The Impact of *Delgamuukw* Guidelines in Atlantic Canada

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In *Delgamuukw v. British Columbia*,[1] the Supreme Court of Canada affirmed the inherent meaning of Aboriginal tenure (or title) and acknowledged its role in constitutional analysis. The message from the modern framers of the Constitution of Canada and the Supreme Court is that Aboriginal law, tenure and rights as well as treaty rights constitute a distinct constitutional order in s. 35(1) of the *Constitution Act*, 1982,[2] with its own implicate architecture, sources, traditions, and texts, that require constitutional equality with the other parts. The Supreme Court has found Aboriginal tenure is inherent in s. 35(1); its existence is constitutionally entrenched. All legislatures, Crown officials, and courts have the duty to protect Aboriginal tenure as part of the "supreme law of Canada" under s. 52(1); to relieve them of their duty would deny constitutional supremacy and its commitment to the rule of law.[3]

In *Delgamuukw,* the Supreme Court established "guidelines" for governments and courts to evaluate and protect Aboriginal tenure because it found the trial court's factual findings unreliable and ordered a new trial. The Court recognized these parallel land tenures have al-

*English translation. Guidance provided by *ababinilli*, *máheóo*, and *niskam*, although I assume full responsibility for interpretation. Notes will be found on pages 368–376.

ways existed in North America, that both sovereigns sought to reconcile the two land tenure systems by consensual treaties in the law of nations and British prerogative law, and that unpurchased Aboriginal tenure has not been extinguished or superseded by Canadian law.

The *Delgamuukw* guidelines affirm and recognize that Aboriginal tenure is *sui generis* tenure: an Aboriginal law generated system of land tenure protected by s. 35(1) of the *Constitution Act, 1982*. The sources, content, and meaning of a *sui generis* tenure exist not only in their physical possession on the land but also in Aboriginal worldviews, languages, laws, perspectives, and practices. A *sui generis* tenure does not take its source or meanings from European, British, Canadian law or practice, and exists independently of any recognition of the tenure. The Court has stressed it would be a mistake to seek answers to this *sui generis* legal system by drawing analogies to British property law or confusing it with doctrine of Crown tenure. The Dickson and Lamer Courts have rejected the inappropriate terminology and misleading categorization of content and proof of Aboriginal tenure of the older judicial precedent.

The *Delgamuukw* guidelines declare that Aboriginal tenure is a real property right in Canadian law: "the right to the land itself" that is distinguishable from Aboriginal rights.[4] Aboriginal tenure is the equivalent of the Crown's original title or tenure in British law. It is created by the overarching Aboriginal legal system that organizes all Aboriginal occupation and uses of land. Chief Justice Antonio Lamer declared the exclusive right to the use and occupation of land in an Aboriginal people means "the exclusion of both non-aboriginals and members of other aboriginal nations." [5] According to Aboriginal law, Aboriginal tenure is an "exclusive" right that is capable of being shared with other Aboriginal nations; but it is not controlled by the common law principles of exclusivity.[6]

The Court identified three "component rights" of Aboriginal tenure:

> First, aboriginal title encompasses the right to exclusive use and occupation of land; second, aboriginal title encompasses the right to choose to what uses land can be put, subject to the ultimate limitation that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, the lands held pursuant to aboriginal title have an inescapable economic component.[7]

As no other property right in Canada has been accorded constitutional protection, Aboriginal tenure and its component rights can prevent others from intruding on their lands.[8] These component rights carry a

constitutional fiduciary duty to Canadian governments, which are entitled to equal protection of the law. If these component rights conflict with other constitutional authorities or rights, they may be subject to judicial reconciliation without the necessity of extinguishing Aboriginal rights.

The application of these guidelines to Atlantic Canada reveals that Aboriginal tenure was vested and reserved for the Aboriginal nations, tribes and peoples by compacts and treaties with the sovereign. Moreover, the sovereign by prerogative legislation prohibited any colonial or individual interference with these reserved tenures. Crown estates or settlements are derived from the treaty reconciliations, and remain part of the unpurchased Aboriginal tenure.[9]

The Wabanaki and Míkmaw compacts and treaties in Atlantic Canada specifically reserved their Aboriginal tenure. The sovereign expressly reserved their exclusive tenure in imperial law. In the British written version of the 1693 treaty, the sagamores and chief captains of the Confederacy agreed to allow British settlements under their Aboriginal law and tenure:

> That their Majesties' subjects the British shall and may peaceably and quietly enter upon, improve, and for ever enjoy all and singular their rights of lands, and former settlements and possessions with the eastern part of the said province of Massachusets [sic] Bay, without any pretension or claims by us, or any other Indians, and be in no wise molested, interrupted or disturbed by them.[10]

Additionally, this treaty provision affirmed colonial government within the Aboriginal territory. Article 3 of the 1713-14 treaties affirmed these settlements in Massachusetts Bay,[11] and the sovereign clarified and reserved the Aboriginal territory and free liberties back to 1693 treaty standard:

> Saving unto the said Indians their own Grounds, & free liberty for Hunting, Fishing, Fowling and all other their Lawful Liberties & Privileges, as on the eleventh day of August in the year of our Lord God One thousand six hundred & ninety three.[12]

The Wabanaki Compact (1725), concluded at Boston,[13] acknowledged the Wabanaki tribes were friends and subjects of the king, the British treaty commissioners candidly admitted they were not successful in getting the tribes to recognize King George as the sole owner and proprietor of New England and Nova Scotia.[14] The compact affirmed the existing treaties, but clarified article 3 of the 1713-14 treaties by

dividing it into two separate articles, 3 and 4.[15] Article 3 of the Wabanaki Compact continued the treaty promises to British subjects:

> Shall and may peaceably and quietly enter upon Improve and forever enjoy all the singular Rights of God and former settlements[,] properties and possessions within the Eastern parts of the said province of the Massachusetts Bay Together with all Islands, inletts[,] Shoars [sic,] Beaches and Fishery within the same without any molestation or claim by us or any other Indians and be in no way molested[,] interrupted or disturbed therein.[16]

Article 4 emphasized the reservation of Aboriginal "lands, Liberties and properties" to the tribes:

> Saving unto the Penobscot, Naridgwalk and other Tribes within His Majesty's province aforesaid and their natural Descendants respectively all their lands, Liberties and properties not by them convey'd or sold to or possessed by any of the British subjects as aforesaid. As also the privilege of fishing, hunting, and fowling as formerly.[17]

Lieutenant Governor Dummer summarized his understanding of the land reservation clause in the following words:

> That the said Indians shall Peaceably Enjoy all their Lands & Property which have not been by them Conveyed and Sold unto, or possessed by the British & be no ways Molested or Disturbed in their planting or Improvement And further that there be allowed them the free Liberty and Privilege of Hunting Fishing & Fowling, as formerly.
>
> And whereas it is the full Resolution of this Government that the Indians shall have no Injustice done them respecting their Lands.[18]

By these treaty terms, the sovereign, the colonialists and the Confederacy agreed that in any dispute over land titles, the British subjects would carry the burden of proving their title by lawful purchase. "[I]f there should be any Dispute or Controversy hereafter between the British and you respecting the Titles or Claims of Land," the treaty commission told the Wabanaki leaders, "after a fair and lawful tryal, if the British cannot make out & prove their Title to the Lands Controverted they shall disclaim them; But if the British can make out their Titles then the Indian shall Disclaim the Lands so Controverted." [19]

Lieutenant Governor Dummer summarized his understanding of the reconciliation clause in the following words:

> I do therefore assure them that the several Claims or Titles (or so many of them as can be then had and Obtained) of the British to the Lands in that part of this Province shall be produced at the Ratification of the present Treaty by a Committee to be appointed by this Court in their present Session, and Care be taken as far as possible to make out the same to the satisfaction of the Indians and to distinguish & Ascertain what Lands belong to the British in Order to effectual prevention of any Contention or Misunderstanding on that Head for the future.[20]

Loron, one of the treaty negotiators in a 1751 treaty conference stated his understanding of the treaty: "Govr Dummer's treaty says we shan't loose a Foot of Ground." [21] Any British settler claim to contested land would have to be proved a title deriving from lawful purchase from the Wabanaki tribes, not the imperial sovereign.

Additionally, the British commissioners proposed to the Confederacy that an executed instrument in the name of the Government be delivered to the Confederacy "distinguishing and securing all your Rights." [22] The treaty commissioners suggested to the Massachusetts House of Representatives the establishment of a "Committee of able Faithful and Disinterested Persons" by the Government to "receive and adjust the claims of Lands in the parts Eastward of Sagadahock & Amoroscoggin Rivers & above Merry Meeting Bay," the only valid British settlement area under the compact.[23] The House read and accepted the proposal and returned them as Instructions to the treaty Commissioners.[24] The Commissioners stated that within twelve months of the conclusion of this "Treaty of Pacification," the commissioners would "ascertain the bounds of such claims & Challenges," "with a number of Indian chiefs appointed for that purpose." [25] "Before their Just right & Title hath been duly Enquired into & made Manifest, & the Indians have had the full knowledge & understanding of such rights & Title," the commissioners stated that no British settlements were to be made beyond those lands.[26] The Confederacy was ambivalent about the proposed claims commission concept, desiring the clarification document, but doubting the process, which was too much like a treaty conference. The Speaker informed the Commissioners that they could not accept the claims commission because such action would go "beyond our Instructions" from the Confederacy.[27]

The initial imperial Charter of 1621 and the 1717 and 1719 Commission to the Governors of Nova Scotia ordered the Governor to "send for the several heads of the said Indian Nations or clans, and promise

them friendship and protection of His Majesty part." [28] Having made no existing treaties with Great Britain and wishing to remain nonaligned,[29] the Míkmaw delegates rejected the treaty no. 239 terms offered by the Nova Scotia delegates.[30] After hearing the new terms, the Míkmaq stated their own understanding of the words: they were supposed to "pay all the respect & Duty to the King of Great Britain as we did to ye King of France, but we reckon our selves a free People and are not bound." [31] On 15 December 1725, the Nova Scotia treaty commission, Major Paul Mascarene, in the Council Chamber in Boston, often new terms, which promised that the "Indian shall not be molested in their persons, Hunting[,] Fishing and Planting Grounds nor in any other their lawfull Occassions by His Majesty's subject or their Dependents." [32] The Míkmaq Delegates agreed to ratify the Wabanaki Compact at Annapolis Royal.

On 4 June 1726, the "Chiefs and Representatives [...] with full power and authority, by an unanimous consent and Desire of the said Indian Tribes, are come in Compliance with the Articles Stipulated by our Delegates as aforesaid" and do "Solemnly confirm & Ratify" the "1725 Compact." [33] Many copies of the ensuing 1726 ratification treaties exist, the multiple iterations and fragmentation of the treaties create many interpretative problems.[34] For unexplained reasons, the British scribes divided the Míkmaw ratification treaties into two separate documents: the first labeled "British to Indians," [35] the second labeled "Indians to British." [36] Over one hundred Aboriginal peoples signed the agreement, some identifying themselves as chiefs of the Mikmaw Nation. Among those signing were the Chief and Delegates from "Cape Sable," the Chief of Annapolis Royal, Chignecto, Minas, Cape Breton and Newfoundland.[37] Thus, it was said that "all the Nova Scotia Tribes" entered into the compact.[38]

In the "British to Indians" written version of the treaty,[39] "His Most Sacred Majesty, George of great Brittain" promised the Míkmaq district chiefs "all Marks of Favour, Protection & Friendship." The written text of the treaty mistranscribed Nova Scotia's treaty commissioner Mascarene promises: "And I do further promise in the name of His honour the Lt Gov. R of the Province in Behalf of this Said Government, That the Said Indians shall not be Molested in their persons, Hunting, Fishing, [and Shooting &] Planting on their planting Grounds nor in any other Lawfull Occasions, by his Majesty's Subjects or their Dependants." [40] The sovereign promised legal enforcement of the treaty:

> [...] if any Indian are Injured by any of his Majesty's Subjects or their Dependants they shall have Satisfaction and Reparation made to them According to his Majesty's Law: Where of the Indians shall have the Benefit Equally with his Majesty's other subjects.[41]

By ratifying the Wabanki compact, the prerogative treaties, the "great King's Talk," recognized and affirmed Aboriginal tenure as a reserved for the chiefs, and granted peaceful occupation to those British settlers who had acquired an interest in Míkmaw tenure by a fair, honest, and consensual purchase.

Distinct from the private enterprises such as Massachusetts Bay colony and New England, the sovereign affirmed the unceded and unpurchased Aboriginal tenure in the prerogative commission creating the royal colony of the Nova Scotia.[42] The *1749 Commission* to Cornwallis, establishing the royal colony of Nova Scotia, renewed the 1719 order requiring treaty of friendship and protection with the Indian nations and provided no grants of land in fee simple for land already disposed of by the sovereign, i.e. the reserved Aboriginal "lands, Liberties and properties" of the Wabanaki Confederacy and Míkmaq Nation. The first condition of the commission stated the governor was "directed to make grants of such land in fee simple as are not already disposed of by his Majesty to any person that shall apply to you for the same." [43] Secondly, as a condition antecedent, the sovereign required that before the governor could grant any such land to British subjects, he had "by & with the advice and consent of our said Council to settle and agree with the Inhabitants of our Province for such Lands, Tenements, & hereditaments as now are or hereafter shall be in our power to dispose of." [44]

Reading these provisions together, the original constitution of Nova Scotia confirms that the reserved Aboriginal tenure could not be granted in fee simple by the governor, since they were already reserved for the Wabanaki Confederacy and Mikmaq nation. The Nova Scotia council had to settle and agree with the Mikmaw nation before any fee simple grants could be issued to colonists of their protected treaty lands.

This "settle and agree" provision, an affirmation of the treaty order established in the Wabanaki Compact, witnessed an elaboration of the requirement of fair and honest purchase of Aboriginal tenure by the Governor for the British sovereign. It also prevented any private purchase of Aboriginal tenure. Only if the Míkmaw Nation sold their ancient tenure and the Governor bought it for the Crown through prerogative treaties[45] could the Governor grant lands to the British settlers in fee simple.

The mandatory Governor-in-Council property agreement and settlement with the Aboriginal nations or tribes under the 1749 Commission, presumably by treaties, were reinforced by other prerogative limitations on the exercise of colonial authority by the Crown. First, His Majesty made all potential legislative power subject to the "further powers" of Royal Instructions and Commands under "our signet & sign manual or by order in our privy Council." Thus, the continuing super-

vision of Nova Scotia was to be carried out by the King-in-Council alone, acting through the issuance of prerogative Instructions. Second, the *Commission* also included a repugnancy clause; it required all law, statutes, and ordinances to be made "agreeable to the Laws and Statutes of this our Kingdom of Great Britain."

Thus, the relevant rules and principles of the United Kingdom's public law were also limitations of the colonial authorities and legislatures.[46] A crucial part of the Statutes of Great Britain was the *Statute of Frauds,*[47] which made written documents necessary in all transfer of legal estates, and applied to purchases of Aboriginal allodial tenure to the sovereign. In the subsequent treaties, however, the Míkmaw Nation did not yield up or sell their land to the Crown; they only agreed to small British settlements within their Aboriginal tenure.[48] Between August 13-15, 1749, at a Council meeting held on board the ship, the *Beaufort Transport*, Cornwallis entered into a renewal "upon the same footing" as the 1726 treaty with the Chignecto Míkmaq.[49] The existence of Aboriginal tenure in Atlantic Canada is a question of law rather than a question of fact as in British Columbia, since it was recognized and established by these imperial compact and treaties.

In Atlantic Canada, colonial law has viewed Aboriginal tenure as a part of the Crown tenure, not as a distinct or *sui generis* land tenure system recognized and vested in the Aboriginal nations and tribes in prerogative treaties. The Supreme Court's insight that Aboriginal tenure is a separate tenure from the common law tenure affirms the treaty reconciliation and resolves the third party interests under Crown grants as an issue of revenue sharing between the federal and provincial governments and Aboriginal peoples.

Most provinces of Atlantic Canada were created different than British Columbia. The constitution of Nova Scotia, New Brunswick, and Prince Edward Island were created by prerogative instruments and consist of treaty, royal commission and instruction to governors, and proclamation.[50] Prince Edward Island in 1873 and Newfoundland in 1949 admission to Canada was effected by an imperial statute and is similar to British Columbia.[51]

In the 1751 treaty negotiation with the Wabanaki Confederacy, Nova Scotia's treaty commissioner Mascarene invited the Wabanaki and "Micquemaques" to come to Chibucto to make peace, Mongaret of the Wabanaki Confederation said he would carry the message to them.[52] In the 1752 negotiations, Grand Chief Cope told the Nova Scotia council that the Míkmaq "should be paid for the land which the British had settled upon in this Country." [53] He agreed to "bring the other tribes of the Mickmack nation" to the treaty conference.[54] The Nova Scotia Council prepared an answer to the other tribes, in French

and English, and promised that the Council "will not suffer that you be hinder from Hunting or Fishing in this Country as you have been use to do" and no person shall "hinder their settlements," especially on the "River Shibenaccadie," nor shall meddle with the land where you are." [55] On 22 November 1752, the Míkmaw chiefs affirmed the existing Wabanaki Compact (1725), and their 1726 and 1749 ratification treaties thus creating the Míkmaw Compact (1752).[56]

The Míkmaw Compact explicitly incorporated and continued the terns if Wabanaki Compact that reserved all Míkmaw lands, liberties, and properties to the Míkmaq that had not been conveyed or sold to the British in 1693, when no British subject possessed any land in Acadia or had purchased any of the Aboriginal tenure.[57] The Míkmaw Compact made the reserved Aboriginal tenure was a vested right by the treaty and an integral part of the constitutional law of the provinces. The Compact did not convey any Míkmaw tenure to the Crown or subjects; it merely accommodated the existing lawful settlements and provided compensation for their use of settlement lands.[58]

The Compact provided that British civil law, rather than political action, expressly protected the reservation of Míkmaw tenure. In an innovative treaty article, Article 8 provided that the Míkmaq were to be treated as equals to the British subjects and that in any controversy the Míkmaq would be protected in their treaty rights in "His Majesty's Courts of Civil Judicature." [59] This is a unique provision in Georgian treaties; the Míkmaw rejected political solutions and criminal law of the Wabanaki Compact in favour of civil remedies.[60] This legal implementation provision made the protection of the reserved Aboriginal tenure a vested legal right.

Six years after the compact, on 2 October 1758, and pursuant to the authority delegated to the sovereign by the Míkmaq, a legislative Assembly was convened in Nova Scotia. British constitutional conventions establish 1758 as the date of the reception of the British law in old Nova Scotia as a settled colony[61] that included New Brunswick.[62] British law was imported, except to the extent that the law was unsuitable to the circumstances of the colony, as for example, when inconsistent with the existing compact and treaties with the Aboriginal nations.[63] Since the Míkmaw Compact and its ratification treaties were an existing prerogative act made before the date of reception of the British common law,[64] no colonial legislation was required to implement the provisions of the compact and treaties. The compacts and treaties were imperial obligations and part of the existing prerogative constitution of Nova Scotia.[65]

After the end of the Seven Years War between the British and French,[66] in 1760, a Míkmaw delegation from French jurisdictions met

with Governor-Chief Justice Belcher and the Legislative Assembly to renew and extend the compact to all parts of the Atlantic Canada previous held by the French.[67] The 1760 treaty affirmed the previous compact and treaties, specifically the legal protection of Aboriginal tenure by British law. Chief Justice Belcher described of the legal nature of protection and allegiance under the compact and treaties:

> Protection and allegiance are fastened together by links. If a link is broken the chain will be loose. You must preserve this chain entire on your part by fidelity and obedience to the Great King George the Third, and then you will have the security of his Royal Arm to defend you. I meet you now as His Majesty's graciously honored Servant in Government and in His Royal Name to receive at this Pillar, your public vows of obedience to build a covenant of Peace with you, as upon the immovable rock of Sincerity and Truth, to free you from the chains of Bondage, and to place you in the wide and fruitful Field of British Liberty.[68]

The "Field of British liberties," Belcher promised the assembled chiefs, would be "free from the baneful weeds of Fraud and Subtlety." [69] To ensure this, "[t]he Laws will be like a great Hedge about your Rights and properties—if any break this Hedge to hurt or injure you, the heavy weight of the Law will fall upon them and furnish their disobedience." [70]

The Míkmaw Compact, the inherited British *Statutes of Frauds*,[71] the 1761 Instructions,[72] and the 1763 Proclamation[73] protected the Aboriginal "lands, Liberties and properties" from any new settlements, interference or encroachment by colonial legislative assemblies, executive council, and the colonialists. Because of complaints to the British sovereign that "settlements had been made and possession taken of Land, the property of which they [the several Nations or Tribes of Indians] had by Treaties reserved to themselves by persons claiming the said lands under pretence of deeds of Sale and Conveyances illegally[,] fraudulently and surreptitiously obtained form the Indians," [74] These prerogative laws protected the tenure of Aboriginal nations and peoples in old Nova Scotia, Prince Edward Island, Newfoundland and Labrador, who had not signed any treaties nor sold or ceded their lands to the British sovereign. These laws were part of the constitution of the provinces, and they prohibited royal governors from surveying or passing patent to the reserved Aboriginal lands, requiring all persons to be removed from unceded or unpurchased Aboriginal lands. They ended and prohibited any private purchases of Aboriginal tenure, and conferred exclusively upon the sovereign a *sui generis* fiduciary duty, both

contractually and equitably, to protect their Hunting Grounds until the sovereign purchased the lands.[75]

Prerogative treaties and law vested the Aboriginal tenure for the Aboriginal nations, as reserved allodial lands.[76] The provinces and colonies had protective and administrative obligations and services to the sovereign to protected the prerogative interests in the land, the provinces did not have any ownership, legal estate or beneficial interests in the unpurchased Aboriginal lands. At Confederation, the sovereign and the provinces agreed to assign these protective and administrative obligations or services to the federal dominion.[77] This change of administrative agents did not change the reserved *sui generis* tenure; these constitutional acts could not transfer to the federal government or the provinces "any legal estate in the Crown lands" beyond that acquired by the sovereign in the compact and treaties.[78] In Atlantic Canada, the "land reserved for the Indians" in s. 91(24) of the *Constitution [British North America] Act, 1867* [79] continued to be vested in Aboriginal nations by the explicit intent and wording of the British sovereign in the treaties and prerogative laws.[80]

The entire justification for establishing Crown land titles in Atlantic Canada was embedded in a presumption that because of prerogative acts and colonial statutes protected the reserved Aboriginal "lands, Liberties and properties," the Aboriginal lands was part of the sovereign land tenure. It was seen as a use right under the common law doctrine of Crown tenure in Britain. The *Delgamuukw* guidelines rejected this presumption, and affirmed that the unifying principle of Aboriginal tenure is *sui generis*, it exist by Aboriginal law distinct from the common law fiction of Crown's tenure.[81] The Supreme Court of Canada has taken pains to clarify that Aboriginal tenure is a proprietary interest and can compete on an equal footing with other proprietary interests,[82] but cannot be interpreted by the common law traditions:

> The inescapable conclusion from the Court's analysis of Indian title up to this point is that the Indian interest in land is truly *sui generis*. It is more than the right to enjoyment and occupancy, although, as Dickson J. pointed out in *Guerin*, it is difficult to describe what more in traditional [English] property terminology.[83]

In *Mitchell* v. *Peguis Indian Band*, Chief Justice Brian Dickson stated the controlling interpretative principle of treaty wording is the Aboriginal peoples understanding of the treaties:

> [...] that aboriginal understanding of words and corresponding legal concepts in Indian treaties are to be preferred over more

> legalistic and technical constructions. This concern with aboriginal perspective albeit in a different context, led a majority of this Court in *Guerin*, to speak of the Indian interest in land as a *sui generis* interest, the nature of which cannot be totally captured by a lexicon derived from European legal systems.[84]

In 1985, the Supreme Court interpreted the 1752 treaty in the *Simon* case,[85] and overruled another colonial presumption in *Syliboy* that held "[t]he savages' right of sovereignty even of ownership were never recognized" by the Crown or international law.[86] This precedent had ended any discussion of Aboriginal ownership by the Canadian courts. Chief Justice Dickson characterized the *Syliboy* decision and its rejection of Aboriginal right to sovereignty and ownership as both substantively unconvincing and a biased product of another era in Canadian law that is inconsistent with a growing sensitivity to native rights in Canada.[87]

With the rebuttal of these legal presumptions in Atlantic Canada, the existing treaty reconciliations where the sovereign reserved and vested the Aboriginal tenure continues and has not been lawfully extinguished. The reserved Aboriginal tenure in the compact and treaties exists as distinct constitutional order of the Aboriginal peoples in the constitution of Canada. This is a different situation from Aboriginal tenure in British Columbia. The vesting of Aboriginal tenure in public law before the creation of legislative assemblies made the *sui generis* tenure beyond the scope of the provincial laws. Neither Nova Scotia nor New Brunswick could amend or violate the reserved Aboriginal tenure by prerogative treaties or the royal instructions or proclamation. In the legal context of pre-confederation, provincial acts could not be inconsistent with the prerogative treaties and laws, thus the provinces did not have jurisdiction to unilaterally extinguishing a vested Aboriginal tenure by creating small Indian reserves.

The constitutionally protected Aboriginal tenure in Atlantic Canada is the vested Aboriginal tenure in prerogative treaties and laws. Even if no treaty had reserved and vested the Aboriginal tenure, it would still a constitutionally protected tenure in the constitutional order. These existing prerogative laws were the source of federal delegated authority over lands reserved for the Indians in s. 91(24). In *St. Catherine's Milling* decision, where the judicial committee of the Privy Council explained at confederation the "natural" meaning of the phrase "Land reserved for the Indians" in s. 91(24) of the *Constitution [British North America] Act, 1867* was:

> sufficient to include all lands reserved, upon any terms or condition, for Indian occupation. It appears to be the plain policy of the

> Act, in order to ensure uniformity of administration, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority.[88]

In *Delgamuukw*, the Lamer Court held "Lands reserved for the Indians" by s. 91(24) itself was under federal jurisdiction, rather than provincial jurisdictions. Chief Justice Lamer found that federal jurisdiction over "Lands reserved for the Indians" included all unpurchased and unceded Aboriginal tenure and land rights in the province of British Columbia, as well as provincially-created Indian reserves.[89] Chief Justice Lamer confirmed these principles in a contemporary context:

> 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, therefore, was to separate the ownership of lands held pursuant to Aboriginal title from jurisdiction over those lands. Thus, although on surrender of Aboriginal title the province would take absolute title, jurisdiction to accept surrenders lies with the federal government. The same can be said of extinguishment—although on extinguishment of Aboriginal title, the province would take complete title to the land, the jurisdiction to extinguish lies with the federal government.[90]

Additionally, Chief Justice Lamer noted, "even if the point were not settled, I would have come to the same conclusion." [91] No imperial acts have changed the vested Aboriginal tenure in the prerogative constitutional of Nova Scotia and New Brunswick between confederation and constitutional amendment in 1982, such as the western provinces in the *Constitution Act, 1930* [92] and the *Natural Resource Transfer Agreements, 1930.*[93]

The Lamer Court held that when British Columbia was admitted to confederation in 1871 "that jurisdiction over aboriginal title must vest with the federal government," [94] implying "the jurisdiction to legislate in relation to Aboriginal title," and "the jurisdiction to extinguish that title." [95] This vested jurisdiction operates to preclude provincial jurisdiction to make laws[96] or extinguish Aboriginal tenure or rights, "because the intention to do so would take the law outside provincial jurisdiction":[97]

> s. 91(24) protects a core of federal jurisdiction even from provincial laws of general application, through the operation of the doctrine of interjurisdictional immunity. That core has been described

> as matters touching on "Indianness" or the "core of Indianness." [...] It follows that aboriginal rights are part of the core of Indianness at the heart of s. 91(24).[98]

The division of powers precludes provincial regulation over land reserved for the Indians. As Lamer stated, "[t]he vesting of exclusive jurisdiction with the federal government over Indians and Indian lands under s. 91(24), operates to preclude provincial laws in relation to those matters." [99] This is a federal responsibility shared with the Aboriginal peoples of Canada in accordance with s. 35(1). These principles should apply to the admission of Prince Edward Island in 1873 and Newfoundland in 1949 to confederation.

In Atlantic Canada, the Delgamuukw guidelines and principles affirm the constitutional validity of Aboriginal tenure reserved in the prerogative treaties and vested in imperial laws.[100] Reserved and unpurchased Aboriginal tenure in Atlantic Canada has not been extinguished by the sovereign or superseded by federal or provincial law or settlement.[101] A unified Supreme Court of Canada in *Sparrow*, held that s. 35(1) is not a codification of the existing or accumulated case law on Aboriginal or treaty rights.[102] The Court affirmed that provincial or federal acts or regulations could not extinguish constitutional rights of Aboriginal peoples. It held that s. 35(1) cannot be read so as to incorporate the specific manner in which constitutional rights were regulated before 1982,[103] and stated that federal-provincial statutory or regulatory control of a constitutional right does not mean that the right is extinguished, even if the control is exercised in "great detail." [104] Finally, the Court stated that the sovereign's intention is controlling and extinguishment of a constitutional right could only be proven if the sovereign's written command is clear and plain.[105] The Court declared that s. 35(1) not only creates a constitutional fiduciary duty on the federal government for Aboriginal peoples but also operates as a "strong" limitation on the legislative powers of the federal Parliament,[106] as well as provincial Legislatures.[107] No reason exists why these constitutional principles do not apply in Atlantic Canada to nullify any inconsistent provincial legislation prior to Confederation or federal legislation after Confederation.

Together the British Columbia Court of Appeals and the Supreme Court rejected federal and provincial Crown arguments that prior to 1982 unrecognized Aboriginal tenure was extinguished. It denied each of their five extinguishment theories: that the assertion of Crown sovereignty had extinguished Aboriginal tenure; that colonial land legislation before Confederation extinguished the Aboriginal peoples' relations to the land; that the creation of land grants by British Colum-

bia to settlers extinguished Aboriginal tenure because the Aboriginal people were precluded from sustaining their relationship to the land; that the establishment of federal Indian reserves in British Columbia extinguished Aboriginal tenure because the Aboriginal peoples "abandoned" their territory; and that s. 88 of the Indian Act allowed provincial laws of general application to extinguish Aboriginal rights. As Justice Hall had said to similar arguments in *Calder,* the Court said these arguments are "self-destructive." [108] Chief Justice Lamer declared that the Crown failed to establish any legal basis to justify the legal dispossession of Aboriginal peoples by provincial authority.[109]

In reviewing the trial judges' decision in *Delgamuukw,* the British Columbia Court of Appeal reversed the trial judge's conclusion that before Confederation there had been blanket extinguishment of Aboriginal tenure or rights.[110] The Court of Appeal held that a trial judge would have to make detailed determinations about the location and scope of existing Aboriginal tenure and the sovereign's clear and plain intent and wording to extinguish it.[111] This issue was not appealed to the Supreme Court, but should be applied to vested Aboriginal tenure in preconfederation Atlantic Canada.

In *Delgamuukw,* the Lamer Court was faced with three specific extinguishment issues: whether the province of British Columbia, from the time it joined Confederation in 1871, until the entrenchment of s. 35(1) in 1982, had the jurisdiction to extinguish the tenure or rights of Aboriginal peoples in that province; if the province was without such jurisdiction, whether provincial laws of general application that were not "in pith and substance" aimed at the extinguishment of Aboriginal rights, could be implied to extinguish; and whether a provincial law, which could otherwise not extinguish Aboriginal tenure or rights, could be given that effect through referential incorporation by s. 88 of the federal *Indian Act*.[112]

The Court declared that the province never had constitutional authority to extinguish *sui generis* Aboriginal tenure, that it had never been extinguished in the past, and that Aboriginal tenure continues as a constitutionally protected tenure in British Columbia that must be respected by courts.[113] These principles and a similar conclusion should be applied to vested Aboriginal tenure in confederated Atlantic Canada.

The absence of any purchase or cession of the vested Aboriginal tenure by the sovereign prior to 1982 creates a Aboriginal peoples jurisdiction over all their "lands reserved for the Indians" in Atlantic Canada. In *Delgamuukw,* Chief Justice Lamer restated *Sparrow*'s principle that to be recognized and affirmed by s. 35(1) Aboriginal tenure or rights must have existed in April 17, 1982; rights that were extinguished by the sovereign before that time are not revived by the

provision.[114] The Supreme Court in *Van der Peet* held that under s. 35(1), Aboriginal tenures and rights cannot be extinguished:

> At common law Aboriginal rights did not, of course, have constitutional status, with the result that Parliament could, at any time, extinguish or regulate those rights [...] it is this which distinguishes the Aboriginal rights recognized and affirmed in s.35(1) from the Aboriginal rights protected by the common law. Subsequent to s.35(1) Aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test.[115]

Aboriginal tenure at federal common law is protected in its full form by its constitutionalization in s. 35(1)[116] by the federal government and Aboriginal peoples. No provincial authority exists over these lands, since the constitution and the federal common law are paramount to provincial laws.[117]

No Canadian court has ever found where the Aboriginal peoples in Atlantic Canada sold their vested treaty lands to the sovereign.[118] The last judicial review of the Nova Scotia Court of Appeal to review the legal record, Chief Justice MacKeigan in *Isaac* stated:

> No Nova Scotia treaty has been found whereby Indians ceded land to the Crown, whereby their rights on any land were specifically extinguished, or whereby they agreed to accept and retire to specific reserves, although thorough archival research might well disclose records of informal agreements, especially in the early 1800's when reserves were established by executive order. [...] I have been unable to find any record of any treaty, agreement or arrangement after 1780 extinguishing, modifying or confirming the Indian right to hunt and fish, or any other records of any cession or release of rights or lands by the Indians. [...] The review has confirmed that Indians have a special relationship with the lands they occupy, not merely a quaint tradition, but rather a right recognized in law.[119]

No archival evidence exists that they Aboriginal peoples sold or ceded their Aboriginal tenure to the British sovereign or that the sovereign authorized the executive orders or any extinguishment, modification, cession or purchase of the reserved lands. No sovereign acts provide for grants in fee simple contrary to prerogative treaties or laws. As Justice Lamer stated in *Sioui* about contemporary treaties in Quebec:

> The British Crown recognized that the Indians had certain ownership rights over their land ...[and] allowed them autonomy in their internal affairs, intervening in this area as little as possible.[120]

The lands reserved for the Indians in Atlantic Canada under prerogative acts have not been sold or transferred from Aboriginal tenure to Crown tenure.

In *Delgamuukw* the Court noted that Aboriginal title and rights recognized and affirmed by s. 35(1) are not absolute. According to the division of powers doctrine, Aboriginal rights may be infringed, both by the federal (e.g., *Sparrow*) and provincial (e.g., *Côté*) governments.[121] However, the Lamer Court declare that such justified infringements of s. 35(1) requires fair compensation to Aboriginal peoples:

> In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when Aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular Aboriginal title affected and with the nature and severity of the infringement and the extent to which Aboriginal interests were accommodated.[122]

This guideline affirms the existing principle of both common law and statute that the Crown may not expropriate a property interest without compensation, and applies the principle to external regulation of Aboriginal tenure. This is especially relevant when prerogative treaties and law vest the Aboriginal tenure in the Aboriginal nations, tribes, or peoples.

Any provincial or federal infringement of the reserved Aboriginal tenure under prerogative laws requires fair compensation. Both the Court of Appeal and the Supreme Court in *Delgamuukw* have suggested that compensation is appropriate for past federal and provincial regulation of Aboriginal tenure.[123] Justice Macfarlane for the majority of British Columbia Court of Appeal held that compensatory damages from the province might be the appropriate remedy for pre-1982 regulatory infringements of Aboriginal tenure.[124] Justice Gerard La Forest in the Supreme Court declared that Aboriginal tenure is a compensable right that can be traced back to *the Royal Proclamation, 1763*.[125] These principles are applicable to the actions of the provinces of Atlantic Canada toward Aboriginal law and tenures.

Fair compensation is a revenue-sharing issue between the Crown and the Aboriginal peoples, rather than an issue between the Aboriginal peoples and the purchasers from the Crown. The Supreme Court and the Privy Council held in *St. Catherine*'s that the provinces under s. 109 could acquire a beneficial interest in Aboriginal territories as a source of revenue only when the estate of the Crown is disencumbered of the Indian tenure.[126] In *Delgamuukw,* the Court rejected the provincial Crown argument that the imperial Parliament in s. 109 of the *Constitution Act, 1867* "vested" the province with the underlying title to

Aboriginal tenure.[127] Moreover, the Lamer Court held that Aboriginal tenure in British Columbia was not extinguished by provincial or federal legislation and the province had not acquired beneficial interest under s. 109.

Since Aboriginal tenure in Atlantic Canada has not been disencumbered, neither the provincial nor federal Crown has any "ultimate" interest, since s. 35(1) has vested such unextinguished tenures in the Aboriginal peoples. Their Lordships of the Privy Council admitted in *St. Catherine's* that if the Ojibwa had been "the owners of fee simple of the territory" at Confederation, the province might not have derived any benefit from the cession, since the land was not vested in the sovereign at Confederation.[128] This is exactly the situation of the Wabanaki and Míkmaw tenure at Confederation: it was an explicit, vested sui-generis tenure recognized and affirmed by the British sovereign in the compact, treaties and prerogative law that would prevent the province or the federal government from deriving any beneficial interest over the reserved territory. Without a consensual sale and purchase of reserved Aboriginal tenure before 1982, the intangible future interest in the contemplation of the sovereign was never perfected, and under s. 35(1) of the *Constitution Act, 1982*, the reserved Aboriginal tenure is vested in the Aboriginal peoples according to their laws.

In sum, the vested Aboriginal tenure by prerogative treaties and law has been affirmed by s. 35(1) of the *Constitution Act, 1982* as a constitutional right to the land itself. The Aboriginal peoples had every right to rely on the Crown's promises that it intended to respect their tenure protected under their compact and treaties. They were entitled by their compact and treaties to assert their Aboriginal law over their reserved ancestral lands as a legal right, a civil right. They were entitled to have their settled expectations transformed into positive constitutional laws creating reliance-based rights. A fundamental principle of British law is that courts will assume that the British sovereign intends that the right of property of the inhabitants of any newly ceded territory will be fully respected.[129]

As the *Delgamuukw* constitutional principles and guidelines illustrate, the passage of time cannot validate an unconstitutional statutes or unlawful settlements and uses.[130] Colonial administration or regulation of these protected tenures or rights, either provincially or federally, could not legally extinguish this distinct legal realm or the reserved tenure, since such action would be a violation of the fundamental constitutional regime of Great Britain and Canada and *ultra vires*.[131] An act that is inconsistent with the constitution of Canada has never been and cannot become valid law, since its radical invalidity remains with the act until it is either repealed or struck down.[132]

Aboriginal and treaty tenures and rights do not cease to exist because the Crown's servants fail to secure them. To make the suggestion of implied extinguishment by colonial settlements of constitutional rights, especially those vested or protected Aboriginal tenure by prerogative laws, is to attempt to enshrine the perverse notion that rights are not to be legally protected in precisely those situations when protection is essential. In the response to *Delgamuukw* guidelines, it is now essential for the federal government to turn its resources to the issue of negotiation, compensation, and remedies for those who have been victimized by centuries of illegal and colonialist conduct. The highest court in Canada has again rejected Atlantic Canada's old colonial legal mentality and its defenses against Aboriginal tenure.

References

1 *Delgamuukw* v. *British Columbia*. [1997] 3 S.C.R. 1010.
2 *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c.11.
3 *Ibid*. *Re Reference by the Governor General in Council Concerning Certain Questions Relating to the Secession of Quebec from Canada* (1998), 161 D.L.R. (4th) 385 at paras. 71-2
4 *Delgamuukw, supra* note 1 at para. 138. *The Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Minister of Supply & Services, 1996) [hereinafter *RCAP Report*] stated Aboriginal tenure as being "recognized and affirmed by s. 35(1) and described it as a "real interest in land that contemplates a right of right with respect to land and resources vol. 2 at 573.
5 *Ibid*. at para. 184.
6 *Ibid*. at para. 156. The court stated: "exclusivity is a common law principle derived from the notion of fee simple ownership and should be imported into the concept of Aboriginal title with caution."
7 *Ibid*. at para. 166. Compare to Justice L'Heureux-Dube's characterization in *R*. v. *Van der Peet*, [1996] 2 S.C.R. 507 at para. 115: "The traditional and main component of the doctrine of Aboriginal rights relates to Aboriginal title, i.e. the *sui generis* proprietary interest which gives Native people the right to occupy and use the land at their own discretion, subject to the Crown's ultimate title and exclusive right to purchase the land"; citing *St. Catherine's Milling and Lumber Co*. v. *The Queen* (1888), 14 A.C. 46 at 54 (P.C.) [hereinafter *St. Catherine's*]; *Calder* v. *Attorney-General of British Columbia,* [1973] S.C.R. 313, at 328, Judson J., and at 383, Hall J; and, *Guerin* v. *The Queen,* [1984] 2 S.C.R. 335, at. 378 and 382, Dickson J. (as he then was) "Aboriginal title lands are lands which the Natives possess for occupation and use at their own discretion, subject to the Crown's ultimate title" see *Guerin, ibid*. at 382.
8 *Delgamuukw, supra* note *1* at para. 155.
9 J.Y. Henderson, "Míkmaw Tenure in Atlantic in Atlantic Canada" (1995) 18(2) Dal. L. J. 216.
10 Cumming & Mickenberg, eds., *Native Rights in Canada* (Toronto: Indian-Inuit Assoc. of Canada, 1972), Art. 4 at 295.
11 *Ibid*. at 297 in Art. 3: "That her Majesty's Subjects, the British, shall & may peaceably & quietly enter upon, imprive [sic], & forever enjoy, all and singular their Rights of Land & former Settlements, Properties, & possessions with the Eastern Parts of the said Province of Massachusetts Bay and New Hampshire, together with all the Islands, Isletts, Shoars, Beaches, & Fisheries within the same, without any molestation or claim by us or any other Indians. And be in no ways molested, interrupted, or disturbed therein. Saving unto the said Indians their own Grounds, & free liberty for Hunting, Fishing, Fowling and all other their Lawful Liberties & Privileges, as on the eleventh day of August in the year of our Lord God One thousand six hundred & ninety three."

12 While this article is more specific than the *Wapapi Akonutomakononol,* see generally R.M. Leavitt and D.A. Francis, eds., *Wapapi Akonutomakonol. The Wampum Records. Wabanaki Traditional Law as recounted by Lewis Michell* (Fredericton, N.B.: Micmac-Maliseet Institute, 1990). The Wampum Records creates an "implemented fence" or boundary between the British and the Wabanaki legal jurisdictions, so that there would be no bothering one another anymore. The concept of "forever" is *askomiw.*
13 *E.g.,* Public Archives of Canada [PAC]; Colonial Office [CO] 5 898 at 173-174v.
14 Public Archives of Nova Scotia [PANS] Record Group [RG] 1, vol. 12 doc. 3 at 15, Dec. 1725; PAC, Manuscript Group [MG] 11; CO 217, Nova Scotia "A" [NSA] vol. 16 at 203, 207; *Native Rights, supra* note 10 at 300-02
15 *Ibid.* at art. 10. The Treaty Commissioners often used the distinguishing terms of "our and your Lands."
16 *Ibid.* art. 3.
17 *Ibid.* art. 4 .
18 J.P. Baxter, ed., *Documentary History of the State of Maine* (Portland, Me.: Fred L. Tower Co. & Maine Historical Society, 1916) [hereinafter DHM] vol. XXIII at 196 (22 Nov. 1725 in the House of Representatives).
19 *Ibid.* NSA American and West Indies, 1724-1725, 4 August 1726.
20 Letter with Enclosures, of Lieutenant Governor Dummer to Duke of Newcastle, 8 Jan. 1726. CO, 5/898.
21 DHM, supra note 18 vol. XXIII at 416 (Report of Conference at the Fort of St. George's Mass. Involving Nova Scotia's treaty commission Mascarene, 24 August, 1751)
22 DHM, *supra* note 18, at 196 (22 Nov. 1725.)
23 *Ibid.* at 196, Art. 1, 23 Nov. 1725.
24 *Ibid.* at 197.
25 *Ibid.* at Art. 2.
26 *Ibid.* at Art. 3.
27 *Ibid.* at 200 , 26 Nov. 1725.
28 Instruction to Governor Philips of Nova Scotia, June 19th, 1719, in L.W. Labaree, ed., *Royal Instructions to British Colonial Governors, 1670-1776*, vol. II (New York: D. Appleton, Century Co., 1935), No. 673 at 469 [hereinafter Labaree, Royal Instructions]. See "Statement prepared by the Council of Trade and Plantations for the King, September 8th, 1721": "It would likewise be for your Majesty's service that the sev. Governts of your Majesties Plantations should endeavor to make treaties and alliances of friendship with as many Indian nations as they can [...] ." Cited Levi, et al., "We Should Walk in the Tract Mr. Dummer Made" (Oct. 1st and 2nd 1992) at 35 [unpublished document distributed at New Brunswick Chiefs' Forum on Treaty Issues, St. John, New Brunswick].
29 "Family Treaty with the British Officials at Annapolis Royal , 7 January 1723" *The New England Courant* (7 January 1723). It was signed by the members of the Grand Claude family following the imprisonment of their relatives. See also Letter of John Doucett to the Board of Trade, 29 June 1722. PAC, MG11 CO 217/4 at 118. See also A.M. MacMechan, ed., *Original*

Minutes of His Majesty's Council at Annapolis Royal, 1720-1739 (Halifax: Public Archives of Nova Scotia, 1908) at 37-41 [hereinafter *Council Minutes*].

30 PAC, MG 11, CO 217, NSA, vol. 16 at 207; PANS CO 217, vol. 4 at 321, 348, 350.

31 *Ibid.* vol. 17 at 2, December 1725.

32 Enclosed in letter from Lt. Governor Armstrong to Council of Trade and Plantations [Newcastle] dated July 27, 1726, C. Headlam, ed., *Calendar of State Papers, Colonial Series*, America and West Indies, vol 29 fol. 77; PANS CO 217, vol. 4 at 321, 348, 350 (often labeled Number 239). In a 1751 treaty conference Mascarene that that he was at the ratification treaties at Casco Bay, Annapolis Royal, Chibucto, see *supra* note 21.

33 *Ibid.* Promises/Ratification of John Ducett, Lt. Gov. of Annapolis Royal to the Tribes in Nova Scotia, signed at Annapolis Royal 4 June 1725. PAC , MG11 CO 217, NSA ,vol. 5 at 3-4; *Ibid.* vol. 17 at 36-41; *Ibid.* vol. 38 at 108-108v, and 116-116v.; PANS CO 217, vol. 4 at 321; PANS CO 217, vol. 38 at 109 (the original parchment copy has not been found).

34 *Ibid.* See PAC, MG 11, CO 217, NSA, vol. 17 at 40; Promises/Ratification of Cape Sables, Annapolis River, Pontiquet, Minis and Passamaquady Indians to Gov. of N.S.PANS, Signed at Annapolis Royal 4 June 1726. CO 217, vol. 4 at 350; an identical text with different signatures is found in Promises/Ratification of St. John's, Passamaquady, Cape Sable, Chuabouacady, LaHave, Minas and Annapolis River Indians to Gov. of N.S. signed at Annapolis Royal 4 June 1726. PANS, CO 217, vol. 38, 108; PANS CO 217, vol. 4 at 320; Promises/Ratification of St. Jones, Cape Sables, Chubenakady, Rechibutou, Jediack, Minas, Chickanecto, Annapolis River, Eastern Coast Micmacs to Gov. of N.S., signed at Annapolis Royal 4 June 1726. PANS CO 217, vol. 38 at 116, also an identical text with different signatures.

35 *Ibid. British to Indians Treaty,* 1726 (U.K.), 12 Geo I. PAC , MG11 CO 217, NSA ,vol. 5 at 3-4; Promises/Ratification of John Ducett [also spelled as Doucette in the documents], Lt. Gov. of Annapolis Royal to the Tribes in Nova Scotia, signed at Annapolis Royal 4 June 1725. *Ibid.* vol. 17 at 36-41 (original parchment copy has not been found); *Ibid.* vol. 38: at 108-108v, and 116-116v. ; PANS CO 217, vol. 4 at 321; PANS CO 217, vol. 38 at 109.

36 *Ibid.* Promises/Ratification of Cape Sables, Annapolis River, Pontiquet, Minis and Passamaquady Indians to Gov. of N.S., signed at Annapolis Royal 4 June 1726. PAC, MG 11, CO 217, NSA, vol. 17 at 40; PANS, CO 217, vol. 4 at 350; CO 217, vol. 4 at 82-83.

37 PAC, NSA , MG11 CO 217, vol. 17 at 43.

38 *Ibid.* at 40-43.

39 CO 217, vol. 4 at 82.

40 *Ibid.* Compare, *supra* note 32. In some copies of the treaty the words "and Shooting &" appear.

41 *Ibid.*

42 Labaree, *Royal Instructions*, *supra* note 28, at 581-82.

43 *Ibid.* See generally L.W. Labaree, *Royal Government in America: A Study of the British Colonial System Before 1783* (New Haven, Conn.: Yale University Press, 1930).

44 *Ibid*. This section applies the British principle of continuity of laws to the new royal colony. This principle is called the doctrine of Continuity in British law, and reserved rights in the United States. The principle of continuity of property rights provides that property rights, once established, continue unaffected by a change of sovereignty unless positively modified or abrogated by the new sovereign (*Campbell* v. *Hall* (1774), 1 Cowp. 204. at 895-96). This principle has been held to apply to Aboriginal tenure by the highest courts in the United States, Great Britain, and Canada. See *Worcester* v. *Georgia,* 31 U.S.(6 Pet.) 515, 8 L. Ed. 483 (U.S. 1832) at 544 and 559; *Mitchel* v. *United States*, 34 U.S. (9 Pet.) 711 (1835) at 734 [hereinafter *Mitchel*]; *R*. v. *Symonds* (1847), [1840-1932] N.Z.P.C. Cases 387; *Nireaha Tamaki* v. *Baker* (1901), [1901] A.C. 561 at 579 (P.C.); *Re Southern Rhodesia* (1918), [1919] A.C. 211 at 234 (P.C.); *Amodu Tijani* v. *Southern Nigeria (Secretary)*, [1921] 2 A.C. 399 at 404; *R*. v. *Calder, supra* note 7; *Guerin* v. *The Queen,* [1984] 2 S.C.R. 335 at 377-78, [1985] 1 C.N.L.R. 120. The Crown provided the correct procedure for settling and agreeing with the Inhabitants by public cession provisions of the *Royal Proclamation of 1763*, R.S.C. 1970, App. II, no.1 [hereinafter *Royal Proclamation*]; J. Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1 at 15-19; and B. Slattery, *The Land Rights of Aboriginal Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories* (Saskatoon, Sk.: College of Law, University of Saskatchewan, 1979).

45 Labaree, *Royal Instructions, supra* note 42.

46 Ibid.

47 1677 (U.K.), 29 Car. II, c. 3

48 *Instructions*, *supra* note 42.

49 PANS RG 1, vol. 209; see letter Gov. Cornwallis to Duke of Bedford, PANS CO 217. The chiefs brought a copy of the treaty with them. One of the recorded treaties in the PANS was not Mascarene promises or the 1726 treaty, but rather the rejected proposed treaty of 1 Dec. 1725 (treaty no 239), *supra* note 30.

50 J. E. Read, "The Early Provincial Constitutions" (1948) 26 Can. Bar. Rev. 621,

51 *Prince Edward Island Term of Union, 1873* (U.K.) and *Newfoundland {British North America], Act, 1949* (U.K.), R.S.C. 1985, Appendix II, Nos. 12 and 32.

52 *Supra* note 21 at 417, 419

53 T. Akins, ed., *Selections from the Public Documents of the Province of Nova Scotia* (Halifax: Annand, 1869) at 671. (14 September 1752) This is the colonizers' version and text of the meeting. Míkmaq tradition says that the Grand Chief required payment for the British settlements.

54 *Ibid*.

55 *Ibid*. at 673 (16 September 1752).

56 *Native Rights*, *supra* note 10 at 307-09; Enclosure in letter of Gov. Hopson to Earl of Holdernesse, PANS, CO 217, vol. 40, at 371

57 *Ibid.,* Art. 1. The date of possession had to be before 1693 according to the Wabanaki Compact. See *Native Rights*, *supra* note 10 at 295. For actual

possession in 1693 to 1760, see A.H. Clark, *Acadia: The Geography of Early Nova Scotia to 1760* (Madison: University of Wisconsin Press, 1968).

58 Míkmaw Compact, 1752, in *Native Rights*, *supra* note 10 at Art. 5. This is the start of the Crown's notion of equalization payments and a redistributive economy.

59 *Ibid*. Art. 8 clarifies Article 6 of 1725 compact and Article 4 of 1726 and 1749 Míkmaw treaties. Article 6 the Wabanaki Compact, 1725 provided that "no private Revenge shall be taken" by either the Wabanaki or the British. Instead, both sovereigns agreed to submit any controversies, wrongs or injury between their people to His Majesty's Government for "Remedy or induse there of in a due course of Justice." Article 6 was affirmed by Míkmaq in 1726 and 1749, Article 7. Compared with the decline of feudal tenures, and corresponding development of central national legal systems, the European treaty order began to specify the effect of boundary changes on access to courts, jurisdictional clauses, and choices of law. Article VIII of the *Treaty of Utrecht* . The *Treaty of Paris* continued this article, but also began a reference to applying "the Law of Nations" to the disputes which might arise in the future. See A. Shortt and A.G. Doughty, eds., *Documents Relating to the Constitutional History of Canada 1759-1791,* vol. 1, 2nd ed. (Ottawa: J. de L. Taché, King's Printer, 1918).

60 *Simon* v. *R*, [1985] 2 S.C.R. 398, 62 N.R. 366 [hereinafter *Simon* cited to S.C.R.].

61 *Uniacke* v. *Dickson* (1848), 2 N.S.R. 287 (S.C. N.S.). P.W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992) at 30, finds this dubious and argues that dates of reception thus derived are quite artificial and are really cut-off dates.

62 This is different from the idea that the first colonist carried as a birth right the British law and filled any legal void in the new territory. This idea was also limited by the courts' determination if they were suitable to the circumstance of the territory, such as prerogative treaties. Hogg *supra* 61 at Chapter 2, at 27-38. The 1763 Proclamation "annexed" Cape Breton and Prince Edward Island to old Nova Scotia's government, while reserving the Míkmaw Hunting Grounds in all places, thus creating a different date for the reception of British law. No other documents "annexed" the reserved Hunting Grounds to any colony or to the federal government.

63 Hogg, *supra* note 61 at 30, 32.

64 *Ibid.* at 28.

65 Sir W. Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765-69) vol. IV at 67-68. See especially, Justice Strong in *St. Catherines Milling and Lumber* v *.R.* (1887), 11 S.C. R. 577: "[A]t the date of confederation the Indian, by constant usage and practice of the crown, were considered to possess a certain proprietary interest in the unsurrendered lands which they occupied as hunting grounds; that this usage had either ripened into a rule of the common law as applicable to the American Colonies, or that such a rule had been derived from the law of nations and had in this way been imported into the Colonial law as applied to Indian Nations [...]" at 615-16

66 In Article 40 of the French Capitulation to the British in 1760, the King promised to maintain the tribes in their Aboriginal lands. See A. Shortt and A.G. Doughty, *supra* note 59 pt. 2, Sessional Papers No. 18. Article 40 continues the terms of the *Treaty of Utrecht*, and Art. II the *Treaty of Paris*, 1763 also reaffirmed it. Additionally, Article XXIII of the *Treaty of Paris* confirmed Article 40 of the Capitulation. Both the *Articles of Capitulation* and the *Treaty* ends any arguments about abrogation by hostilities or conquest. See especially, *Campbell* v. *Hall*, *supra* note 44 at 895-96 (articles of capitulation upon which the country is surrendered and the articles of peace by which it is ceded are sacred and inviolable according to their true intent and meaning).

67 PANSRG 1, vol. 37, doc. 14 (Treaties of Peace and Friendship with Mirimechi, Jediack, Pogmouch, and Cape Breton Micmacs at Halifax, 25 June 1761). For a list of the chiefs who had to ratify the compact See "Col. Fry Letter to Governor Belcher, 7 March 1760" [1760] London Magazine at 377 and *Collections of the Massachusetts Historical Society,* (Boston: The Society, from 1792) , vol. 10 at 115. The Wabanaki reaffirmed peace on the basis of their 1725 compact on 13 February 1760; B. Murdoch, *Epitome of the Laws of Nova Scotia*, vol. II (Halifax: J. Howe Publishers, 1832) at 384-5.

68 Míkmaw Compact, *supra* note 58; PAC NSA: American and West Indies, vol. 1 at 699-700. *Ibid.*

69 *Ibid.*

70 *Ibid.* The metaphor of "the Hedge" is directly related to the Wabanaki concept of "fence (implement)" (*lahkalusonihikon*) or territorial boundaries in the *Wapapi Akonutomakonol*, and its laws (*tapaskuwakonol*). Leavitt & Francis, *supra* note 12 at 56-57.

71 *Supra* note 47.

72 3 Geo. III; CO 217/19: 27-28; PANS Micro reel B-1028 4 May 1762. Implemented by Gov. Belcher Proclamation of 4 May 1762 and Act for the Regulation of Indian Trade, 1762 PANS, CO 217, vol. 19 at 33. See J. Singer, "Well Settled?: The Increasing Weight of History in American Indian Land Claims" (1994) 28 Georgia L. Rev. 481 at 503-508.

73 7 October 1763; Privy Council Register, Geo. III, vol. 3 at 102; PRO, c. 6613683; R.S.C. 1970, App. at 123-29. Original text is entered on the Patent Rolls for the regnal year 4 Geo. III, is found in the United Kingdom PRO: c. 66/3693 (back of roll); C.S. Brigham, ed., *British Royal Proclamations Relating to America*, vol. 12 (Worcester, Mass.: American Antiquarian Society, 1911) at 212-18; *Native Rights*, supra note 10 at 285-292.

74 1761 Instruction *supra* note 72 and 1763 Proclamation, *supra* note 73.

75 *Native Rights*, *supra* note 10 at 285-286.

76 See, Míkmaw Tenure in Atlantic Canada, *supra* note 9 at 267-296

77 *Ibid.* at 55.

78 *Ibid.* at 55.

79 U.K., 30 & 31 Victoria, c. 3.

80 *St. Catherine's, supra* note 7 at 55.

81 See Sir W. Blackstone, *Commentaries on the Laws of England,* vol. III (Oxford: Clarendon Press, 1765-69) at 43. A.V. Dicey, "The Paradox of the Land

Law" (1905) 21 L.Q. Rev. 221 at 222. A.W.B. Simpson, *A History of the Land Law,* 2nd ed. (Oxford: Oxford University Press, 1986) at 1.

82 *Delgamuukw, supra* note 1 at para. 113 (per Lamer C.J.C.)

83 *Ibid.* at para. 189 (per La Forest J), relying on *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335, at 382 and *Canadian Pacific Ltd.* v. *Paul*, [1988] 2 S.C.R. 654 at 677.

84 [1990] 2 S.C.R. 85, [1990] 3 C.N.L.R. 46 at 82. J.Y. Henderson, "Interpreting *Sui generis* Treaties" (1997) 36(1) Alberta L. Rev. 46.

85 *R.* v. *Simon, supra* note 60 *reversing R.* v. *Syliboy,* [1929] 1 D.L.R. 307 and the Nova Scotia Court of Appeals on treaties in *Isaac v. The Queen infra* note 119*; R.* v. *Cope* 49 N.S.R. 555 at 564 (N.S.S.C.A.D.); *R.* v. *Simon* 49 N.S.R. (2d) 566, at 572-77 (N.S.S.C.A.D.).

86 *R.* v. *Syliboy, ibid.* at 313.

87 *Simon, supra,* note 60 at 399.

88 *Ibid.* at 59.

89 *Delgamuukw, supra* note 1 at para. 269.

90 *Ibid.* at para. 175.

91 *Ibid.* at para. 176.

92 (U.K.), 20 & 21 Geo. V, c. 26.

93 *Ibid.* at Schedules R.S.C. 1970, App. No. 25 at Para. 1 of Schedules.

94 *Ibid.* at para. 181.

95 *Ibid.* at para. 173ff. Similar reasoning was advanced for Aboriginal rights relating to land .The Court asserted that the federal government had: "the power to legislate in relation to other aboriginal rights in relation to land," which "encompasses within it the exclusive power to extinguish Aboriginal rights, including Aboriginal title."

96 *Ibid.* at para. 179.

97 *Ibid.* at para. 180.

98 *Ibid.* at para. 181. See generally, or intergovernmental or interjurisdictional immunity, J. Vaissi-Nagy, "Intergovernmental Immunity in Canada" in P. Lordon, *Crown Law* (Toronto & Vancouver: Butterworths, 1991) at ch. 5 at 129-169.

99 *Ibid.* at para. 179. Under the doctrine of paramountcy, where the federal government has a constitutional interest in property, provincial legislation over such interest, even if it that normally falls with its jurisdiction, is not binding, and federal legislation may override it and render it inoperative, *A.G. B.C.* v. *A.G. Canada (Johnny Walker case)*, [1924] A.C. 222, at 236-261 *Reference Re Waters and Water Powers,* [1929] S.C.R. 200 at 212-13, 223-26; *Alberta Government Telephones* v. *I.B.E.W.,* [1989] 2 S.C.R. 3181 *R.* v *Red Line Ltd.* (1930), 54 C.C.C. 271 (Ont. CA); *Re Young*, [1955] 5 D.L.R. 225 (Ont. CA.); *R.* v. *Glibbery* (1963) 36 D.L.R. (2d) 548 (Ont. CA); C.H.H. McNairn, "Crown Immunity from Statute—Provincial Governments and Federal Legislation: (1978), 56 Can. Bar. Rev. 145-150; K. Swinton, "Federalism and Provincial Government Immunity" (1979) 29 U.T.L.J. 1-50.

100 *Ibid.* at 1091-93. The Court refused to equate "existing" with the concept of being actual or exercisable. See *R.* v. *Eninew* (1984), 10 D.L.R. (4th) 137, 32 Sask. R. 237 (C.A.) [hereinafter *Eninew* cited to D.L.R.]. This ap-

proach answers the problem of how law can persist as order in a world of pervasive change and progression.

101 See generally Canada and the provinces position on Aboriginal land claims in the Atlantic Canada, J.Y. Henderson and A. Tanner, "Aboriginal Land Rights in the Atlantic Provinces" in K. Coates, ed. *Aboriginal land claims in Canada : a regional perspective* (Toronto: Copp Clark Pitman, 1992) at 131-167.

102 *R.* v *Sparrow*, [1990] 1 S.C.R. 1075 at 1105-06.

103 *Ibid.* at 1091 and 1109.

104 *Ibid.* at 1095-1101, 1111-1119. In *Denny* v. *The Queen*, [1990] 2 C.N.L.R. 115 at 263 (N.S.C.A.), the court affirmed the Aboriginal right to fish for food strictly on a constitutional interpretation of the *Constitution Act, 1982*, *supra* note 2 s.35(1) and independent of the force and effect of the terms of the Míkmaq treaties; court stated: "based upon the decision in *Isaac*, *infra* note 119 this [aboriginal] right has not been extinguished through treaty, other agreements or competent legislation. Given the conclusion that the appellants possess an aboriginal right to fish for food in the relevant waters, it is not necessary to determine whether the appellants have a right to fish protected by treaty."

105 *Ibid.* at 1098-99; *R.* v. *Alphonse*, [1993] 5 W.W.R. 401, 4 C.N.L.R. 19 (B.C.C.A.).

106 *Ibid.* at 1110.

107 *Ibid.* at 1115, 1110; *R.* v. *Howard*, [1994] 2 S.C.R. 299 , 3 C.N.L.R. 146 (S.C.C.), Gonthier J.

108 *Calder, supra* note 7 at 414.

109 *Delgamuukw, supra* note 1 at paras. 179-81, 183.

110 *Delgamuukw,* (1993) 104 D.L.R. (4th) 470, at 490 (B.C.C.A.). Hutcheon, J.A. for the minority opinion in the Court of Appeal agreed that there had not been blanket extinguishment of Aboriginal tenure, *ibid.* at 764.

111 Ibid.

112 *Ibid.* at paras. 173-183.

113 *Ibid.* at paras. 114, 126.

114 *Ibid.* at para. 172.

115 *Van der Peet, supra* note 7 at para. 28. Justice Heureux-Dubé agreed with the dissenting opinion in *R.* v. *Horseman*, [1990] 3 C.N.L.R. 95 at 117, 1 S.C.R. 901. In *Roberts* v. *Canada* [1989] 1 S.C.R. 322, Justice Wilson stated there is a law of Aboriginal title in the federal common law, at 340.

116 *Delgamuukw, supra* note 1 at para. 133-34.

117 *Bisallon* v. *Keable* [1983] 2 S.C.R.60 at 108.

118 See, Míkmaw Tenure in Atlantic Canada, *supra* note 9 at 259-267.

119 *Isaac v. The Queen* (1975) 13 N.S.R, (2d) 460 (N.S.C.A.D.) at 478-79, 483, 485. Chief Justice MacKeigan concluded that "The history of the next eighty-seven years discloses little concern for the Indians. The incoming settlers pushed them back to poorer land in the interior of the province. The government gradually herded them into reserves and made sporadic and unsuccessful attempts to convert them into agricultural people" (483-84). Before the Supreme Court of Canada in *Simon*, *supra*, note 60 the

Province of Nova Scotia argued that the Treaty of 1752 was not a valid treaty because it did not cede land to the Crown or delineate boundaries, and that occupancy by the white man under Crown grant or lease had extinguished the treaty reservation and gave absolute title in the land covered by the 1752 Treaty to the Crown (part VIII, 408-10). The Court found in unnecessary to come to a final decision on extinguishment by occupation of Crown grant or lease (at 405-406)

120 *R.* v. *Sioui,* [1990] 1 S.C.R. 1025 at 1055.

121 *Delgamuukw, supra* note 1 at para. 160. See, K. McNeil, " Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" 1998 61(2) Sask. L. Rev. 431; and *Defining Aboriginal Title in the 90's. Has the Supreme Court finally got it Right?* (Toronto: Robarts Centre for Canadian Studies, 1998)

122 *Ibid.* at para. 169; also see *Sparrow, supra* note 102 at 1115, 110.

123 *Delgamuukw, supra* note 1 at para. 145.

124 *Ibid.,* B.C.C.A. at 537. The minority would have remitted the issues of damages to the trial judge.

125 *Ibid.* at para. 203.

126 *St. Catherine's, supra* note 7 at 46.

127 Section 109 provides: 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 Provinces in the same. *Constitution Act, 1867, supra* note 79.

128 *Ibid.* at 58.

129 *Oyekan* v. *Adele* [1957] 2 All E.R. 785 at 788 (P.C.).

130 *Delgamuukw, supra* note 1 at paras. 172-183.

131 *See also , Ref. Re Manitoba Language Rights* [1985] 1 S.C.R. 721, 744-45 (discussing section 52(1) of *Constitution Act, 1982* relationship to section 2 of the *Colonial Law Validity Act)*

132 *Manitoba (A.G.)* v. *Metro Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110.132; *P.A.T.A.* v. *A.G. Canada* [1931] A.C. 310,313.