1921] 2 A.C. 399 (P.C.) [*Amodu Tijani*].

[49] *Ibid.* at 402-03. Viscount Haldane also cites *Attorney-General for Quebec v. Attorney-General for Canada*, [1921] 1 A.C. 401 (P.C.), which reiterates the *St. Catherine's* ruling.

> Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading.[50]

His Lordship distinguishes here between native title proper, which consists of a communal usufructuary right, and the internal operation of that title, which is governed by the internal customs of the community and so differs from group to group.

Viscount Haldane observes that, when the British Crown gained the colony by cession, no doubt it acquired, along with the sovereignty, the radical or ultimate title to the land. But the cession appears to have been made on the footing that the property rights of the inhabitants were to be fully respected. He notes that this principle is a usual one under British policy and law when such occupations take place. The general words of the cession are construed as relating primarily to sovereign rights rather than property.[51] He concludes that the courts below failed to recognise the real character of the title to land occupied by a native community. *Prima facie*, that title is based, not on individual ownership as in English law, but on a communal usufructuary occupation, which may be so complete as to reduce any radical right in the Sovereign to comparatively limited rights of administrative interference.[52]

The *Amodu Tijani* case has the virtue of placing the *St. Catharines* decision in the broader context of the British Empire as a whole. It clarifies the relationship between the *concept of native title as such*, which consists of a communal usufructuary title that co-exists with the ultimate title of the Crown, and the *internal operation of that title*, which is governed by the customary law of the Indigenous group in question. The decision portrays native title as a distinctive form of title that presumptively survives the Crown's acquisition of sovereignty and does not depend on an explicit act of recognition by the Crown.

In sum, these cases steer a middle course between the view that aboriginal title is a right grounded exclusively in Indigenous custom, and the opposing view that it is a translated right held under English property law. They portray aboriginal title as a generic collective right at common

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[50] *Amodu Tijani*, *ibid*. at 403-04.

[51] *Ibid.* at 407.

[52] *Ibid.* at 409-10.

law that allows for the continued operation of customary law within the group — what we have called the *sui generis* conception of aboriginal title.

5. Modern Canadian Jurisprudence

These classic judgments have served as anchor and ballast for the modern Canadian case law on aboriginal title. They were quoted extensively in the watershed decision of the Supreme Court in the *Calder* case,[53] where they featured in the opinions of both Judson J. and Hall J. The same stream of jurisprudence was tapped by Dickson J. in the later *Guerin* case,[54] where he characterized aboriginal title as a *sui generis* right that cannot be described appropriately in terminology drawn from general property law. He held that aboriginal title gives Indigenous peoples the legal right to possess their traditional lands and that the right is inalienable except to the Crown, which holds the ultimate title.

The distinctive nature of aboriginal title was underlined in the *Delgamuukw* decision, now the leading authority on the subject.[55] In his wide-ranging discussion, Lamer C.J.C. explains that aboriginal rights stem from the reconciliation of prior Indigenous occupation with the Crown's assertion of sovereignty. Reconciliation is achieved by building a *bridge* between Indigenous and non-Indigenous cultures, which gives rise to common law rights that are truly *sui generis*.[56] In line with this approach, the Chief Justice rejects the appellants' argument that aboriginal title is tantamount to an inalienable fee simple. He likewise dismisses the respondents' contention that it is no more than a bundle of rights to engage in a variety of specific traditional practices. Rather, he holds that aboriginal title is a *sui generis* right that gives Indigenous peoples the right to use the land for a broad range of purposes. These purposes need not be aspects of traditional customs and practices, so long as they are not irreconcilable with the nature of the group's basic attachment to the land.[57]

Lamer C.J.C. comments that the phrase "personal and usufructuary right" used by the Privy Council in the *St. Catherine's* case is not particularly helpful:

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[53] *Supra* note 4 at 320-23, 354-55, 376-85, and 401-02.

[54] *Supra* note 4 at 376-82.

[55] *Supra* note 4. For discussion of the decision, see McNeil, "Post-*Delgamuukw*," *supra* note 20; Slattery, "Making Sense", *supra* note 9 at 211-15; J. Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 77-110.

[56] *Delgamuukw, ibid.* at paras. 81-82.

[57] *Ibid.* at paras. 109-11, 117.

> What the Privy Council sought to capture is that aboriginal title is a sui generis interest in land. Aboriginal title has been described as sui generis in order to distinguish it from "normal" proprietary interests, such as fee simple. However, as I will now develop, it is also sui generis in the sense that its characteristics cannot be 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, it must be understood by reference to both common law and aboriginal perspectives.[58]

The *sui generis* character of aboriginal title, explains the Chief Justice, is manifested in three distinctive features: it cannot be transferred to anyone other than the Crown; it stems from the occupation of land prior to the assertion of British sovereignty; and it is a collective right held by all members of an Indigenous nation and governed by communal decisions.[59]

In summary, the *Delgamuukw* case stands for the proposition that aboriginal title is a collective title that bridges the divide between European-derived land systems and Indigenous land systems. Viewed externally, aboriginal title is a generic right which possesses certain distinctive features, such as inalienability, that do not change from one Indigenous group to another. Viewed internally, aboriginal title allows each Indigenous group to use its lands in its own fashion, within certain broad limits. In taking this approach, *Delgamuukw* anchors its reasoning in the *sui generis* theory expounded in the classic cases.

6. The Marshall/Bernard Decision

This long line of jurisprudence, extending over nearly two centuries, serves as a ringing endorsement of the *sui generis* concept of aboriginal title. It is surprising, then, to find the Supreme Court of Canada apparently favouring a different approach in the recent *Marshall/Bernard* decision[60] — one that portrays aboriginal title as a translated right held under English common law. In a puzzling judgment, McLachlin C.J.C. sets out the following approach to aboriginal title:

> The Court's task in evaluating a claim for an aboriginal right is *to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right*. The question is whether the

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[58] *Ibid.* at para. 112.

[59] *Ibid.* at paras. 113-15.

[60] *Supra* note 5. For commentary on the decision, see McNeil, "Aboriginal Title and the Supreme Court", *supra* note 20; P. L. A. H. Chartrand, "*R. v. Marshall; R. v. Bernard*: The Return of the Native" (2006) 55 U.N.B.L.J. 135; S. Imai, "The Adjudication of Historical Evidence: A Comment and an Elaboration on a Proposal by

> aboriginal practice at the time of assertion of European sovereignty (not, unlike treaties, when a document was signed) translates into a modern legal right, and if so, what right? This exercise involves both aboriginal and European perspectives. The Court must consider the pre-sovereignty practice from the perspective of the aboriginal people. *But in translating it to a common law right, the Court must also consider the European perspective; the nature of the right at common law must be examined to determine whether a particular aboriginal practice fits it*. This exercise in translating aboriginal practices to modern rights must not be conducted in a formalistic or narrow way. The Court should take a generous view of the aboriginal practice and should not insist on exact conformity to the precise legal parameters of the common law right. The question is whether the practice corresponds to the core concepts of the legal right claimed.[61]

According to this passage, the judicial task is one of *translation*. The court has the job of converting historical Indigenous practices into modern rights under the common law. By "common law," the Chief Justice appears to mean *English* common law. She associates the common law with the "*European* perspective,"[62] and elsewhere she says that "both aboriginal and *European common law* perspectives must be considered."[63] Here the term "European" seems to be a proxy for "English," for there is, of course, no such thing as European common law. The common law is confined to England — the rest of Europe being governed by civil law systems.

The overall effect of this approach is apparently to endorse the view that aboriginal title is a translated right held under modern English common law – which is the second theory considered earlier. This approach has a number of problems. First, as we have seen, aboriginal title is not a *modern* right. It is an ancient form of title, grounded in colonial practice dating back to the 1600s, recognized in the *Proclamation of 1763*, and extensively analysed in court decisions from the early nineteenth century onwards. To treat it as the product of modern judicial activity is to turn one's back on several centuries of legal history. Second, although aboriginal title is a common law right, there is little in the jurisprudence to suggest that it is a right held under *English* common law, much less *European* common law, whatever that might be. Finally, aboriginal title does not result from the *translation* of Indigenous customary practices into non-Indigenous legal categories. Rather, aboriginal title is a distinctive inter-societal right that bridges the gap between Indigenous and European-based land systems and regulates

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Justice LeBel" (2006) 55 U.N.B.L.J. 146.

[61] *Marshall/Bernard*, *ibid.* at para. 48 [emphasis added].

[62] *Ibid.* [emphasis added].

[63] *Ibid*. at para. 45 [emphasis added].

their interaction. No translation is needed.

It is hard to know what to make of the Supreme Court's approach in *Marshall/Bernard*. Superficially, at least, it represents a sharp departure from the *sui generis* approach previously endorsed by the Court. Whether the Chief Justice truly intends to reverse the existing course of jurisprudence is open to question – there is no evidence of such a radical intent in her judgment. The Chief Justice's main concern — and a proper one at that — is to bring about the *reconciliation* between historical aboriginal rights and modern rights held under general Canadian law. This concern comes to the fore in the following passage:

> In summary, the court must examine the pre-sovereignty aboriginal practice and translate that practice into a modern right. The process begins by examining the nature and extent of the pre-sovereignty aboriginal practice in question. It goes on to seek a corresponding common law right. In this way the process determines the nature and extent of the modern right and reconciles the aboriginal and European perspectives.
>
> The second underlying concept — the range of aboriginal rights — flows from the *process of reconciliation* just described. Taking the aboriginal perspective into account does not mean that a particular right, like title to the land, is established. The question is what modern right best corresponds to the pre-sovereignty aboriginal practice, examined from the aboriginal perspective.[64]

McLachlin C.J.C. rightly emphasizes that reconciliation is the main goal of the modern law of aboriginal rights. Where she goes astray is in assuming that this can be achieved by a process of translation. In reality, such a process artificially constrains and distorts the true character of aboriginal title and risks compounding the historical injustices visited on Indigenous peoples. Far from reconciling Indigenous peoples with the Crown, it seems likely to exacerbate existing conflicts and grievances.

How, then, can reconciliation best be achieved? I suggest that the path forward lies in distinguishing between Principles of Recognition and Principles of Reconciliation. This is the subject of our next section.

7. Principles of Recognition and Reconciliation

As seen earlier, *Principles of Recognition* govern the nature and scope of aboriginal title at the time of Crown sovereignty — what we have called *historical title*. This title provides the point of departure for any modern inquiry and a benchmark for assessing the actions of colonial

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[64] *Ibid.* at paras. 51-52 [emphasis added].

governments and the scope of Indigenous dispossession. By contrast, *Principles of Reconciliation* govern the legal effects of aboriginal title in modern times. They take as their starting point the historical title of the Indigenous group, as determined by Principles of Recognition, but they also take into account a range of other factors, such as the subsequent history of the lands in question, the Indigenous group's contemporary interests, and the interests of third parties and the larger society. So doing, they posit that historical aboriginal title has been transformed into a *generative right*, which can be partially implemented by the courts but whose full implementation requires the negotiation of modern treaties.

Unless we distinguish between these two sets of principles, we may fall into the trap of assuming that historical aboriginal title gives rise automatically to modern title, without regard to its broader social impact. Such an assumption fosters two judicial tendencies. The courts may be led to construe historical aboriginal title in an artificially restrictive way, in the effort to minimize conflicts with modern societal and third party interests. Alternately, an expansive view may be taken of the processes whereby historical title is extinguished, whether by Crown action or the passage of time. These tendencies, if left to operate unchecked, will diminish the possibility of reconciliation ever occurring. For the successful settlement of aboriginal claims must involve *the full and unstinting recognition of the historical reality of aboriginal title, the true scope and effects of Indigenous dispossession, and the continuing links between an Indigenous people and its traditional lands*. So, for example, to maintain that "nomadic" or "semi-nomadic" peoples had historical aboriginal title to only a fraction of their ancestral hunting territories,[65] or to hold that aboriginal title could be extinguished simply by Crown grant,[66] is to rub salt into open wounds. However, by the same token, *the recognition of historical title, while a necessary precondition for modern reconciliation, is not in itself a sufficient basis for reconciliation, which must take into account a range of other factors*. So, for example, to suggest that historical aboriginal title gives rise to modern rights that automatically trump third party and public interests constitutes an attempt to remedy one grave injustice by committing another.

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[65] See McLachlin C.J.C.'s apparent suggestion that seasonal hunting, fishing, and gathering activities typically do not give rise to aboriginal title, even if conducted in the same place on an annual basis from time immemorial in *ibid.* at para. 58. The general issue is considered in B. J. Burke, "Left Out in the Cold: The Problem with Aboriginal Title Under Section 35(1) of the *Constitution Act, 1982* for Historically Nomadic Aboriginal Peoples" (2000) 38 Osgoode Hall L.J. 1.

[66] See *Mabo*, *supra* note 17 at 46-52.

The point is nicely captured in a passage in the *Mikisew* case,[67] where Binnie J. states:

> The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding.

As Binnie J. notes, the process of reconciliation requires the courts to take account of the claims and interests of both aboriginal and non-aboriginal peoples. But the process is overshadowed by historical grievances that cannot be minimized or glossed over. In effect, reconciliation must strike a balance between the need to remedy past injustices and the need to accommodate contemporary interests. On the one hand, unless the modern law provides appropriate standards (in the form of Principles of Recognition) for understanding the true nature and scope of historical aboriginal rights, there can be no proper basis for modern reconciliation. On the other hand, if historical rights are taken to give rise to modern rights *tout court*, without any regard to their impact on present-day society, the cause of reconciliation will be equally ill-served.

Let me attempt a preliminary sketch of the twin sets of Principles of Recognition and Reconciliation, while emphasizing the need for further elaboration in the context of actual cases. I suggest that Principles of Recognition should have the following basic characteristics:

(1) They should acknowledge the historical reality that "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries," as Judson J. observed in the *Calder* case.[68] They should not draw arbitrary distinctions between "settled," "nomadic," and "semi-nomadic" peoples but accept that *all* of the Indigenous peoples in Canada had historical rights to their ancestral homelands — the lands from which they drew their material livelihood, social identity, and spiritual nourishment — regardless whether they had developed conceptions of "ownership," "property," or "exclusivity," and without forcing their practices into conceptual boxes derived from English or French law.

(2) They should take account of the long history of relations between Indigenous peoples and the British Crown, and the

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[67] *Supra* note 2 at para. 1.

[68] *Supra* note 4 at 328.

body of inter-societal law that emerged from those relations.

(3) They should draw inspiration from fundamental principles of international law and justice, principles that are truly universal, and not grounded simply in rules that European imperial powers formulated to suit their own convenience, such as the supposed "principle of discovery."[69]

(4) They should envisage the continuing operation of customary law within the Indigenous group concerned. At the same time, they should explain the way in which the collective title of an Indigenous group relates to the titles of other Indigenous groups and to rights held under the general land system.

As argued earlier, the conception of historical aboriginal title that best satisfies these criteria is the *sui generis* theory, which holds that aboriginal title is a distinctive common law right grounded in inter-societal relations between Indigenous peoples and the Crown in the early centuries of colonization.

Turning now to Principles of Reconciliation, I suggest they should have the following basic features:

(1) They should acknowledge the historical rights of Indigenous peoples to their ancestral lands under Principles of Recognition, as the essential starting point for any modern settlement.

(2) They should explain how historical aboriginal rights were transformed into generative rights with the passage of time and the rise of third party and other societal interests.

(3) They should draw a distinction in principle between the "inner core" of generative aboriginal rights that may be implemented without negotiation in modern times, and a "penumbra" or "outer layer" that needs to be articulated in treaties concluded between the Indigenous people and the Crown.[70]

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[69] See the apt remarks of Lamer C.J.C. in *Côté*, *supra* note 9 at paras. 50-54, and *Delgamuukw*, *supra* note 4 at para. 136, and further discussion in Slattery, "Making Sense", *supra* note 9 at 198-206.

[70] For the distinction between an inner core and a negotiated penumbra as applied to aboriginal governmental rights, see Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services Canada, 1993) at 36-48; Canada, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group,

(4) They should provide guidelines governing the accommodation of rights and interests held by third parties within the historical territories of Indigenous peoples.

(5) They should create strong incentives for negotiated settlements to be reached within a reasonable period of time.[71]

While it may seem a tall order to identify principles that fulfill these sets of criteria, I think that, given time and a little imagination, it is hardly beyond the capacities of the courts. Indeed, the constitutional basis for doing so has already been identified by the Supreme Court of Canada in the path-breaking decisions in *Haida Nation*[72] and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*,[73] which mark the emergence of a new constitutional paradigm governing aboriginal rights.[74] This paradigm views section 35 of the *Constitution Act, 1982* as the basis of a generative constitutional order — one that mandates the Crown to negotiate with Indigenous peoples for the recognition of their rights in a form that balances their contemporary needs and interests with the needs and interests of the broader society.

According to this approach, when the Crown claimed sovereignty over Canadian territories and ultimately gained factual control over them, it did so in the face of pre-existing Indigenous sovereignty and territorial rights. The tension between these conflicting claims gave rise to a special relationship that requires the Crown to deal honourably with Indigenous peoples. The fundamental principle of the "honour of the Crown" obliges the Crown to respect aboriginal rights, which in turn requires it to negotiate with Indigenous peoples with a view to identifying those rights. It also obliges the Crown to consult with Indigenous peoples in all cases where its activities affect their asserted

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1996), Vol. 2 at 213-24.

[71] For helpful discussion, see S. Lawrence & P. Macklem, "From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult" (2000) 79 Can. Bar Rev. 252 esp. at 270-72; S. Imai, "Sound Science, Careful Policy Analysis, and Ongoing Relationships: Integrating Litigation and Negotiation in Aboriginal Lands and Resources Disputes" (2003) 41 Osgoode Hall L.J. 587; S. Imai, "Creating Disincentives to Negotiate: *Mitchell v. M.N.R.*'s Potential Effect on Dispute Resolution" (2003) 22 Windsor Y.B. Access Just. 309.

[72] *Supra* note 14.

[73] [2004] 3 S.C.R. 550 [*Taku River*].

[74] For fuller discussion, see B. Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 Sup. Ct. L Rev. 433, from which this account is drawn.

rights and, where appropriate, to accommodate these rights by adjusting the activities.[75] McLachlin C.J.C. sums up the matter as follows:

> Put simply, Canada's Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the Constitution Act, 1982. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.[76]

The Chief Justice emphasizes that the Crown has the duty to achieve a just settlement of aboriginal claims by negotiation and treaty. So doing, she attributes a *generative* role to section 35. In effect, she holds that the Crown, with judicial assistance, has the duty to foster a new legal order for aboriginal rights, through negotiation and agreement with the Indigenous peoples affected. This approach views section 35 as serving a dynamic function — one that does not come to an end even when treaties are successfully concluded. As McLachlin C.J.C. states:

> The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a *process* flowing from rights guaranteed by s. 35(1) of the Constitution Act, 1982.[77]

In other words, section 35 does not simply recognize a static body of aboriginal rights, whose contours may be ascertained by the application of general legal criteria to historical circumstances — what we have called historical rights. Rather, the section recognizes a body of generative rights, which bind the Crown to take positive steps to identify aboriginal rights in a contemporary form, with the participation and consent of the Indigenous peoples concerned.

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[75] *Haida Nation*, *supra* note 14 at para. 32; *Taku River*, *supra* note 73 at para. 24.

[76] *Haida Nation*, *ibid.* at para. 25.

[77] *Ibid.* at para. 32 [emphasis added].