

From Common Law Recognition to Judicial Confirmation: An Analysis of Native Title's Proof Criteria in Canada and Australia¹

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I - INTRODUCTION

The rights and interests of Indigenous Peoples in respect of their traditional territories are generally articulated as *land rights* and *native title*, two distinct yet often confounded concepts. Land rights refer to so-called 'ordinary' common law real property rights² (for example: 'title in fee simple', 'freehold tenure', 'leasehold tenure' and 'usufructuary rights') that afford their beneficiaries the right to use, enjoy, occupy and/or possess specific tracts of land. Land rights exist by virtue of deeds or grants created by the Crown and are not specific to Indigenous Peoples, meaning that they may be claimed by any individual who can prove his or her title to a specific tract of land (i.e. by producing an entitling deed or grant or by demonstrating 'exclusive possession'³ of a specific tract of land). Native title (also referred to as 'aboriginal title' and 'Indian title' in Canada, and 'traditional title' in Australia), by contrast, is a unique or *sui generis* common law real property right that is available only to Indigenous Peoples. Unlike 'ordinary' common law land rights, whose source is Crown action (i.e. the issuing of a deed or grant or confirmation of 'exclusive possession'), native title exists by virtue of Indigenous Peoples' occupation of their traditional territories prior to the assertion of sovereignty by the Crown and/or by virtue of Indigenous Peoples' 'traditional' laws and customs. In sum, land rights are Crown-delegated rights to land and native title is a pre-existing or inherent right to land.

In the settler dominions of Canada and Australia, Indigenous Peoples have made both 'land rights' and 'native title' claims in attempts to reconcile the past dispossession of their traditional territories and to prevent future dispossession. The pursuit of native title, however, has generally been preferred to the pursuit of land rights or 'ordinary' common law title for at least two compelling reasons. First, few Indigenous Peoples can establish 'ordinary' common law title to their traditional territories by producing a Crown issued deed or grant to the lands in question because: (i) Crown deeds and grants did not exist prior to the assertion of sovereignty by the Crown; and, (ii) Crown deeds and grants were infrequently issued to Indigenous people after the assertion of sovereignty by the Crown. Second, few Indigenous Peoples can establish 'ordinary' common law title to

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² 'Real property' (also termed 'real estate' and 'immovable property') is any property that is immovable (i.e. property consisting of: land; buildings, crops or other resources still attached to or within the land; and improvements or fixtures permanently attached to the land or permanently attached to a structure on the land); and/or, an interest, benefit, right or privilege in such property.

³ 'Exclusive possession' is a legally defensible claim to proprietary tenure at common law in the absence of a better claim to the land(s) in question.

their traditional territories by demonstrating their exclusive possession of said territories because: (i) colonial settlement occasioned massive encroachments onto the traditional territories of Indigenous Peoples; and, (ii) many Indigenous Peoples were forcibly removed from their traditional territories by government policy and/or legislation. Securing native title to their traditional territories has also been generally preferred to securing ‘ordinary’ common law title to those same lands by Indigenous Peoples because native title recognises Indigenous Peoples’ unique relationships with their traditional territories prior to the arrival of colonial newcomers and the subsequent assertions of Crown sovereignty.⁴ As a result, the pursuit of native title recognition and respect is considered an important aspect of the indigenous rights agenda in both Canada and Australia.

In recent years, the Indigenous Peoples of Canada and Australia have managed to successfully navigate the judicial processes imported by their colonizers to secure native title’s recognition as an existing (albeit unique) common law real property right.⁵ Securing this formal recognition (which was achieved in 1973 in the Canadian case, and 1992 in the Australian case) was not an insignificant accomplishment. Prior to the recognition of native title at common law, the claimed rights and interests of Indigenous Peoples in respect of their traditional territories were presumed to be unsubstantiated in law and thus difficult (if not impossible) to successfully assert and/or defend. As a result, political authorities could, and in fact did, justify their inaction on the Indigenous land agenda by dismissing the land-based rights claims of Indigenous Peoples as moot claims premised upon irrelevant pre-colonial histories. Upon native title’s recognition at common law, however, such justifications and inaction became not only inappropriate but also amenable to judicial review (i.e. through the litigated settlement of continuing native title claims). As a result, the recognition of native title at common law compelled an almost immediate political recognition of native title in Canada and Australia and the introduction of central government policies (i.e. the comprehensive claims policy in the Canadian case and the *Native Title Act* in the Australian case) designed to facilitate the resolution of continuing native title claims outside of ordinary judicial processes.

Given these developments, it is perhaps not surprising that much of the popular and academic commentary on the recognition of native title at common law in Canada and Australia has portrayed the act of recognition as an important, if not monumental, accommodation of indigenous rights to land. According to this body of literature, Indigenous Peoples’ contemporary ability to assert and defend claims of continuing native title at common law and through central government policies rightly marks the recognition of native title at common law as a significant turning point in the legal and

⁴ Although the purchase of ‘ordinary’ common law title is sometimes an option available to Indigenous people/Indigenous Peoples (finances/Indigenous Peoples (finances permitting), many (if not most) Indigenous people view this option as an unjustified affront to their rightful ownership claims and consequently reject it on principle.

⁵ For the Canadian case see: *Calder v Attorney-General of British Columbia* [1973] SCR 313 (confirmed in *R v Guerin* [1985] 1 CNLR 120; *Roberts v Canada* [1989] 1 SCR 322; *R v Sparrow* [1990] 1 SCR 1075; *Delgamuukw v British Columbia* [1998] 3 SCR 1010; and others). For the Australian case see: *Mabo v Queensland (No. 2)* [1992] 66 ALJR 408 (confirmed in *Western Australia The Commonwealth* [1995] 128 ALR 1; *Wik and Thayorre Peoples v State of Queensland* [1996] 141 ALR 129; *Commonwealth v Yarmirr* [1999] 168 ALR 426; *Western Australia and Ors v Ward and Ors* [2000] 179 ALR 159; *Members of the Yorta Yorta Community v State of Victoria* [2001] FCA 45; and others).

political accommodation of indigenous rights to land.⁶ At the same time, however, many Indigenous people and increasing numbers of Indigenous Studies scholars have criticised (post-)colonial legal and political institutions' handling of the native title issue. According to this body of literature, the judicial characterization of native title at common law and the native title claims processes designed by (post-)colonial governments have so limited the concept of 'continuing native title' that Indigenous Peoples' practical ability to successfully procure formal legal and/or political confirmation of their unique territorial rights is little different in Canada and Australia today than it was prior to native title's recognition at common law.⁷

These counterpoised bodies of literature invite a deeper exploration of the native title issue; one that goes beyond simplistic evaluations of the relative merits and demerits of native title recognition versus non-recognition and draws attention to the manner in which native title has been practically accommodated by colonial and (post-)colonial legal and political institutions. This paper takes up this invitation by offering a general comparative overview of the of native title's characterization at common law and a critical comparative analysis of native title's proof criteria at common law as these have been developed by the Supreme Court of Canada and High Court of Australia. The findings of this comparative endeavor are four-fold. First, the proof criteria for native title at common law are notably different in Canada owing to the differently determined source and nature of native title in the two cases. Second, both the Supreme Court of Canada and the High Court of Australia have placed themselves in the rather precarious position of authoritatively translating traditional indigenous relations with land into judicially defensible incidents of continuing native title. Third, the recognition of Indigenous Peoples as potential (if not actual) land owners in the Canadian case and as mere land inhabitants and/or land users in the Australia case has served to direct such authoritative translations in notably different ways in the two cases. And finally, the significant resources required to litigated continuing native title claims and the 'go for

⁶ See for example: Michael Asch, "From *Calder* to *Van der Peet*: Aboriginal Rights and Canadian Law, 1973-1996" in *Indigenous Rights in Australia, Canada and New Zealand*, Paul Havemann (ed), (Auckland: Oxford University Press, 1999); C. Radha Jhappan, "Natural Right vs Legal Positivism: Indians, the Courts and the New Discourse on Aboriginal Rights in Canada", *British Journal of Canadian Studies* 6:1, (1991), pp. 60-100; Dara Culhane, *The Pleasure of the Crown: Anthropology, Law and First Nations* (Burnaby: Talon, 1998); Lorna Lippman, "The Mabo Decision" in *Generations of Resistance* (3rd ed; Melbourne: Longman, 1994), ch 10; Frank Brennan, "Reconciliation in the post-Mabo era", *Aboriginal Law Bulletin* 3:61(1993), pp. 18-21; Gordon Brysland, "Rewriting History", *Alternative Law Journal* 17:4 (1992); and, Richard H. Bartlett, "The Landmark Case on Aboriginal Title in Australia: *Mabo v. State of Queensland*" in *The Recognition of Aboriginal Rights: Case Studies 1, 1996*, Corrigan and Sawchuk (eds), (Brandon: Bearpaw Publishing, 1996).

⁷ See for example: Union of BC Indian Chiefs, "Certainty: Canada's Struggle to Extinguish Aboriginal Title", (Vancouver: Union of BC Indian Chiefs, 1998); Antonia Mills, *Eagle Down is Our Law: Witsuit'en Law, Feasts, and Land Claims* (Vancouver: UBC Press, 1994); Brian Thom, "Aboriginal Rights and Title in Canada After *Delgamuukw*: Anthropological Perspectives on Rights, Tests, Infringement and Justification", *Native Studies Review* 14:2 (2001), pp. 1-42; Aboriginal Provisional Government, "The Mabo Case: The Court Gives an Inch but Takes another Mile", *APG Papers* 1 (July 1992), pp. 33-44; Rob Riley, "Reconciliation", *Good Weekend*, Aug 21 (1993), p. 24; Peter Poynton, "Mabo: now you see it now you don't", *Race and Class* 35:4 (1994), pp. 41-56; Mick Dodson, "The Struggle for Recognition of Collective Rights" (1997 - unpublished manuscript); Janice Gray, "The Mabo Case: A Radical Decision", *The Canadian Journal of Native Studies* 17:1 (1997), pp. 33-74.

broke' nature of native title litigation is likely to dissuade (or prevent) many Indigenous Peoples from pursuing a litigated settlement of their continuing native title claims.

II – A GENERAL OVERVIEW OF NATIVE TITLE'S CHARACTERIZATION AT COMMON LAW

Both the Supreme Court of Canada and the High Court of Australia have characterized native title as *sui generis* (meaning: unique; of its own kind; constituting a class alone; and/or peculiar) in order to distinguish it from 'ordinary' common law land rights. As explained by Chief Justice Lamer in *Delgamuukw v British Columbia* [1998] (hereafter referred to as *Delgamuukw*):

Aboriginal title has been described as *sui generis* in order to distinguish it from 'normal' proprietary interests, such as fee simple. However ... it is also *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives.⁸

And explained by Justices Deane and Gaudron in *Mabo v Queensland (No 2)*[1992] (hereafter referred to as *Mabo (No 2)*):

The preferable approach is ... to recognise the inappropriateness of forcing the native title to conform to traditional common law concepts and to accept it as *sui generis* or unique.⁹

At the same time, however, both the Supreme Court of Canada and the High Court of Australia have sought to breathe life into the *sui generis* real property right identified as 'native title' by defining its general characteristics with reference to the common law system of landholding. (Please see Appendix 1 for a useful summary of native title approximate placement with the hierarchy of 'ordinary' common law landholdings).

According to the Supreme Court of Canada, native title is properly characterized at common law as a *sui generis* proprietary right to land arising from Indigenous Peoples' occupation of their traditional territories prior to the assertion of Crown sovereignty. At common law, an 'ordinary' proprietary right to land (or 'proprietary tenure') conveys an unqualified legal and beneficial estate and equitable property interest in the actual land. For all intents and purposes, an individual in possession of an 'ordinary' proprietary tenure is recognised as owning the land in question (usually in the form of a 'title in fee simple'¹⁰), and may thus use said land however s/he chooses (i.e. s/he may occupy it, build on it, cultivate it, exploit its resources, and/or sell it). Accordingly, an 'ordinary' proprietary tenure can not be 'wrongfully' (meaning without consent or without notice

⁸ *Delgamuukw*, *supra* note 5, Lamer CJ at para 112.

⁹ *Mabo (No. 2)*, *supra* note 5, Deane and Gaudron JJ at p 443. Also see: *Mabo (No. 2)*, *supra* note 5, *per* Deane and Gaudron JJ at p 409; Brennan J at p. 437; and, Toohey J at pp. 482 and 489; *Wik*, *supra* note 5, Kirby J at p. 257.

¹⁰ A 'title in fee simple' is the highest form of land tenure recognised by the common law

and equitable relief) extinguished by subsequent executive action and is legally defensible against all other claims to the land in question.

As a result of the judicial characterization of native title as a *sui generis* proprietary right to land at common law, native title's nature and content are considered to be matters of *law* in the Canadian case (determined according to the interaction of the common law and traditional Indigenous law(s)) and can be summarized as follows:

Nature of Native Title:

1. native title is a *right to the land itself*¹¹;
2. native title is 'personal' only in the sense that it is *inalienable except by surrender to the Crown*¹²;
3. native title is a *burden on the Crown's radical title*¹³;
4. native title is a *communal landholding* that cannot be held by individuals¹⁴;
5. native title is *subject to an inherent limit* that prevents native title holders from using native title lands in a manner that is irreconcilable with the nature of their attachment to those lands; and¹⁵,
6. native title *likely can not be revived once validly extinguished* (i.e. by a valid government action) but is *likely capable of revival if temporarily 'lost'* (i.e. through a broken chain of continuity between present and pre-sovereignty occupancy)¹⁶.

Content of Native Title:

1. native title encompasses the proprietary right to *exclusive use and occupancy* of the land held pursuant to that title for a variety of purposes¹⁷;
2. native title encompasses the proprietary right to *choose to what uses land can be put* (the use and occupancy of land held pursuant to native

¹¹ See: *Delgamuukw*, *supra* note 5, *per* Lamer CJ, and Cory, McLachlin and Major JJ; Lamer at para 113 and 138; and, *per* La Forest and L'Heureux Dubé.

¹² See: *Delgamuukw*, *supra* note 5, Lamer CJ at para 113.

¹³ See: *Delgamuukw*, *supra* note 5, Lamer CJ at para 145.

¹⁴ See: *Delgamuukw*, *supra* note 5, *per* Lamer CJ and Cory, McLachlin and Major JJ; and Lamer CJ at para 115.

¹⁵ See: *Delgamuukw*, *supra* note 5, *per* Lamer CJ and Cory, McLachlin and Major JJ; and, Lamer CJ at paras 111, 125, 130 and 131.

¹⁶ Although the Canadian courts have not directly considered the matter of revival of native title following extinguishment, the legal reasoning applied by the High Court of Australia in *Mabo (No. 2)* and *Wik* on the issue of revival is equally applicable to the Canadian case in principle: when native title is extinguished (by valid acts of government) the Crown's radical title expands to a *plenum dominium*. Subsequent to this expansion of the Crown's title, the common law recognises all interests in land as with held by the Crown or of the Crown by virtue of a grant.

By virtue of the reasoning proffered in *Delgamuukw* (*supra* note 27) that "[a]n unbroken chain of continuity need not be established between present and prior occupation" (emphasis added) [*per* Lamer CJ and Cory, McLachlin and Major JJ at p. 1016], however, the Supreme Court of Canada left open the possibility that native title can be revived after or, more precisely, cannot be 'lost' due to temporary gaps in physical occupation (the fact of which ground native title in common law, at least in part).

¹⁷ See: *Delgamuukw*, *supra* note 5, *per* Lamer CJ and Cory, McLachlin and Major JJ; and Lamer at paras 117 and 166.

- title are not restricted to aspects of Indigenous practices, customs and traditions which are integral to distinctive Indigenous cultures)¹⁸;
3. the right to choose to what uses land held pursuant to native title can be put is subject to native title's *inherent limit*¹⁹;
 4. native title encompasses *mineral rights* and the lands held pursuant to native title are capable of exploitation (subject to native title's inherent limitation)²⁰;
 5. lands held pursuant to native title are recognised by the common law as having an *inescapable economic component*²¹; and,
 6. lands held pursuant to native title are recognised by the common law as having *non-economic* or *inherent value* in and of themselves²².

This judicial characterization of native title arguably reflects the recognition of Indigenous Peoples as potential (if not actual) land owners in that it presumes that the connection between Indigenous Peoples and their traditional territories is predicated upon fixed proprietorship derived from the common law concept of 'exclusive possession',²³.

The High Court of Australia, by contrast, has determined that the rights and interests of Indigenous Peoples' in respect of their traditional territories (i.e. native title) are properly characterized as *sui generis personal* interests in land at common law, reflecting the lawful entitlements of Indigenous Peoples in respect of lands and waters in accordance with their traditional laws and/or customs. An 'ordinary' personal interest is a non-proprietary common law land right that is absent any equitable estate or interest in the actual land. In sum, an individual in possession of an 'ordinary' personal interest does not own the land in question but, rather, is invested with a right of permissive use and/or occupancy or a licence to use, occupy and/or enjoy the land in question according to the discretion of another (i.e. s/he has 'usufructuary rights' in respect of the land in question). For example, a forestry lease (which is a type of personal interest) permits its holder to harvest a certain number of trees, in a delineated geographic area, over a specified period of time, but does not convey ownership of the land itself. Accordingly, a personal interest can not compete on an equal footing with other proprietary interests and is susceptible to wrongful extinguishment by inconsistent grant²⁴. Within the hierarchy of 'ordinary' common law land holdings, then, an 'ordinary' personal interest represents a much less substantial common law right to land than does an 'ordinary' proprietary tenure.

¹⁸ See: *Delgamuukw*, *supra* note 5, *per* Lamer CJ and Cory, McLachlin and Major JJ; and, Lamer CJ at paras 111, 117 and 166.

¹⁹ See: *Delgamuukw*, *supra* note 5, Lamer CJ at paras 111, 117, 125-128, and 166.

²⁰ See: *Delgamuukw*, *supra* note 5, *per* Lamer CJ, and Cory, McLachlin and Major JJ; and, Lamer CJ at para 112.

²¹ See: *Delgamuukw*, *supra* note 5, *per* Lamer CJ, and Cory, McLachlin and Major JJ; and, Lamer CJ at paras 166 and 169.

²² See: *Delgamuukw*, *supra* note 5, *per* Lamer CJ, and Cory, McLachlin and Major JJ.

²³ 'Exclusive possession' is possession that exists by virtue of occupancy, use and/or control of real property to the exclusion of all others. At common law the fact of 'exclusive possession' can ground an ordinary proprietary tenure in the absence of an entitling legal instrument (i.e. a Crown grant).

²⁴ An 'inconsistent grant' abridges or abrogates a common law right to land by permitting land uses or creating third party right that prevent the landholder from being able to exercise (wholly or partially) his/her common law right to the land in question.

As a result of the general judicial characterization of native title as a *sui generis* personal interest, the nature and content of native title in any given instance are considered to be matters of *fact* in the Australian case, to be determined by reference to the traditional laws acknowledged by and the traditional customs observed by Indigenous land claimants. Accordingly, there has been no general judicial statement on the content of native title in the Australia case. As Mantziaris and Martin explain:

Every instance of native title is different. A title might confer exclusive occupation and use of land, or more limited rights of occupation and use. It might include the right to occupy, maintain and manage an area of land, the right to hunt, fish and gather, the right to access the land, the right to make decisions about access to land, the right to preserve sites of significance, the right to engage in trade, and the right to conserve and safeguard the natural resources of an area. Different titles might be exercised with different degrees of exclusivity in relation to non-native title interests in a given geographical area. Furthermore, the identity of native title group members, and the manner in which they may exercise their native title rights and interests, may be defined in different ways.²⁵

Furthermore, because native title is presumed to owe its origins to the traditional laws and customs of Indigenous Peoples, the inherent nature of this *sui generis* real property right has been characterized in only the most general of terms by the High Court of Australia:

1. native title is *not a right to the land itself* (it is a *sui generis* personal interest, with possible proprietary aspects, and is properly characterized as a ‘bundle of rights’^{26,27});
2. native title is a *burden on the Crown’s radical title*²⁸;
3. native title is *inalienable* except by surrender to the Crown²⁹; and,
4. native title is *not capable of revival* once extinguished (i.e. by a valid act of government)³⁰ or ‘lost’ (i.e. by the abandoning of Indigenous laws and

²⁵ Christos Mantziaris and David Martin, *Native Title Corporations: A Legal and Anthropological Analysis* (Leichhardt: The Federation Press, 2000), p. 44.

²⁶ “The characterisation of native title as a separable ‘bundle’ of individual and unrelated rights allows for the removal of individual rights from the ‘bundle’ by Crown acts that are inconsistent with that particular exercise of native title. This ‘bundle’ may then be progressively reduced by the cumulative effect of a succession of different grants [see: *Western Australia v Ward* [2002] HCA 28, Gleeson CJ, Gaudron, Gummow and Hayne JJ at paras 76 and 95] Over time, this process may lead to such extensive extinguishment that ‘a bundle of rights that was so extensive as to be in the nature of a proprietary interest, by partial extinguishment may be so reduced that the rights which remain no longer have that character’ [Ibid]. The result of this approach is that native title is extremely susceptible to every small incursion and may only ever decrease in strength.” [Phillipa Hetherington, “2001: A Native Title Odyssey”, *Indigenous Law Bulletin* 5:4 (Nov/Dec 2000), p. 16-17.]

²⁷ See: *Mabo (No. 2)*, *supra* note 5, Brennan J at pp. 31-432; and, Deane and Gaudron JJ at pp. 443 and 452; *Wik*, *supra* note 5, Kirby J at p. 257; and, *Western Australia v Ward*, *supra* note 5, Gleeson CJ, Gaudron, Gummow and Hayne JJ at paras 76 and 95.

²⁸ See: *Mabo (No. 2)*, *supra* note 5, *per* Brennan J and Mason CJ and McHugh J at p 409; *per* Deane and Gaudron JJ at p. 409; Brennan J at p. 426; and, Toohey J at p. 496.

²⁹ See: *Mabo (No. 2)*, *supra* note 5, Brennan J at pp. 426 and 430; and, Deane and Gaudron JJ at pp. 442 and 452.

³⁰ See: *Wik*, *supra* note 5, Brennan J at pp. 155, 157 and 160.

customs; through a loss of connection to traditional territories; and/or upon the death of the last member of the Indigenous group concerned)³¹.

This judicial characterization of native title arguably reflects the recognition of Indigenous Peoples as mere land inhabitants and/or land users in that it assumes that the connection between Indigenous Peoples and their traditional territories is predicated upon the uses to which specific tracts of land may be put (in accordance with traditional laws and customs) rather than upon fixed proprietorship.

As the remainder of this paper will now explain, these variations in the judicial characterization of *sui generis* native title have led to significant differences in the judicial characterization of native title's proof criteria in the Canadian and Australian cases and thus to significant differences in Indigenous Peoples' ability to assert and defend their traditional territories through the (post-)colonial legal institutions of Canada and Australia respectively.

IV – Proof of Native Title at Common Law: The Canadian Case

Since the Supreme Court of Canada recognised the existence of native title at common law in its 1973 *Calder*³² decision, each major native title case has resulted in elaborations of the legal tests required to establish native title at common law.³³ Prior to the Supreme Court's 1997 decision in *Delgamuukw*³⁴, for example, native title claimants were required to prove four elements in order to establish native title to their traditional territories. These four elements, originally outlined by the Federal Court (Trial Division) in *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* [1979]³⁵ and subsequently adopted by the Supreme Court of Canada, were:

1. membership in an organized society;
2. occupation by the organized society of the specific territory over which native title is being claimed;
3. occupation by the organized society of the territory in question to the exclusion of other organized societies; and,
4. proof that the occupation of the territory in question was an establish fact at the time English sovereignty was asserted.³⁶

Because this test required native title claimants to prove a system of social organization 'sufficiently evolved' (in European terms) to support a proprietary interest in land cognizable to and defensible under the common law, it has been frequently criticized for being both too restrictive in its application and overtly Eurocentric in its nature.³⁷

³¹ See: *Mabo (No. 2)*, *supra* note 5, Brennan J at p. 430.

³² *Calder v Attorney-General of British Columbia* [1973] SCR 313.

³³ See for example: *Kruger and Manuel v R.* [1978] 1 SCR 104; *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development* [1979] 3 CNLR 17; and, *R. v Van der Peet* [1996] 2 SCR 507.

³⁴ *Delgamuukw v British Columbia* [1998] 3 SCR 1010.

³⁵ *Hamlet of Baker Lake*, *supra* note 33.

³⁶ Thomas Isaac, *Aboriginal Law: Cases, Materials and Commentary* (2nd ed; Saskatoon: Purich Publishing, 1999), p. 11.

³⁷ *Ibid*, pp. 97-98

In its 1997 *Delgamuukw* decision³⁸, however, the Supreme Court of Canada outlined a modified version of the *Baker Lake* test, notably absent any ‘organized society’ criteria.³⁹ As explained in Chief Justice Lamer’s reasons for judgement:

[i]n order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.⁴⁰

According to the *Delgamuukw* test for continuing native title, the group asserting native title is also assumedly required to “specify the area that has been continuously used and occupied by identifying general boundaries.”⁴¹

Because the *Delgamuukw* test represents Canada’s current test for establishing continuing native title at common law, each of these four proof criteria will now be examined in turn, followed by a discussion of the ‘evidentiary standards’ to be applied in native title adjudication.

i) The Delgamuukw Test for Continuing Native Title

a) Occupancy at Sovereignty

According to the judgement and reasoning proffered by the majority in *Delgamuukw*, in order to demonstrate a judicially defensible native title claim at common law, “the aboriginal group asserting the claim must establish that it *occupied the lands in question at the time at which the Crown asserted sovereignty over the land subject to the title*”⁴² (emphasis added).

Because the source of native title – prior occupancy – is grounded in both the common law and pre-existing Indigenous law, the Canadian courts have reasoned that both should be taken into account in establishing ‘proof of occupancy’.⁴³ According to the Supreme Court of Canada, ‘physical occupancy’ as a proof criterion for native title finds its legal touchstone in the established principles of the common law. As the majority of the Court explained in *Delgamuukw*: “At common law, the fact of physical occupation is proof of possession in law, which in turn will ground title to the land.”⁴⁴ In other words, because proof of ‘physical occupancy’ is sufficient to establish an ‘ordinary’ proprietary title to land at common law, it is also reasoned to be sufficient to establish a native title (which has been reasoned to be uniquely proprietary) at common law.

What then is required of native title claimants to prove their ‘physical occupancy’ of the lands in question at sovereignty? According to the majority in *Delgamuukw*, “occupancy is determined by reference to the activities that have taken place on the land

³⁸ *Delgamuukw*, *supra* note 5.

³⁹ According to Isaac: “This may be an implicit recognition by the Supreme Court of Canada not to judge the nature of pre-contact Aboriginal governance structures.” (Isaac 2004, p. 19.)

⁴⁰ *Delgamuukw*, *supra* note 5, Lamer CJ at para 143.

⁴¹ *Ibid*, *per* La Forest and L’Heureux Dubé JJ.

⁴² *Ibid*, *per* Lamer CJ and Cory, McLachlin and Major JJ.

⁴³ See: *Delgamuukw*, *supra* note 5, Lamer CJ and Cory, McLachlin and Major JJ at para 146. Also see precedent in: *Baker Lake*, *supra* note 333, at pp. 561 and 559; and, *Van der Peet*, *supra* note 5.

⁴⁴ *Delgamuukw*, *supra* note 5, Lamer CJ, and Cory, McLachlin and Major JJ at p. 32.

and the uses to which the land has been put by the particular group.”⁴⁵ These activities and uses can range 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 resource.”⁴⁶ According to the majority of the court in *Delgamuukw*, “[i]n considering whether occupation sufficient to ground title is established, the group’s size, manner of life, material resources, and technological abilities, and the lands claimed must be taken into account.”⁴⁷ It is thus that pre-existing Indigenous systems of law, and specifically Indigenous perspectives on land and land holding, is factored into the legal reasoning supporting ‘physical occupancy’ as a proof criterion for native title. As explained by Justices La Forest and L’Heureux Dubé in *Delgamuukw*:

when dealing with a claim of ‘aboriginal title’, the court will focus on the occupation and use of the land as part of the aboriginal society’s *traditional way of life*. In pragmatic terms, this means looking at the manner in which the society used the land *to live*, namely to establish villages, to work, to get to work, to hunt, to travel to hunting grounds, to fish, to get to fishing pools, to conduct religious rites, etc. These uses, although limited to the aboriginal society’s traditional way of life, may be exercised in a contemporary manner; see *R v Sparrow*, [1990] 1 SCR 1075 at p. 1099 [emphasis original].⁴⁸

By permitting the contemporary expression of traditional Indigenous land uses to be factored into the proof of native title at common law, the *Delgamuukw* court has explicitly reinforced the recognition of Indigenous Peoples as potential (if not actual) land owners by recognizing their proprietary right to use traditional land holdings in a variety of manners. To summarize the Court’s reasoning on this point, because native title has been characterized as a unique proprietary landholding at common law and because established common law principles permit ‘ordinary’ proprietary landholdings to be subjected to a variety of land uses, as well as to a variety of land uses *over time*, the modern expression of traditional Indigenous land uses has been reasoned to be consistent with a continuing native title claim. As was explained by the *Delgamuukw* majority, however, “the range of uses [to which lands held under native title may be put] is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land from which forms the basis of the particular group’s aboriginal title.”⁴⁹ As a result of this judicially imposed ‘inherent limit’, Indigenous land claimants who have put their traditional territories to uses that are irreconcilable with their Peoples’ ‘traditional way of life’ (by, for example, constructing an arena on traditional hunting grounds) are unlikely to be able to satisfy the *Delgamuukw* test for continuing native title.

The *Delgamuukw* majority also determined that sovereignty (as opposed to the date of first contact between an Indigenous People and colonial newcomers) was the appropriate time to consider in the context of native title adjudication for at least three compelling reasons. First, from a practical perspective, the majority determined that

⁴⁵ Ibid, Lamer CJ and Cory, McLachlin and Major JJ at para 128.

⁴⁶ Ibid, *per* Lamer CJ, and Cory, McLachlin and Major JJ.

⁴⁷ Ibid.

⁴⁸ Ibid, La Forest and L’Heureux Dubé JJ at para 194.

⁴⁹ Ibid, Lamer CJ at para 111. Also see: Lamer CJ at paras 117 and 166.

sovereignty was the most appropriate time period to consider in the context of native title adjudication because “the date of sovereignty is more certain than the date of first contact.”⁵⁰ Second, from a theoretical perspective, the majority determined that because native title is a burden on the Crown’s radical title and the Crown “did not gain this title until it asserted sovereignty[,] it makes no sense to speak of a burden on the [Crown’s] underlying title before that title existed.”⁵¹ And finally, from a legal perspective, the majority determined that because “any land that was occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of the claimants”⁵², native title “does not raise the problem of distinguishing between distinctive, integral aboriginal practice, customs and tradition and those influenced or introduced by European contact.”⁵³ This legal perspective was inspired by the Supreme Court’s determination in *R v Adams* [1996]⁵⁴ that native title is “simply one manifestation of a broader-based conception of aboriginal rights”⁵⁵.

In short, to successfully assert *aboriginal rights* claims in Canada, claimants are required to prove the existence of the aboriginal right(s) in question from ‘the point of *first contact*’ with European newcomers. This proof criterion flows from the fact that aboriginal rights have been determined to find their source in the activities, customs and/or traditions ‘integral to the distinctive cultures’ of Indigenous Peoples.⁵⁶ In sum, practices asserted as ‘aboriginal rights’ must not be introduced or influenced by contact with European settlers, hence the identification of ‘first contact’ as the relevant point of reference in aboriginal rights adjudication. In the context of native title, however, the same logic does not apply. As Chief Justice Lamer explained in *Delgamuukw*:

Although this [i.e. central significance to a society’s distinctive culture] remains a crucial part of the test for aboriginal rights, given the occupancy requirement in the test for aboriginal title, I cannot imagine a situation where this requirement would actually serve to limit or preclude a title claim. The requirement exists for rights short of title because it is necessary to distinguish between those practices which were central to the culture of claimants and those which were more incidental. However, in the case of title, it would seem clear that any land that was occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of the claimants. As a result, I do not think it is necessary to include explicitly this element as part of the test for aboriginal title.⁵⁷

This judicial reasoning not only reinforces the idea that native title is a pre-existing or inherent right to land that has been recognised by the common law (rather than created by the Crown), it also serves to practically limit the degree of historical ‘proof of prior

⁵⁰ Ibid.

⁵¹ Ibid, *per* Lamer CJ and Cory, McLachlin and Major JJ at p. 1017.

⁵² Ibid, *per* Lamer CJ at para 151. Also see: *La Forest J* at para 199.

⁵³ Ibid, *per* Lamer CJ and Cory, McLachlin and Major JJ at p. 1017.

⁵⁴ *R v Adams* [1996] 3 SCR 101.

⁵⁵ Ibid, Lamer at para 25 as quoted by Lamer CJ (at para 137) in *Delgamuukw*, *supra* note 5.

⁵⁶ See: *Van der Peet*, *supra* note 5, Lamer at para 46; and, *Delgamuukw*, *supra* note 5, Lamer CJ at para 50.

⁵⁷ *Delgamuukw*, *supra* note 5, Lamer CJ at para 151.

occupancy' required of Indigenous land claimants thus facilitating their ability to successfully demonstrate continuing native title. Furthermore, by obviating the need for Indigenous land claimants to explicitly prove that the land(s) under claims are of 'central significance to their People's distinctive culture', this judicial reasoning reinforces the recognition of Indigenous land claimants as potential (if not actual) proprietary land holders (i.e. land owners) with the lawful right to use their traditional territories as they see fit.

b) Continuity Between Present and Pre-Sovereignty Occupation

Because "[c]onclusive evidence of pre-sovereignty occupation may be difficult to come by"⁵⁸, the *Delgamuukw* majority concluded that present occupation may serve as proof of pre-sovereignty occupation in a native title claim if there is "a continuity between present and pre-sovereignty occupation."⁵⁹ 'Continuity' between present and pre-sovereignty occupation is required of native title claimants using present occupation as proof of pre-sovereignty occupation in Canada, "because the relevant time for the determination of aboriginal title is at the time before sovereignty."⁶⁰ In other words, because native title to specific tracts of land had to exist pre-sovereignty to be recognised by the common law at sovereignty, native title claimants must prove that their present occupation of the lands under claim *follows from* their pre-sovereignty occupation of those same lands. This is because the primary source of native title is 'prior occupancy'. In sum, just as 'ordinary' proprietary land claimants must reference the source of their lawful titles (i.e. a Crown issued deed or grant or 'exclusive possession') in order to prove the validity of their 'ordinary' land claims at common law, so too must native title claimants reference the source of their lawful titles (i.e. 'prior occupancy'/'occupancy at sovereignty') in order to prove the validity of their *sui generis* land claims at common law.

It is important to note, however, that an 'unbroken chain of continuity' between present and pre-sovereignty occupation need not be established by native title claimants in the Canadian case. As was explained by the majority in *Delgamuukw*:

to impose the requirement of continuity too strictly would risk 'undermining the very purpose of s. 35(1) [of the *Constitution Act 1982*, which recognizes and affirms 'aboriginal and treaty rights',] by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect aboriginal rights to land (*Côté*⁶¹...at para 53).⁶²

As a result, precedent established in the aboriginal rights jurisprudence of Canada suggests that disruptions in occupancy caused by the regular 'seasonal movements' of Indigenous Peoples or by temporary 'environmental circumstances' (such as limited game in traditional hunting territories) are unlikely to nullify a native title claim at common law.⁶³ How more long-term disruptions in occupancy, such as the dislocation

⁵⁸ *Ibid*, Lamer CJ and Cory, McLachlin and Major JJ at para 152.

⁵⁹ *Ibid*.

⁶⁰ *Ibid*.

⁶¹ *R v Côté* [1996] 3 SCR 139.

⁶² *Delgamuukw*, *supra* note 5, Lamer CJ and Cory, McLachlin and Major JJ at para 153.

⁶³ See: *Delgamuukw*, *supra* note 5, *per* Lamer CJ and Cory, McLachlin and Major JJ at p. 32.

and/or forced removal of Indigenous Peoples from their traditional territories by colonial authorities, will be interpreted by the Canadian courts, however, remains unclear.

As Chief Justice Lamer, writing for the majority, asserted in *Delgamuukw*: “[t]he occupation and use of lands [by Indigenous Peoples] may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognise aboriginal title.”⁶⁴ Returning to the source of native title, however, this same opinion adopted the High Court of Australia’s requirement (set down in *Mabo (No 2)*), that there be a “‘substantial maintenance of the connection’ between the people and the land”⁶⁵ in order to prove native title at common law. In a notable qualification of this requirement, however, the majority justices in *Delgamuukw* asserted that “the fact that the nature of occupation has changed would not normally preclude a claim for aboriginal title as long as substantial connection between the people and the land is maintained.”⁶⁶ This qualification provides clear recognition of Indigenous Peoples as ‘proprietary’ land owners with the accompanying lawful right to choose to what uses their lands may be put.

The judicially imposed ‘inherent limit’ of native title, however, significantly restricts the Canadian courts’ flexible approach to ‘continuity’ by requiring that land held pursuant to native title not be put to uses “which are inconsistent with continued use by future generations of aboriginals.”⁶⁷ In other words, if the nature of an Indigenous People’s occupation of its traditional territories has significantly changed since the assertion of sovereignty by the Crown, a native title claim will not be admitted if a court holds that the nature of the present occupation includes or permits land uses inconsistent with an Indigenous group’s ‘traditional’ attachment to the land(s) under claim. This limitation flows from the “relationship between the common law which recognizes occupation as proof of possession and systems of aboriginal law pre-existing the assertion of British sovereignty”⁶⁸ which governed Indigenous land use during the pre-sovereignty period. In sum, because the primary source of native title – ‘prior occupancy’ – was governed by pre-existing systems of landholding (i.e. indigenous systems of law), the *Delgamuukw* justices have reasoned that all lawful uses of native title lands must continue to conform to the pre-existing systems of landholding that governed lawful occupation *cum* possession in the first place. This judicial reasoning clearly serves to freeze lawful indigenous land uses in the past, but as was explained by Chief Justice Lamer in *Delgamuukw*::

[T]he law of native title does not only seek to determine the historic rights of aboriginal peoples to land; it also seeks to afford legal protection to prior occupation in the present-day. Implicit in the protection of historic patterns of occupation is a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time.

... The relevance of the continuity of the relationship of an aboriginal community with its land here is that it applies not only to the past, but to the

⁶⁴ Ibid, Lamer CJ and Cory, McLachlin and Major JJ at para 153.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid, Lamer CJ and Cory, McLachlin and Major JJ at para 154.

⁶⁸ Ibid, *per* Lamer CJ, and Cory, McLachlin and Major JJ at p. 1014.

future as well. That relationship should not be prevented from continuing into the future. As a result, uses of the lands that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title.⁶⁹

In sum, the ‘continuity between present and pre-sovereignty occupation’ proof criterion for native title may serve to not only nullify some contemporary native title claims but also to discourage Indigenous People from pursuing certain types of development on their traditional territories in the contemporary period.

c) Exclusivity

According to the *Delgamuukw* test of native title, if indigenous land claimants choose to prove ‘occupancy at sovereignty’ in order to establish native title to specific tracts of land they must also prove that their ‘prior occupancy’ of the lands in question was ‘exclusive’. This proof criterion flows from the judicial characterization of native title’s nature (i.e. a *sui generis* proprietary right to land) and content (which includes the proprietary right to ‘exclusive use and occupancy’). As Chief Justice Lamer explained in *Delgamuukw*:

Were it possible to prove title without demonstrating exclusive occupation, the result would be absurd, because it would be possible for more than one aboriginal nation to have aboriginal title over the same piece of land, and then for all of them to attempt to assert the right to exclusive use and occupation over it.⁷⁰

That having been said, however, the *Delgamuukw* Court also determined that the concept of ‘exclusivity’ (like the conception of ‘occupation’) should be sensitive to the realities of Indigenous societies and flexibly applied. As Chief Justice Lamer explained in his reasons for judgement on this matter:

... it is important to note that exclusive occupation can be demonstrated even if other aboriginal groups were present, or frequented the claimed land. Under those circumstances, exclusivity would be demonstrated by ‘the intention and capacity to retain exclusive control’. Thus an act of trespass, if isolated, would not undermine a general finding of exclusivity, if aboriginal groups intended to and attempted to enforce their exclusive possession.⁷¹

This judicial reasoning, flowing as it does from the established common law principle of ‘intent and capacity to retain exclusive control’ that governs ‘ordinary’ proprietary tenures, reinforces the recognition of Indigenous Peoples as potential (if not actual) land owners. Chief Justice Lamer even went so far as to assert that the presence of other Indigenous Peoples on the land in question might serve to support a native title claim. For example, if permission to access the lands in question was requested of the native title claimants by another Indigenous group or groups it could serve as evidence of the

⁶⁹ Ibid, Lamer CJ at para 126.

⁷⁰ Ibid, Lamer CJ and Cory, McLachlin and Major JJ at para 155.

⁷¹ Ibid, Lamer CJ and Cory, McLachlin and Major JJ at para 156.

native title claimants' recognised authority over those lands.⁷² In another instance the presence of other Indigenous Peoples on the land in question might support a determination of 'joint native title' arising from 'shared exclusivity'. As Lamer explains, "[t]he meaning of shared exclusivity is well-known to the common law. Exclusive possession is the right to exclude others. Shared exclusive possession is the right to exclude others except those with whom possession is shared."⁷³ In sum, native title's 'exclusivity' proof criterion has been directly influenced by the established common law principles governing 'ordinary' proprietary tenures, a fact which serves to reinforce the recognition of Indigenous Peoples as potential (if not actual) land owners.

In the reasoning of the Supreme Court of Canada, however, the *sui generis* character of native title demands that the proof criterion of 'exclusivity', like the proof criterion of 'occupancy', be determined with attention to both the common law and indigenous systems of law. This is because the source of *sui generis* native title has been identified, at least in part, by the interaction of the common law and indigenous systems of law. In theory, then, native title claimants need not establish 'exclusive occupancy' according to the same evidentiary standards required of 'ordinary' common law title claimants (more will be said on this point in sub-section *e* below).

d) Specificity

In *Delgamuukw*, minority Justices La Forest and L'Heureux Dubé opined that native title claimants must "*specify* the area which has been continuously used and occupied"⁷⁴ (emphasis original) when asserting a native title claim by identifying the general boundaries of the territory(ies) under claim. Although the opinion of the majority in *Delgamuukw* did not include 'specificity' as a proof criterion for native title, it is reasonable to assume that some degree of territorial delineation will be expected of native title claimants by Canadian courts. Supporting this conclusion is that fact that all 'ordinary' common law titles and tenures are geographically delimited and the presumption that the common law could not defend native title holders' right to 'exclusive use and occupancy' if the extent of their title did not have some cognizable boundaries. In any case, it seems highly unlikely that any Indigenous People would bring a native title claim before the Canadian courts with out specifying, at least to some degree, the extent of the lands claimed or that a Canadian court would confirm an Indigenous People's native title to an unspecified area of land. 'Specificity', then, is the fourth proof criterion of native title in the Canadian case.

e) Evidentiary Standards

According to the Supreme Court's majority opinion in *Delgamuukw*, to establish native title at common law native title claimants must prove either: (i) their 'exclusive occupancy' of the territories under claim 'at sovereignty'; or, (ii) that their 'present occupancy' of the territories under claim continues from and is evidence of their pre-sovereignty occupation of the same territories. Establishing 'occupancy', however, may be very difficult for Indigenous Peoples to do given the 'ordinary' evidentiary standards of the common law.

⁷² Ibid.

⁷³ Ibid, Lamer CJ and Cory, McLachlin and Major JJ at para 158.

⁷⁴ Ibid, La Forest and L'Heureux Dubé JJ at para 195.

Speaking to the issue of evidentiary standards, Chief Justice Lamer held in *R v Van der Peet* that when a court is adjudicating aboriginal rights claims, [it] should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of Aboriginal claims, and of the evidentiary difficulties in proving a right which originates in time when there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by Aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private torts case.⁷⁵

In *Delgamuukw*, Chief Justice Lamer applied this same credo to the adjudication of native title claims, asserting that native title cases require the courts to adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past.⁷⁶

Although admitting oral history as ‘valid’ evidence at common law pays respect to Indigenous systems of knowledge and may theoretically improve Indigenous Peoples’ ability to successfully assert and defend native title claims in court, it also leaves some critical questions unanswered. For example: do Canadian justices have the capacity to understand, interpret and evaluate Indigenous oral histories?; to what evidentiary standards will oral histories be held?; who will design such standards?; and, how will competing or conflicting oral histories be weighed? In sum, *how* Canadian courts will ‘come to terms with the oral histories of aboriginal societies’ has yet to be determined.

That having been said, however, the judicial recognition of the need to apply evidentiary standards in a flexible manner when adjudicating native title claims not only pays credence to the fact that extra-common law systems of landholding governed Indigenous Peoples’ prior occupation of their traditional territories, it also serves to potentially facilitate Indigenous Peoples’ practical ability to successfully litigate their continuing native title claims.

ii) Other Considerations Relevant to the Proof of Native Title at Common Law in the Canadian Case

As has been demonstrated, the proof of native title at common law in the Canadian case owes significant allegiance to the established common law principles governing ‘ordinary’ proprietary tenures at common law. This reinforces recognition of Indigenous Peoples as potential (if not actual) land owners. Of course, Indigenous Peoples’ ability to successfully assert native title at common law is not only governed by the judicial proof criteria designed by (post)colonial legal institutions. It is also governed by the financial

⁷⁵ *Van der Peet*, *supra* note 5, Lamer CJ at para 68.

⁷⁶ *Delgamuukw*, *supra* note 5, Lamer CJ at para 84.

costs, lengthy time-spans and uncertain outcomes inherently embedded in the Canadian judicial system.

As Murray Angus explains:

Lawyers with specialized expertise in native law seldom come cheaply (legal fees for lawyers representing the government in land claims litigation in [the province of] British Columbia have run as high as \$6,000 per day); court costs can be astronomical (an estimated \$800 per hour); and the depth of legal and historical research required to build a successful case is often far greater than in 'normal' litigation practice.⁷⁷

Given that Indigenous Peoples “are not typically endowed with the financial resources needed to engage in lengthy court actions”,⁷⁸ the litigated settlement of continuing native title claims is not a realistic option for many (if not most) Indigenous Peoples of Canadians. This is particularly true given Canadian governments' almost unlimited access to both financial and legal resources:

Recent records show the federal government has been spending more money to fight native land claims than any other issue. In 1988-89, the law firm that billed the Department of Justice the most money in Canada was Koenigsberg and Russell of Vancouver, whose primary job was to fight three high profile claims in British Columbia. The third highest bill was from MacAuley and McColl, also of Vancouver, which shared the workload on the same three cases. The fourth highest billing came from Black & Co. of Calgary, which represented the government in its negotiation with the Lubicon [Cree]. In short, three of the top four highest billing private law firms in Canada were engaged in fighting aboriginal people in court.⁷⁹ Aboriginal groups, by comparison, have often had to rely on 'feasts, public appeals, raffles, bingos, etc.'⁸⁰ to raise funds to fully present their cases during even the first round of court action.⁸¹

Of course, the amount expended on private law firms does not encapsulate the total cost of federal government expenditures on native title litigation:

The Department of Justice maintains its own internal Native Law Section to track and assess events and decisions related to a myriad of issues associated with native law: land rights, treaty rights (pre-Confederation and post-Confederation); hunting rights; resource rights (to fish, timber, wildlife, oil and gas, wild rice); constitutional rights; and taxation. The section provides the government with strategic advice on how to deal with legal actions

⁷⁷ Murray Angus, *“and the last shall be first”: Native Policy in an Era of Cutbacks* (Ottawa: The Aboriginal Rights Coalition (Project North), 1990, p. 59.

⁷⁸ *Ibid*, pp. 59-60.

⁷⁹ *Canadian Lawyer* (October 1989), pp. 14-15. The article noted: “Native claims pushed fallout from bank failures, urea formaldehyde lawsuits, and even free trade out of the spending spotlight for outside legal services during Ottawa’s most recent fiscal period (April 1, 1988 – March 31, 1989).”

⁸⁰ “Letter to the People of Canada” from Don Ryan, President of the Gitksan-Wet’suwet’en Tribal Council (May 25, 1988).

⁸¹ Angus (1990), pp. 59-60.

emanating from the native community. The Department of Justice also maintains a Legal Services Branch within each federal department, including those directly affected by native claims (Indian Affairs, Environment and Fisheries). In Indian Affairs, in particular, so much legal defence work is done that a special Legal Liaison and Support Branch has been created to co-ordinate the government's response.⁸²

In the face of this degree of harnessed legal expertise, it is not surprising that many Indigenous Peoples are leery to pursue a litigated settlement of their continuing native title claims.

In addition to being expensive and requiring a tremendous harnessing of legal expertise, native title litigation is also both time consuming and risky, as the experience of the Teme-Augama Anishnabai, or Bear Island Band, clearly demonstrates. In 1973, the Teme-Augama Anishnabai took the first step towards asserting legal jurisdiction over their traditional territories in north-eastern Ontario. After failed attempts to resolve the dispute through negotiation, however, the case went to trial in the Superior Court of Ontario in 1982. "Two years later, after 119 days of proceedings, the court ruled against the band's claim^[83]. The band appealed, but it took five more years before the Appeal Court of Ontario issued its ruling^[84], which went against the band."⁸⁵ A final appeal to the Supreme Court of Canada was lodged shortly after the Appeal Court of Ontario's 1989 verdict, but on 15 August 1991 the Supreme Court of Canada upheld the lower courts' decision and dismissed the Teme-Augama Anishnabai's claim of continuing native title.⁸⁶ As a result, after almost two decades of legal research, court costs, and lawyers fees, the Teme-Augama Anishnabai not only lost their legal battle to secure common law recognition of their continuing native title claim but also the hope of regaining rightful jurisdiction over the territories their ancestors had occupied and cared for since time immemorial. In the words of Murray Angus: "[t]o 'go for broke' in the courts can mean winning big, but it can also mean losing big, and losing once-and-for-all."⁸⁷

As will now be demonstrated, however, the Indigenous Peoples of Australia face even bigger obstacles when attempting to secure confirmation of their territorial rights through native title litigation.

II – PROOF OF NATIVE TITLE AT COMMON LAW: THE AUSTRALIAN CASE

According to the High Court of Australia's judgement and reasoning in *Mabo (No. 2)*⁸⁸, the incidents of native title are to be ascertained "according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land."⁸⁹ This is because the primary source of native title has been identified as

⁸² Ibid, pp. 60-61.

⁸³ *Bear Island Foundation v. Ontario* (1984) 15 DLR (4th) 321 (SCO).

⁸⁴ *Bear Island Foundation v. Ontario* [1989] 2 CNLC 73 (OCA).

⁸⁵ Angus (1990), p. 61.

⁸⁶ *Ontario (Attorney General) v Bear Island Foundation* [1991] 2 SCR 570.

⁸⁷ Angus (1990), p. 62.

⁸⁸ *Mabo (No. 2)*, *supra* note 5.

⁸⁹ Ibid, Brennan J at p. 435.

‘indigenous laws and custom’ (rather than ‘prior occupancy’). As a result, native title claimants are required to prove at least two things during the course of native title litigation: (i) that they continue to adhere to their traditional laws and customs; and, (ii) that they continue to maintain a substantial connection to their traditional territories in accordance with their traditional laws and customs. It may also require them to prove that they are members of an indigenous community. Each of these proof criteria will now be discussed in turn, followed by a discussion of the ‘evidentiary standards’ applied by Australian courts in native title adjudication.

i) The Mabo Test for Native Title

a) Continuing Adherence to Traditional Laws and Customs

As explained in Justice Brennan’s reasons for judgement in *Mabo (No. 2)*, “[t]he term ‘native title’ conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, *possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants*”⁹⁰ (emphasis added). As a result the *Mabo (No. 2)* majority concluded that “[t]he ... incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.”⁹¹ This means that native title claimants must prove that they continue to adhere to the traditional laws and customs that anchor their special attachment to their traditional territories in order to demonstrate continuing native title. As Justice Brennan explained in *Mabo (No. 2)*:

[w]here a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connection with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise.⁹²

Although the *Mabo (No. 2)* justices neither elaborated upon *how* native title claimants might go about proving that they continue to acknowledge their traditional laws and observe their traditional customs, nor explained *what* they meant by ‘so far as practicable’, they did opine that “[i]t is immaterial that the laws and customs [of native title claimants] have undergone some change since the Crown acquired sovereignty provided the general nature of the connection between the indigenous people and the land remains.”⁹³ According to Justice Brennan’s reasoning in *Mabo (No. 2)*, however:

... when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition. Australian law can protect the interests of members of an indigenous clan or group, whether communally

⁹⁰ Ibid, Brennan J at p. 429.

⁹¹ Ibid.

⁹² Ibid, Brennan J at p. 430.

⁹³ Ibid, Brennan J at p. 435. Also see: Brennan J at p. 431.

or individually, only in conformity with the traditional laws and customs of the people to whom the clan or group belongs and only where members of the clan or group acknowledge those laws and observe those customs (so far as is practicable to do so). Once native title expires, the Crown's radical title expands to a full beneficial title, for then there is no other owner.⁹⁴

b) Continuing Maintenance of a Substantial Connection to Traditional Territories (In Accordance with Traditional Laws and Customs)

Equally as important as the adherence to traditional laws and customs for the proof of native title at common law in the Australian case is the maintenance of a substantial connection to the lands in question in accordance with those same laws and customs. In fact, the two proof criteria are practically inseparable. As explained by Justice Brennan in *Mabo (No. 2)*: “[n]ative title to particular land ... its incidents and the persons entitled to it are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection to the land.”⁹⁵ The *Mabo (No. 2)* justices, however, had very little to say about the nature and degree of connection required to establish native title at common law. It is important to note, however, that the Meriam People's continuing ‘physical’ connection to their traditional territories seems to have played a central role in the High Court of Australia's validation of their native title claim. As explained by Justice Brennan in *Mabo (No. 2)*:

Of course, since European settlement of Australia, many clans or groups of indigenous people have been physically separated from their traditional land and have lost their connection with it. But that is not the universal position. It is clearly not the position of the Meriam People.⁹⁶

If a continuing ‘physical’ connection to traditional territories is in fact required of native title claimants, the unlawful dispossession and forced dislocation of Indigenous Peoples perpetrated by colonial newcomers over the course of the past 200 years will likely negatively affect a great number of native title claimants in the Australian case. As Justice Brennan explained in *Mabo (No. 2)*:

As the Governments of the Australian Colonies, and, laterly, the Governments of the Commonwealth, States and Territories have alienated or appropriated to their own purposes most of the land in this country during the last 200 years, the Australian Aboriginal peoples have been substantially dispossessed of their traditional lands. They were dispossessed by the Crown's exercise of its sovereign power to grant land to whom it chose and to appropriate to itself the beneficial ownership of parcels of land for the Crown's purpose ... Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial

⁹⁴ Ibid, Brennan J at p. 430. See also: Toohey J at p. 488.

⁹⁵ Ibid, Brennan J at pp. 434-435.

⁹⁶ Ibid, Brennan J at p. 430.

settlement. Their dispossession underwrote the development of the nation.⁹⁷

In sum, the ‘continuing maintenance of a substantial connection’ proof criterion can not be satisfied if the clan or group in question loses its connection to the land either physically⁹⁸, or by ceasing to acknowledge those laws and observe those customs that connect the clan or group to the land⁹⁹. This is because the nature and content of native title are matters of *fact* (not law) in the Australia case and must be determined on a case-by-case basis, with reference to the indigenous laws and customs which serve as the primary source of this *sui generis* real.

It is a readily acknowledged fact (considering native title was considered a legal *terra nullius* until 1992) that the colonization of Australia proceeded with an absolute disregard for Indigenous Peoples and their interests. This result was a massive displacement of Indigenous Peoples from their traditional territories and a gross disruption of Indigenous Peoples’ abilities to exercise their traditional laws and customs (including their ability to fulfill land related obligations and to transmit cultural knowledge to younger generations). Despite the fact that the Indigenous survivors of colonization are today attempting to return to their traditional territories and reassert their traditional laws and customs, the dislocation of Indigenous Peoples from their traditional territories and consequent erosion of traditional laws and customs means that very few, if any, Indigenous groups will be able to translate their homeland and cultural revival efforts into viable native title claims.

c) Membership in an Indigenous Community

In *Mabo (No. 2)*, the majority proffered the opinion that “[t]he term ‘native title’ conveniently describes the interests and rights of *indigenous inhabitants* in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants”¹⁰⁰ (emphasis added). As a result, these justices determined that

[w]here a *clan or group* has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of *that clan or group*, whereby their traditional connection with the land has been substantially maintained, the traditional community title of *that clan or group* can be said to remain in existence. [emphasis added]¹⁰¹

Inherent in these statements is the fact that native holders/successful native title claimants must be bone fide members of an indigenous community. Although it would seem commonsensical that a native title claimant who demonstrated adherence to traditional laws and customs and a connection to traditional territories (in accordance with those laws and customs) would in fact be a member of an indigenous community,

⁹⁷ Ibid, Brennan J at p. 434.

⁹⁸ See: *Mabo (No 2)*, *supra* note 5, Deane and Gaudron JJ at p. 452 and Toohey J at p. 496.

⁹⁹ See: *Mabo (No 2)*, *supra* note 32, Brennan J at p. 435. Deane and Gaudron JJ (at p. 452 of the same) reason that “where the relevant tribe or group continues to occupy or use the land” they will not lose their native title “by the abandonment of traditional customs and ways”.

¹⁰⁰ Ibid, Brennan J at p. 429.

¹⁰¹ Ibid, Brennan J at p. 430.

the *Mabo (No. 2)* justices nonetheless offered the opinion that membership in an indigenous community “depends on biological descent from the indigenous people and on mutual recognition of a particular person’s membership by the person and by the elders or other persons enjoying traditional authority among those people.”¹⁰² The lack of detailed comment and/or reasoning on this point, however, suggests that proof of a continuing adherence to traditional laws and customs will, for all intents and purposes, be accepted as proof of membership in an indigenous community (unless, of course, a native title claimant’s ‘indigenous’ heritage is subject to formal challenge at trial). At the same time however, three member of the *Mabo (No. 2)* court opined that native title is extinguished upon the death of the last member of the group or clan¹⁰³. As a result, biological membership in the relevant group or clan may in fact be necessary in order to demonstrate a lawful claim to continuing native title at common law.

d) Evidentiary Standards

Unlike the Supreme Court of Canada, which has discussed the unique evidentiary standards that must be applied in native title cases in some detail, the High Court of Australia has said very little on the matter. In fact all that can be gleaned on the issue of ‘evidentiary standards’ from the *Mabo (No. 2)* and *Wik* judgements is that: (i) “[t]he ascertainment [of native title’s nature and incidents] may present a problem of considerable difficulty”¹⁰⁴ to the Australian courts owing to its origins in the traditional laws acknowledged by and the traditional customs observed by Indigenous Peoples; and that (ii) “the recognition of the rights and interest of a sub-group or individual dependent on a communal native title is not precluded by an absence of a communal law to determine a point in contest between rival claimants ... A court may have to act on evidence which lacks specificity in determining a question of that kind.”¹⁰⁵

These finding suggest that although the High Court of Australia has recognised the necessity of looking to indigenous laws and customs for guidance on native title issues, it has not yet grappled with how it might do this and still remain true to its own laws and customs. As in the Canadian case, then, the High Court of Australia has given itself a tremendous degree of discretion in native title cases without giving serious attention to how it will ensure that this discretion is applied in a fair, honourable and equitable manner.

ii) Other Considerations Relevant to the Proof of Native Title at Common Law in the Australian Case

As in the Canadian case, Indigenous Peoples’ ability to assert and/or defend their continuing native title claims is dependent not only on the common law ‘test’ of continuing native title devised by the courts, but also by ancillary practical factors, such as cost, the ability to harness legal and/or anthropological expertise, and the willingness to subject continuing native title claims to intense scrutiny. As Hal Wootten explains:

¹⁰² Ibid, Brennan J at p. 435.

¹⁰³ See: *Mabo (No 2)*, *supra* note 5, Brennan J at p. 435; and, Deane and Gaudron JJ at p. 452.

¹⁰⁴ Ibid, Brennan J at p. 429.

¹⁰⁵ Ibid, Brennan J at p. 431.

Governments, miners, pastoralists and developers normally have no trouble in hiring lawyers of their choice who will, within the bounds of professional propriety, do their best to advance their client's case. However, aboriginal claimants are not quite so fortunate, as they have found some of the biggest firms unwilling to act for them, presumably for fear of offending large corporate clients. In addition, as they are publicly funded, there are constraints on the fees Aboriginal litigants can pay, which are unacceptable to some lawyers.¹⁰⁶

With regards to securing requisite anthropological expertise, however, the boot is frequently on the other foot: "it is corporate clients who complain of the difficulty of retaining anthropologists to assist in fighting Aboriginal claims ... In contrast to legal practice, anthropology is not an adversarial pursuit, but part of a worldwide scholarly discipline in which truth is sought on a cooperative basis."¹⁰⁷ According to Hal Wootten, however, "[w]hereas the amount of power of knowledge of native title exists in descending order from Aboriginal people to anthropologists to lawyers, the amount of power to define it for official recognition may exist in inverse order in the three groups."¹⁰⁸ As a result, many Indigenous Peoples are reluctant to 'go for broke' in the courts. As McRae, Nettheim and Beacroft explain:

Some commentators suggest that Aboriginal groups are better off consolidating and extending their legal gains rather than pursuing expensive and legally hazardous common law actions. The ALRC Report No. 31 (1986), para 902, comments:

In practice common law claims (such as that in *Mabo's* case) are likely to do little to satisfy the aspirations of most Aboriginal people for land rights.

This view takes into account the high risk of expensive failure, the limited rights derived from aboriginal title (in particular, it probably yields rights only to occupancy, not ownership ...), and the fact that it is vulnerable to extinguishment by the Crown.¹⁰⁹

CONCLUSION

As this paper has demonstrated, the proof of native title at common law in the Canadian and Australian cases is intimately related to the judicially determined source and nature of common law native title. In sum, because native title has been characterized as a *sui generis* proprietary interest in land at common law (originating in Indigenous Peoples' prior occupation of their traditional territories) in the Canadian case, the proof of native title at common law has been reasoned to emerge from the intersection of the common law doctrine that occupation give rise to possession in the absence of a

¹⁰⁶ Hal Wootten, "The end of dispossession? Anthropologists and lawyers in the native title process" in J. Finlayson and D.E. Smith (eds), *Native Title: Emerging Issues for Research, Policy and Practice*, CAEPR Research Monograph No. 10 (Canberra: CAEPR – ANU, 1995), p. 103.

¹⁰⁷ *Ibid*, pp. 103-104.

¹⁰⁸ *Ibid*, p. 105.

¹⁰⁹ H. McRae, G. Nettheim, and L. Beacroft, *Aboriginal Legal Issues* (Sydney: The Law Book Company Ltd., 1991) pp. 102-103.

better claim to real property and the laws and customs of Indigenous land claimants that gave rise to occupation *cum* possession in the first instance. In Australia, by contrast, because native title has been characterized as a *sui generis* personal interest in land originating in the traditional laws and customs of Indigenous Peoples, the proof of native title at common law has been reasoned to emerge from the traditional laws acknowledged by and the traditional customs observed by Indigenous land claimants as these are received by the common law as proof of legally defensible native title rights, interests and incidents. As a result, while Canadian Indigenous land claimants must satisfy (post-)colonial legal institutions (i.e. courts) that their traditional relationships with land can substantiate the proof criterion of ‘possession’ required of ‘ordinary’ proprietary title holders (subject to somewhat flexible evidentiary standards) in order to successfully litigate a continuing native title claim, Australian Indigenous land claimants must satisfy (post-)colonial legal institutions that they have traditional laws and customs; that they continue to observe and practice such laws and customs; and that such laws and customs make them the lawful parties to a clearly defined range of native title rights, interests and incidents in order to achieve the same end result.

Furthermore, although both the Supreme Court of Canada and the High Court of Australia have placed themselves in the rather precarious position of authoritatively translating traditional indigenous relationships with land into judicially defensible incidents of continuing native title, the recognition of Indigenous Peoples as potential (if not actual) land owners (Canada) or mere land inhabitants and/or land users (Australia) has served to direct such authoritative translation in notably different ways. To explain this last point further, in the Canadian case the recognition of Indigenous Peoples as potential (if not actual) land owners and the characterization of native title as a *sui generis* proprietary interest in land has inspired the Supreme Court of Canada to engage in a translation process that is guided by the proof criterion of ‘ordinary’ proprietary land rights, subject to the realities of both: (a) Indigenous Peoples’ unique relationships with their traditional territories as was (and is) regulated by traditional laws and customs; and, (b) the effect colonial settlement practices have had on Indigenous Peoples, their traditional territories, and Indigenous Peoples’ relationship with their traditional territories. In the Australian case, by contrast, the recognition of Indigenous Peoples as mere land inhabitants and/or land users and the characterization of native title as a *sui generis* personal interest in land (with possible proprietary aspects) has inspired the High Court of Australia to engage in a translation process guided by the content of traditional laws that continue to be acknowledged and traditional customs that continue to be observed by Indigenous land claimants, subject to the realities of: (a) colonial dispossession (i.e. the previous extinguishment/infringement of native title); and, (b) the effect of colonial settlement processes on the traditional laws acknowledged by and the traditional customs observed by Indigenous Peoples.

In sum, while the recognition of native title at common law has provided the Indigenous Peoples of Canada and Australia with the opportunity to assert claims to their traditional territories within the legal institutions of their colonizers, it has may not have significantly improved their ability to secure confirmation of continuing native title. This is owing not only to the judicial characterization of native title’s proof criteria but also to the financial costs, lengthy time-spans and uncertain outcomes inherently embedded in the Canadian and Australia legal systems.

Although the Indigenous Peoples of Canada and Australia may choose to forgo a litigated settlement of their continuing native title claims and instead seek to negotiate a modern treaty (under the terms of Canada's 'Comprehensive Claims Policy') or pursue a positive native title determination order (under the terms of Australia's *Native Title Act*), the fact that both of these extra-judicial claims process take the judicial characterization of native title at common law and the judicially designed proof criteria for native title at common law as their fundamental starting points demonstrates that the recognition of native title at common law may not have been as monumental an accommodation of indigenous rights to land as it is commonly purported to be.

Appendix 1

Native Title's Approximate Placement Within the Hierarchy of 'Ordinary' Common Law Landholdings

	Source	Nature	Content	Vulnerability
Plenum Dominium (also termed 'royal demesne')	Crown sovereignty (i.e. Crown acquisition of land by cession, surrender or conquest; or Crown acquisition of land classified as ' <i>terra nullius</i> ')	Unqualified paramount title held <i>by</i> the Crown (i.e. unqualified legal and equitable proprietary right to all real property within the Crown's sovereign jurisdiction)	Imparts absolute beneficial ownership of the land itself	Can only be extinguished by cession or conquest Can not be infringed without Crown consent
Radical Title (also termed 'underlying title')	Crown sovereignty (i.e. Crown acquisition of land not classified as ' <i>terra nullius</i> '/ land occupied by indigenous inhabitants)	Qualified paramount title held <i>by</i> the Crown (i.e. legal and equitable proprietary right to all real property within the Crown's sovereign jurisdiction subject to or burdened by pre-existing rights to the same land)	Imparts final or underlying beneficial ownership of the land itself (i.e. when radical title is 'unburdened' by the extinguishment of native title, the Crown's title is elevated to a <i>plenum dominium</i>)	Can only be extinguished by cession surrender or conquest Can not be infringed without Crown consent
Proprietary Tenure (also termed 'common law estate', 'proprietary estate', 'common law title' or 'equitable estate')	Crown grant of legal title (i.e. constructive possession); or statutory grant of legal title (i.e. title derived through adverse, exclusive, hostile or peaceable possession)	Unqualified legal and equitable proprietary right to delineated tracts of land held <i>of</i> the Crown (e.g. title in fee simple)	Legally imparts beneficial tenure of the land Practically imparts full beneficial ownership of the land itself	Can be extinguished by inconsistent Crown or statutory grant but not without notice and equitable relief (i.e. compensation) or consent of the lawful proprietor
Native Title (Canada)	Prior occupancy (primary source); Indigenous laws and customs; recognition (not creation) by the <i>Royal Proclamation of 1763</i>	Qualified legal and equitable proprietary tenure (i.e. <i>sui generis</i> proprietary tenure that is 'personal' only in the sense that it is inalienable except to the Crown)	Imparts qualified beneficial tenure of the land itself	<u>Sovereignty to 1982</u> : could be extinguished by ordinary federal legislation revealing a 'clear and plain intention' to extinguish native title <u>1982 to Present</u> : can not be extinguished without the consent of native title holders

	Source	Nature	Content	Vulnerability
Native Title (Australia)	Indigenous laws and customs (primary source); prior occupation/use; (exclusive) possession derived from Indigenous laws and customs	Qualified legal and non-equitable personal interest (i.e. <i>sui generis</i> personal interest that may have some proprietary aspects)	Imparts a continuing right to use, enjoy, occupy and/or possess land in accordance with the Indigenous laws and customs that gave rise to the prior (and continuing) use, enjoyment, occupation and/or possession	Can be extinguished by: (i) 'valid' Commonwealth, State and Territorial legislation that reveals a clear and plain intention or uses clear and unambiguous words to extinguish native title; (ii) 'valid' Commonwealth, State and Territorial legislation that by necessary statutory implication extinguishes native title; (iii) inconsistent statutory grants to third parties; (iv) Crown appropriations; (v) loss of native title holders' connection to the land through the abandonment of Indigenous laws and customs; and/or, (vi) the extinction of the relevant Indigenous clan or group
Personal Interest (also termed a 'derivative right')	Crown or statutory grant of legal, beneficial, possessory and/or other (i.e. non-beneficial) interests in land	Qualified legal and non-equitable personal (i.e. non-proprietary) right to delineated tracts of land held <i>of</i> the Crown (e.g. leasehold tenures)	Imparts qualified beneficial interests in the land (e.g. a forestry lease) or qualified non-beneficial interests in the land (e.g. the public's right to use, access and/or enjoy Crown land)	<u>As a qualified beneficial interest:</u> can only be extinguished and/or infringed by inconsistent Crown or statutory grant in accordance with the terms of the entitling legal instrument (e.g. the terms of the relevant lease) <u>As a qualified non-beneficial interest:</u> can be extinguished and/or infringed at the will of the Crown