

The Law of the Land: New Jurisprudence on Aboriginal Title

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As to ghosts or spirits they appear totally banished from Canada. This is too matter-of-fact country for such supernaturals to visit. Here there are no historical associations, no legendary tales of those that came before us. Fancy would starve for lack of marvellous food to keep her alive in the backwoods. We have neither fay nor fairy, ghost nor bogle, satyr nor wood-nymph; our very forests disdain to shelter dryad or hamadryad. No naiad haunts the rushy margin of our lakes, or hallows with her presence our forest-rills. No Druid claims our oaks; and instead of poring with mysterious awe among our curious limestone rocks, that are often singularly grouped together, we refer them to the geologist to exercise his skill in accounting for their appearance: instead of investing them with the solemn characters of ancient temples or heathen altars, we look upon them with the curious eye of natural philosophy alone.

Catherine Parr Traill, *The Backwoods of Canada* (1836)¹

I. INTRODUCTION

The Supreme Court of Canada has stressed time and again that a fundamental purpose of the recognition of Aboriginal rights within the Canadian legal system is reconciliation: on the one hand, there is the fact of “the prior occupation of North America by distinctive aboriginal

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¹ Catherine Parr Traill, *The Backwoods of Canada: letters from the wife of an emigrant officer, illustrative of the domestic economy of British North America* (London: Charles Knight, 1836), at 153-54 [hereinafter “Parr Trail”]. I am indebted to Margaret Herrick for bringing this passage to my attention, and for many revelatory discussions that have inspired this paper.

societies”,² societies that “lived on the land ... with their own practices, traditions and cultures”,³ which is to be reconciled with the assertion of Crown sovereignty over Canadian territory on the other hand.⁴ In a subsequent formulation, the Court said that the reconciliation is to be between “aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions”.⁵ Although the reconciliation of Aboriginal peoples to Crown claims of sovereignty is quite a different idea than the reconciliation of the broken relationship between Aboriginal and non-Aboriginal Canadians, both ideas are engaged in the newest decision of the Supreme Court of Canada in *Tsilhqot’in Nation v. British Columbia*.⁶

Within Canadian law, the concept of Aboriginal title serves as a major gatekeeper of this reconciliation. “Assertion of Crown sovereignty”, in the Court’s language,⁷ describes the imposition of a colonial legal order that began to deny the land rights of Indigenous peoples. “Aboriginal title” is the way the Canadian legal system articulates the land rights of Indigenous people. The Canadian legal order assumes the validity of the Crown’s assertion of sovereignty⁸ and understands it as the status quo against which claims by Aboriginal peoples are to be measured, and it is the Aboriginal parties in litigation who have the burden of proof of showing their presence. What does this assertion look like on the ground, as it were? The above epigraph is from one of the most popular “emigrant guides” for European settlers arriving in Upper Canada, a genre that flourished in the mid-19th century, and encapsulates this vision well. The colonial vision of a “blank slate” on the land, of a “matter-of-fact country”, is in fact diametrically opposed to how many First Nations see the land.⁹ Almost two centuries later, Canadian law

² *Delgamuukw v. British Columbia*, [1997] S.C.J. No. 108, [1997] 3 S.C.R. 1010, at para. 81 (S.C.C.) [hereinafter “*Delgamuukw*”].

³ *R. v. Van der Peet*, [1996] S.C.J. No. 77, [1996] 2 S.C.R. 507, at para. 31 (S.C.C.).

⁴ *Delgamuukw*, *supra*, note 2, at para. 81.

⁵ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] S.C.J. No. 71, 2005 SCC 69, at para. 1 (S.C.C.) [hereinafter “*Mikisew Cree*”].

⁶ [2014] S.C.J. No. 44, 2014 SCC 44 (S.C.C.) [hereinafter “*Tsilhqot’in Nation*”].

⁷ *Delgamuukw*, *supra*, note 2.

⁸ *R. v. Sparrow*, [1990] S.C.J. No. 49, [1990] 1 S.C.R. 1075, at 1103 (S.C.C.).

⁹ See, e.g., *Delgamuukw*, *supra*, note 2, at paras. 13-14; *Squamish Indian Band v. British Columbia (Minister of Sustainable Resource Management)*, [2004] B.C.J. No. 2143, 2004 BCSC 1320 (B.C.S.C.); Darlene Johnston, “Respecting and Protecting the Sacred”, paper prepared for the Ipperwash Inquiry (Toronto: Ministry of the Attorney General, 2006), online: <http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/policy_part/research/pdf/Johnston_Respecting-and-Protecting-the-Sacred.pdf> [hereinafter “*Johnston*”]. For examples of such conflicts since Professor Johnston’s paper was written, see *Ke-Kin-Is-Uqs v. British Columbia (Minister of Forests)*,

(c) aims to do better. Although certain crucial aspects of the Canadian legal system, such as the recognition of the validity of the Crown's assertion of sovereignty, will always have an imperialistic character, the way in which Canadian law mediates the interaction between Crown and Indigenous legal orders, and the framing of those interactions as the rights of Indigenous peoples, can make a difference on the relationship between Indigenous and settler communities. Our contemporary legal concept of Aboriginal title is meant to provide an opportunity to Indigenous peoples to litigate and negotiate with the colonial state for recognition of those rights, to aim for a different way for Indigenous and non-Indigenous communities to live together in Canada in the future.

The new Supreme Court decision in *Tsilhqot'in Nation*, released in June 2014, powerfully affirms the intention of the Court to move the Canadian legal system away from the "blank slate" envisaged by colonial ideology. In unequivocally rejecting the "postage stamp" theory of Aboriginal title put forward by the Crown, and adopted by the British Columbia Court of Appeal,¹⁰ the Supreme Court decision is a reaffirmation of earlier jurisprudence which had envisaged the Aboriginal title jurisprudence as a way of negotiating a more just relationship between Aboriginal and non-Aboriginal Canadians. It is also a reaffirmation of a centuries-old tradition within British colonial law of recognizing the land rights of Indigenous peoples, and represents another nail in the coffin of Victorian-era imperialistic fictions that pretended Aboriginal people did not exist, and which upended the earlier colonial legal order. In this way, *Tsilhqot'in Nation* reaffirms the law of the land.

This paper will sketch out the development of the doctrine of Aboriginal title, including through judicial decisions and historical treaties, to show the importance of the crossroads at which the Court found itself, and to show the significance of the path that it has chosen. It will then touch on what implications these developments may have for

[2008] B.C.J. No. 2089, 2008 BCSC 1505 (B.C.S.C.); *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2008] B.C.J. No. 454, 2008 BCCA 107 (B.C.C.A.); *Brokenhead Ojibway First Nation v. Canada (Attorney General)*, [2009] F.C.J. No. 608, 2009 FC 484 (F.C.); *Wahgoshig First Nation v. Ontario*, [2012] O.J. No. 22, 2011 ONSC 7708 (Ont. S.C.J.); and *Ktunaxa Nation Council v. British Columbia (Minister of Forests, Lands and Natural Resource Operations)*, [2014] B.C.J. No. 584, 2014 BCSC 568 (B.C.S.C.). For another detailed and illuminating discussion of such conflicts, see Michael Lee Ross, *First Nations Sacred Sites in Canada's Courts* (Vancouver: UBC Press, 2005), especially Ch. 3-4 [hereinafter "Ross"].

¹⁰ *Tsilhqot'in Nation v. British Columbia*, [2012] B.C.J. No. 1302, 2012 BCCA 285 (B.C.C.A.) [hereinafter "*Tsilhqot'in Nation (C.A.)*"].

the objective of reconciliation more broadly speaking. It will argue that the reaffirmation of the importance of Indigenous legal orders to the Canadian legal system suggests a promising direction that the jurisprudence can take. This path affords the Canadian legal system an opportunity to reaffirm that true reconciliation — one that recognizes Aboriginal societies as rule-governed legal orders — is indeed what Canadian law aims for. In this way, the law of the land does not need to be an imperialist project, but one that honours the place of Aboriginal peoples in the Canadian Constitution. An analogy is made to English ecclesiastical law and its place within the English legal system to suggest a practical form that the recognition of Indigenous legal orders by the Canadian legal system can take.

Space only permits a consideration of the approach in *Tsilhqot'in Nation* to the sufficiency of occupation necessary to make out Aboriginal title; the wealth of other issues touched on by the case must unfortunately be left for other commentary.

II. ABORIGINAL TITLE: HOW DID WE GET HERE?

In *Tsilhqot'in Nation*, the Supreme Court forcefully rejected the British Columbia Court of Appeal's vision of Aboriginal title. The Court of Appeal had held that Aboriginal title is confined to "specific sites on which hunting, fishing, or resource extraction activities took place on a regular and intensive basis". For the Court of Appeal, examples of land that would qualify for Aboriginal title "might include salt licks, narrow defiles between mountains and cliffs, particular rocks or promontories used for netting salmon, or, in other areas of the country, buffalo jumps".¹¹ In opposition to the "territorial conception" of Aboriginal title, this has been dubbed the "postage stamp" theory.¹² The "postage stamp" conception was soundly rejected by the Supreme Court in favour of the territorial conception. This part of this paper will contextualize this debate to show the significance of the road not taken by the Court.

In the centuries of transactions and litigation regarding Aboriginal ownership of the land, it is difficult to locate any reference to the idea that First Nations only had title over small, "postage stamp" pieces of land. At the early stages of British colonization in North America,

¹¹ *Id.*, at para. 221.

¹² *Id.*, at paras. 64-65.

purchasing lands from Indigenous communities was the normal course of acquisition of land for the settler communities.¹³ At certain points, war was also used as a tool by settler communities to displace Indigenous communities. But in either case, the fact of Indigenous presence on the land, and their right to that presence, were recognized by the act of purchase or by that of war. Both are quite different from the presumption that the land was *terra nullius*, a land belonging to no one. The fictive aspect of colonial claims to sovereignty is well described by Chief Justice Marshall of the United States Supreme Court in 1832, in the landmark case of *Worcester v. Georgia*:

Soon after Great Britain determined on planting colonies in America, the King granted charters to companies of his subjects, who associated for the purpose of carrying the views of the Crown into effect, and of enriching themselves. The first of these charters was made before possession was taken of any part of the country. They purport generally to convey the soil, from the Atlantic to the South Sea. This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The Crown could not be understood to grant what the Crown did not affect to claim, nor was it so understood.

Certain it is, that our history furnishes no example, from the first settlement of our country, of any attempt, on the part of the Crown, to interfere with the internal affairs of the Indians farther than to keep out the agents of foreign powers who, as traders or otherwise, might seduce them into foreign alliances. The King purchased their lands when they

¹³ See, e.g., Brian Slattery, “The Land Rights of Indigenous Canadian Peoples” (D. Phil Thesis, University of Oxford, 1979) [hereinafter “Slattery”]. For an early case, see *Mohegan Indians v. Connecticut*, as discussed in Mark D. Walters, “Mohegan Indians v. Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America” (1995) 34 Osgoode Hall L.J. 785; Sa’ke’j Henderson, “Unravelling the Riddle of Aboriginal Title” (1977) 5 Am. Ind. L. Rev. 75. The transaction of lands between Indigenous and settler communities is a deep and interesting topic that this paper can only canvass in the most cursory fashion, but the main point to be made here is that British settlers almost invariably reached some accommodation with Indigenous communities for sharing the land; they could not afford to treat the land as empty, because it was in fact not empty.

were willing to sell; at a price they were willing to take, but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies, but never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only.¹⁴

As Chief Justice Marshall describes it, the assertions of Crown sovereignty at most served to exclude other European powers from negotiating treaties with Indigenous communities covered by the assertion.¹⁵ To understand such assertions as granting the Crown sovereignty over Aboriginal peoples *and* title to their lands was, in the words of the Chief Justice, an “extravagant and absurd idea”. Even if we were to grant the efficacy of the Crown’s claim to sovereignty, the weight of common law opinion is that such an assertion did not affect the property rights of the inhabitants of those lands, and thus would not have any effect on their title to the land.¹⁶ In common law, then, the right of Indigenous communities to be protected by the Crown with respect to how the settler community was permitted to use and occupy Indigenous lands became known as “Indian title” or “Aboriginal title”.

This basic legal regime for mediating between Aboriginal and settler communities was codified in the *Royal Proclamation, 1763* and generally commanded compliance by Crown officials in Canada through the 19th and early 20th centuries.¹⁷ The *Royal Proclamation* stipulated that Aboriginal communities were not to be disturbed in their possession of their traditional lands absent their consent, and only when such consent was clearly

¹⁴ 31 U.S. (6 Pet.) 515, at 517 (1832).

¹⁵ Even the idea that the assertion of sovereignty by a European power should be considered legally efficacious may be considered fantastical. See, e.g., L.C. Green & Olive P. Dickason, *The Law of Nations and the New World* (Edmonton: University of Alberta Press, 1989), at 4-7, for discussion re the Papal Bull *Inter caetera*, which purported to divide the non-Christian world between Spanish and Portuguese sovereignties, which was a foundation for the doctrine of discovery as enunciated by Justice Marshall. There are movements around the world that have asked the Vatican to revoke the bull; see, e.g., “Revoking the Bull ‘Inter Caetera’ of 1493”, online: <<http://www.manataka.org/page155.html>>.

¹⁶ See Kent McNeil, “Common Law Aboriginal Title” (Oxford: Oxford University Press, 1989), Ch. 6 [hereinafter “McNeil”]; Slattery, *supra*, note 13, Ch. 2. As Slattery points out (at 3), in 1763, at the time of the Crown’s assertion of sovereignty over much of what is now Canada, the population of European descent was approximately equal to those of Indigenous descent, and people of European descent had not yet set eyes on most of the lands of Canada, let alone established any kind of control of the lands.

¹⁷ See, e.g., the federal government’s map of historical treaties in Canada, online: <http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/htoc_1100100032308_eng.pdf>.

communicated at a meeting called for that purpose.¹⁸ When such consent was obtained, the Aboriginal title was considered by the Crown to be surrendered.¹⁹ The agreements — the Treaties that are now recognized and affirmed by section 35(1) of the *Constitution Act, 1982*²⁰ — did not merely describe agreements about “postage stamp” sized pieces of land. Upper Canada Treaty 72 of 1854, for instance, clearly and carefully describes the boundaries of a large tract of land that totals about 450,000 acres.²¹ Similarly, Treaty 11 of 1921 concerns “an area of approximately three hundred and seventy-two square miles”.²² It is clear that in neither instance are “postage stamp” pieces of land at issue in the respective agreements.

Early judicial interpretation of the treaties seems to affirm the territorial conception of Aboriginal title. The view of the Crown assertion of sovereignty merely resulting in an exclusive right of the Crown to negotiate treaties dealing with Aboriginal title with Aboriginal communities, and not in and of itself giving the Crown property rights over the land which it could then patent to settlers, was affirmed in the seminal case of *St. Catharine’s Milling*.²³

The Judicial Committee, speaking through Lord Watson, explicitly equated Aboriginal title, or in the language of the time, “Indian title”, with the land interest that was protected through the *Royal Proclamation, 1763*.²⁴ Lord Watson highlighted the following salient features from the Proclamation:

[I]t was just and reasonable that the several nations and tribes of Indians who lived under British protection should not be molested or disturbed in the “possession of such parts of Our dominions and territories as, not

¹⁸ *Royal Proclamation, 1763* [reprinted in R.S.C. 1985, App. II, No. 1]. For more extensive discussion, see also Senwung Luk, “Not So Many Hats: The Crown’s Fiduciary Obligations to Aboriginal Communities Since *Guerin*” (2013) 76 Sask. L. Rev. 1, at 4-9 [hereinafter “Luk”].

¹⁹ *Delgamuukw*, *supra*, note 2, at paras. 174-176; *St. Catharine’s Milling and Lumber Co. v. R.* (1888), 14 A.C. 46 (J.C.P.C.) [hereinafter “*St. Catharine’s Milling*”]. As an aside, it is, then, also no surprise that contemporary international law, as expressed in the *United Nations Declaration on the Rights of Indigenous Peoples*, echoes this idea with the requirement that “free, prior, and informed consent” be obtained from an Indigenous community before the infringement of their land rights. For a more extensive discussion, see Senwung Luk, “Justified Infringement – A Minimal Impairment Approach” (2013) 25 J. Envtl. L. & Prac. 169, at 170-72.

²⁰ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. For discussion of this point in *Tsilhqot’in Nation*, *supra*, note 6, see para. 4.

²¹ Treaty 72, online: <<http://www.aadnc-aandc.gc.ca/eng/1370372152585/1370372222012#ucls24>>.

²² Treaty 11, online: <<http://www.aadnc-aandc.gc.ca/eng/1100100028916/1100100028947>>.

²³ *Supra*, note 19.

²⁴ *Id.*, at 53-54.

having been ceded to or purchased by us, are reserved to them or any of them as their hunting grounds,” it is declared that no governor or commander-in-chief in any of the new colonies of Quebec, East Florida, or West Florida, do presume on any pretence to grant warrants of survey or pass any patents for lands beyond the bounds of their respective governments, or “until Our further pleasure be known,” upon any lands whatever which, not having been ceded or purchased as aforesaid, are reserved to the said Indians or any of them.²⁵

This “underlying Indian title” was a “mere burden” on the Crown’s title; and the “underlying Indian title” was “extinguished” through surrender in Treaty 3.²⁶

The prohibition on granting patents on unsurrendered lands, and the description of the unsurrendered, reserved lands, as “hunting grounds” would seem to suggest a territorial conception of land that is protected under the concept of “Indian title” or Aboriginal title. More support for this view can be found in the following description of the lands dealt with through Treaty 3:

Commencing at a point on the Pigeon River route where the international boundary line between the Territories of Great Britain and the United States intersects the height of land separating the waters running to Lake Superior from those flowing to Lake Winnipeg; thence northerly, westerly and easterly along the height of land aforesaid, following its sinuosities, whatever their course may be, to the point at which the said height of land meets the summit of the watershed from which the streams flow to Lake Nepigon; thence northerly and westerly, or whatever may be its course, along the ridge separating the waters of the Nepigon and the Winnipeg to the height of land dividing the waters of the Albany and the Winnipeg; thence westerly and north-westerly along the height of land dividing the waters flowing to Hudson’s Bay by the Albany or other rivers from those running to English River and the Winnipeg to a point on the said height of land bearing north forty-five degrees east from Fort Alexander, at the mouth of the Winnipeg; thence south forty-five degrees west to Fort Alexander, at the mouth of the Winnipeg; thence southerly along the eastern bank of the Winnipeg to the mouth of White Mouth River; thence southerly by the line described as in that part forming the eastern boundary of the tract surrendered by the Chippewa and Swampy Cree tribes of Indians to Her Majesty on the third of August,

²⁵ *Id.*, at 53.

²⁶ *Id.*, at 58-60.

one thousand eight hundred and seventy-one, namely, by White Mouth River to White Mouth Lake, and thence on a line having the general bearing of White Mouth River to the forty-ninth parallel of north latitude; thence by the forty-ninth parallel of north latitude to the Lake of the Woods, and from thence by the international boundary line to the place beginning.

*The tract comprised within the lines above described, embracing an area of fifty-five thousand square miles, be the same more or less. ...*²⁷

It is notable that the Treaty does not ask for anything akin to the surrender of “salt licks, narrow defiles between mountains and cliffs, particular rocks or promontories used for netting salmon, or ... buffalo jumps”²⁸ or the like. It asks for a territory delimited by an outside boundary, and, quite important for the discussion here, explicitly embracing an area of 55,000 square miles.

Similarly, the Supreme Court of Canada has stated as recently as 2005 that Treaty 8 dealt with land totalling about 840,000 square kilometres.²⁹ It would seem that the proposition that Aboriginal communities held title to all lands in Canada prior to arrival of Europeans³⁰ — or at least that they held vast tracts of it — was consistently assumed.

Yet a major exception to the use of treaties by the Crown to obtain the surrender of Aboriginal title was in British Columbia, where, after the Vancouver Island treaties were negotiated in the 1850s, the colonial government chose to deny that First Nations had any land rights at all, and decided to forego entering into treaties with them.³¹ In effect, as a matter of policy, the Crown decided to deal with the lands of most of British Columbia as if they were *terrae nullius*. In Atlantic Canada as well, the historical treaties that were entered into were Peace and Friendship Treaties that generally do not explicitly deal with the sharing of the land with settlers.³² The problem of Aboriginal title also remains a potent source of conflict in the Maritime provinces.

²⁷ Treaty 3, online: <<http://www.gct3.net/grand-chiefs-office/gct3-info-and-history/government-of-canada-document/>> (emphasis added).

²⁸ *Tsilhqot'in Nation (C.A.)*, *supra*, note 10, at para. 221.

²⁹ *Mikisew Cree*, *supra*, note 5, at para 2.

³⁰ See, e.g., *Canada v. McMaster*, [1926] Ex C.R. 68; *R. v. Polchies*, [1981] N.B.J. No. 334, 37 N.B.R. (2d) 546 (N.B. Prov. Ct.) [hereinafter “*Polchies*”].

³¹ See, e.g., *Calder v. British Columbia*, [1973] S.C.J. No. 56, [1973] S.C.R. 313, at 334 (S.C.C.).

³² See, e.g., *R. v. Marshall*, [1999] S.C.J. No. 55, [1999] 3 S.C.R. 456 (S.C.C.); *R. v. Marshall*; *R. v. Bernard*, [2005] S.C.J. No. 44, 2005 SCC 43 (S.C.C.) [hereinafter “*Marshall / Bernard*”]; *Polchies*, *supra*, note 30.

In British Columbia, the pretence that these lands belonged to no one would, perhaps inevitably, run into the hard fact that the people who lived on those lands at the time of the arrival of colonial authorities were never conquered and still exist today. Of the many resources at their disposal for resisting colonial claims, some of them chose litigation. Such efforts were disrupted by the Parliament of Canada, which enacted a provision in the *Indian Act* prohibiting Aboriginal communities from hiring legal counsel without permission of the Minister of Indian Affairs.³³ This prohibition was not repealed until 1951.³⁴

The recommencement of Aboriginal title litigation after the 1951 repeal of the prohibition on hiring legal counsel culminated in the 1973 Supreme Court decision in *Calder v. British Columbia*.³⁵ The Court split evenly on the question of whether Aboriginal title in British Columbia had been extinguished,³⁶ but had no trouble agreeing that it did exist at the time of the establishment of the colony of British Columbia, and gave every indication that Aboriginal title was understood to cover large territories. As Judson J., writing for the judges who felt Aboriginal title had been extinguished in British Columbia, observed: “the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means...”³⁷

Justice Hall’s judgment, opining that Aboriginal title in British Columbia was unextinguished, went into even greater detail in considering the evidence tendered at trial with respect to the nature of Aboriginal title. For example, Hall J. recited expert evidence adduced at trial on the nature of the litigant First Nation’s occupation of the land. The expert testified that “the ownership of the mouth of the stream and the seasonal villages, or habitations that were built there, signify the ownership and use of the entire valley”.³⁸ Justice Hall further quotes the expert: “Even if they didn’t subject the forest to wholesale logging, they did establish ownership of tracts used for hunting, trapping and food gathering. ... Except for barren and inaccessible areas which are not utilized even today, every part of the Province was formerly within the

³³ *Indian Act*, R.S.C. 1927, c. 98, s. 141.

³⁴ *Indian Act*, S.C. 1951, c. 29.

³⁵ [1973] S.C.J. No. 56, [1973] S.C.R. 313 (S.C.C.) [hereinafter “*Calder*”].

³⁶ *Per* Judson J., who held that it had been extinguished, at 344, *id.*; *per* Hall J., who held at 422 that it had not.

³⁷ *Calder*, *supra*, note 35, at 328.

³⁸ *Id.*, at 361.

owned and recognized territory of one or other of the Indian Tribes.”³⁹ Justice Hall’s judgment is a landmark of Canadian jurisprudence on Aboriginal title; it is clear that he did not conceive of it as covering only “postage stamp” pieces of territory.

In light of the split result in *Calder*, some First Nations in British Columbia chose to pursue further litigation. Aboriginal title litigation reached the Supreme Court of Canada again in 1997 in *Delgamuukw v. British Columbia*. Most notably for the purposes of this paper, *Delgamuukw* established a test for an Aboriginal community to meet if it is to secure the Canadian legal system’s recognition of its land rights.

In *Delgamuukw*, the Supreme Court of Canada established that for an Aboriginal community to prove Aboriginal title, it must show that the land in question was occupied by the First Nation at the time of the assertion of British sovereignty.⁴⁰ The occupation must have been exclusive, or, if other Aboriginal groups were present, then title can be proven by showing that the community had the intent and capacity to retain exclusive control.⁴¹ Evidence to prove this could arise in different ways.⁴² The community could bring forward evidence of laws of the community about those lands:

[T]he aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples. ... As a result, if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.⁴³

The community could also bring forward evidence of physical occupation. As the Court said:

Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources. ... In considering whether occupation

³⁹ *Id.*, at 62.

⁴⁰ *Delgamuukw*, *supra*, note 2, at para. 143.

⁴¹ *Id.*, at para. 156.

⁴² *Id.*, at paras. 146-151.

⁴³ *Id.*, at para. 148 (citation omitted).

sufficient to ground title is established, “one must take into account the group’s size, manner of life, material resources, and technological abilities, and the character of the lands claimed”...⁴⁴

Evidence from these sources could be adduced to prove exclusive occupation. Once title is proven, the Aboriginal community is entitled to exclusive occupation of its title lands, subject to the possibility that the Crown can show that its infringement of the title lands is justified.⁴⁵ In *Delgamuukw* itself, this test for proof of title was never applied to the facts because the Supreme Court of Canada ordered a new trial in the case.⁴⁶ The Court held that the trial judge had erred in his handling of the oral history evidence during the trial, and that the factual findings could not form a sufficient basis for the Court to decide the case.⁴⁷

The Supreme Court of Canada next had the opportunity to consider the *Delgamuukw* test in *Marshall / Bernard*.⁴⁸ In those appeals, heard jointly before the Court, the accused had cut timber on lands that the Crown asserted were Crown lands.⁴⁹ As a defence, the accused pleaded that they had cut the timber from lands on which the communities of the respective accused held Aboriginal title. As noted above, the Maritime provinces, from which these appeals arose, are not subject to land surrender treaties; rather, the treaties that apply there are of the peace and friendship variety. The Supreme Court seemed to proceed on the basis of the assumption that the Aboriginal title to the lands had not been surrendered.⁵⁰

Speaking for five of seven justices of the Supreme Court, McLachlin C.J.C. held against the accused. In considering the defence of having logged on Aboriginal title lands, the Chief Justice employed a physical occupation test. Citing *Delgamuukw*, she held that physical occupation “may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources”.⁵¹ The Chief Justice explained this standard in the following way:

⁴⁴ *Id.*, at para. 149 (citations omitted).

⁴⁵ *Id.*, at para. 162ff.

⁴⁶ *Id.*, at para. 108.

⁴⁷ *Id.*, at para. 107.

⁴⁸ *Supra*, note 32.

⁴⁹ *Id.*, at para. 1.

⁵⁰ *Id.*, at para. 38.

⁵¹ *Id.*, at para. 56, citing *Delgamuukw*, *supra*, note 2, at para. 149.

It follows from the requirement of exclusive occupation that exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into aboriginal title to the land if the activity was sufficiently regular and exclusive to comport with title at common law. However, more typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right. This is plain from this Court's decisions in *Van der Peet*, *Nikal*, *Adams* and *Côté*. In those cases, aboriginal peoples asserted and proved ancestral utilization of particular sites for fishing and harvesting the products of the sea. Their forebears had come back to the same place to fish or harvest each year since time immemorial. However, the season over, they left, and the land could be traversed and used by anyone. These facts gave rise not to aboriginal title, but to aboriginal hunting and fishing rights.⁵²

In contrast, the Chief Justice held that the inquiry must look for concepts in Aboriginal societies that were “notions of exclusive physical possession equivalent to common law notions of title”, observing that “[t]hey often exercised such control over their village sites and larger areas of land which they exploited for agriculture, hunting, fishing or gathering”.⁵³ She continued by questioning “whether nomadic and semi-nomadic peoples can ever claim title to land”,⁵⁴ but seemed to suggest that the issue should be decided on the facts:

The right to control the land and, if necessary, to exclude others from using it is basic to the notion of title at common law. In European-based systems, this right is assumed by dint of law. Determining whether it was present in a pre-sovereignty aboriginal society, however, can pose difficulties. Often, no right to exclude arises by convention or law. So one must look to evidence. But evidence may be hard to find. The area may have been sparsely populated, with the result that clashes and the need to exclude strangers seldom if ever occurred. Or the people may have been peaceful and have chosen to exercise their control by sharing rather than exclusion. It is therefore critical to view the question of exclusion from the aboriginal perspective.⁵⁵

The Chief Justice stressed further the fact-specific nature of the inquiry:

The second sub-issue is whether nomadic and semi-nomadic peoples can ever claim title to aboriginal land, as distinguished from rights to

⁵² *Id.*, at para. 58.

⁵³ *Id.*, at para. 62.

⁵⁴ *Id.*, at para. 63.

⁵⁵ *Id.*, at para. 64.

use the land in traditional ways. The answer is that it depends on the evidence. As noted above, possession at common law is a contextual, nuanced concept. Whether a nomadic people enjoyed sufficient “physical possession” to give them title to the land, is a question of fact, depending on all the circumstances, in particular the nature of the land and the manner in which it is commonly used. Not every nomadic passage or use will ground title to land; thus this Court in *Adams* asserts that one of the reasons that aboriginal rights cannot be dependent on aboriginal title is that this would deny any aboriginal rights to nomadic peoples (para. 27). On the other hand, *Delgamuukw* contemplates that “physical occupation” sufficient to ground title to land may be established by “regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources” (para. 149). In each case, the question is whether a degree of physical occupation or use equivalent to common law title has been made out.⁵⁶

The Court’s approach in *Marshall / Bernard* suggested a restrictive understanding of Aboriginal title. Moreover, amid all the discussion of the test for physical occupation, the Chief Justice’s majority opinion did not address the possibility laid out in *Delgamuukw* of using evidence of Aboriginal laws to prove Aboriginal title, as the concurring judgment of LeBel J.⁵⁷ and other commentators have observed.⁵⁸

The jurisprudential background for the first application of the *Delgamuukw* test was in the trial decision of *Tsilhqot’in Nation v. British Columbia*,⁵⁹ in which the trial judge, after 339 trial days, declined to decide the Aboriginal title issue.⁶⁰ He declined to decide the case on the basis of the law of pleadings, which is meant to prevent any litigant from being surprised by being confronted with arguments beyond what her opponent had pleaded that he would argue. He found that there was sufficient evidence to result in a declaration of Aboriginal title over lands that were in a somewhat different configuration than lands that had been described in the Tsilhqot’in Nation’s pleadings. However, he declined to make a declaration of Aboriginal title because this different configuration of lands might have surprised the Crown. Instead, the trial judge spent about 1,400 paragraphs in his decision evaluating the evidence that had

⁵⁶ *Id.*, at para. 66.

⁵⁷ *Id.*, at paras. 130, 140.

⁵⁸ Kent McNeil, “Aboriginal Title and the Supreme Court: What’s Happening?” (2006) 69 Sask L. Rev. 281, at 302-305 [hereinafter “McNeil, ‘What’s Happening?’”].

⁵⁹ *Tsilhqot’in Nation v. British Columbia*, [2007] B.C.J. No. 2465, 2007 BCSC 1700 (B.C.S.C.) [hereinafter “*Tsilhqot’in Nation (S.C.)*”].

⁶⁰ *Id.*, Executive Summary.

been put before him, to form “only an expression of opinion I have made to assist the parties in the negotiations that lie ahead”.⁶¹ He found that the date of assertion of Crown sovereignty was 1846, the date of the Oregon Boundary Treaty between Britain and the United States.⁶² He gave an opinion that Aboriginal title could be found over certain large tracts of Tsilhqot’in traditional territory, though not over the entire area described by the Tsilhqot’in Nation’s claim.⁶³

At the Court of Appeal, the unanimous panel reversed the trial judge’s finding on the pleadings issue, finding that the trial judge would have been within his rights to grant the declaration of Aboriginal title even though the declaration would have been over a different area than what had been pleaded, since “[t]here is no general rule of pleading that either requires declarations to be pleaded precisely or that precludes a court from granting a declaration that is less sweeping than the one sought by the plaintiff”.⁶⁴ Yet the Court of Appeal denied the First Nation the declaration of Aboriginal title — and instead of basing the denial on the law of pleadings as the British Columbia Supreme Court had done, the Court of Appeal based its holding squarely within the law of Aboriginal title.

The Court of Appeal characterized the debate as being between two rival views of Aboriginal title — the territorial theory and the “postage stamp” theory⁶⁵ — and as a matter of law, it rejected the former and espoused the latter.

In considering the evidence, the Court of Appeal found that “[e]xcept in respect of a few specific sites, the evidence did not establish regular presence on or intensive occupation of particular tracts of land within the Claim Area. There were no permanent village sites, though there was evidence of encampments and wintering sites, including groupings of pit houses.”⁶⁶ It also found that only a few locations were used intensively by the Tsilhqot’in Nation, and that the Tsilhqot’in did not cultivate or enclose fields.⁶⁷ On the Court of Appeal’s view of the evidence, it rejected the Tsilhqot’in Nation’s “territorial” claim to Aboriginal title:

⁶¹ *Id.*, at para. 961.

⁶² *Id.*, at paras. 585-602.

⁶³ *Id.*, at paras. 946-962.

⁶⁴ *Tsilhqot’in Nation (C.A.)*, *supra*, note 10, at para. 114, citing *Lau Wing Hong & Others v. Wong Wor Hung & Another*, [2006] 4 HKLRD 671 (H.C.).

⁶⁵ *Tsilhqot’in Nation (C.A.)*, *id.*, at paras. 205-241.

⁶⁶ *Id.*, at para. 215.

⁶⁷ *Id.*, at para. 216.

I do not see a broad territorial claim as fitting within the purposes behind s. 35 of the *Constitution Act, 1982* or the rationale for the common law's recognition of Aboriginal title. Finally, I see broad territorial claims to title as antithetical to the goal of reconciliation, which demands that, so far as possible, the traditional rights of First Nations be fully respected without placing unnecessary limitations on the sovereignty of the Crown or on the aspirations of all Canadians, Aboriginal and non-Aboriginal.⁶⁸

The Court of Appeal continued:

As I read *Delgamuukw*, Aboriginal title cannot generally be proven on a territorial basis, even if there is some evidence showing that the claimant was the only group in a region or that it attempted to exclude outsiders from what it considered to be its traditional territory. I acknowledge that *Delgamuukw* did not fully address the quality of occupancy that was necessary to support a title claim, apart from indicating that the occupancy must have been exclusive. That said, several passages in *Delgamuukw* strongly suggest that an intensive presence at a particular site was what the Court had in mind.

In particular, I note that the examples of title lands given at para. 149 of *Delgamuukw* are well-defined, intensively used areas. The reference to hunting, fishing and other resource extraction activities is coupled with a specific description of the lands so used as 'definite' tracts of land. I agree with British Columbia's assertion that what was contemplated were specific sites on which hunting, fishing, or resource extraction activities took place on a regular and intensive basis. *Examples might include salt licks, narrow defiles between mountains and cliffs, particular rocks or promontories used for netting salmon, or, in other areas of the country, buffalo jumps.*⁶⁹

This restrictive view of Aboriginal title was what the Supreme Court so forcefully rejected in *Tsilhqot'in Nation* to arrive at the first ever judicial declaration of Aboriginal title in Canadian history. In a unanimous opinion drafted by the Chief Justice, the Court held that to make out Aboriginal title, the Aboriginal community must show occupation of the land prior to the assertion of European sovereignty. Such occupation "must possess three characteristics. It must be *sufficient*; it must be *continuous* (where present occupation is relied on); and it must

⁶⁸ *Id.*, at para. 219.

⁶⁹ *Id.*, at paras. 220-221 (emphasis added).

be *exclusive*.⁷⁰ The Chief Justice held that the Court of Appeal had erred in its construction of the sufficiency requirement.⁷¹ In the Supreme Court's view, "[t]he question of sufficient occupation must be approached from both the common law perspective and the Aboriginal perspective ...".⁷² In this view, "[t]he Aboriginal perspective focuses on laws, practices, customs and traditions of the group",⁷³ which "must take into account the group's size, manner of life, material resources, and technological abilities, and the character of the lands claimed".⁷⁴ For the Court, "[t]he common law perspective imports the idea of possession and control of the lands. At common law, possession extends beyond sites that are physically occupied, like a house, to surrounding lands that are used and over which effective control is exercised."⁷⁵

For the Court, these perspectives must be reconciled to each other for a context-specific consideration of the evidence. The intensity and frequency of the occupation that could be sufficient to make out Aboriginal title "may vary with the characteristics of the Aboriginal group asserting title and the character of the land over which title is asserted".⁷⁶ The Court found that the carrying capacity of the land would be relevant in considering whether a small population spread out over a large land area could establish title. The Court also found that the historic Aboriginal community must have communicated to outsiders "that it held the land for its own purposes",⁷⁷ but that "the kinds of acts necessary to indicate a permanent presence and intention to hold and use the land for the group's purposes are dependent on the manner of life of the people and the nature of the land".⁷⁸

Reflecting upon the previous Supreme Court jurisprudence, the Court held that in *Delgamuukw*, and through *Marshall / Bernard*, a territorial conception of Aboriginal title was always what the Court had contemplated, and that the "postage stamp" theory was never suggested.⁷⁹ Contrary to the Court of Appeal's view that a territorial conception of Aboriginal title

⁷⁰ *Tsilhqot'in Nation*, *supra*, note 6, at para. 25 (emphasis in original).

⁷¹ *Id.*, at para. 56.

⁷² *Id.*, at para. 34.

⁷³ *Id.*, at para. 35.

⁷⁴ *Id.*, citing Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727.

⁷⁵ *Tsilhqot'in Nation*, *id.*, at para. 36.

⁷⁶ *Id.*, at para. 37.

⁷⁷ *Id.*, at para. 38.

⁷⁸ *Id.*

⁷⁹ *Id.*, at paras. 41-44.

was antithetical to reconciliation, the Supreme Court found that the territorial conception was exactly what reconciliation required.

The Supreme Court's decision in *Tsilhqot'in Nation* is a momentous step for the Canadian legal system. As suggested in the canvassing of the historical context of Aboriginal title in Canada, the normal situation in Canadian history was one in which the land rights of Indigenous peoples were recognized, such as through treaty and purchase. The denial of Indigenous land rights through the legal fiction of *terra nullius* is the exceptional case, most notably being the fiction under which the settler state operated in British Columbia. The view of the British Columbia Court of Appeal in this case ran the risk of entrenching the fiction (with the exception of salt licks, salmon rocks and buffalo jumps, of course) against the better judgment of courts and Crown officials throughout much of Canadian history. The decision in *Tsilhqot'in Nation* decisively charts a course away from the fiction of *terra nullius*. Yet, as this paper will now argue, it can only be a beginning of the process of reconciling Indigenous and non-Indigenous communities in Canada, and not the end, as the recognition of Indigenous legal orders must also be a part of this process.

III. LAW OF THE LAND: RECOGNITION OF INDIGENOUS LEGAL ORDERS THROUGH THE DOCTRINE OF ABORIGINAL TITLE

Besides affirming that the proper basis for the recognition of Aboriginal title is territorial, the Supreme Court also affirmed that evidence of Indigenous laws can constitute proof of Aboriginal title.⁸⁰ This sets out a basis for the recognition of Indigenous legal orders by the Canadian legal system. What this looks like in practical terms, and why this kind of recognition is essential for the reconciliation of Indigenous and non-Indigenous people in Canada, will be illustrated through the examples that this section of the paper will lay out. It suggests that a helpful precedent might be found in the way that English law has treated English ecclesiastical law.

This paper began with an epigraph citing a popular “emigrant guide” of the 19th century, suggesting that Canada “is too matter-of-fact country for ... supernaturals to visit”.⁸¹ This is a specimen of a colonial mindset

⁸⁰ *Id.*, at paras. 35, 41.

⁸¹ Parr Traill, *supra*, note 1.

that pushes Indigenous peoples off the page, off the land, and out of mind. Of course the land was not devoid of spirits, of “historical associations” or “legendary tales” when European settlers arrived in the 19th century. A settler could only cling to that vision by assiduously avoiding any meaningful interaction with Aboriginal people. If Canadian law were to focus on physical occupation of the land at the expense of consideration of evidence of Indigenous laws and Indigenous perspectives on land use, it risks, in the words of Parr Traill, banishing the spirits from the land, looking upon it “with the curious eye of natural philosophy alone”.⁸² A true reconciliation of Aboriginal and non-Aboriginal Canadians must involve moving beyond such a colonialist viewpoint. Indigenous occupation of the land consists of more than just artifacts, footsteps and other physical evidence. It also includes the land as a site for spirituality, history and narratives. This is the promise of the recognition of Indigenous laws through the Aboriginal title doctrine, one that allows for the possibility of beginning to move away from Canadian law’s Eurocentric roots.

An approach to Aboriginal title that focused on evidence of physical occupation at the expense of evidence of Indigenous legal orders risks ignoring evidence of the most important aspects of any society, Indigenous ones included. Consider a hypothetical situation where an Aboriginal community is aware of the existence of a burial ground. The same community has a legal prohibition against disturbing the burial site.⁸³ As a consequence, members of the community avoid the area, in order to avoid disturbing the burials, in conformity with the rule of the Indigenous legal order. How should this piece of land be considered if there was a claim for Aboriginal title?

In the trial decision in *Tsilhqot’in Nation*, the findings of which were affirmed by the Supreme Court, evidence of Tsilhqot’in law was not extensively considered. In reasons that were almost 1,400 paragraphs in length, evidence of Tsilhqot’in law was only considered in seven paragraphs.

⁸² *Id.*

⁸³ Consider, for instance, a norm in Anishinabe law: “It is the obligation of the Living to ensure that their relatives are buried in the proper manner and in the proper place and to protect them from disturbance or desecration. Failure to perform this duty harms not only the Dead but also the Living”: Johnston, *supra*, note 9, at 6. See also Professor Johnston’s testimony in *Hiawatha First Nation v. Ontario (Minister of the Environment)*, [2007] O.J. No. 506, 221 O.A.C. 113, at para. 45 (Ont. Div. Ct.); John Borrows, *Canada’s Indigenous Constitution* (Toronto: University of Toronto Press, 2010), Ch. 9, especially 246-47; Ross, *supra*, note 9, at 53, for discussion of a similar restriction against visiting a sacred site with the Lil’wat First Nation in British Columbia.

This may have been due to the uncertain status of Indigenous laws as proof of Aboriginal title after the *Marshall / Bernard* decision,⁸⁴ an uncertainty that has been decisively resolved in the Supreme Court's decision in *Tsilhqot'in Nation*. Nonetheless, perhaps because of the paucity of evidence on Tsilhqot'in law canvassed by the trial judge, such evidence was also not extensively considered by the Supreme Court's reasons for judgment, which focused mainly on evidence of physical occupation.

In *Tsilhqot'in Nation* at the Court of Appeal, the Court found that title can only be found in "well-defined, intensively used areas",⁸⁵ "specific sites on which hunting, fishing, or resource extraction activities took place on a regular and intensive basis".⁸⁶ The Supreme Court has rightly rejected this approach to Aboriginal title. It stressed the importance of evidence of Indigenous legal orders in proving Aboriginal title.⁸⁷ However, perhaps because the facts found at trial were so centred on physical occupation, its enunciation of the sufficiency of occupation test also centred on physical factors. The Court held that the "characteristics of the Aboriginal group" and the "carrying capacity of the land" were factors to be considered in gauging the degree of occupation necessary to prove title.⁸⁸ Yet the Court also said that communicating to third parties that they were to be excluded from a piece of land would also be sufficient to establish sufficiency of occupation.⁸⁹ Such a standard seems to incorporate prohibitions within Indigenous legal orders on access to a site, such as the hypothetical situation of the burial site considered here. However, the precise way in which Canadian law would approach the situation of the land on which physical occupation is prohibited has not been clearly defined. Yet it seems that land of this nature should be the *par excellence* example of land over which an Aboriginal community should be recognized as having title. It is exactly the kind of land for which Canadian law should recognize their right to exclude others, and to be able to make decisions as a community concerning the land.

It may surprise many Canadian lawyers to discover that just this kind of co-existence has been part of the English law for centuries. What

⁸⁴ McNeil, "What's Happening?", *supra*, note 58.

⁸⁵ *Tsilhqot'in Nation (C.A.)*, *supra*, note 10, at para. 221.

⁸⁶ *Id.*

⁸⁷ *Tsilhqot'in Nation*, *supra*, note 6, at para. 35.

⁸⁸ *Id.*, at para. 37.

⁸⁹ *Id.*, at para. 38.

follows in this paper is an analogy to the recognition of laws on land access and ownership in English common law, which has had centuries of experience with living and growing alongside English ecclesiastical law. As the Supreme Court has stated, the law of Aboriginal title ought to take into account the perspective of the common law.⁹⁰ The experience of the common law in this regard, therefore, should be an instructive example for the development of the Canadian law of Aboriginal title. This experience of the common law in co-existing with ecclesiastical law should be especially pertinent as the Supreme Court has suggested repeatedly that the law of Aboriginal title should take the perspective of the common law into account.⁹¹

First, to contextualize the discussion a little, it is important to note that the term “common law” actually has broader and narrower meanings. For instance, equity had its own legal doctrines and its own system of courts before the courts of common law and equity were fused. Nowadays, the broader understanding of the term “common law” includes equity. For example, no education in the common law would be complete without education in equity. Yet in the narrower understanding, common law doctrines on contracts exclude equitable contractual doctrines.

The relationship between common law and English ecclesiastical law may be thought of in a similar way. However, unlike the courts of equity, which have been fused with the common law courts and hence no longer have a separate existence, ecclesiastical law still has its own legal doctrines and parallel court system to some extent, although the jurisdiction of the ecclesiastical courts is subject to some constraints imposed by the English Court of Queen’s Bench,⁹² and the Judicial Committee of the Privy Council sits on appeal of the ecclesiastical courts in some cases.⁹³

Under English law, until the mid-19th century, around the time of the Crown assertion of sovereignty over British Columbia, and well after its assertion of sovereignty over the rest of Canada, burial sites in England

⁹⁰ *Marshall / Bernard, supra*, note 32, at para. 48; *Tsilhqot’in Nation, supra*, note 6, at paras. 32, 36.

⁹¹ For example, *Tsilhqot’in Nation, id.*, at paras. 14, 34, 42.

⁹² E. Garth Moore, *An Introduction to English Canon Law* (Oxford: Clarendon Press, 1967), at 125 [hereinafter “Moore”].

⁹³ *Ecclesiastical Jurisdiction Measure 1963* (U.K.), s. 8. The ecclesiastical courts are not bound by the Privy Council “in relation to matter of doctrine, ritual or ceremonial”: s. 48.

were principally governed by ecclesiastical law.⁹⁴ It was only starting in the mid-19th century, when more and more people did not wish to be buried in land consecrated under the law of the Church of England, that Parliament enacted statutes enabling land to be set aside for cemeteries, and for those cemeteries to be governed according to non-ecclesiastical land law.

Thus, prior to the mid-19th century, generally speaking Christian cemeteries were governed by ecclesiastical law, and even after the 19th century reforms, Church of England churchyards, whether constructed before the reforms or after, are still so governed. Under ecclesiastical law, a bishop has the authority to consecrate land by signing the Sentence of Consecration.⁹⁵ Once this has happened, the land becomes “consecrated land” and restricted to “sacred uses”.⁹⁶ Whether a use is considered sacred is a matter for the ecclesiastical courts to determine.⁹⁷ The boundary of the ecclesiastical jurisdiction extends to the unconsecrated “curtilage”, meaning “the land around or immediately contiguous to, and belonging to, a building”.⁹⁸ Within the consecrated land and its curtilage, it is “impossible to create a legal estate, save under authority of an Act of Parliament or a Measure”,⁹⁹ and the jurisdiction of the secular, common law courts is ousted.¹⁰⁰ Under ecclesiastical law, the exhumation of burials is prohibited, and may only be done where permission is granted by an ecclesiastical court.¹⁰¹ English ecclesiastical law provides for “decent and undisturbed interment”,¹⁰² and exhumation should only be permitted in exceptional cases.¹⁰³

⁹⁴ *Re Welford Road Cemetery, Leicester*, [2007] 1 All E.R. 426 (Cons. Ct.).

⁹⁵ *Re St. John's, Chelsea*, [1962] 2 All E.R. 850, at 852 (Cons. Ct.).

⁹⁶ *Id.* See also Moore, *supra*, note 92, at 97-100, 129; Mark Hill, *Ecclesiastical Law*, 3d ed. (Oxford: Oxford University Press, 2008), at 261-63 [hereinafter “Hill”]; *Rugg v. Kingsmill* (1867), L.R. 2 P.C. 59; *Sutton v. Bowden*, [1913] 1 Ch. 518 [hereinafter “Sutton”]; *Re West Norwood Cemetery*, [1994] Fam. 210 (Cons. Ct.); *Re Blagdon Cemetery*, [2002] 4 All E.R. 482 (Cons. Ct.); *Re Keynsham Cemetery*, [2003] 1 W.L.R. 66 (Cons. Ct.).

⁹⁷ *Re St. John's, Chelsea*, *supra*, note 95; *Corke v. Rainger*, [1911] Probate 69 (Cons. Ct.); *Re the Parish of Bideford*, [1900] Probate 314 (Cons. Ct.).

⁹⁸ Moore, *supra*, note 92, at 99, n. 5; *Re St. Peter's, Bushey Heath*, [1971] 2 All E.R. 704 (Cons. Ct.).

⁹⁹ *Re St. Peter's, Bushey Heath*, *id.*, 706. See also *Re St. Clement's, Leigh-on-Sea*, [1988] 1 W.L.R. 720 (Cons. Ct.), esp. at 728ff.

¹⁰⁰ *Sutton*, *supra*, note 96.

¹⁰¹ Hill, *supra*, note 96, at 267-68.

¹⁰² *Re West Norwood Cemetery*, *supra*, note 96, at para. 224.

¹⁰³ *Re Blagdon Cemetery*, *supra*, note 96, at para. 33.

The consecration of a burial ground under ecclesiastical law is a matter of law, and a lack of intensive physical occupation is not sufficient to defeat the jurisdiction of the ecclesiastical courts. In the 1962 case of *Re St. John's, Chelsea*, the land in question was consecrated for a church in 1876. A neighbouring parcel, left unconsecrated, was used as a vicarage.¹⁰⁴ In 1940, German air raids demolished both the church and the vicarage, and for 20 years after, the site was “unoccupied and more or less level”.¹⁰⁵ A proponent proposed building a gas station on the site where the vicarage had stood, and a parking lot on the consecrated ground where the church had stood. The ecclesiastical court denied permission to go ahead with these plans. It held that the disuse of the land could not cause the land to become deconsecrated; only an Act of Parliament or a Measure of the Church of England could do that.¹⁰⁶ The court also rejected the proposition that a parking lot could be considered a sacred use.¹⁰⁷

Ecclesiastical law is not thought to be a part of the common law that was received into the colonies, including Canada, although that was not a settled position for much of Canada’s colonial history.¹⁰⁸ My intention here is not to argue that ecclesiastical law applies as law in Canada, but only to show the adaptability of common law principles and doctrines to other bodies of law. Such adaptability is not merely a feature of the past, but continues to the present day,¹⁰⁹ and forms part of the “common law perspective” that the Supreme Court has held is essential to fleshing out the law of Aboriginal title. The ecclesiastical courts today still maintain jurisdiction over consecrated churchyards in England. Generally all pre-mid-19th century Christian burial sites in England, therefore, are governed under a body of law that is not part of the common law narrowly understood. Yet it cannot be said that the Church of England’s jurisdiction over these English sacred sites has somehow caused the English economy to grind to a halt, or placed the Church of England in a position of intractable conflict with English society, or, in the Court of Appeal’s words, “antithetical to reconciliation”. Indeed, many people, the

¹⁰⁴ *Re St. John's, Chelsea*, *supra*, note 95, at 851.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*, at 852.

¹⁰⁷ *Id.*, at 853-57.

¹⁰⁸ See *In re Lord Bishop of Natal* (1864), 16 E.R. 43 (J.C.P.C.).

¹⁰⁹ The common law also has a long history of recognizing local customary land laws in England, which may be different from common law land law: see, *e.g.*, McNeil, *supra*, note 16, at 183, n. 83.

author included, have found the churchyards in the middle of English towns to be endearing places to visit and linger for quiet reflection.

It would seem that the kind of recognition by the Canadian legal system of Aboriginal legal orders, and those orders' jurisdiction over certain lands, as contemplated in *Delgamuukw* and *Tsilhqot'in Nation*, is not drastically different conceptually from the relationship between the ecclesiastical courts and the British legal system. Under the Canadian law of Aboriginal title, where an Aboriginal community proves its title, the land is held communally.¹¹⁰ This means that decisions about its use are subject to the legal processes for decision-making that exist within the community.¹¹¹ Moreover, the nature of Aboriginal title as being inalienable except to the Crown¹¹² means that decisions of the community about alienating the land to the Crown will be governed by the laws of the Aboriginal community.¹¹³

Consider the parallels of such a relationship with that between ecclesiastical law and the British legal system. Decisions about the use of consecrated land are the exclusive purview of the ecclesiastical authorities, governed by ecclesiastical law, as applied by the ecclesiastical courts. Decisions about whether to deconsecrate a piece of ecclesiastical property are made exclusively by ecclesiastical authorities, also governed by ecclesiastical law, as applied by the ecclesiastical courts. In extraordinary cases, the state legal system can override these decisions through an Act of Parliament.

It is also interesting to observe that the state legal system in both cases has nonetheless asserted authority to override ecclesiastical land law in England's case, and Aboriginal title in Canada's case. Under the British legal system, the only way for the decision of the Church of England to be overridden is through an Act of Parliament. In Canada, Aboriginal title is protected as a constitutional right and trumps ordinary

¹¹⁰ *Delgamuukw*, *supra*, note 2, at para. 115.

¹¹¹ See, e.g., *Campbell v. British Columbia*, [2000] B.C.J. No. 1524, 2000 BCSC 1123, at paras. 137-143 (B.C.S.C.).

¹¹² *Id.*, at para. 113.

¹¹³ See *Tsilhqot'in Nation*, *supra*, note 6, at paras. 75-76, and generally, Kent McNeil, "Self-Government and the Inalienability of Aboriginal Title" (2002) 47 McGill L.J. 473; *Guerin v. Canada*, [1984] S.C.J. No. 45, [1984] 2 S.C.R. 335 (S.C.C.); *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] S.C.J. No. 99, [1995] 4 S.C.R. 344 (S.C.C.); *Semiahmoo Indian Band v. Canada*, [1997] F.C.J. No. 842, [1998] 1 F.C. 3 (F.C.A.).

legislation,¹¹⁴ but the right is subject to justified infringement. As the Supreme Court has stated, the objectives of government action infringing Aboriginal title must be substantial and compelling.¹¹⁵ However, such infringements must also be consistent with the Crown's role as fiduciary for Aboriginal peoples, cannot destroy the land and its benefits for future generations, and can only minimally infringe the rights available under Aboriginal title.¹¹⁶ Moreover, Canadian law provides for an additional gatekeeper against assertions of Aboriginal title. Whereas under English law, the common law courts will respect the decisions of the ecclesiastical courts about the boundaries and extent of consecrated ground, the Canadian courts mediate between Aboriginal law and common law land law, requiring that Aboriginal title be proven to a common law court before recognizing the jurisdiction of the Aboriginal community.¹¹⁷

The fact of the co-existence between English common law and English ecclesiastical law suggests that the accommodation of spiritual values in land use is not incompatible with the common law, but is in fact a time-honoured element of the common law. It hints at the co-existence that is possible between the Canadian legal system and a revitalized and robust set of Indigenous legal orders.

It may be helpful at this stage to contrast the protection afforded to English burials with the protection afforded to Aboriginal burials in Canada, to show the kinds of frictions that currently exist at the interface of Canadian state law and Indigenous law. We can use Ontario's regime as a representative example.¹¹⁸ In Ontario, upon the discovery of human remains, the Registrar of Cemeteries, under the Ministry of Consumer Services, must be notified.¹¹⁹ The Registrar may then order an investigation into the site.¹²⁰ The Registrar has the discretion to determine whether the site is an "[A]boriginal peoples burial ground", or merely a "burial ground" or an "irregular burial site".¹²¹ Upon the finding that the

¹¹⁴ *Delgamuukw*, *supra*, note 2, at paras. 133-139; *Tsilhqot'in Nation*, *supra*, note 6, at paras. 77-88.

¹¹⁵ *Tsilhqot'in Nation*, *id.*, at paras. 77-88.

¹¹⁶ See *id.*, at paras. 77-88, and Luk, *supra*, note 18.

¹¹⁷ *Delgamuukw*, *supra*, note 2, at para. 140ff.

¹¹⁸ For a fuller discussion of the legislative picture across Canada, see Bruce Ziff & Melodie Hope, "Unsightly: The Eclectic Regimes that Protect Aboriginal Cultural Places in Canada" in Catherine Bell & Robert K. Paterson, eds., *Protection of First Nations Cultural Heritage: Laws, Policy, and Reform* (Vancouver: UBC Press, 2009), Ch. 5.

¹¹⁹ *Funeral, Burial and Cremation Services Act, 2002*, S.O. 2002, c. 33, s. 95.

¹²⁰ *Id.*, s. 96.

¹²¹ *Id.*, s. 98.

land is an “[A]boriginal peoples burial ground”, the Registrar has some discretion over which First Nation to give notice to.¹²² The Registrar then seeks to convince the parties involved (*e.g.*, a First Nation and a property developer) to come to a “site disposition agreement”, failing which the Registrar may compel the parties to enter into arbitration.¹²³

Several differences are of note when compared to the English regime. First, the Canadian state actually has very little information with respect to the traditional knowledge of Aboriginal communities. Not having gained the trust of traditional knowledge-holders, government officials may have access to very little of the knowledge that a community may have about the land. Hence, unlike in England, burials in Ontario are likely to be discovered in the act of excavation, which is in itself a disturbance. Second, in the absence of a recognition of Aboriginal title, the Registrar in Ontario retains full authority throughout the process, and the authority of the First Nation with respect to burial grounds is not recognized in any substantive way by Ontario law, such that the final decision about what happens to the land comes through an arbitrator.¹²⁴ Third, the expected outcome is a “site disposition agreement”, which does not exclude, or even express a preference against, the disturbance of the burial by excavation and reburial elsewhere. Of course, the Ontario regime also does not provide for lands that may have been set aside by First Nations as a place of repose for cremated ashes, and in such cases there will be no discovery of bones to alert the Canadian state to the desecration and disturbance that is taking place. As is evident, the current regime in Ontario struggles to recognize the sacred nature of burial sites and can become the source of serious friction between Indigenous and non-Indigenous communities. The recognition of Indigenous legal orders by the Canadian state may be a more promising vehicle for allowing the kind of reconciliation envisioned by the Supreme Court.

In its relationship with ecclesiastical law, the common law in England accommodates ancient English traditions that continue to the present day. This relationship offers a valuable model for how a reconciled, post-colonial relationship might operate between the Canadian state and Aboriginal traditions that continue to the present day.

¹²² *Funeral, Burial and Cremation Services Act, 2002* – General, O. Reg. 30/11, s. 145: the discretion is between “the nearest First Nations Government” or “another community of aboriginal peoples that is willing to act as a representative and whose members have a close cultural affinity to the interred person”.

¹²³ *Funeral, Burial and Cremation Services Act, 2002*, *supra*, note 119, s. 99.

¹²⁴ See Johnston, *supra*, note 9, at 66.

This framework is applicable not only to burial sites, but to other sacred or spiritual sites as well. In England, this extends to sacred lands such as churches and churchyards. In Canada, more research and engagement by the state with Aboriginal communities would need to be done to inventory what an analogous category might include,¹²⁵ but the importance of such conflicts as borne out in the case law suggests a serious engagement with the issue by the law of Aboriginal title would go a long way to alleviating many of the conflicts over sacred and spiritual sites that currently take place.¹²⁶ It may be the case that the boundaries around sacred sites of First Nations are not demarcated as precisely as consecrated ground would be under ecclesiastical law,¹²⁷ but from the perspective of reconciliation, engaging with Aboriginal communities to learn about where the centres of the sacred sites are, and what buffers and other legal regulations may be necessary to protect them, would certainly be a step forward from living in ignorance of them.

Moreover, Indigenous legal orders not only govern sacred uses of land, but also uses that include economic or subsistence uses as well.¹²⁸ Here is a hypothetical example: the hunting territory of a family may be set at the beginning of the season by the First Nation as a whole, and disputes about the boundary of the territory may be resolved by the community in council. These would be the kinds of Indigenous legal orders that seem capable of being proof of Aboriginal title. The relationship between the English legal system and ecclesiastical law provides an example of how the Canadian legal system could relate to laws about the sacred within Indigenous legal orders, and to other laws on land use as well. The manner in which English law treats English burial sites can be a model for how Canadian law can treat sites of spiritual importance for Aboriginal communities.

¹²⁵ Considering the sacred nature of the knowledge of the sites, and the potential for vandalism that arises out of disclosure of the knowledge of the sites, the state legal system could be doing more to facilitate an exchange of information about the sites. For instance, there is currently no explicit recognition of the confidentiality interest of Indigenous traditional knowledge in the federal *Access to Information Act*, R.S.C. 1985, c. A-1, or in the Ontario *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, that would allow for certainty in the protection of the traditional knowledge from the prying eyes of the public.

¹²⁶ *Supra*, note 9.

¹²⁷ For further discussion of this point, see Ross, *supra*, note 9, at 63ff.

¹²⁸ *Tsilhqot'in Nation (S.C.)*, *supra*, note 59, at paras. 426-432.

IV. CONCLUSION

For most of the history of the relationship between Aboriginal communities and the Crown, the treaty was the main device for relationship-building. As is apparent from the brief canvassing earlier in this paper of the history of treaties, the Crown acknowledged historical fact and did not challenge the fact that First Nations have territories. Indeed, this assumption is the basis for treaty-making. Thomas Berger, counsel for the Nisga'a in *Calder*, observed in the following anecdote from the 1970s:

The senior counsel for the government of British Columbia was Douglas McKay Brown, who was the leading civil litigator in the province at that time. He stood at the head of the profession and his junior, if you will, was a veteran lawyer in the A.G.'s [attorney general's] ministry, Bill Hobbs. ... Doug Brown didn't take it altogether seriously. ... But Bill Hobbs did. And he said: "We realize there is an argument here and we've got to meet it, and we were going through the pleadings, that is, formal allegations made by the Nisga'a Tribal Council about the history of the Nass Valley." And we said: "The Nisga'a have lived there since time immemorial. They've used, developed and occupied the land. That is something of course you have to establish to argue Aboriginal title." I can still remember Doug Brown saying to Bill Hobbs: "Well is there any dispute about this?" And Bill Hobbs said: "Well, they've been there since time immemorial. They've used and occupied the land and they are still there." Doug Brown said: "Well, we'll admit that." In Aboriginal land claims cases today, that's two or three years of anthropological evidence and Elders and oral history, but they did the right thing. That's what the attorney general, representing Her Majesty, is supposed to do. If something ought to be admitted, it should be admitted. ...¹²⁹

Of course, as Berger observes, quite a different approach is taken by the Crown in Aboriginal litigation these days. (Some of this reticence may be due to the more recent awareness of competing claims of First Nations, but there is nothing to suggest that lands not subject to any such competing claims could not simply be recognized by the Crown as Aboriginal title lands.) One reason the *Tsilhqot'in Nation* trial took over 339 trial days is because the fact of the presence of the Tsilhqot'in on the

¹²⁹ "Frank Calder and Thomas Berger: A Conversation" in Hamar Foster, Heather Raven & Jeremy Webber, eds., *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2011) 37, at 43.

land became a litigation issue.¹³⁰ Once it becomes a litigation issue, the onus lies on the plaintiff — the Aboriginal litigant — to meet the onus of the burden of proof.¹³¹ This is the opposite of how Aboriginal title has been dealt with historically.

Although the *Tsilhqot'in Nation* decision was a momentous first for the judicial recognition of Aboriginal title in Canada, it is important to remember that the area claimed in the litigation was only five per cent of what the Tsilhqot'in Nation considered their traditional territory, and the area declared to be Aboriginal title lands was only a portion of that five per cent.¹³² Yet the Supreme Court's unanimous judgment in *Tsilhqot'in Nation* provides a solid basis for moving away from the debate between the "postage stamp" conception and the territorial conception of Aboriginal title, and may empower Aboriginal communities to pursue more robust claims. By reaffirming the role of Indigenous laws in the process of proving Aboriginal title, the Supreme Court has provided a solid basis for the recognition of the land laws of Canada's First Peoples as the law of the land. This paper has modestly suggested that the arrangements for such recognition in England may serve as a model for Canadian law, so that Aboriginal traditions may receive as much respect and recognition from the Canadian state as English ones do from the British state. This comparison seems to be a pretty good proxy of how much the Canadian legal system is still pushing Indigenous narratives off the page and off the land, and how much ground remains to be covered on the road to reconciliation.

¹³⁰ *Tsilhqot'in Nation (S.C.)*, *supra*, note 59, "Executive Summary".

¹³¹ Kent McNeil, "The Onus of Proof of Aboriginal Title" (1999) 37 *Osgoode Hall L.J.* 775.

¹³² *Tsilhqot'in Nation (S.C.)*, *supra*, note 130, at para. 623.

