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THE SOURCE, NATURE, AND CONTENT OF THE CROWN'S UNDERLYING TITLE TO ABORIGINAL TITLE LANDS

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The highest courts in Australia, Canada, and New Zealand have consistently held that the Crown has the underlying title to Aboriginal title lands. The United States Supreme Court has likewise concluded that either the federal or state governments have the underlying title to Indian lands. However, the source, nature, and content of this title remain obscure. This article will examine the relevant case law and contend that, in Canada, the Crown's underlying title is a purely proprietary interest that does not amount to a current beneficial interest and does not entail any jurisdictional authority. It is sourced in the doctrine of tenure and is not unlike the title the Crown has under the common law to lands that are held in fee simple.

Les plus hautes instances judiciaires de l'Australie, du Canada et de la Nouvelle-Zélande ont uniformément affirmé que la Couronne possède le droit de propriété sous-jacent du titre ancestral. La Cour suprême des États-Unis a elle aussi conclu que le droit de propriété sous-jacent des terres indiennes appartient soit au gouvernement fédéral soit au gouvernement de chaque État. Toutefois, la source, la nature et le contenu de ce droit de propriété demeurent obscurs. Cet article porte sur la jurisprudence pertinente et soutient qu'au Canada, le droit de propriété sous-jacent de la Couronne est un droit de propriété pur et simple qui n'équivaut ni à un intérêt bénéficiaire ni n'implique l'existence d'une compétence. Il prend sa source dans la doctrine des tenures

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et est semblable au droit de propriété que possède la Couronne, en vertu de la common law, sur les terres détenues en fief simple.

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1. Introduction

In the principal settler states colonized by Britain where the common law was received—the Thirteen Colonies that became the original United States, Canada apart from Quebec, Australia, and New Zealand—the highest courts have consistently declared that the Crown acquired the underlying or radical title to Indian, Aboriginal, or Native title lands. However, the source and content of the Crown's underlying title are somewhat obscure, especially in Canada. This article will examine the closely related questions of the source, nature, and content of this title from the perspective of the common law.

2. The United States: The Doctrine of Discovery and Underlying Title

In the United States, Chief Justice Marshall in *Johnson v M'Intosh* relied on the doctrine of discovery and concluded that it gave the discovering European nation both sovereignty over and title to lands occupied by the Indian nations, whose pre-existing sovereignty was diminished but whose land rights continued as a burden on the underlying title of the discovering nation.¹ He viewed this as an aspect of international law based on an agreement among the European nations who were engaged in overseas colonization, even though subsequent research has revealed that there

¹ 21 US (8 Wheat) 543, 5 L Ed 681 (1823) [*M'Intosh*].

was no such agreement.² Nine years later, in *Worcester v Georgia*,³ Chief Justice Marshall clarified his position by acknowledging that the doctrine of discovery applied only among the European nations that had agreed to it and could not affect the pre-existing rights of the Indian nations that had not agreed.⁴ So for the discovering nation to attain sovereignty and underlying title vis-à-vis the Indian nations, more was required: it had to actually acquire these by conquest or treaty. Although this clarification could have relegated the application of the doctrine of discovery to the European powers' relations with one another, the doctrine in American law has become the foundation for the Crown's, and hence the United States', sovereignty and underlying title to Indian lands.⁵

As title to land, unlike sovereignty, is generally a matter of internal domestic law rather than international law, and Chief Justice Marshall himself admitted this,⁶ it is unclear why he did not look for the source of the Crown's underlying title in the common law. Howard Highland addressed this question in his Osgoode LL.M. thesis, *Constitutional Realism and Third Party Property Rights in Tsilhqot'in Nation v. British Columbia and Oneida*

² See L. Oppenheim, *International Law: A Treatise*, vol 1 (London, UK: Longmans, Green & Co, 1905) at 265; MF Lindley, *The Acquisition and Government of Backward Territory in International Law* (London, UK: Longmans, Green & Co, 1926); Friedrich August Freiherr von der Heydte, "Discovery, Symbolic Annexation and Virtual Effectiveness in International Law" (1935) 29:3 *Am J Intl L* 448; Julius Goebel, Jr, *The Struggle for the Falkland Islands: A Study in Legal and Diplomatic History* (New Haven, CT: Yale University Press, 1927) at 47–119; John Thomas Juricek, *English Claims in North America to 1660: A Study in Legal and Constitutional History* (PhD Dissertation, University of Chicago Department of History, 1970) [unpublished].

³ 31 US (6 Pet) 515, 8 L Ed 483 (1832).

⁴ This acknowledgment is consistent with international law, as well as common law principles, whereby agreements are generally binding only on the parties thereto: *Direct United States Cable Co Ltd v Anglo-American Telegraph Co* (1877), 2 App Cas 394 at 421, 1876 WL 18562 (WL Can) (PC); "Arbitral Award on the Subject of the Difference Relative to the Sovereignty over Clipperton Island" (1932) 26:2 *Am J Intl L* 390 at 394; Lord McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961) at 309–21; Charles G Fenwick, *International Law*, 4th ed (New York: Appleton-Century-Crofts, 1965) at 412; Malcolm N Shaw, *International Law*, 7th ed (Cambridge: Cambridge University Press, 2014) at 672–74.

⁵ Lindsay Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2005); Robert J Miller et al, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (Oxford: Oxford University Press, 2010).

⁶ *M'Intosh*, *supra* note 1 at 572; Emer de Vattel, *The Law of Nations; or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, translated by Joseph Chitty (London, UK: S Sweet, 1834) Book I, ch 18 at paras 204–05; John Westlake, *International Law*, 2nd ed (Cambridge: Cambridge University Press, 1910) Part 1 at 86–90; Sir John Salmond, *Jurisprudence*, 7th ed (London, UK: Sweet & Maxwell, 1924) at 554.

Nation v New York.⁷ As Highland convincingly argues, the Crown's title to land in the Thirteen Colonies prior to the American Revolution should have been derived from the domestic law doctrine of tenure rather than the doctrine of discovery, but the unpopularity of feudal-based tenure in the American Republic would have made that explanation unpalatable for the Chief Justice.⁸

3. Australia and New Zealand: Application of the Doctrine of Tenure

In the other three settler states under consideration, reception of the common law doctrine of tenure has been taken for granted by the courts. In the leading Australian decision, *Mabo v Queensland [No 2]*,⁹ Justice Brennan (as he then was) expressed this clearly by rightly separating acquisition of sovereignty as a matter of international law from acquisition of title to land in domestic law.¹⁰ He said that the British Crown acquired sovereignty over New South Wales by discovery *and* settlement, rather than discovery alone, and this was an act of state the legality of which cannot be questioned in domestic courts.¹¹ As New South Wales had been classified in British colonial law as a settlement, the common law, insofar as it was applicable to local circumstances, was received automatically upon acquisition of sovereignty by the arrival of British settlers in 1788.¹² Included in this body of common law is the feudal doctrine of tenure, by virtue of which all interests in land are deemed to be held of the Crown as lord paramount.¹³ Another way of describing the Crown's paramount lordship is that the Crown has the underlying or radical title to all lands within its dominions where the common law applies.¹⁴ This applies even to lands held in fee

⁷ Howard Highland, *Constitutional Realism and Third Party Property Rights in Tsilhqot'in Nation v. British Columbia and Oneida Nation v New York* (LLM Thesis, York University, Osgoode Hall Law School, 2011) [unpublished].

⁸ *Ibid* at 92–123.

⁹ [1992] HCA 23, 175 CLR 1 (Australia HC) [*Mabo*].

¹⁰ *Ibid* at paras 43–45.

¹¹ *Ibid* at paras 31–34.

¹² *Ibid* at paras 34–38.

¹³ *Ibid* at paras 46–48.

¹⁴ In the absence of interests in land held by Indigenous titleholders, private persons, and corporations, it has generally been held that the Crown would have not just the underlying or radical title, but absolute ownership: *Falkland Islands Company v R* (1864), 2 Moo PC (NS) 266 at 272; *R v Symonds*, (1847) NZPCC 387 at 388–90, 393 (NZSC) [*Symonds*]; *Williams v Attorney-General for New South Wales*, [1913] HCA 33, 16 CLR 404 at 428 (Barton AC), 439 (Isaacs J); Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 135 [McNeil, *Common Law Aboriginal Title*]. Compare Ulla Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (Oxford: Hart Publishing, 2014) at 147–65, 239–53 [Secher] (arguing that, in Australian law post-*Mabo*, the Crown would have only the radical title, rather than beneficial ownership, in this situation). Where the Crown has

simple by private landowners: although the Crown has the underlying or radical title, in practical terms since the decline of feudalism all this means is that the land will escheat (go back) to the Crown if the fee simple owner dies intestate and without heirs.¹⁵

In *Mabo*, Justice Brennan acknowledged that it is arguable that it was not reasonable to apply the feudal doctrine of tenure in the Australian colonies.¹⁶ He noted that even in the United Kingdom there are examples of absolute or allodial private ownership of land, specifically on the Orkney and Shetland Islands where customary Udal law excludes the Crown's radical title.¹⁷ But given that the doctrine of tenure had been applied from the outset and become the basis for landholding in Australia, he said it was far too late to question its application.¹⁸ However, Brennan held, and all but one of the High Court judges agreed, that accepting the application of the doctrine does not entail denying Indigenous peoples' land rights in settled colonies such as Australia.¹⁹ If the Indigenous inhabitants could show that they had land rights under their own laws and customs at the time of Crown acquisition of sovereignty and the reception of the common law, those rights would have continued as a burden on the Crown's underlying or radical title.²⁰ Brennan expressed it this way:

Recognition of the radical title of the Crown is quite consistent with recognition of native title to land, for the radical title, without more, is merely a logical postulate required to support the doctrine of tenure (when the Crown has exercised its sovereign power to grant an interest in land) and to support the plenary title of the Crown (when the Crown has exercised its sovereign power to appropriate to

absolute title, the doctrine of tenure does not apply because there is no tenant, although the doctrine would be invoked if the Crown chose to grant an interest. The Crown's power to grant would come from its ownership, out of which it could carve an estate. For example, if the Crown granted a fee simple estate, the doctrine of tenure would immediately apply and convert the Crown's absolute title into a paramount lordship, creating a tenurial relationship between the Crown and the fee simple tenant.

¹⁵ McNeil, *Common Law Aboriginal Title*, *supra* note 14, ch 3.

¹⁶ *Mabo*, *supra* note 9 at 47. For an article supporting this argument, see Samantha Hepburn, "Feudal Tenure and Native Title: Revising an Enduring Fiction" (2005) 27:1 Sydney L Rev 49.

¹⁷ *Mabo*, *supra* note 9 at 46. For additional authority, see McNeil, *Common Law Aboriginal Title*, *supra* note 14 at 154, n 102.

¹⁸ *Mabo*, *supra* note 9 at 47. For detailed discussion, see Secher, *supra* note 14.

¹⁹ In so deciding, the High Court overruled *Milirrpum v Nabalco Pty* (1971), 17 FCR 141 (NTSC). See Secher, *supra* note 14 at 32–33, 76–77; Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (Sydney: Federation Press, 2008) [Young].

²⁰ *Mabo*, *supra* note 9 at 48–51 ("The radical title is a postulate of the doctrine of tenure and a concomitant of sovereignty" at 48, Brennan J). I interpret this to mean that the doctrine of tenure gave the Crown its radical title and that the radical title accompanied sovereignty. For in-depth analysis, see Secher, *supra* note 14.

itself ownership of parcels of land within the Crown's territory). Unless the sovereign power is exercised in one or other of those ways, there is no reason why land within the Crown's territory should not continue to be subject to native title. It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty.²¹

Similarly in New Zealand, the Court of Appeal has held that the Crown acquired radical title to all land along with sovereignty, but that this underlying Crown title is burdened by the pre-existing land rights of the Maori under their customs and usages.²² Following Brennan's judgment in *Mabo*, Chief Justice Elias stated in the leading case of *Attorney General v Ngati Apa*: "The radical title of the Crown is a technical and notional concept. It is not inconsistent with common law recognition of native property."²³

4. Canada: The Source of the Crown's Underlying Title

In Canada outside of Quebec, the doctrine of tenure has also been regarded as having been received along with other applicable common law doctrines and rules.²⁴ As a result, the Crown is deemed to have received the underlying title to all land at the time sovereignty was acquired and the common law was introduced. If this is what Chief Justice Dickson and Justice La Forest

²¹ *Mabo*, *supra* note 9 at 50–51. Note that Justice Brennan's view that the Crown could exercise its sovereign power to grant land or appropriate land to itself was a pragmatic compromise meant to protect existing property rights in Australia, where the Crown did not enter into treaties for the surrender of Native title. It is not consistent with the protection the common law accords to property rights generally: Kent McNeil, "Racial Discrimination and Unilateral Extinguishment of Native Title" (1996) 1:2 Australian Indigenous L Reporter 181 [McNeil, "Racial Discrimination"], reprinted in Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) 357 [McNeil, *Emerging Justice?*]; Secher, *supra* note 14 at 122–28. In Canada, exercise of equivalent sovereign power would require clear and plain statutory authority, and would be subject to the constitutional division of powers and the protection provided to Aboriginal title by section 35 of the *Constitution Act*, 1982: Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2001) 33:2 Ottawa L Rev 301 [McNeil, "Extinguishment of Aboriginal Title"].

²² *AG v Ngati Apa*, [2003] NZCA 117, [2003] 3 NZLR 643 [*Ngati Apa*]; Young, *supra* note 19 at 167–200.

²³ *Ngati Apa*, *supra* note 22 at para 30. See also *Symonds*, *supra* note 14; *Nireaha Tamaki v Baker*, [1901] AC 561, [1901] NZPC 1 (PC) [*Nireaha Tamaki*]. For discussion, see Secher, *supra* note 14 at 59–78; Kent McNeil, "Legal Rights and Legislative Wrongs: Maori Claims to the Foreshore and Seabed" in Andrew Erueti & Claire Charters, eds, *Maori Property Rights and the Foreshore and Seabed: The Last Frontier* (Wellington, NZ: Victoria University Press, 2007) 83.

²⁴ Bruce Ziff, *Principles of Property Law*, 5th ed (Toronto: Carswell, 2010) at 67–71; Mary Jane Mossman & Philip Girard, *Property Law: Cases and Commentary*, 3rd ed (Toronto: Emond Montgomery, 2014) at 229–35, 240–41.

meant in *R v Sparrow* when they stated, in reference to lands burdened by Aboriginal title in British Columbia, that “there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown,”²⁵ it would be consistent with the decisions of the High Court of Australia and the Court of Appeal of New Zealand in the cases discussed above. However, the authority upon which Dickson and La Forest relied, in addition to the Royal Proclamation of 1763, was *Johnson v M'Intosh*, where we have seen that the Crown's underlying title was taken to have been derived from the doctrine of discovery.²⁶ In *Guerin v Canada*, Justice Dickson (as he then was) also relied on *Johnson v M'Intosh* in deciding that the Crown has the underlying title to Aboriginal title lands in Canada.²⁷ He additionally relied on *St Catherine's Milling and Lumber Co v R*,²⁸ where the Privy Council regarded the Crown's underlying title to Treaty 3 lands in northwestern Ontario as having been acquired by cession of French Canada to Britain by the Treaty of Paris in 1763.²⁹ The sources of the Crown's underlying title have therefore been variously suggested to be the common law, the doctrine of discovery, and in the former French colonies, cession from France.

The Supreme Court of Canada has provided little insight into the source of the Crown's underlying title. In my opinion, a more doctrinally accurate explanation was provided by Justice Campbell in his trial decision in *Chippewas of Sarnia v Canada (AG)*, where he observed the accepted position that the underlying title is in the Crown “is simply a basic proposition of English and Canadian property law that applies to all land.”³⁰ He elaborated as follows:

As demonstrated earlier it is axiomatic in our common law system that the underlying, allodial, or radical title in Indian land, like all land is indeed vested in the Crown. But that title is subject to the overlying burden of Indian title. That overlying burden of Indian title is not vested in the Crown but guaranteed by the Crown to the Indians until surrendered by the Indians to the Crown.³¹

The Supreme Court returned to the issue of the Crown's underlying title in *Delgamuukw v British Columbia*,³² where Chief Justice Lamer stated:

²⁵ [1990] 1 SCR 1075 at 1103, 46 BCLR (2d) 1 [*Sparrow*]. For critical commentary, see Michael Asch and Patrick Macklem, “Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*” (1991) 29:2 *Alta L Rev* 498.

²⁶ *M'Intosh*, *supra* note 1 at 573.

²⁷ [1984] 2 SCR 335 at 377–379, 59 BCLR 301 [*Guerin*].

²⁸ [1888] UKPC 70, 14 App Cas 46 [*St Catherine's* cited to App Cas].

²⁹ *Guerin*, *supra* note 27 at 380.

³⁰ (1999), 88 ACWS (3d) 728, 40 RPR (3d) 49 at para 377 (ONSC), *rev'd* on other grounds (2001), 51 OR (3d) 641, 195 DLR (4th) 135.

³¹ *Ibid* at para 419.

Aboriginal title is a burden on the Crown's underlying title. However, the Crown did not gain this title until it asserted sovereignty over the land in question. Because it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at the time sovereignty was asserted.³³

The Supreme Court accepted that the Crown asserted sovereignty over the territories of the Wet'suwet'en and Gitksan nations in 1846 when it entered the Oregon Boundary Treaty with the United States. The source of the Crown's underlying title in British Columbia was therefore not discovery, which had occurred prior to 1846.³⁴ Instead, it appears that the Crown acquired sovereignty, and hence underlying title, by unilateral assertion and international acknowledgement thereof by a bilateral treaty with another sovereign, the United States.³⁵ Acceptance of 1846 as the year for assertion of Crown sovereignty and the vesting of Aboriginal title in that province was recently affirmed by Chief Justice McLachlin in *Tsilhqot'in Nation v British Columbia*.³⁶

5. The Nature of the Crown's Underlying Title in Canada

It is important to understand that the Crown's underlying title is a property right derived from the doctrine of tenure, rather than a source of jurisdiction (governmental authority), because this means that it is subject to the common law protections accorded to other real property rights by the common law. In the *St Catherine's* case, the Privy Council decided that the Crown had the underlying title to lands within Ontario that were burdened by Aboriginal title prior to the surrender of that title to the Crown by treaty.³⁷ The province received the beneficial interest in those lands after the surrender as a result of section 109 of the *British North America Act, 1867* (now the *Constitution Act, 1867*), which provides that, subject to the exceptions referred to in sections 108 and 117, public lands and resources belong to the provinces.³⁸ The provincial interest is "subject to any Trusts

³² [1997] 3 SCR 1010, 66 BCLR (3d) 285 [*Delgamuukw* cited to SCR].

³³ *Ibid* at para 145.

³⁴ See *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at paras 585–602, [2008] 1 CNLR 112. In that case Justice Vickers rejected discovery as a means for Crown acquisition of sovereignty, but accepted 1846 as the appropriate year in British Columbia.

³⁵ For critical commentary, see Kent McNeil, "Negotiated Sovereignty: Indian Treaties and the Acquisition of American and Canadian Territorial Rights in the Pacific Northwest" in Alexandra Harmon, ed, *The Power of Promises: Rethinking Indian Treaties in the Pacific Northwest* (Seattle: University of Washington Press, 2008) 35 [McNeil, "Negotiated Sovereignty"].

³⁶ 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in Nation*].

³⁷ *St Catherine's*, *supra* note 28 at 58.

³⁸ Section 108 provides that the property listed in the third schedule to the Act, including canals, public harbors, lighthouses, railways, customs houses, military equipment and installations, "shall be the Property of Canada," whereas section 117 empowers Canada

existing in respect thereof, and to any Interest other than that of the Province in the same.”³⁹ Section 109 is thus one of the provisions in the Act dealing with *the division of public property* between the provinces and the federal government; *it is not concerned with the division of powers* (legislative and executive jurisdiction), which is provided for by other sections, especially sections 91 and 92.

In *St Catherine's*, the Privy Council held that Aboriginal title is an “Interest other than that of the Province” within the meaning of section 109, and so the lands burdened by that title did not become available to the province as a source of revenue until the burden of that title had been removed in 1873 by Treaty 3.⁴⁰ As Aboriginal title is a property right along with the other interests preserved by section 109, such as fee simple estates, it must enjoy the same common law protections as those other property rights.⁴¹ Specifically, in the parliamentary system of government that Canada received from Britain, legal rights can only be infringed or taken away by or pursuant to unequivocal legislation. This is particularly so where property rights are concerned, as they have always enjoyed special protection in the common law.⁴² The rule against executive taking with respect to land dates from at least 1215, when chapter 29 of *Magna Carta* specified that “[n]o Freeman shall ... be disseised [i.e., dispossessed of his land] ... but by the lawful Judgment of his Peers, or by the law of the Land.”⁴³ This

to assume any provincial property “required for Fortifications or for the Defence of the Country.” *Constitution Act, 1867* (UK), 30 & 31 Vict, c3.

³⁹ Section 109 provides in full: “All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same”.

⁴⁰ *Supra* note 28 at 58–59.

⁴¹ The remainder of this paragraph is excerpted from McNeil, “Extinction of Aboriginal Title,” *supra* note 21 at 309–10. For a more detailed discussion, see McNeil, “Racial Discrimination,” *supra* note 21 at 182–90 (*Emerging Justice?* at 359–69).

⁴² William Blackstone, *Commentaries on the Laws of England*, vol 1 (Oxford: Clarendon Press, 1765) at 129; Herbert Broom, *Constitutional Law Viewed in Relation to Common Law and Exemplified by Cases*, 2nd ed by George L Denman (London, UK: W Maxwell & Son, 1885) at 225–45 [Broom]; *Harrison v Carswell*, [1976] 2 SCR 200 at 219, 62 DLR (3d) 68, Dickson J; *Leiriao v Val-Bélair (Town)*, [1991] 3 SCR 349 at 356–57, 29 ACWS (3d) 1112, L’Heureux-Dubé J (dissenting). For further discussion, see Kent McNeil, “Aboriginal Title as a Constitutionally Protected Property Right” in *Emerging Justice?*, *supra* note 21 at 292, 293–95 [McNeil, “Constitutionally Protected Property Right”].

⁴³ *Magna Carta* (UK), 16 John. In *AG v De Keyser's Royal Hotel Ltd*, [1920] UKHL 1, [1920] AC 508 at 569, Lord Parmoor stated: “Since *Magna Carta* the estate of a subject in lands or buildings has been protected against the prerogative of the Crown” [*De Keyser's Royal Hotel*].

restraint on the authority of the executive branch of government is basic to the rule of law,⁴⁴ as it protects property against government taking except in accordance with law.⁴⁵ Simply put, it means that there is no prerogative power to confiscate or extinguish property rights in times of peace.⁴⁶ Any executive authority to take or extinguish property rights must, therefore, be created by legislation because only legislatures have the constitutional authority to interfere with property rights.⁴⁷

The proprietary nature of the Crown's underlying title and the common law protection against executive taking provided to Aboriginal title were both confirmed by the Supreme Court in the *Delgamuukw* decision.⁴⁸ In that case, British Columbia tried to rely on the fact that section 109 gives the Crown's underlying title to the province in arguing that "this right of ownership carried with it the right to grant fee simples which, by implication, extinguish aboriginal title."⁴⁹ Chief Justice Lamer concluded that this argument failed "to take account of the language of s.109":

Although that provision vests underlying title in provincial Crowns, it qualifies provincial ownership by making it subject to "any Interest other than that of the Province in the same". In *St. Catherine's Milling*, the Privy Council held that aboriginal title was such an interest, and rejected the argument that provincial ownership operated as a limit on federal jurisdiction. The net effect of that decision,

⁴⁴ *Entick v Carrington*, [1765] EWHC KB J98, [1765] 19 St Tr 1030 (CP).

⁴⁵ In *Eshugbayi Eleko v Government of Nigeria*, [1931] UKPC 37, [1931] AC 662 at 670, Lord Atkin stated: "no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice." See also James W Ely, Jr, *The Guardian of Every Other Right: A Constitutional History of Property Rights*, 2nd ed (New York: Oxford University Press, 1998) at 13–14, 54–55.

⁴⁶ In wartime the Crown can take private property for defense purposes, but only if compensation is paid: See *De Keyser's Royal Hotel*, *supra* note 43; *Commercial and Estates Co of Egypt v Board of Trade*, [1925] 1 KB 271 at 294–97, [1925] LI LR 218 (CA) Atkin LJ; *Burmah Oil Co v Lord Advocate*, [1964] UKHL 6, [1965] AC 75.

⁴⁷ Broom, *supra* note 42 at 231: "no man's property can legally be taken from him or invaded by the direct act or command of the sovereign, without the consent of the subject, given expressly or impliedly through parliament." Where land is concerned, modern expropriation statutes are the main source of this kind of executive authority: Keith Davies, *Law of Compulsory Purchase and Compensation*, 3rd ed (London, UK: Butterworths, 1978) at 9–10; Graham L Fricke, ed, *Compulsory Acquisition of Land in Australia*, 2nd ed (Sydney: Law Book Company Limited, 1982) at 5–6; Eric CE Todd, *The Law of Expropriation and Compensation in Canada*, 2nd ed (Toronto: Carswell, 1992) at 26–29; *Rugby Joint Water Board v Shaw Fox*, [1972] 2 WLR 757, [1973] AC 202 (HL) at 214 (Lord Pearson stated that "compulsory acquisition and compensation for it are entirely creations of statute").

⁴⁸ *Delgamuukw*, *supra* note 32 at paras 160–169, 189.

⁴⁹ *Ibid* at para 175.

therefore, was to separate the ownership of lands held pursuant to aboriginal title from jurisdiction over those lands.⁵⁰

Thus, the province's underlying title is a property interest that is subject to other property interests, including Aboriginal title. It does not give the province any jurisdiction over Aboriginal title lands. This is entirely consistent with the common law position that the Crown's underlying title to all lands does not carry with it jurisdiction to extinguish or diminish any property rights that burden the underlying title.

In spite of Chief Justice Lamer's clear ruling on this issue in *Delgamuukw*, in *Haida Nation v British Columbia (Minister of Forests)*, British Columbia again contended that section 109 gave the province the "exclusive right" to lands burdened by Aboriginal title, and argued that this right "cannot be limited by the protection for Aboriginal rights found in s. 35 of the *Constitution Act, 1982*."⁵¹ The province contended that, as a result, any duty to consult for potential infringements of Aboriginal title rested solely with the federal government.⁵² Chief Justice McLachlin summarily dismissed these contentions and held that the provinces have a duty to consult when they propose action that may negatively impact asserted Aboriginal title:

The answer to this argument is that the Provinces took their interest in land subject to "any Interest other than that of the Province in the same" (s. 109). The duty to consult and accommodate here at issue is grounded in the assertion of Crown sovereignty which pre-dated the Union. It follows that the Province took the lands subject to this duty. It cannot therefore claim that s. 35 deprives it of powers it would otherwise have enjoyed. As stated in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), lands in the Province are "available to [the Province] as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title" (p. 59). The Crown's argument on this point has been canvassed by this Court in *Delgamuukw, supra*, at para. 175, where Lamer C.J. reiterated the conclusions in *St. Catherine's Milling, supra*. There is therefore no foundation to the Province's argument on this point.⁵³

Clearly, then, the provinces' underlying title does not carry with it authority to infringe Aboriginal title in the same way as the Crown's underlying title to fee simple lands does not carry with it any authority to infringe the rights of fee simple owners. If the provinces have authority to infringe Aboriginal title, it must be legislative authority derived from the division of powers in the *Constitution Act, 1867*, not from the division of property in that Act.

⁵⁰ *Ibid.*

⁵¹ 2004 SCC 73, [2004] 3 SCR 511 at para 58 [*Haida Nation*].

⁵² *Ibid* at para 57.

⁵³ *Ibid* at para 59.

6. The Content of the Crown's Underlying Title in Canada

The content of the Crown's underlying title at common law is what is left after the rights of private persons and Aboriginal titleholders are subtracted from the totality of property rights that pertain to the land in question. In principle, this approach should apply in each of the four settler states. This approach is at least implicit in the case law in Australia and New Zealand.⁵⁴ However, in the United States the Supreme Court has regarded the fee simple to Indian title lands to be vested by the doctrine of discovery in the Crown and its successor, which in this context could be either the United States or a state government, though this fee simple is equivalent to a remainder that does not include a right to possession until the Indian title has been validly extinguished.⁵⁵ Alternatively, in their own legal orders, some Indigenous peoples may be the absolute or allodial owners of their lands, rendering the Crown's underlying title nonexistent, as nothing would remain after the land rights of the Indigenous peoples were subtracted.⁵⁶

In this article, my main concern is with the content of the Crown's underlying title in Canada from the perspective of the Supreme Court. Prior to the *Delgamuukw* decision in 1997, the Court had not shed much light on this matter, no doubt because it had not provided a definition of the Aboriginal title that has to be subtracted from the underlying title.⁵⁷ However, in *Delgamuukw*, Chief Justice Lamer described Aboriginal title as a "right to the land itself" that could "compete on an equal footing with other proprietary interests."⁵⁸ Elaborating, he stated:

⁵⁴ *Western Australia v Ward* (2002), 191 ALR 1, 213 CLR 1; *Nḡati Apa*, *supra* note 22. For detailed discussion, see Secher, *supra* note 14 at 59–78 (regarding New Zealand), 147–64 (regarding Australia).

⁵⁵ *Fletcher v Peck*, 10 US (6 Cranch) 87 (1810), 3 L Ed 162; *M'Intosh*, *supra* note 1; *Mitchel v United States*, 34 US (9 Pet) 711, 9 L Ed 283 (1835) at 745–46, 9 L Ed 283. For discussion, see Kent McNeil, "Extinguishment of Native Title: The High Court and American Law" (1997) 2:3 Australian Indigenous L Reporter 365, reprinted in *Emerging Justice?*, *supra* note 21 at 409.

⁵⁶ See e.g. James [sákéj] Youngblood Henderson, "Mikmaw Tenure in Atlantic Canada" (1995) 18:2 Dal LJ 196 [Henderson, "Mikmaw Tenure"]; John Borrows, "The Durability of *Terra Nullius*: *Tsilhqot'in v The Queen*" (2015) 48:3 UBC L Rev 701 [Borrows]. In relation to Australia, see Brendan Edgeworth, "Tenure, Allodialism and Indigenous Rights at Common Law: English, United States and Australian Land Law Compared after *Mabo v Queensland*" (1994) 23:4 Anglo-Am L Rev 397.

⁵⁷ McNeil, *Common Law Aboriginal Title*, *supra* note 14 at 276–90. In the *St Catherine's* case, *supra* note 28, the Privy Council described the Crown's underlying title as "a substantial and paramount estate" (at 55) and "a present proprietary estate in the land" (at 58), but, as their Lordships found it unnecessary to define Aboriginal title precisely, the content of the Crown's underlying title was also left vague.

⁵⁸ *Delgamuukw*, *supra* note 32 at paras 112, 138, 140, 113. Chief Justice Lamer relied upon *Canadian Pacific Ltd v Paul*, [1988] 2 SCR 654 at 677, 91 NBR (2d) 43.

Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies.⁵⁹

He went on to conclude that Aboriginal title comprises natural resources, including subsurface resources such as oil and gas, even if those resources had not been known to or used by the Aboriginal titleholders prior to the Crown's assertion of sovereignty.⁶⁰

In *Tsilhqot'in Nation*, Chief Justice McLachlin affirmed that the Crown's underlying title was acquired along with sovereignty:

At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the *Royal Proclamation* of 1763. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.⁶¹

She also affirmed that Aboriginal title amounts to the entire beneficial interest in the land:

The content of the Crown's underlying title is what is left when Aboriginal title is subtracted from it: s. 109 of the *Constitution Act, 1867*; *Delgamuukw*. As we have seen, *Delgamuukw* establishes that Aboriginal title gives "the right to exclusive use and occupation of the land ... for a variety of purposes", not confined to traditional or "distinctive" uses (para. 117). In other words, Aboriginal title is a beneficial interest in the land: *Guerin*, at p. 382. In simple terms, the title holders have the right to the benefits associated with the land—to use it, enjoy it and profit from its economic development. As such, the Crown does not retain a beneficial interest in Aboriginal title land.⁶²

However, Aboriginal title is unlike common law real property interests such as fee simple estates, in part because it is inalienable other than by surrender to the Crown.⁶³ This restriction on alienation has been described in New

⁵⁹ *Delgamuukw*, *supra* note 32 at para 111.

⁶⁰ *Ibid* at paras 118–24.

⁶¹ *Supra* note 36 at para 69.

⁶² *Ibid* at para 70.

⁶³ *Delgamuukw*, *supra* note 32 at para 113; *Tsilhqot'in Nation*, *supra* note 36 at para 74. Another *sui generis* aspect of Aboriginal title is that it is subject to an inherent limit that

Zealand as a Crown right of pre-emption, but whether it stems from the Crown's underlying title or some other source is unclear.⁶⁴ My own view is that it is neither a restriction inherent in Aboriginal title itself nor a Crown right of pre-emption, but rather a restriction on the ability of settlers to acquire lands directly from the Aboriginal titleholders. In Australia and New Zealand, the courts have held that, due to the doctrine of tenure, settlers can acquire real property rights only from the Crown.⁶⁵ However, I think there is an additional explanation for this settler incapacity. In *Campbell v British Columbia (AG)*, Justice Williamson held that Aboriginal title is more than mere property—it has governmental dimensions as well.⁶⁶ It should follow that Aboriginal title cannot be acquired by private persons or corporations, as they lack the legal capacity to acquire governmental authority from anyone other than the Crown.⁶⁷ Consequently, only the Crown and,

prevents the land from being “encumbered in ways that would prevent future generations of the group from using and enjoying it” or “developed or misused in a way that would substantially deprive future generations of the benefit of the land”: *Tsilhqot'in Nation* at para 74. For further discussion, see Kent McNeil, “The Post-*Delgamuukw* Nature and Content of Aboriginal Title” in *Emerging Justice?*, *supra* note 21 at 102. Significantly, this inherent limit also applies to the Crown, restricting its ability to justify infringements of Aboriginal title: *Tsilhqot'in Nation* at para 86. See Brian Slattery, “The Constitutional Dimensions of Aboriginal Title” (2015) 71:1 SCLR 45 at 58–63 [Slattery, “Constitutional Dimensions”]. Justifiable infringement is discussed briefly below.

⁶⁴ *Symonds, supra* note 14; *Nireaha Tamaki, supra* note 23. For discussion, see Secher, *supra* note 14 at 60–67, 71–75.

⁶⁵ *Symonds, supra* note 14; *Mabo, supra* note 9. However, this explanation is not consistent with the common law doctrine of adverse possession, whereby private persons can acquire real property rights (even against the Crown in some instances) by possession for the statutory limitation period: John M Lightwood, *The Time Limit on Actions, Being a Treatise on the Statute of Limitations and the Equitable Doctrine of Laches* (London, UK: Butterworth & Co, 1909); McNeil, *Common Law Aboriginal Title, supra* note 14 at 87–92; Secher, *supra* note 14 at 126.

⁶⁶ 2000 BCSC 1123, [2000] 4 CNLR 1 at 37–38. In *House of Sga'nisim v Canada (AG)*, 2011 BCSC 1394, [2012] 2 CNLR 82, Justice Smith followed *Campbell* out of comity, but also held that the governmental authority in the Nisga'a Final Agreement, 1998, the validity of which was challenged in these cases, could be upheld as having been delegated by the agreement. Smith's decision was upheld on this basis, without deciding the inherent right issue: 2013 BCCA 49, [2013] 2 CNLR 226. For further discussion, see Brian Slattery, “Constitutional Dimensions”, *supra* note 63; Kent McNeil, “Indigenous Land Rights and Self-Government: Inseparable Entitlements” in Lisa Ford & Tim Rowse, eds, *Between Indigenous and Settler Governance* (Abingdon, UK: Routledge, 2013) 135; Jeremy Webber, “The Public-Law Dimension of Indigenous Property Rights” in Nigel Bankes & Timo Koivurova, eds, *The Proposed Nordic Saami Convention: National and International Dimensions of Indigenous Property Rights* (Oxford: Hart Publishing, 2013) 79; Joshua Nichols, “A Reconciliation Without Recollection? *Chief Mountain* and the Sources of Sovereignty” (2015) 48:2 UBC L Rev 515.

⁶⁷ For an example of Crown conferral of governmental authority on a corporation, see the Rupert's Land Charter, 1670, whereby Charles II granted extensive governmental

arguably, other Indigenous nations can acquire Aboriginal title directly from the titleholders.⁶⁸ However, this should not prevent the titleholders from creating lesser property interests in their title lands under their own laws, as long as they retain Aboriginal title itself and the jurisdiction that it entails.⁶⁹

Returning to *Tsilhqot'in Nation*, after concluding that the Crown's underlying title has no beneficial content, Chief Justice McLachlin continued:

What remains, then, of the Crown's radical or underlying title to lands held under Aboriginal title? The authorities suggest two related elements – a fiduciary duty owed by the Crown to Aboriginal people when dealing with Aboriginal lands, and the right to encroach on Aboriginal title if the government can justify this in the broader public interest under s. 35 of the *Constitution Act, 1982*. The Court in *Delgamuukw* referred to this as a process of reconciling Aboriginal interests with the broader public interests under s. 35 of the *Constitution Act, 1982*.⁷⁰

With respect, the power to encroach on Aboriginal title in the broader public interest by infringement cannot come from the Crown's underlying title, which is purely proprietary. We have also seen that Aboriginal title is a property interest that can “compete on an equal footing with other proprietary interests.”⁷¹ It must therefore enjoy at least the same protection as the common law accords to other property rights, and arguably even greater protection because, unlike other property rights, it has been constitutionally protected in Canada since 1982 by section 35.⁷² In addition, McLachlin affirmed that the Crown owes unique fiduciary obligations to Indigenous peoples in relation to their lands.⁷³ Even apart from these special protections,

authority in North America to the Hudson's Bay Company. The Charter is reproduced in EE Rich, ed, *Minutes of the Hudson's Bay Company 1671-1674* (Toronto: Champlain Society, 1942) at 131–48.

⁶⁸ Technically, when Aboriginal title is surrendered to the Crown by treaty, the burden of that title is removed from the Crown's underlying title, which expands into what Lord Watson called “a plenum dominium”: *St Catherine's*, *supra* note 28 at 55. Transfer of Aboriginal title from one group to another was envisaged by Justice La Forest in his concurring judgment in *Delgamuukw*, *supra* note 32 at para 198.

⁶⁹ Chief Justice Marshall envisaged this in *M'Intosh*, *supra* note 1 at 593. For further discussion, see Kent McNeil, “Self-Government and the Inalienability of Aboriginal Title” (2002) 47:3 McGill LJ 473.

⁷⁰ *Tsilhqot'in Nation*, *supra* note 36 at para 71.

⁷¹ *Delgamuukw*, *supra* note 32 at para 113.

⁷² See McNeil, “Constitutionally Protected Property Right”, *supra* note 42 at 292.

⁷³ As decided in *Guerin*, *supra* note 27, the Crown's fiduciary obligations arise in part from the inalienability, other than by surrender to the Crown, of Aboriginal title and reserve lands, which gives the Crown discretionary power. But in *Tsilhqot'in Nation*, *supra* note 36 at para 112, Chief Justice McLachlin stated that, “although Aboriginal title can be alienated

it is fundamental in the constitutional system that Canada inherited from the United Kingdom that the Crown does not have prerogative authority to infringe property rights.⁷⁴ As we have seen, since at least *Magna Carta* the Crown has been unable to infringe real property rights by virtue of its underlying title to all lands within its common law dominions. The only way it can legally infringe property rights, excluding times of war, is if it has clear and plain statutory authority to do so, such as that provided by expropriation legislation.⁷⁵

In keeping with fundamental constitutional principles, the Crown's power to infringe, which the Court in *Tsilhqot'in Nation* decided pertains to both the federal and provincial Crowns,⁷⁶ can come only from the legislative authority conferred on Parliament and the provincial legislatures by sections 91 and 92 of the *Constitution Act, 1867*. This means that, before any infringement can justifiably take place, legislation must be enacted that infringes Aboriginal title directly or gives the executive branch the authority to do so. Of course, infringement in these ways will still not be constitutionally valid unless the Crown is able to justify the infringement in accordance with the *Sparrow* test, as narrowed by Chief Justice McLachlin's judgment in *Tsilhqot'in Nation*,⁷⁷ by proving a valid legislative objective, adequate consultation, minimal impairment of Aboriginal title, and compensation in appropriate circumstances.⁷⁸

to the Crown, this does not confer a fixed right to future enjoyment in the way property that is vested in interest would. Rather, it would seem that Aboriginal title vests the lands in question in the Aboriginal group." In other words, the Crown's right to acquire Aboriginal title lands by surrender does not entail a vested proprietary interest in the lands.

⁷⁴ See the Preamble to the *Constitution Act, 1867*, *supra* note 38: "Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom".

⁷⁵ See the authorities cited in notes 42–47 above.

⁷⁶ This ruling involved a rejection of the application of the doctrine of interjurisdictional immunity to section 35 rights. For critical commentary, see Kerry Wilkins, "Life Among the Ruins: Section 91(24) after *Tsilhqot'in* and *Grassy Narrows*" (2017) 55:1 *Alta L Rev* 91 [Wilkins, "Life Among the Ruins"]; HW Roger Townshend, "What Changes Did *Grassy Narrows First Nation* Make to Federalism and Other Doctrines?" (2017) 95:2 *Can Bar Rev* 459.

⁷⁷ As mentioned in note 63 above, Chief Justice McLachlin stated the inherent limit on Aboriginal title also applies to the Crown, so infringements that would substantially deprive future generations of the benefit of the land cannot be justified: *Tsilhqot'in Nation*, *supra* note 36 at para 86. Moreover, McLachlin stated that "the Crown must seek the consent of the title-holding Aboriginal group to developments on the land" before proceeding unilaterally and attempting to justify its actions, at para 90. I am grateful to Kerry Wilkins for pointing this out to me.

⁷⁸ *Sparrow*, *supra* note 25; *Delgamuukw*, *supra* note 32 at paras 160–69; *Tsilhqot'in Nation*, *supra* note 36 at paras 77–88.

7. Conclusion: Sovereignty and Underlying Title in Canada

It is essential to separate sovereignty from title to land in the Crown's overseas dominions. Focusing on Canada, it appears that the Crown got sovereignty over Acadia and New France from the French King by conquest and cession,⁷⁹ though this leaves unanswered the question of how France acquired sovereignty over territories occupied and controlled by Indigenous peoples.⁸⁰ The geographical extent of France's North American possessions is also an open question.⁸¹ In the rest of Canada, various terms have been used to explain Crown acquisition of sovereignty, such as discovery, settlement, and assertion. Recognition of Crown sovereignty by a single neighboring nation, the United States, has been taken as adequate for the Crown to have acquired sovereignty over British Columbia. Then, in *Haida Nation*,⁸² the Supreme Court acknowledged pre-existing Indigenous sovereignty for the first time. It referred to Crown sovereignty and control as "assumed" and "*de facto*,"⁸³ without any explanation of how the Crown could have *de facto* sovereignty over territories that were completely occupied and controlled by Indigenous peoples before and for some time after the Crown's supposed acquisition of sovereignty in 1846.⁸⁴ If the Crown acquired sovereignty over all of British Columbia at that time, then as I have previously argued it can

⁷⁹ Regarding New France, see *St Catherine's*, *supra* note 28. Regarding French colonies in what became Nova Scotia and New Brunswick, see *R v Marshall*; *R v Bernard*, 2005 SCC 43, [2005] 2 SCR 220 at para 71, relying on the lower courts' decisions.

⁸⁰ Michel Morin, *L'Usurpation de la souveraineté autochtone: Le cas des peuples de la Nouvelle-France et des colonies anglaises de l'Amérique du Nord* (Montreal: Éditions Boréal, 1997); Michel Morin, "Des nations libres sans territoire? Les Autochtones et la colonisation de l'Amérique française du XVIe au XVIIIe siècle" (2010) 12:1 *J History Intl L* 1; Brian Slattery, *French Claims in North America 1500-59* (Saskatoon: University of Saskatchewan Native Law Centre, 1980); Brian Slattery, "Paper Empires: The Legal Dimensions of French and English Ventures in North America" in John McLaren, AR Buck & Nancy E Wright, eds, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 50; Luc Huppé, "L'établissement de la souveraineté européenne au Canada" (2009) 50:1 *C de D* 153 [Huppé].

⁸¹ Huppé, *supra* note 80 at 155–56; Kent McNeil, *Native Rights and the Boundaries of Rupert's Land and the North-Western Territory* (Saskatoon: University of Saskatchewan Native Law Centre, 1982).

⁸² *Haida Nation*, *supra* note 51.

⁸³ *Ibid* at paras 20, 32. See also *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550, handed down the same day as *Haida Nation*, at para 42, where Chief Justice McLachlin, for a unanimous Court, stated: "The purpose of s. 35(1) of the *Constitution Act, 1982* is to facilitate the ultimate reconciliation of prior Aboriginal occupation with *de facto* Crown sovereignty. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims".

⁸⁴ Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: University of Saskatchewan Native Law Centre, 2012).

only have been *de jure*, and only in legal systems that would acknowledge Crown sovereignty—such as British colonial law and possibly international law, but not Indigenous law.⁸⁵

Nonetheless, one cannot deny the reality that the Crown did eventually acquire *de facto* sovereignty over all of Canada, and probably obtained *de jure* sovereignty in domestic Canadian law as well as in international law.⁸⁶ However, apart from French Canada, the source of the Crown's *de jure* sovereignty has never been adequately explained by any branch of the Canadian government—judicial, executive, or legislative. Perhaps *de facto* sovereignty has resulted in gradual acquisition of *de jure* sovereignty domestically and internationally by prescription, but this does not explain how pre-existing Indigenous sovereignty could have been legally superseded by Crown sovereignty without conquest, cession, or Indigenous acquiescence.⁸⁷ Crown sovereignty, even if legal in Euro-based juridical systems, therefore lacks legitimacy because it depends on the application of those legal systems to Indigenous peoples without their consent, and without taking account of their pre-existing sovereignty and laws.⁸⁸ Indigenous peoples, in both treaty and non-treaty areas, continue to assert that they never gave up their sovereignty and that mutually respectful negotiations

⁸⁵ McNeil, “Negotiated Sovereignty”, *supra* note 35; Kent McNeil, “The Doctrine of Discovery Reconsidered: Reflecting on Robert J Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, and Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada*” (2016) 53:2 Osgoode Hall LJ 699 [McNeil, “Discovery Reconsidered”]. For further discussion of the relativity and limited scope of European and American assertions of sovereignty in North America, see Kent McNeil, “Factual and Legal Sovereignty in North America: Indigenous Realities and Euro-American Pretensions” in Julie Evans et al, eds, *Sovereignty: Frontiers of Possibility* (Honolulu: University of Hawai'i Press, 2013) 37; Kent McNeil, “Sovereignty and Indigenous Peoples in North America” (2016) 22:2 U California Davis J Intl L & Policy 81.

⁸⁶ International recognition of Canada as a nation-state and a member of the United Nations would support Crown sovereignty internationally. Canada's asserted territorial extent also seems to be generally accepted, with a few exceptions such as the North-West Passage in the Arctic.

⁸⁷ Internationally, at least, prescription appears to depend on acquiescence by the displaced sovereign: DHN Johnson, “Acquisitive Prescription in International Law” (1950) 27:1 Brit YB Intl L 332; RY Jennings, *The Acquisition of Territory in International Law* (Manchester: Manchester University Press, 1963) at 20–28; Yehuda Z Blum, *Historic Titles in International Law* (The Hague: Martinus Nijhoff Publishers, 1965) at 6–37; Surya P Sharma, *Territorial Acquisition, Disputes and International Law* (The Hague: Martinus Nijhoff Publishers, 1997) at 107–19; Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014) at 38–41.

⁸⁸ McNeil, “Discovery Reconsidered”, *supra* note 85; Felix Hoehn, “Back to the Future: Reconciliation and Indigenous Sovereignty after *Tsilhqot'in*” (2016) 67 UNBLJ 109.

need to occur so that sovereignty can be shared.⁸⁹ In *Haida Nation*, the Supreme Court seemed to acknowledge this. Chief Justice McLachlin stated:

Where treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims: *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at pp. 1105-6. *Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty*, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*. Section 35 represents a promise of rights recognition, and “[i]t is always assumed that the Crown intends to fulfil its promises” (*Badger*, *supra*, at para. 41). *This promise is realized and sovereignty claims reconciled through the process of honourable negotiation*. It is a corollary of s. 35 that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate.⁹⁰

Assuming that the Crown acquired *de jure* sovereignty in domestic Canadian law over the parts of Canada not acquired from France, applicable common law would have been received automatically at the same time.⁹¹ As we have seen, it has been generally accepted that the doctrine of tenure was included in this received body of law, which is how the Crown obtained its underlying title. However, as discussed above, this is a property interest that has been

⁸⁹ See e.g. Henderson, “Mikmaw Tenure”, *supra* note 56; Borrows, *supra* note 56; Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000); James (Sa’ke’j) Youngblood Henderson, *Treaty Rights in the Constitution of Canada* (Toronto: Thomson Carswell, 2007); Gordon Christie, “Who Makes Decisions over Aboriginal Title Lands?” (2015) 48:3 UBC L Rev 743 at 787–92; Shiri Pasternak, *Grounded Authority: The Algonquins of Barrier Lake Against the State* (Minneapolis: University of Minnesota Press, 2017); Arthur Manuel & Grand Chief Ronald Derrickson, *The Reconciliation Manifesto: Recovering the Land and Rebuilding the Economy* (Toronto: James Lorimer & Company, 2017).

⁹⁰ *Haida Nation*, *supra* note 51 at para 20 [emphasis added].

⁹¹ According to long-standing doctrines of British colonial law, in settled colonies the common law, to the extent it is applicable to local circumstances, is automatically received: McNeil, *Common Law Aboriginal Title*, *supra* note 14 at 134–35, 274–75; Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens & Sons, 1966) at 544–57; JE Côté, “The Reception of English Law” (1977) 15:1 Alta L Rev 29. However, this does not mean that Indigenous law was displaced: *Connolly v Woolrich* (1867) 17 RJRQ 75, 1 CNLC 70 (Qc SC), aff’d 17 RJRQ 266, 1 CNLC 151 (Qc CA). For this reason, as Brian Slattery has reminded me, instead of being classified as “settled” (a classification that really could only apply to uninhabited territories), the areas of Canada not acquired by the Crown from France would more appropriately come within a mixed category where the English settlers brought the common law with them but local law continued to apply to the Indigenous inhabitants: Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories* (D Phil dissertation, Oxford University, 1979) at 10–24, online: <works.bepress.com/brian_slattery/24/>.

burdened from the outset by Aboriginal title—it has no present beneficial content and does not give the Crown any authority to extinguish or infringe Aboriginal title. The underlying title only amounts to a right to obtain the land if the Aboriginal title comes to an end, either by surrender of the title to the Crown or if the titleholders cease to exist, in much the same way as a fee simple estate can be surrendered back to the Crown or will revert to the Crown by escheat if the fee simple owner dies intestate without heirs.

The unwritten part of the Canadian Constitution is based on the British Constitution, as provided by the Preamble to the *Constitution Act, 1867*. In both the United Kingdom and Canada, the legislative branch can extinguish and infringe property rights, and give the executive branch authority to do so, as long as the intention to do so is clear and plain.⁹² Given the division of powers in Canada's federal system, Parliament alone had the power to extinguish or authorize the extinguishment of Aboriginal title up until section 35 of the *Constitution Act, 1982* was enacted.⁹³ Since then, even Parliament does not have this power, but Parliament can still infringe or authorize the infringement of Aboriginal title if the *Sparrow* test for justifiable infringement, as modified by *Tsilhqot'in Nation*, is met.⁹⁴ Prior to *Tsilhqot'in Nation*, it was unclear whether provincial legislatures could infringe Aboriginal title,⁹⁵ but in that decision the Supreme Court concluded that provinces can, provided they are able to justify the infringement.⁹⁶ However, given that this appears to have been a modification of existing law, the retroactive impact of this aspect of the decision is questionable.⁹⁷

In sum, the title of the Crown that underlies Aboriginal title is a proprietary interest that has no present beneficial content. As a property

⁹² TRS Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44:1 Cambridge LJ 111. Infringement of property rights in this broader context usually involves a diminution of them, as opposed to mere regulation (e.g., building codes). In the context of Aboriginal rights, infringement can involve regulation (see *Sparrow*, *supra* note 25), but I would argue that unilateral diminution of Aboriginal title is a more serious infringement that should rarely, if ever, be justifiable: Kent McNeil, "Aboriginal Title and the Provinces after *Tsilhqot'in Nation*" (2015) 71 SCLR (2d) 67 [McNeil, "Aboriginal Title and the Provinces"].

⁹³ *Delgamuukw*, *supra* note 32 at paras 172–83 (Chief Justice Lamer held that provincial power to extinguish Aboriginal title has been excluded since Confederation by section 91(24) of the *Constitution Act, 1867*, *supra* note 38, which gives Parliament exclusive jurisdiction over "Indians, and Lands reserved for the Indians").

⁹⁴ *R v Van der Peet*, [1996] 2 SCR 507 at para 28, 23 BCLR (3d) 1; *Mitchell v Canada (MNR)*, 2001 SCC 33 at para 11, [2001] 1 SCR 911.

⁹⁵ Kent McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61:2 Sask L Rev 431, reprinted in *Emerging Justice?*, *supra* note 21 at 249; Kerry Wilkins, "Of Provinces and Section 35 Rights" (1999) 22:1 Dal LJ 185.

⁹⁶ Wilkins, "Life Among the Ruins", *supra* note 76.

⁹⁷ McNeil, "Aboriginal Title and the Provinces", *supra* note 92.

interest, it does not entail any authority to extinguish or infringe Aboriginal title. The power of the federal and provincial governments to infringe Aboriginal title is purely legislative, embedded in sections 91 and 92 of the *Constitution Act, 1867*.