Can Euro-Canadian law and Indigenous Law Find Common Ground?¹

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RECONCILIATION: WHAT CANADIAN LAW SAYS IT IS DOING

A distinctive feature of Canadian law is the constitutional protection of Aboriginal and treaty rights. The Canadian Constitution says:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.²

In interpreting this provision, the Supreme Court of Canada introduced the concept of reconciliation:

...the aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory.³

In applying this, the Supreme Court has ruled that in adjudicating Aboriginal rights, one must give weight to both the Aboriginal perspective and the common law perspective.⁴ Further, the laws of evidence must be adapted to accommodate Aboriginal traditional oral history and put it on an equal footing with the kinds of historical evidence more familiar to Courts.⁵

This concept of reconciliation, then, is the apparent basis of the doctrines of Aboriginal title and Aboriginal rights. Since these doctrines are aimed at reconciliation, and are sourced in part outside of Euro-Canadian law, one could imagine that they should be conceived of being outside both Indigenous law and Euro-Canadian law – as a form of inter-societal or international law.⁶ However, since such doctrines are developed by Euro-Canadian Courts, there is a tendency to treat them as if they were situated conceptually wholly within the Euro-Canadian legal system. As we will see below, the tests for establishing rights under these doctrines are based on 1) the content of ancient traditional activities of the Aboriginal group in question⁷; 2) how or if these activities can be recognized as rights under the common law⁸, and 3) how or if such rights can be enforced in a modern context, which requires a balancing with other rights.

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² Constitution Act, 1982, s. 35(1)
⁷ The content of Indigenous law can be used as evidence of the occupation of land required to establish Aboriginal title, but does not affect the nature and content of Aboriginal title, which is uniform throughout Canada. Delgamuukw v. B.C., [1997] 3 S.C.R. 1010, para 148 and 117.
⁸ There are interesting questions about how Aboriginal rights apply in Québec, which has a civil law system. In R. v. Côté, [1996] 3 S.C.R. 139, the Attorney General of Québec argued explicitly that s. 35 of the Constitution Act, 1982 did not apply in Québec, because French colonial law had not recognized Aboriginal rights. The Supreme Court of Canada rejected this, mentioning arguments about Aboriginal rights being contained in federal common law or in unwritten British constitutional law. The Court found it persuasive
The rest of this paper examines key Aboriginal rights doctrines and how or if they have been able to accomplish the reconciliation which is asserted to be their purpose.

INDIGENOUS PERSPECTIVES ON LAND AND WAY OF LIFE

It is a great honour to act for a First Nation in a land rights matter. To understand why requires an understanding of the place of the land in Aboriginal life and thought. While there are many and diverse Aboriginal cultures, in all of them, the land has a place almost beyond the comprehension of a European-trained mind, which, generally speaking, deals with land as an economic commodity. The Royal Commission on Aboriginal Peoples grappled with this reality as follows:

Aboriginal people have told us of their special relationship to the land and its resources. This relationship, they say, is both spiritual and material, not only one of livelihood, but of community and indeed of the continuity of their cultures and societies.

Many Aboriginal languages have a term that can be translated as ‘land’. Thus, the Cree, the Innu and the Montagnais say aski; Dene, digeh; the Ojibwa and Odawa, aki. To Aboriginal peoples, land has a broad meaning, covering the environment, or what ecologists know as the biosphere, the earth’s life-support system. Land means not just the surface of the land, but the subsurface, as well as the rivers, lakes (and in winter, ice), shorelines, the marine environment and the air. To Aboriginal people, land is not simply the basis of livelihood but of life and must be treated as such.

The way people have related to and lived on the land (and in many cases continue to) also forms the basis of society, nationhood, governance and community. Land touches every aspect of life: conceptual and spiritual views; securing food, shelter and clothing; cycles of economic activities including the division of labour; forms of social organization such as recreational and ceremonial events; and systems of governance and management.

To survive and prosper as communities, as well as fulfil the role of steward assigned to them by the Creator, Aboriginal societies needed laws and rules that could be known and enforced by their citizens and institutions of governance. This involved appropriate standards of behaviour (law) governing individuals and the collective, as well as territorial rights of possession, use and jurisdiction that — although foreign to and different from the European and subsequent Canadian systems of law and governance — were valid in their own right and continue to be worthy of respect.

that the law should avoid creating a patchwork of constitutional protection, depending on specific details of the legal history of colonization.
“Our survival depended on our wise use of game and the protection of the environment. Hunting for pleasure was looked upon as wasteful and all hunters were encouraged to share food and skins. Sharing and caring for all members of the society, especially the old, the disabled, the widows, and the young were the important values of the Mi’kmaq people. Without these values, my people would not have survived for thousands of years as a hunting, fishing and gathering culture.”

Kep’tin John Joe Sark  
Micmac Grand Council  
Charlottetown, Prince Edward Island  
5 May 1992

Even today, Aboriginal people strive to maintain this connection between land, livelihood and community. For some, it is the substance of everyday life; for others, it has been weakened as lands have been lost or access to resources disrupted. For some, the meaning of that relationship is much as it was for generations past; for others, it is being rediscovered and reshaped. Yet the maintenance and renewal of the connection between land, livelihood and community remain priorities for Aboriginal peoples everywhere in Canada — whether in the far north, the coastal villages, the isolated boreal forest communities, the prairie reserves and settlements, or in and around the major cities.9

Indeed, a connection with the land and resource harvesting are at the core of most, if not all, Aboriginal identities. In dealing with Ojibway identity in the context of hunting rights litigation, anthropologist Dr. Paul Driben expressed it this way:

Now Ojibway — Ojibway men, it’s quite different. They have far less latitude. I could be a scholar in any field to be accorded high status in my culture. But for Ojibway men, it’s a very narrow window and that window is hunting. That’s what they have to do. They have to hunt to realize themselves as Ojibway. To be Ojibway, that’s the essence of their identity.10

To be entrusted with the conduct of a piece of Aboriginal land right litigation, then, is to be entrusted with far more than protecting an economic asset, as would be the case in almost all litigation. It is to be entrusted with the recognition of something close to the core of a community’s identity.

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Traditional knowledge of the land and land customs are also a distinctive feature in Aboriginal perspectives. While such traditional knowledge can be important evidence in land rights cases, it is important to understand that often this knowledge is considered sacred and esoteric. It may not be considered appropriate to share such knowledge in the context of adversarial litigation, and with people who are not genuinely interested in and respectful of such knowledge. Often there are protocols about with whom and in what circumstances such traditional knowledge is to be shared. Such protocols could include, for instance, that there be a long-standing and trusting relationship with the person seeking knowledge before some kinds of knowledge can be shared.

Traditional knowledge is typically held by elders. Again, the status and role of elders in Aboriginal society is much different than any corresponding status in a non-Aboriginal community. The Royal Commission on Aboriginal Peoples had this to say:

Elders in Aboriginal communities are those recognized and respected for knowing, living and teaching the traditional knowledge. They see the world through the eyes of the ancestors and interpret the contemporary world through lessons passed down through generations. Their wisdom is transferred to young people who seek their teachings. The elders are a living bridge between the past and the present. They also provide a vision for the future, a vision grounded in tradition and informed by the experience of living on the land, safeguarding and disseminating knowledge gained over centuries.\(^\text{11}\)

To call an Aboriginal elder to give evidence in litigation is not something to be undertaken lightly, although it is most appropriate for the Court to have the benefit of the wisdom and knowledge of the elders. But one must bear in mind that exposing an elder to cross-examination may result in events which are considered disrespectful and insulting by the community, since it is considered highly culturally inappropriate to challenge the credibility or wisdom of an elder.

The kind of gap which must be bridged in an Aboriginal case can be illustrated by a story contained in *Dancing with a Ghost*, a book by Rupert Ross, an Ontario Crown Attorney reflecting on his experiences with Aboriginal people in Courts. It illustrates both the diversity of different Aboriginal cultures and the way that persons from different cultures, even when they are trying to act respectfully, can end up offending each other when they do not understand the different cultural meanings of the same action.

I can think of no better way to begin than by retelling a story told to me by Dr. Clare Brant, a Mohawk from Tyendinaga in southern Ontario, who has been one of my two most helpful Native mentors over the last several years.

In the 1970s, he said, his Mohawk band hosted a sporting tournament to which they invited a group of James Bay Cree. The Mohawk, who were an agricultural people long before contact

with Europeans, had developed a custom of always setting out considerably more food than their guests could consume. In this way they demonstrated both their wealth and their generosity. The Cree, however, had a different custom. A hunter-gatherer people for whom scarcity was a daily fact, their custom involved always eating everything that was set before them. In this way they demonstrated their respect for the successful hunter and for his generosity.

Needless to say, a problem arose when these two sets of rules came into collision. The Cree, anxious to show respect, ate and ate until they were more than a little uncomfortable. They considered the Mohawk something akin to gastro-intestinal sadists intent on poisoning them. The Mohawk, for their part, thought the Cree ill-mannered people intent on insulting Mohawk generosity.\(^{12}\)

In what follows, I will try to show that this same dynamic can occur, even when Canadian law is trying to arrive at reconciliation with Aboriginal rights and perspectives. As will be seen, Canadian legal concepts are situated in a different world.

**CANADIAN LEGAL DOCTRINES IN ABORIGINAL LAW**

Canadian law has established a general concept of Aboriginal rights. This doctrine protects activities which are related to pre-contact traditional activities. The focus of the inquiry, then, is into Aboriginal activities at the time of first European contact, as far as that can be reconstructed. A particular example of an Aboriginal right is Aboriginal title, which is recognized as a property right in the land itself. Establishing Aboriginal title, however, requires showing exclusive occupancy of the land in question at the time of the assertion of British sovereignty (usually significantly later than the time of first European contact).\(^{13}\)

**Aboriginal Rights**

The basic test for establishing an Aboriginal right is that the activity in question must have continuity with a pre-contact activity which was integral to the distinctive culture of the relevant aboriginal people.\(^{14}\)

Such a test obviously presents challenges in marshalling the required evidence. The evidence itself need not date from the pre-contact period, but it needs to somehow point back to the pre-contact period. The date of first European contact puts the spotlight on the earliest accounts of

\(^{12}\) Rupert Ross, *Dancing with a Ghost* (Markham: Octopus Publishing Group, 1992) at 1.

\(^{13}\) I note that Canadian law seems somewhat unique in viewing the relationship between Aboriginal rights and Aboriginal title in this way. In other jurisdictions that recognize Aboriginal rights and title (such as the U.S. and Australia), usually it is title which is considered the over-arching concept, and specific rights flow from the original title. When relying on cases from other jurisdictions (which regularly happens in Aboriginal litigation), it is important to understand such different nuances in the structure and content of doctrines which on their face appear similar.

European explorers and missionaries. These accounts are frequently vague and confusing. Both geographic and group identity names frequently have shifted since the time of first contact. (Early explorers rarely identified Aboriginal groups by the names they used for themselves – they tended to make up a name in a European language based on some characteristic they observed, use the name for a newly-contacted group used by their translators, who belonged to a different Aboriginal group, or mistake a family designation for a national (“tribal”) identity). Thus, often there are unresolved questions about where precisely a certain explorer was, and what Aboriginal group he met. Nonetheless, these accounts become a touchstone for establishing an Aboriginal right. Since Aboriginal peoples have the burden of proof of establishing their rights if they come to a Canadian Court, this vagueness in the European side of the record works to their disadvantage. In principle, traditional knowledge can be used as evidence, and, while it is supposed to be treated equally to written records, one cannot help wondering if Courts are more comfortable with written evidence. Two B.C. cases in 2009 focussed on claims of Aboriginal rights to commercial fishing, and may illustrate this.

As background, Canadian Courts have acknowledged that it is possible to establish a commercial fishing right, but it requires establishing a practice of a different character and scope than that required to establish a right to fish for food, social and ceremonial purposes.\(^{15}\) Also as background, early European contact with the First Nation plaintiff in \textit{Ahousaht}\(^ {16}\), was extensively documented in explorers’ records. In fact the plaintiffs in that case chose not to call as evidence any of what is usually thought of as traditional knowledge. The state of the evidence in \textit{Lax Kw'alaams}\(^ {17}\) was quite different.

In \textit{Ahousaht} the plaintiffs succeeded in establishing a right to fish and to sell the fish, although the Court stopped short of considering this to be a full scale “commercial” right. The Court was satisfied that the right should not be construed as being species-specific, since the evidence about the way of life was of a seasonal round, where species gained or lost importance according to their abundance. The Court ruled that the activity in question was properly characterized as fishing, and that it would be unduly restrictive to limit this to specific species. The Court also had to consider the significance of the plaintiffs’ customs in construing the right. The Court ruled that it was not appropriate to disqualify trade between kin (which often has a very wide meaning in Aboriginal cultures) as being commercial trade, since, for example, there was evidence that sometimes marriages were arranged precisely to facilitate trade. As well, the Court did not disqualify “gifts” – that is, gifts which were intended to be reciprocated – as trade. The Court viewed this as a polite form of trade.

In \textit{Lax Kw’alaams}, the plaintiffs failed to establish a right to fish commercially for all species. The Court of Appeal essentially accepted the approach of the trial judge below. The trial judge had found that trade in fish and fish products, with the exception of eulachon grease, was “low volume, opportunistic, irregular, [and] for [food, social and ceremonial] purposes”. The trial judge had also expressed the view that the pre-contact economy of the plaintiffs was a “kinship economy”, with “gift-giving” at its heart. Therefore the claimed commercial right did not meet the test of “integral to the distinctive culture”. Although the trial judge thought that trade in


\(^{16}\) \textit{Ahousaht Indian Band and Nation v. Canada (A.G.)}, 2009 BCSC 1494 (appeal to BCCA pending)

\(^{17}\) \textit{Lax Kw’alaams Indian Band v. Canada (A.G.)}, 2009 BCCA 593
eulachon grease might be integral to the distinctive culture of the plaintiffs, the pleadings had not been separated out in a species specific way, and so the question was not considered.

Aboriginal cultures can be very different from one another, so it is possible that Housaht and Lax Kw’alaams are properly distinguishable on their facts. However, the way the decisions view kinship, “gifts”, and species specificity appear to be in some tension. One is left with the impression that cases may turn less on what pre-contact Aboriginal cultures were like, and more on whether or not those cultures had been documented precisely enough by early European explorers, and on the lens through which the evidence is viewed.

These cases also illustrate another issue of contention – how to characterize the right in question. Much will turn on whether the right the Court considers is the “right to fish” or whether the right must be established on a species by species basis; whether the right is to harvest for one’s own use as food; or is to support oneself from the land and waters by means including selling or trading products harvested, or is to “commercial” harvesting. These matters have all become the subject of argument and rulings, although in principle one might have thought that plaintiffs would be entitled to choose how to characterize what they wanted to prove, and then have tested whether or not they had proved it.

In addition, this also may illustrate the how the issue of evolution of Aboriginal rights is applied. The Supreme Court has clearly rejected the concept of “frozen rights” – that rights are only to practice the exact activities in the same way that they were practiced pre-contact. Rather, rights are allowed to evolve over time in a way that makes sense in an altered context. Nonetheless, Courts seem to struggle with how to apply this, especially if it is suggested that a harvesting right has developed into something “commercial”. In such cases, Courts have required a character and scope of pre-contact harvesting that involved a very substantial amount of trade with external groups. This seems to obscure the reality, articulated by McLachlin J. (as she then was), dissenting in Van der Peet: the right is to harvest the resource and use it to provide for one’s needs – if in a modern context, this requires commerce, then the right should include that, up to the point of moderate sustenance. This approach would recognize that sale or trade, even on a small scale, is “commerce”.

However, Courts instead have, at times, found a right to sell or trade products that falls short of being “commercial”. Now, “commercial” is taken to mean “on a scale limited only by the availability of the resource or human ability to exploit it”. Rarely, Courts have been persuaded that Aboriginal rights existed to this level of commercial harvesting, and this usually only for a single species or product.

In principle, Aboriginal rights apply to anything which is in continuity with a pre-contact activity which was integral to the distinctive culture of the relevant aboriginal people. In practice, the vast majority of Aboriginal rights cases involve resource harvesting. Occasional cases recognized rights such as to practise customary adoption (ie a right to regulate family and social matters), and to permit visiting Aboriginal people to share in resource harvesting (ie a right to

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regulate resource allocation). However, the right to “self-government” or “management of reserve lands” have been considered too general to be recognized as such.

**Aboriginal Title**

The leading case concerning the nature and content of aboriginal title is *Delgamuukw v. British Columbia*. The Supreme Court indicated that aboriginal title is unique in the following aspects: (1) it cannot be transferred to anyone except the Crown, (2) its sources lie in the occupation of the land by aboriginal peoples prior to British sovereignty and in the content of aboriginal land law, and (3) it is a communal right. Aboriginal title includes the exclusive right to the use of land for a variety of purposes. These purposes need not be aboriginal rights in themselves, but they must not be irreconcilable with the aboriginal group’s attachment to the land. This limitation, roughly speaking, means aboriginal title does not include the right to ruin the land. The Court did make it clear that aboriginal title includes mineral rights.

*Delgamuukw* also specified how aboriginal title must be proved. An aboriginal group must show that it exclusively occupied the land prior to the assertion of British sovereignty, and that their title has not been extinguished. Both physical occupation of the land and the content of aboriginal land law can be used to prove occupancy.

**EXCLUSIVITY**

The Court in *Delgamuukw* also noted that “shared exclusive possession” is possible, that isolated acts of trespass do not affect title, and that the presence of others with permission is consistent with, and indeed supportive of, aboriginal title. The Court also specified that it was not necessary to show, on top of exclusive occupancy, that use of a particular tract of land was of central significance to the culture of the relevant aboriginal people.

In *Marshall and Bernard*, the Supreme Court elaborated that “exclusive occupation” meant the effective control of land so that the Aboriginal group could have excluded others had it chosen to do so. This requires showing an “intention and capacity” to control access to the land. The Court thought it might not be fair, however, to require actual evidence that others had actually been excluded if, for example, the historic practice had been to allow access to any friendly group that asked for it.

This seems to have intended as a “middle ground” between the lower Courts in *Bernard*, which had viewed incidents of forceful exclusion of others as a requisite element of proof of Aboriginal title, and the Court of Appeal in *Bernard*, which had considered it sufficient to show that a group had a defined and unchallenged territory that was respected by others. However, if, in fact, a group has a defined and unchallenged territory, it is hard to see why this should not

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25 Despite the apparent clarity of this, the conceptual basis and nature of Aboriginal title remains “shrouded in doubt”. See Brian Slattery, “The Metamorphosis of Aboriginal Title”, in Maria Morellato, *Aboriginal Law Since Delgamuukw*, (Aurora: Canada Law Book, 2009).
qualify for Aboriginal title. Proof of a specific intention to exclude others is a higher standard than required in non-Aboriginal contexts for establishing title. For example, when establishing common law occupation (from which flows possessory title in the absence of a rebutting circumstance) one does not require explicit proof of an intention and capacity to exclude others — the only intention required is to remain in occupation and this is usually implied from the circumstances. In a case of an unchallenged territory of an Aboriginal group it can be very difficult to come up with evidence of a specific intention to exclude others — there could have been no practical need to express such an intention explicitly. Euro-Canadian law is trying to draw a conceptual line which may be invisible from an Aboriginal perspective.

REGULARITY

The Court in *Delgamuukw* had noted that the degree of occupation required will vary with the context — regular use of specific territories for traditional harvesting can be sufficient occupation in some contexts. The Court also suggested that a nomadic group which “varied ‘the location of their settlements with the season and changing circumstances’” might be unable to establish aboriginal title. The Court expanded on this in *Marshall and Bernard*. The Court did re-affirm that the regular use of land for resource harvesting could be sufficient proof of occupation. However, the majority judgment seemed to take a narrow view of the “regularity” of occupation that is required to prove Aboriginal title. It suggested that the regular seasonal use of particular tracts of land would give rise to Aboriginal rights, but not Aboriginal title. The majority took this view despite having noted, citing some English cases, that the degree of possession sufficient to ground common law title depended on all the circumstances, and that, depending on the nature of the land and how it was commonly enjoyed, it could be sufficient to prove that one hunted on the land, or that one chose to use the land only intermittently and sporadically. It is hard to reconcile these doctrines with what the majority ruled in *Marshall and Bernard*.

Despite the popular impression, it is unlikely that there were many aboriginal groups in North America whose movements were really so random as to amount to being “nomadic”, which is by now a largely discredited concept in anthropology. It may have seemed to seventeenth century European eyes that an Aboriginal group was wandering about fecklessly, but this was not Aboriginal reality. Anthropological research indicates that most, if not all, North American aboriginal peoples occupied definite tracts of land, within which they moved on a seasonal basis, returning to the same locations where they were familiar with the resources, and to which they may have had spiritual ties as well.

LeBel J., in a concurring judgment in *Marshall and Bernard*, pointed out that the majority’s reasoning on this point might prove fundamentally incompatible with a “nomadic” or “semi-nomadic” lifestyle. Thus to ignore the Aboriginal relationship to the land amounts to adopting the view that Canada was not occupied prior to the assertion of British sovereignty, and as LeBel J. goes on to note, is “clearly unacceptable and incongruent with the Crown’s recognition that Aboriginal peoples were in possession of the land when the Crown asserted sovereignty”.

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LeBel J. would have given a much greater role to the Aboriginal perspective, not just as evidence, but also in modifying common law property concepts so that they would be less Euro-centric. Again, Euro-Canadian law is trying to draw a conceptual line which is invisible from an Aboriginal perspective.

Such an “invisible” conceptual line may have been the result in *Tsilhqot’in Nation.* In that case the Crown had advanced what the Court characterized as the “postage stamp” theory of Aboriginal title – the idea that that title is to be decided on the basis of regular use of very small pieces of land (e.g., villages or fishing camps) scattered throughout the territory, but that it does not include the territory in between them. This theory is only a small step removed from the doctrine of *terra nullius* – that the land was “unoccupied” when Europeans “discovered” it, and therefore Aboriginal peoples have no special rights. This theory is highly offensive to Aboriginal peoples, since at root it denies their humanity. The *terra nullius* doctrine has been rejected by Canadian Courts. However, the assertion of the “postage stamp” theory is based on a very similar supposition – that only tiny portions of land were “occupied” by Aboriginal peoples, and the rest of the land was “unoccupied”, despite its use by Aboriginal peoples for resource harvesting.

The *Tsilhqot’in Nation* Court rejected the “postage stamp” theory, and in the end, came to the view that a relatively large, contiguous tract of land (200,000 hectares) was subject to Aboriginal title. On the other hand, the Court treated the test for Aboriginal title as an onerous one, and was of the view that Aboriginal title had been established for only about half of the claim area (which, in turn was only about 5% of *Tsilhqot’in* traditional territory).

*Tsilhqot’in Nation* applied the legal test by first looking at whether the Tsilhqot’in had provided enough evidence of occupation, exclusivity and continuity on certain parcels of land. This threshold was plainly satisfied where there was evidence of village sites—such as archaeological remnants of pit houses. The Court also considered the threshold met where there was evidence of a well-defined network of waterways and trails, which included use of land, rivers and lakes on a regular basis for hunting, trapping, fishing and gathering. Further, the Court considered lands to be sufficiently occupied if they were cultivated “from the Tsilhqot’in perspective”: valleys and slopes where the Tsilhqot’in gathered roots plants, medicines and berries. In this the Court clearly rejected the notion that only cultivation in the European meaning could count as occupation. The Court also considered, as relevant to occupation, evidence about creation stories with specific geographical references, Aboriginal place names, and in-depth botanical knowledge (the last, on the basis that such local knowledge could only have been obtained after many generations). The Court then drew a boundary of a large contiguous tract of land including such parcels of land which met the threshold for occupation, and any connecting areas between them.

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36 In fact, the “discovery” of the Americas sparked lengthy theological and judicial debates in Europe about whether indigenous people indeed were or should be treated as humans. For more detail on the international law aspects of this, see, for example, O. Dickason, “Concepts of Sovereignty at the Time of First Contact,” in Dickason and Green, eds., *The Law of Nations and the New World* (Edmonton: University of Alberta Press, 1989).
The *Tsilhqot'in Nation* Court also concluded that there was not sufficient occupation to prove Aboriginal title over the whole claim area, although the Court accepted that “there is no doubt that Tsilhqot'in people have derived subsistence from every quarter of [the claim area]”\(^{37}\)

The *Tsilhqot'in Nation* Court identified as factors tending to show insufficient occupation of certain areas that 1) the population of the Tsilhqot'in at the time of sovereignty assertion was about 300; 2) occupation of more permanent nature during the winter was confined to lakes and rivers in the southern area; 3) oral history evidence does not demonstrate the same degree of use throughout the entire area; 4) the time and extent of traditional housing in the interior of the claim area was not known.

For areas where *Tsilhqot'in Nation* concluded there was sufficient use of an area, the Court then looked at exclusivity. The Court concluded that at the time of sovereignty assertion, the Tsilhqot'in had exclusive control over the lands they used regularly. Exclusivity was demonstrated by conflicts at specific sites, and historical records kept by Europeans that indicated that they knew they were permitted access to the land at the ‘sufferance’ of the Tsilhqot'in people, and that outsiders were often obliged to give gifts to the Tsilhqot'in in exchange for access. Also, Tsilhqot'in witnesses testified about the use of scouts and runners to check for intruders and to warn the community.

In my view the *Tsilhqot'in* Court struggled with finding where was the appropriate line between a sufficient and an insufficient degree of occupation for Aboriginal title. Indeed, it found something that resulted in a ruling between the positions of the parties. But it is very difficult to discern the principles governing where the line was drawn, despite the Court having provided a list of factors involved in that decision\(^{38}\). In my view, this is due to the inherent vagueness and ambiguity in the legal test, as demonstrated by the sharply different approaches of the two sets of reasons for judgment in *Marshall and Bernard*.

**“MAGIC” DATES**

There are also troubling consequences arising from the very specific timeframes established for Aboriginal rights and Aboriginal title. As we have seen, for Aboriginal title, First Nations need to prove exclusive occupation of their lands at the “magic date” of the assertion of British sovereignty. However, for Aboriginal rights, the operative date is first European contact.

Suppose, for example, a First Nation migrated some time between “first contact” and “assertion of British sovereignty”. If for some reason this First Nation fails to meet the standard of “exclusive occupation” at the time of the assertion of British sovereignty, or if their Aboriginal title was found to have been extinguished by treaty, they would be left with either Aboriginal rights in a location distant from their present location, or perhaps, with no rights at all if they could have been considered to have abandoned rights in their ancient location. So it might be possible for an Aboriginal group to have profound cultural and spiritual ties to its territory where it has lived for the last 300 years, and yet have no rights to that territory, or perhaps anywhere, because of something that happened 350 years ago. This fails, in my view, to successfully recognize the prior occupation of territory by Aboriginal peoples, and reconcile this with the


assertion of Crown sovereignty. Such a result is also quite contrary to the historic practice of the Crown in making treaties, which was to deal with whatever Aboriginal groups were occupying the territory at the time a treaty was to be made.

The implications are even more troubling when one considers that a Mètis group may have arisen, after the assertion of British sovereignty, whose ancestors were members of the (not very) hypothetical Aboriginal group described above. In Powlcy, a case of Mètis rights, the Court was faced with an obvious need to adapt the “standard” tests for Aboriginal rights, since the Mètis by definition arose post-contact. Instead of the first contact date which is critical for other Aboriginal rights, the operative date for Mètis rights is the date of “effective control” by European laws and customs.

Although, on the hypothetical situation suggested above, the First Nation could not have hunting rights in its current location, a Mètis group with common Aboriginal ancestry to the First Nation could. This seems unfair to the First Nation.

Further, how, for example, would the tests apply if a First Nation and a Mètis community claimed joint (or competing) Aboriginal title to territory? Powlcy added further complexity to this question. Would it not have been simpler and fairer if the operative date for all Aboriginal rights (including title) were the same? “Effective control” could be appropriate for the Aboriginal rights of First Nations as well. This, in fact, was precisely what McLachlin, J. (as she then was) suggested, in dissent, in Van der Peet. Such a criterion would place the focus on an event (effective control) which, contrary to the concept of assertion of sovereignty, would have been observable and would have likely appeared significant to the Aboriginal people in question.

“Justified” Infringements

Supposing an Aboriginal group succeeds in establishing at first sight that it has Aboriginal rights or title, it is still possible that federal or provincial laws may infringe these rights or this title, and this may be permitted if a justification test is passed. This was established by the Supreme Court in Sparrow. The Court reasoned that even constitutionally recognized rights were not absolute, and that a test was required which reconciled federal legislative power with federal duty to Aboriginal peoples. Therefore the Court set out a justified infringement doctrine.

If a prima facie infringement is to be justified, there must be a valid legislative objective. Sparrow stated that the “public interest” was too vague to qualify as a valid objective, contrasting it with compelling and substantial objectives such as conservation or public safety. In R. v. Adams, this was elaborated on, and the enhancement of sports fishing was found not to be a sufficiently compelling or substantial enough objective to justify an infringement of aboriginal food fishing rights. On the other hand, where the aboriginal right in question has no internal limitation, such as a commercial fishing right or aboriginal title itself, the interests of the broader society in economic development may be a sufficient purpose to justify an

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39 The Mètis are an Aboriginal people initially formed by the descendants of European men who married women from First Nations. Mètis rights are explicitly recognized in s. 35 of the Constitution Act, 1982.
infringement. Otherwise, the aboriginal right would amount to an exclusive and virtually absolute right.

Supposing that there is a sufficient legislative objective, the "honour of the Crown" must still be upheld – this is often expressed as the fulfilment of the fiduciary duty of the Crown. Factors relevant to this include (1) whether priority has been given to native rights (i.e. depending on the nature of the right, this could be some sense of preferential treatment, not necessarily an absolute, exclusive priority), (2) whether there has been as little infringement as possible, and (3) whether the aboriginal group has been consulted.

For the duty of consultation and accommodation to be satisfied, there must be some accommodation of the aboriginal interest – at least good faith consultation is required, and often a greater involvement, sometimes even the consent, of the relevant aboriginal group; the allocation of resources must "reflect" the prior aboriginal interest, and compensation for infringements of aboriginal title will normally be required.  

It could be suggested that in cases of past infringements of Aboriginal title, the test for justification is unlikely to be met, since these required factors have not often even been in the minds of those responsible for infringements. However, Canadian Courts have yet to address this question.

**Evidence Law Principles in Aboriginal Cases**

In proving occupation, aboriginal oral history should be considered on an equal footing with written records. Oral histories have features which would count against them with respect to both admissibility and weight on a traditional approach to evidence law. However, in order that aboriginal peoples not face an "impossible burden of proof", the Court ruled that the laws of evidence are to be adapted, on a case by case basis.

Applying this can be difficult. There is no doubt a tendency in the Canadian legal system to prefer evidence that comes in more familiar forms. Even when Courts and tribunals are willing to consider such evidence, traditional knowledge holders may not be willing to testify for some of the reasons noted above. If they do testify, cultural differences may obscure what they are saying. Traditional expressions of respect may be mistaken for doubt. Unwillingness to translate some things into English which traditionally are required to be recounted only in an Aboriginal language may be mistaken for evasiveness. Silence may be mistaken for agreement.

**COMPARISON TO OTHER JURISDICTIONS**

The focus on traditional activities as a basis of rights is a distinctive feature of Canadian law, as compared to other jurisdictions which recognize Aboriginal rights. In Australia and New Zealand, for instance, the content of Aboriginal title (i.e. called "native title" in Australia or being the rights associated with "customary lands" in New Zealand) depends on content of the traditional laws and customs of the Aboriginal group regarding land. For example, if those laws and customs speak of exclusivity, Aboriginal title will be exclusive, if not, it might be something

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less than exclusive. In Canada, the content of Aboriginal title is fixed, and Aboriginal laws and customs are relevant to proving its existence, but not to defining its content.

The focus of Canadian law on “magic dates” at which the tests for Aboriginal rights and title are applied is not shared universally. In U.S. law, there is not as sharp a distinction between the tests for the proof of Aboriginal rights and Aboriginal title as there is in Canada. Aboriginal rights are usually thought to flow from Aboriginal title. Although there have been many cases decided about Aboriginal rights and title in the U.S., the relevant time period to consider has not been narrowed down. Occupancy of land for a “long period” of time is required to establish Aboriginal title, but this long period could commence after the assertion of European sovereignty. Such an approach avoids many of the anomalies discussed above which flow from the Canadian Courts’ approach to date.

The approach of Canadian Courts concerning the doctrine of extinguishment is also distinctive. The Court in Delgamuukw re-affirmed the “clear and plain” standard for extinguishment, and ruled that provincial laws cannot extinguish aboriginal title, since any legislation which was sufficiently “clear and plain” would be exclusively within federal competence.

Extinguishment is a point on which Canadian and U.S. Aboriginal law diverge sharply. In the U.S. it is significant whether Aboriginal title was been “recognized” by the government or not. If not, title can be unilaterally extinguished by the federal government without compensation, but this is not so if the title had been “recognized”. The Supreme Court of Canada emphatically rejected the significance of “recognition” in R. v. Côté:

> Section 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features which were fortunate enough to have received the legal recognition and approval of European colonizers.

This is also a point on which Canadian law diverges from Australian law. Australia has taken quite a different course from Canada in dealing with competing rights, perhaps because of its Native Title Act. Native title is conceived as a bundle of rights, including property and other rights. The way Australian Courts approach competing rights is to “unbundle” the bundle of rights and extinguish any that conflict with a common law right. The Australian Courts also only require an inconsistency with a common law right in order to extinguish an Aboriginal

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47 See for example, Mabo v. Queensland (No. 2) (1992), 107 A.L.R. 1 (H.C.A.)
48 This concept was rejected by the Supreme Court of Canada in R. v. Adams, [1996] 3 S.C.R. 101, which ruled that Aboriginal rights had been established despite it not being possible to establish Aboriginal title in that case.
49 Confederated Tribes of Warm Springs Res. v. United States, 177 Ct.Cl. 184 (1966), and Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935 (Ct. Cl. 1974)
51 Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955)
53 Native Title Act, 1993 (Cth).
right, and have rejected the need for a "clear and plain" intention to extinguish Aboriginal rights.\textsuperscript{55}

**RECONCILIATION?**

The concept of land as having spiritual and cultural significance comes from a different world than the concept of land as an economic commodity.

While the Euro-Canadian law is attempting to reconcile these very different perspectives, it must be emphasized that to Aboriginal people, the doctrines of Aboriginal law as they are developed by Canadian Courts are not just an intellectual matter. They cut deeply into their identity. My clients are frequently shocked at what issues the Crowns raise for determination, since to them, many of these matters are so close to their identity that they are self-evident. An Aboriginal law practitioner needs to explain to his or her clients that the Court indeed will need to be persuaded of matters that are self-evident to them, and then consider carefully what evidence would be considered persuasive to a Court, which may be very different from what Aboriginal people would consider persuasive. To be as persuasive as possible to a Court, while still being respectful of the perspectives of one’s Aboriginal clients, can be a challenge. The courtroom can become the scene for a clash of cultures.

On the face of it, one might think the Australian approach, in which indigenous laws and customs are more central to the inquiry about Aboriginal title, would produce a result more respectful of Aboriginal rights. However, the Australian “unbundling” and extinguishment approaches have overwhelmed any value that might have been gained from what might be thought of as a better starting point. On this point, Canadian law seems to be doing a better job of reconciliation.

The Canadian “magic date” approach is problematic for reasons noted above. Beyond this, it should be noted that the doctrines are giving great legal significance to events of first contact and the assertion of British sovereignty. These are events which may have appeared to have little significance, or even to have passed unnoticed, to the Aboriginal people involved. This is another case of drawing a conceptual line which is invisible from an Aboriginal perspective.

It is surely a step toward reconciliation that the “postage stamp” approach for Aboriginal title has been rejected to this point. However, drawing a conceptual line which is invisible from an Aboriginal perspective about the degree of occupation required to prove title, falls short of reconciliation. The introduction of the “nomadic” concept is unfortunate. One hopes that future Court decisions will heed the way the concept of “nomadic” is now viewed in anthropology. One could be left with the impression that Courts are concerned about non-Aboriginal interests and are (perhaps unconsciously) declining to give weight to Aboriginal laws and customs that appear too “different” from Euro-Canadian law because of this concern.

It is true that for there to be “reconciliation”, non-Aboriginal interests must be considered. What the Courts have created for precisely this purpose is the doctrine of “justified infringement”. In my view this is the proper place to consider non-Aboriginal interests. The tests for the existence of Aboriginal title do not need to be shaped for this purpose, nor should Aboriginal groups be

\textsuperscript{55} Western Australia v. Ward (2002), 191 A.L.R. 1 at para 78.
required to have customs that track Euro-Canadian concepts of ownership and use of land in order to recognize territory as “theirs”. The common law is flexible enough to incorporate Aboriginal concepts that may be different from European law concepts – this is precisely what the Australian Courts have taken as their starting point.\footnote{See, for example, 
\textit{Mabo v. Queensland (No. 2)} (1992), 107 A.L.R. 1 (H.C.A.).}

My view is that the common law has the conceptual tools which indeed can lead to reconciliation. It could also (and sometimes has) lead to conceptual lines which are invisible to Aboriginal litigants. Reconciliation requires not only the right conceptual tools – they must be used with a great amount of good faith, imagination and courage. However, that is not enough – even when acting in good faith, misunderstanding can lead to offence. Above all, what is needed is a willingness and ability to interact fairly with a worldview that is fundamentally different from one’s own.