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Mikmaw Tenure in Atlantic Canada

James [sákéj] Youngblood Henderson

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*The Supreme Court of Canada has characterized aboriginal title to land as a *sui generis* legal interest. This essay describes the *sui generis* interest of Míkmaw tenure in Atlantic Canada from a Míkmaq linguistic perspective. The author argues the prerogative treaties and legislation of the eighteenth century suggest it is a reserved and protected tenure, which in Eurocentric law might be reconceptualized as allodial tenure.*

Introduction

With the proclamation by the Queen of the *Constitution Act, 1982*,¹ the post-colonial era began in Canadian law. Section 35(1) of the Act “recognized and affirmed” existing Aboriginal and treaty rights, thus restoring Canada’s jurisgenesis and the original and hidden constitution of Canada.² Aboriginal and treaty issues dominate the birth of the Atlantic Provinces, the birth and expansion of Confederation across the continent, and were renewed in 1982. Aboriginal and treaty rights remain some of the oldest sources of constitutional law in modern Canada.

Very few legal and political issues have lasted so long in Canada as Aboriginal and treaty rights. They have been entrenched in each legal order, have undergone so many policies and cycles, but they appear unresolved or unsolvable. Continually, the colonial governments, colonial courts and the legal profession have tried to draw meaning from Aboriginal rights and the prerogative Treaties of another legal era and another legal realm to create justice. But justice has been elusive because seldom have the colonial participants understood the legal context of Aboriginal and treaty rights or the ramifications of these rights.

The purpose of this essay is to examine the effect of post-colonial order on the Aboriginal land rights of the Crown’s oldest ally in Canada, the Míkmaw Nation of Atlantic Canada. In examining this issue, I will identify three predicaments of British colonial law which will be briefly explored. Next, I will examine the Aboriginal vision of land and Míkmaw langscape and law to establish an Aboriginal *sui generis* context. I will then examine the intersection of these two contexts in the prerogative

1. 1982, being Schedule B to the *Canada Act 1982* (U.K.), c. 11.

2. B. Slattery, “The Hidden Constitution of Canada: Aboriginal Rights in Canada” (1984) 32 Am. J. Comp. L. 364; and “The Constitutional Guarantee of Aboriginal Rights” (1983) 8 Queen’s L.J. 23ff.

treaties in Atlantic Canada to restate the meaning of the reserved *sui generis* Míkmaw tenure. My thesis will be that Míkmaw tenure can be best characterized as “allodial tenure” and the treaties recognizing and affirming this aboriginal tenure as part of the first constitutional order of Canada continue as an integral and permanent part of the new constitutional order of Canada.

I. British Colonial Law Predicaments

The colonial writer does not have words of his [sic] own. Is it not possible that he projects his own condition of voicelessness into whatever he creates? [T]hat he articulates his own powerlessness, in the face of alien words, by seeking out fresh tales of victims? [T]he language was drenched without non-belonging . . . words had become our enemy.

Dennis Lee³

The basic constitutional framework of colonial law is concerned with the relations between Great Britain and its colonies.⁴ Often this colonial framework and the resulting body of common law principles are applied to Aboriginal title.⁵ This approach ignores the distinct branch of prerogative Treaties and Legislation that developed in British law concerning Aboriginal nations and the Crown. Until the enactment of section 35(1) of the *Constitution Act, 1982*,⁶ these issues were viewed as merely interesting legal history. Now the existing Aboriginal rights and treaties are part of the supreme law of Canada. The Supreme Court has affirmed that

[T]he context of 1982 is surely enough to tell us that this is not just a codification of the case law on Aboriginal rights that had accumulated by 1982. Section 35 calls for just settlement for Aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.⁷

3. “Cadence, country, silence: writing in colonial space” (1974) 3 *Boundary 2* No. 311 at 162, 63.

4. See e.g. K. Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens, 1966); and C. Clark, *A Summary of Colonial Law* (London: Sweet, 1834).

5. See *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313; *Milirrpum v. Nabalco Pty. Ltd.* (1971), 17 F.L.P. 141 at 208 (Aust. N.T.S.C.); *R. v. St. Catharines Milling and Lumber Co.*, [1887] 13 S.C.R. 577 at 610, (1888), 14 A.C. 46, 4 Cart. 107 (P.C.) [hereinafter *St. Catharines Milling* cited to A.C.]; *R. v. Symonds* (1847), [1840–1932] N.Z.P.C.C. 387 at 388–93 (N.Z.S.C.); *Worcester v. Georgia*, 6 Pet. 515 (1832); and *Johnson and Graham's Lessee v. M'Intosh*, 8 Wheaton 543 at 573–88 (1823); *Fletcher v. Peck*, 6 Cranch 87 at 142–43 (1810); *Jackson v. Wood*, 7 Johnson's Reports 290 at 295 (1810); *Mohegan Indians v. Connecticut, infra*, notes 193–94 and text.

6. *Supra* note 1.

7. *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1106, 3 C.N.L.R. 178 [hereinafter *Sparrow* cited to S.C.R.]. The Court was quoting from Professor Noel Lyon's article, “An Essay on Constitutional Interpretation” (1988) 26 Osgoode Hall L.J. 95 at 100.

This creates a predicament for constitutional interpretation that must be briefly explored.

Legal history is a difficult domain. Historians and lawyers view the past from different perspectives. Typically, legal history is viewed by historians as a branch of social history. Lawyers have little interest in legal history; their interest is in judicial thinking. Often, both judges and lawyers think of legal history as modern law read backward—precedent. In this presentist process there is a loss of comprehension about how the law is interwoven and connected to non-law. To simply assume that modern legal concepts have always existed is a particularly efficient way of enforcing a singular modern view of law.

Tracing the relationship between Aboriginal tenure and the British Sovereign through modern law and colonial legal history is a task of linguistics, history, and law. It is very difficult to conceptualize the historical consciousness of the treaty making era in Atlantic Canada. Seldom did the participants state their worldview, consciousness or concepts in which their lives were constructed and the treaties formulated.

In attempting to understand legal relations between the Míkmaw Nation,⁸ the Imperial Crown and the colonists in the eighteenth century, we are continually confronted with three different legal consciousnesses, which are often incompatible. The consciousness of the treaty makers, Imperial Crown and the Santé Mawíomi of Míkmaq, were constructed on distinct worldviews and linguistic traditions. Each worldview defined a distinct relationship between culture and environment that comprehended two dualities of place and time.⁹ One cannot construct the distinct consciousness and order of each worldview with encyclopedias or dictionaries with which the two societies never provided us. Equally difficult is our understanding of nonnarrative sources of the era, since the primary materials of this essay were not constructed from a modern Eurocentric conception of rights and property. The nonnarrative sources signify another view, often inconsistent with modern concepts. Consequently, modern lawyers must not attempt to read into the aboriginal and

8. There are many different spellings for the Mikmaq. I use the Doug Smith-Bernie Francis system that is the official phonemic orthography of the Santé Mawíomi (Grand Council) of the Míkmaq. It is different from the English orthography. It is comprised of a, á, e, é, i, í, i, j, k, l, m, n, o, ó, p, q, s, t, u, ú, w. See M.A. Battiste, *An Historical Investigation of the Social and Cultural Consequences of Micmac Literacy* (Ph.D. Thesis, Stanford University, 1983) at 162. Míkmaq is plural and Míkmaw is singular. Its derivation is uncertain; it was either “our kin” or “allied people”, or “people of the red earth” depending on how it was pronounced. Some of the other spelling variations are Micmacs, Mickmakis, Migemaq, Mic Mac, Mikmakiques, Migmagi, Mique Macque. In colonial literature they were also labeled as Abenakis, Eastern Indians, Tarrantines, Acadians, Gaspesians, Toudamand, Cape Sable Indians, Souriquois.

9. See L. Littlebear, “Concept of Native Title” (1982) Can. Leg. Aid Bulletin 99.

treaty eras the refinements and conventions of the present, or the oppression of the colonial era.

Two modern constraints obstruct our understanding of Míkmaq tenure in Atlantic Canada. They are the legal fiction of original title of tenure of the Crown and the legacy of the colonial landscape in Canadian law. If we look at the treaty formation process through either of these legal categories, we are likely to be misled.¹⁰ These modern conventions tell us little about what was on the minds of the Crown and Santé Mawíomi, since they were constructed after this era.¹¹

1. *Original Title of the Crown in England*

At the time of the seminal Wabanaki and treaty conferences (1660–1725), no comprehensive or dominant European idea of property existed explaining how to organize people on the land. There were many competing ideas, all derived from a hierarchy, either ecclesiastical or aristocratic. European ideas of property begin and are tangled with Judeo-Christian religion¹² that describes God's relations to humans and the earth¹³ and is later transformed into civil law of the Continent derived from Roman law and aristocratic feudalism, and a unique British common law.

At the beginning of the treaty era in Atlantic Canada, the Peace of Westphalia in 1648 had ended the authority of the Holy See and created an international order on defined territorial units.¹⁴ A number of international law theories were developed to explain the relationship between

10. H.L.A. Hart, "Definition and Theory in Jurisprudence" (1954) 70 L.Q. Rev. 21.

11. After the Wabanaki and Mikmaw treaties, in the nineteenth century, Sir Henry Maine asserted that legal consciousness found the idea of property existing in the human consciousness and evolutionary order, see F. Pollock, ed., 10th ed., *Ancient Laws 1861* (London: John Murray 1906) at 306, while the English utilitarian philosophers rejected any divine, natural or evolutionary theory and assert that positive law created property: J. Bentham, "Of Property" in J.H. Burns & H.L.A. Hart, eds., *The Theory of Legislation, Introduction to Principles of Moral and Legislation* (London: Athlone Press 1864) at 111. Also in modern law, protecting the artifact of property came to be understood as a basic purpose of all Governments. These representative ideal types of state-imposed property systems are common property, collective property, and private property. All these systems, however, combine the characteristic of these ideal types. None of these ideal types existed at the time of the Mikmaq treaties in English thought.

12. For the ecclesiastical ideas, see M. Stogre, *That the World May Believe: The Development of Papal Social Thought on Aboriginal Rights* (Sherbrooke, Que.: Editions Paulines, 1992).

13. H. Grotius, *De Jure Belli ac Pacis, Libri Tres*, vol. 2 (Oxford: Clarendon Press, 1925) at 186.

14. M. Shaw, *Title to Territory in Africa, International Legal Issues* (Oxford: Clarendon Press, 1986) at 1–6.

the territory and the monarchies.¹⁵ In England, the debate concerning property and government revolved around the ideas that the Crown inherited land from God through Adam, and John Locke's belief that a right to possess property was more a fundamental human right to be protected by the Crown. In *Patriarcha*,¹⁶ Robert Filmer argued that God gave the world and its services not to all men but to Adam and his line by natural inheritance. It was a grant of absolute dominion and exclusive control over other humans and resources. God's grant was the beginning of absolute regal power and aristocratic society. The authority of the Stuart monarchs in England, Filmer suggested, can be traced back to the Adamite line, thus justifying the Crown's tenure.¹⁷ Locke argued that neither reason nor revelation indicates that any man had been favoured with authority from God over his fellow humans. Any person's uses or labours on the land were limitations on the Crown's authority over the land and people.¹⁸ His work transformed the divine right of Crown into historical entitlement of natural rights to land acquired by various individuals outside of civil society but protected by the Crown. Interestingly, neither of these authors argued the English common law's version of the original title in the Crown.

However, toward the conclusion of Mi'kmaw treaties (1760–1779), entitlement to land in England was viewed as an exclusive despotic dominion.¹⁹ Sir William Blackstone, for example, asserted “[t]he grand

15. *Ibid.* at 13–16.

16. P. Laslett, ed., *Patriarcha and other Political Works of Sir Robert Filmer* (Oxford: Basil Blackwell, 1949) at 1–48. Filmer's treatise, written between 1638 and 1652, was originally published in 1648. It was reprinted in 1652, 1653, 1678, 1680. Locke is said to have read the 1680 collection. In international law it is called the patrimonial theory, based on feudal ideas of land tenure that regarded territory as a piece of private property pertaining to the ruler.

17. When the Whigs' attempted to exclude James, Duke of York, the son of King Charles II, from accession to the throne of England in 1679–1681 on the basis of popery and arbitrary government, the Tory defense was based on Filmer's treatises on Divine Right and passive obedience to hereditary succession, even if this entailed a Roman Catholic monarch. P. Laslett, ed., *Two Treatises of Government* (Cambridge: Cambridge University Press, 1970) at 48 (originally published in 1689).

18. *Ibid.* “The Supreme Power,” he wrote “cannot take from any Man any part of his Property without his own consent . . . [I]t is a mistake to think, that the Supreme of Legislative Power of any Commonwealth, can do what it will, and dispose of the Estate of the Subject arbitrarily, or take any part of them at pleasure” (at II at 138.4). His arguments were extended to Chief Justice Coke's protective rationale of existing property rights in *Calvin's Case* (1608), 7 Co. Rep. 1a, 77 E.R. 377 to respect all existing property rights in England.

19. W. Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765–69) at vol. 2 “Of the Rights of Things”, and Chap. 1 “Of Property in general”: “There is nothing which so generally strikes the imagination, and engages the affection of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”

and fundamental maxim of all [English] feudal tenure is this, that all lands were originally granted out by the sovereign, and are therefore holden, either mediately or immediately, of the Crown.”²⁰ Moreover, in the law of England there is no proper alluvium, or land, not held of the King; and no subject can have more than the usufruct or beneficial enjoyment of the land he occupies.²¹ The Crown’s original dominion was a collective tenure, not a system of private rights.

In English law, the original title of the Crown is the fundamental starting point for every subdivision of property rights. This maxim asserts that every claimant to an interest in land in England and Canada must show an estate derived from the Crown. All estates must be evidenced by either a direct royal grant or indirectly through the Crown grantee’s. These Crown derivative grants must be registered, and are viewed as the fundamental evidence of legitimate historical entitlement to land.²²

While a grand and fundamental maxim, the Crown’s original dominion is a fiction of English law that has no foundation in reality or truth.²³ As Professor McNeil has explained:

As for the doctrine of tenures, its effect in this context is to give the Crown a paramount lordship over lands held by subjects. The fiction of original Crown ownership and grants was invented to explain how these feudal relations arose. That is the fiction’s purpose, and this is the extent of its application. The doctrine of tenures, thought capable at common law of giving the Crown a title to land in the event an estate held of it expires, cannot be used otherwise to claim lands which subjects possess.²⁴

This fiction had no independent authority in the Law of Nations or Aboriginal America. Domestic legal fictions should not be applied to foreign lands. These fictions are not a proxy for actual foreign consent. The only valid limitations on foreign tenure were those imposed through a manifestation of its consent according to the traditions or rules of its society.

The extension of the English fiction to Aboriginal tenures in North America, and now Canada, is an effect of colonial landscape and Eurocentric legal thought. For example, as recently as 1990 a unanimous Supreme Court of Canada in *Sparrow*, stated “there was from the outset never any doubt that sovereignty and legislative power, and indeed the

20. *Ibid.* at vol. 2, 415.

21. *Ibid.* at vol. 2, 51–60; vol. 4, 418.

22. D. Baker, *Megarry’s Manual of the Law of Real Property*, 5th ed., (London: Stevens & Sons, 1975) at 9–14 and 513–19.

23. Blackstone, *supra* note 19 at vol. 2, 51; J. Allen, *Inquiry into the Rise and Growth of the Royal Prerogative in England* (London: 1849, reprint New York: Burt Franklin) at 125–55.

24. *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 107.

underlying title, to such [Aboriginal] lands vested in the Crown.”²⁵ This statement is a classic colonial and Anglocentric assumption, a legal prejudice born of the colonial context.²⁶ This shibboleth constructs an irrebuttable and irrefutable presumption on the shaky foundation of a legal fiction.²⁷ In post-colonial law such an irrebuttable presumption of colonial law continues to obstruct the processes of truth. There were, and remain, many doubts among Aboriginal people, foreign nations, and legal scholars about the validity of assertions of Crown sovereignty and title in the colonization process. These doubts should not be dismissed by the courts in favour of a colonial nostalgia pretending to be law. The honour of the Crown, by its own prerogative legislation (the *Royal Proclamation of 1763*) requires proof of an equitable and honest purchase of lands from Aboriginal nations. The post-colonial order is so new in Canada that colonial law once accepted by everyone requires explanation and justification. The validity of the fictitious title of the Crown has vanished in Canada. So too has the colonial context.

2. Colonial Context

In the colonial context of Canada, language and its relationship to place has been a complex problem. This dilemma remains a barrier to understanding and constructing the legal context of aboriginal rights, old treaties and colonial laws. While most Canadian lawyers are familiar, perhaps too familiar, with the fictitious title of the Crown, most are unaware of its limitation. As illustrated above, this unreflective familiarity is particularly significant when they have to give contemporary content to old laws or to understand the context of Aboriginal tenure in British Law.

Any construction of Mi'kmaq tenure in British law must confront the unique predicament of the colonial context—the langscape of property. Property becomes landscape when it is seen, and langscape when it reveals human attitudes and perceptions in languages or *paysage intérieur* (the landscape of the mind). This constant tension between landscape and langscape has dominated Canadian writing and judicial decisions.

25. Sparrow, *supra* note 7 at 1103. As demonstrated below, Mi'kmaq tenure is reserved in Treaties and the *Royal Proclamation of 1763*, thus it is different from other Aboriginal title, for example in British Columbia.

26. See *R. v. Simon*, [1985] 2 S.C.R. 387, [1986] 1 C.N.L.R. 153 and Lambert and Hutcheon JJ.A. dissents in *Delgamuukw v. B.C.*, [1991] 3 W.W.R. 97, [1991] 5 C.N.L.R. 1, [1993] 5 C.N.L.R. 1 at 218–37, and 262–65.

27. The assertion that the Crown was or is the exclusive owner of land tenure in the Island of England had deep conceptual problems. K. McNeil, *supra* note 24 at 82–83.

The most widely shared manifestation of this tension in the Canadian consciousness is the alienating discontinuity in the colonist's mind between the experience of place and the language available to describe it. This fracture is a classic and all-pervasive feature of colonial writing. The common literary themes showing the discontinuity between language and place were: the problems of exile, of finding and defining home; physical and emotional confrontations with the new land and its ancient Aboriginal meanings; and the formation of racial and oppressive politics and law.²⁸

Another related theme was ignoring and denying nature or the ecosystem. Colonial writers and artists in Canada have viewed the landscape as negative in their wilderness and civilization dichotomy called the wacousta syndrome.²⁹ Canadian society has incorporated this negative view into moral and legal co-ordinates of savage and human, colonized and colonists. This gothic vision of the Aboriginal landscape and its inhabitants was viewed as either an unconsciousness or chaos or a kind of existence that is cruel and meaningless.³⁰ These views reflected the terror of the colonizer's transplanted soul. Also these views have created a pervasive anxiety about recovery of an effective relationship between self and place and cognitive authenticity. Likewise, this anxiety has created a national and personal crisis of identity. Those who are unaffected with dislocation and place either view the new land as an object to be exploited or have had their sense of self eroded by dislocation or destroyed by cultural denigration.

These themes manifest themselves in literature as an unquestioning belief in the adequacy or superiority of the imported language and civilization. This created a "double vision" where identity is constituted by a strategy of differences.³¹ The haunting distinction is between the authentic experience of the real world and the inauthentic experience of the ideological contexts. It is the polarity of opposites: homeland and

28. See D.E.S. Maxwell, "Landscape and Theme" in J. Press, ed., *Commonwealth Literature* (London: Heineman, 1965) at 82–99.

29. G. McGregor, *The Wacousta Syndrome: Exploration in the Canadian Landscape* (Toronto: University of Toronto Press, 1985).

30. W.H. New, *Among Worlds: An Introduction to Modern Commonwealth and South African Fiction* (Erin, Ont.: Press Porcopic, 1975); N. Fry, *The Bush Garden: Essays on the Canadian Imagination* (Toronto: Anansi, 1971) at 141–42; M. Atwood, *Survival: A Thematic Guide to Canadian Literature* (Toronto: Anansi, 1972) [hereinafter *Survival*]; M. Kline, *Beyond the Land Itself: Views of Nature in Canada and United States* (Cambridge, Mass.: Harvard University Press, 1970).

31. See A. Memmi, *The Colonizer and the Colonized* (New York: Orion Press, 1965); J.M. Blaut, *The Colonizer's Model of the World: Geographical Diffusionism and Eurocentric History* (N.Y.: Guilford Press, 1993).

colony, Europe and New World, metropolitan and provincial, order and disorder, authenticity and inauthenticity, reality and imaginary, power and impotence, even being and nothingness. No effective linguistic accommodations of the colonial experience exist for expressing these differences in a positive and creative way. These themes and patterns are not accidental. They inform a psychic and historical condition of colonial law and the construction of eurocentrism.³² Eurocentrism became and remains an intellectual paradigm about the superiority of Europeans and their ideals and institutions over other people.³³

The problem of an imported language and the “alien” Aboriginal landscape has been characterized as a pervasive conflict in Canadian writing. Dennis Lee and Robert Kroetsch wrote that the problem was a mismatch between language and landscape.³⁴ The North American landscape has been and is the wrong historical, cultural and physical environment for English literature. Their colonial minds searched for a comforting reality, a search initiated by the gap between its worldview and the land.

The gap between language and landscape, to Lee and Kroetsch, was the perceived “inauthenticity” of the spoken European language to a colonial and Aboriginal space. Robert Kroetsch writes:

At one time I considered it to be the task of the Canadian writer to give names to his experience, to be the namer. I now suspect, that, on the contrary, it is his task to un-name . . . the Canadian writer’s particular predicament is that he works with a language within a literature, that appears to be his own. . . . But . . . there is in the Canadian word a concealed other experience, sometimes British, sometimes American.³⁵

Canadians, in Lee’s terms, do not have their own language but are forced to use the languages of others. The colonial imagination drives Canadians to continually recreate the experience of writing with their non-belonging to the land, to experience writing in a colonial space. The

32. As to Eurocentrism construction in literature see B. Ashcroft, G. Griffiths & H. Tiffin, *The Empire Writes Back: Theory and Practice in Post-Colonial Literatures* (London: Routledge, 1989); I. Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990); I. Adam & H. Tiffin, *Past the Last Post: Theorizing Post-Colonialism and Post-Modernism* (Calgary: University of Calgary Press, 1990). See the critical legal theorist deconstructing the false opposite in modern law, D. Kennedy, “A Semiotics of Legal Argument” (1991) 42 Syracuse L. Rev. 75; J. Lyotard, *The Post-Modern Condition: A Report on Knowledge* (Manchester: Manchester University Press, 1984).

33. See S. Amin, *Eurocentrism* (N.Y.: Monthly Review Press, 1988).

34. *Supra* note 3, and R. Kroetsch, “Unhiding the hidden: recent Canadian fiction” (1974) 3 J. Can. Fiction 43.

35. *Ibid.*

problem of inauthenticity and its ultimate insolubility, Lee argued, generates the Canadian obsession with being a victim.³⁶

The first necessity of the colonial writer, Lee argues, is for the imagination to come home. Yet, this is not possible for the colonial, because the “words of home are silent.” Lee writes,

Try to speak the words of your home and you will discover—if you are a colonial—that you do not know them. . . . To speak unreflectingly in a colony then, is to use words that speak only alien space. To reflect is to fall silent, discovering that your authentic space does not have words. And to reflect further is to recognize that you and your people do not in fact have a privileged authentic space just waiting for words; you are, among other things, the people who have made an alien inarticulacy of a native space which may not exist. . . . But perhaps—and here was the breakthrough—perhaps our job was not to fake a space of our own and write it up, but rather to find words for our space-lessness. Instead of pushing against the grain of an external, uncharged language, perhaps we should finally come to writing with the grain.³⁷

Lee also argued:

Beneath the words our absentee masters have given us, there is an undermining silence. It saps our nerve. And beneath that silence, there is a raw welter of cadence that tumbles and strains toward words and that makes the silence a blessing because it shushes easy speech. That cadence is home. . . . The impasse of writing that is problematic to itself is transcended only when the impasse becomes its own subject, when writing accepts and enters and names its own conditions as it is naming the world.³⁸

Lee describes this experience of being “gagged” for authentic words, while other writers unreflectively used inauthentic words.³⁹ While avoiding an untenable nationalist position, Lee partially answers the problems of the transplanted and transported post-colonial landscape by suggesting that the typical alien consciousness dreamed up the land to fill the crisis of emptiness.⁴⁰ The colonizers created an architectonic “langscape” or

36. *Ibid.*; Also see, novelist Margaret Atwood’s account of Canadian literature in *Survival*, *supra* note 30.

37. *Supra* note 3 at 163.

38. *Ibid.* at 165ff.

39. Lee was not alone. *E.g.* D.H. Lawrence captures this sentiment when he states that “America hurts, because the land has a powerful disintegrative influence upon the white psyche. It is full of grinning unappeased Aboriginal demons, too, ghosts, and it persecutes the white men. . . . America is tense with latent violence and resistance. . . . Yet one day the demons of America must be placated, the ghosts must be appeased, the Spirit of Place atoned for” (Quoted by J. Anaya, “Native Land Claims in the United States. The unatoned-for Spirit of Place” (Winter 1994) *Cultural Survival Quarterly* 52).

40. *Supra* note 3 at 166.

word world as an artifact, a syncretic vision of European language and Aboriginal landscape.⁴¹

3. Indian Title in Post-Colonial Law

Similar cognitive predicaments of colonial displacement have informed the legal decisions on Indian title in British, American, and Canadian law. Central to the common predicament is the fact that English land law emerged from particular cultural myths and traditions. It was not conceived as a universal concept and is alien to Aboriginal and civil law. Moreover, behind the fictions and technicalities of English land law in Canada are a hidden concept of monocentrism and deeply engrained assumptions about language, epistemologies, and values.

The imperial expansion of an English land law to other continents has radically destabilized its utility. By attempting to justify the taking of land from indigenous peoples other than by consensual purchase, the colonialist jurists pushed their own inherited fictions, assumptions, and traditions to their limits. Doctrines of sovereign immunity and jurisdiction serviced the fictions and silenced indigenous resistance.⁴² When this legal landscape is questioned by the Aboriginal peoples, the British legal system became jurispathic.⁴³

Colonial and Eurocentric contexts contaminated initial judicial attempts to classify Aboriginal and treaty rights in Canadian law. Some of these precedents have been challenged and are no longer valid.⁴⁴ Most of these precedents, however, remain active in Canadian law.

41. McGregor, *supra* note 29; K. Benterrak, *Reading the Country: Introduction to Nomadology* (Freemantle, W.A.: Freemantle Arts Centre Press, 1984); L. Ricon, *Vertical Man/Horizontal World: Man and Landscape in Canadian Prairie Writing* (Vancouver: University of B.C. Press, 1973).

42. See *The Indian Act*, R.S.C. 1927, c. 98, s. 141, as rep. S.C. 1951, c. 29. See generally, P. Hogg, *Constitutional Law of Canada*, 3d ed., (Toronto: Carswell, 1992) at 263–79, and 301–14.

43. See *Delgamuukw*, *supra* note 26. An exception to this rule is the dissenting opinion of Justice Black of the United States Supreme Court in *FPC v. Tuscarora Indian Nation*, (1960) 362 U.S. 99 at 142. See also *Guerin*, *infra* at 54.; Hall J. in *Calder*, *supra* note 5 and *Amodu Tijani v. Southern Nigeria* (1921) 2 A.C. 399 [hereinafter *Amodu Tijani*] when the Privy Council stated “There is a tendency, operating at times, unconsciously, to render that [native] title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.” (at 403).

44. The decolonization of Canadian law was initiated by Justice Hall of the Supreme Court of Canada when he condemned the practice of invoking the savage/civilization dualism in litigation in his opinion in *Calder*, *supra* note 5 at 346. Justice Hall suggested that the law must re-examine its notions of Aboriginal society, its law, and its people in the face of more detailed and sophisticated understandings. See also *Simon*, *supra* note 26.

The current intersections of post modernism, critical theory, feminist criticism, and post-cultural theory illuminate the need for dismantling colonial thought, its strategy of hierarchical differentiation, and its law. Contemporary jurists and lawyers continue to peel away the layers of colonial law, and expose its bias that originates in their language and worldview. The decolonization of Canadian law is best understood as a struggle to limit governmental power and a search for equitable remedies. In the legal process, power is the ability to annex, determine, and verify partial truths as total truths.⁴⁵ Colonial oppression, for example, was built not only on control over law, life and property, but also control over language and the means of communication. The crucial function of English language as a medium of power and colonial law requires that post-colonial law redefine itself by including Aboriginal law and language.

Like the colonial mentality and soul of Canada, the Constitution of Canada is a complex instrument.⁴⁶ The Constitution is a fragmented series of documents surrounded by unwritten Aboriginal and English conventions.⁴⁷ It includes aboriginal and treaty rights forged in the prerogative power in foreign jurisdiction, and the imported conventions and documents of the Imperial Parliament to the colonists under domestic jurisdictions.⁴⁸ While the colonizers may have called for a written constitution to explain their ability to make and implement law and adjudicate disputes, it was the Imperial Parliament which constituted the *Constitution Act, 1867* and its subsequent amendments.⁴⁹

45. M. Foucault, "The political function of the intellectual" (1977) 12 *Radical Philosophy* 17; "Afterword: The Subject and Power" in H. Dreyfus & P. Rabinow, *Micheal Foucault: Beyond Structuralism and Hermeneutics* (Brighton: Harvester, 1982).

46. Hogg, *supra* note 42 at 3–26.

47. Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: Queen's Printer, 1993) at 20–27 [hereinafter RCAP]. For a more complete description of aboriginal law as a recognized source of law see discussion of *Connolly v. Woolrich* (1867) 11 L.C.Jur. 197 (Que. S.C.); aff'd (1869) 17 R.J.R.Q. 266 (Que. Q.B.); J. Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1 at 2, 6, 7, and 41.

48. In *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, 3 C.N.L.R. 46, Dickson C.J. acknowledged the separation of the prerogative treaty order from provincial federalism. He stated: "the Indians' relationship with the Crown or sovereign has never depended on the particular representatives of the Crown involved. From the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations. This is not to suggest that aboriginal peoples are outside the sovereignty of the Crown, nor does it call into question the divisions of jurisdiction in relation to aboriginal peoples in federal Canada" (at 83). See also J.Y. Henderson, "Empowering Treaty Federalism" (1995) 58 Sask. L. Rev. 241; P.W. Hogg & M.E. Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) 74 Can. Bar Rev. 187.

49. (U.K.) 30 & 31 Vice. c. 3. See, Section 52(2) and Appendix B of Constitution Act, 1982.

The *Constitution Act, 1982* is the latest and controlling component of the Canadian constitution.⁵⁰ In the patriation of the constitution from control by the United Kingdom Parliament, the First Ministers conceived of a new Canadian society.⁵¹ Section 35 of the *Constitution Act, 1982* is part of the latest constitutional amendments. It linked the old prerogative regime protecting aboriginal and treaty rights with the parliamentary regime or responsible government.⁵² Section 35(1) states, “[t]he existing aboriginal and treaty rights of the aboriginal people of Canada are hereby recognized and affirmed”,⁵³ thus establishing the borderline between colonial law and post-colonial law in Canada. As a part of the supreme law of Canada, section 35(1) specifically directs and mandates recognition and affirmation of existing Aboriginal and treaty rights at every level of Canadian society, creating new contexts for interpretation of governmental responsibility and treaty rights in Canada. This section protects ancient and customary relations to the land either as an Aboriginal right or a vested treaty obligation.

In 1984, in *Guerin*, the Supreme Court of Canada took the first fragile step in decolonizing the Anglo-Canadian law of property. It asserted that the Crown had a legal duty to the First Nations in relation to their aboriginal lands, which the majority called a fiduciary duty.⁵⁴ While addressing issues of Aboriginal title in relation to this duty, the Supreme Court of Canada departed from existing legal precedents and pushed legal theory and language through colonialist mental barriers. Thus, the post-colonial legal context witnesses an analogous cognitive process in

50. As the last expression of the United Kingdom, Parliament under the doctrine of parliamentary sovereignty has the power to make and unmake any law, whatever it is controlling. See Hogg, *supra* note 42 at 301–14; RCAP, *supra* note 47 at 25–27.

51. Hogg, *supra* note 42 at 53–59. Its innovative features provided for a domestic amending process and a Charter of Rights recognizing the supremacy of the rule of law which protects the rights of its territorial residents, *ibid.* at 7–8.

52. *R. v. Secretary of State*, [1981] 4 C.N.L.R. 86 (C.A. Eng.); *Manual v. England* (A.G.), [1982] 3 C.N.L.R. 13 (Ch.D. Eng.).

53. Section 35(2) provides that “aboriginal people of Canada” includes the Indian, Inuit and Métis people of Canada. Section 35(4) provides that “notwithstanding any other provision of this Act, aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.”

54. *R. v. Guerin*, [1984] 2 S.C.R. 335 at 358, [1985] 1 C.N.L.R. 120 [hereinafter *Guerin* cited to S.C.R.]. A *sui generis* or unique fiduciary obligation in this case arose out of the Crown’s duty to protect and preserve a collective aboriginal interest in contemporary land surrendered for lease by a Band to the federal government under section 18(1) of the *Indian Act*. The particular duty was to follow the instructions of the Band governing the Crown’s dealings with third parties in relation to the Band’s interest in the reserved Indian land. The obligation was its roots in the *sui generis* nature of Aboriginal or Indian title, and the historic powers and responsibility assumed by the Crown (*ibid.* at 376). The nature of the relationship involved gave rise to the fiduciary duty, and the categories of fiduciary obligations, like those of negligence, should not be considered closed (*ibid.* at 356).

understanding the Canadian landscape as has post-colonial Canadian literature.

The Supreme Court decided that Aboriginal land title is *sui generis*. Chief Justice Dickson for the majority⁵⁵ analyzed “Indian title” in British and Canadian colonial law⁵⁶ and concluded

It appears to me that there is no real conflict between the cases which characterize Indian title as a beneficial interest of some sort, and those which characterize it a personal, usufructuary right. Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in the land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law. There is a core of truth in the way that each of the two lines of authority has described native title, but an appearance of conflict has nonetheless arisen because in neither case is the categorization quite accurate.

Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with land for the benefit of the surrendering Indians. These two aspects of Indian title go together, since the Crown’s original purpose in declaring the Indians’ interest to be inalienable otherwise than to the Crown was to facilitate the Crown’s ability to represent the Indians in dealing with third parties. The nature of the Indian’s interest is therefore best characterized [in British law] by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians’ behalf when the interest is surrendered. Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.⁵⁷

55. *Ibid.* at 376–82, Beetz, Chouinard and Lamer JJ. concurring. Justice Estey found that the Crown acted as the statutory agent of the Indian Band (tribal or community interest) in arranging a lease of their reserved land with non-Indians (*ibid.* at 394). Justice Wilson, on behalf of three members of the court, described the Crown’s liability in terms of breach of a trust. She felt that the surrender document created an express trust of the Crown in the involved case (*ibid.* at 355). Madame Justice Wilson, further noted the *Indian Act*’s provisions did not create a fiduciary obligation in relation to reserves, but the Act “recognized the existence of such an obligation” (*ibid.* at 356). Her Ladyship saw Indian title as a property or beneficial interest sufficient to constitute a trust *res or corpus*.

56. *Ibid.* at 379–80. He discussed *St. Catharines Milling*, *supra* note 5; *Star Chrome case* (*Ont. Mining Co. v. Seybod*), [1903] A.C. 73, *aff’g* [1902] 32 S.C.R. 1; *Amudu Tijani*, *supra* note 43 at 404; and *Calder*, *supra* note 5.

57. *Ibid.* at 382. This characterization does not take one much further than the *Royal Proclamation of 1763*. See B. Slattery, *The Land Rights of Indigenous Canadian People, As Affected by the Crown’s Acquisition of their Territories* (Saskatoon: Native Law Centre, 1979).

Chief Justice Dickson's insight is more valuable than this analysis. His insight disclosed the misleading colonial description of Indian title as "beneficial use" or "personal usufructuary rights".⁵⁸ These vague and conflicting concepts have appropriated, silenced and marginalized Aboriginal conceptions of land,⁵⁹ thereby enabling the courts to deny any independent view of their homeland by Aboriginal peoples.⁶⁰ Instead, Dickson C.J. stated the Indians' interest in land is an independent legal interest in Canadian law, but distinct from Anglo-Canadian general property law.⁶¹ Moreover, he stated that this enforceable legal interest was not a creature of either the legislative or executive branches of government, therefore it is not a derivative title or estate under the Crown

58. *Ibid.* at 379–82. In *St. Catharines Milling*, the Privy Council began this tradition. Lord Watson's opinion stated: "There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a *plenum dominium* whenever that title was surrendered or otherwise extinguished" (*supra* note 5 at 55). *E.g. Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*, [1979] 3 C.N.L.R. 17 at 62, [1980] 1 F.C. 518, (1980), 107 D.L.R. (3d) 513 (F.C.T.D.).

59. Chancellor Boyd, in his opinion in *St. Catharines Milling* (1885), 10 O.R. 196 at 206 (Ch.D. Eng.) [hereinafter *St. Catharines* (Ch.D.)] gave the classic Eurocentric position. Despite the fact that there was a treaty cession of land to the Crown which created the conflict between the federal and provincial governments, Boyd, C. stated "Indian peoples were found scattered wide-cast over the continent, having, as a characteristic, no fixed abodes, but moving as the exigencies of living demanded. As heathens and barbarians it was not thought that they had any proprietary title to the soil, nor any such claims thereto as to interfere with the plantations, and the general prosecution of colonization. They were treated 'justly and graciously' as Lord Bacon advised, but no legal ownership of land was ever attributed to them." Colonialism was an issue of power, disguised as law.

60. Chancellor Boyd noted that Marshall C.J. in *M'Intosh*, *supra* note 5 stated "All our [English] institutions recognize the absolute title of the Crown, subject only to the Indian right of occupancy, and recognize the absolute title of the Crown to extinguish that right." Boyd concluded, "This right to occupancy attached to the Indians in their tribal character. They were incapacitated from transferring title to any stranger, though it was susceptible of being extinguished. The exclusive power to procure its extinguishment was vested in the Crown, a power which as a rule was exercised only on just and equitable terms. If this title was sought to be acquired by others than the Crown, the attempted transfer passed nothing, and could operate only as an extinguishment of the Indian right from the benefit of the title paramount." (*ibid.* at 209) This is inconsistent with his notion that Aboriginal peoples lack any proprietary idea of title to the soil. No mention was made of *Worcester v. Georgia*, *supra* note 5 correcting these colonial presumptions. Marshall C.J. wrote that upon discovery, the European colonizers simply possessed "the exclusive right to purchase such lands as the native were willing to sell" (*ibid.* at 545) and the constitutional nature of treaty cessions (*ibid.* at 557). See J.Y. Henderson, "Unraveling the Riddle of Aboriginal Title" (1977) 5 Am. Indian L. Rev. 75 at 93–96.

61. *Guerin*, *supra* note 54 at 378 and 385. See B. Slattery, "The Legal Basis of Aboriginal Title" in F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. the Queen* (Lantzville, B.C.: Oolichan Books, 1992) at 117–21 (argues for an intersocietal law of aboriginal rights as the keystone of our common Constitution).

or made by law of any government under its derived powers.⁶² Dickson C.J. described the legal right as derived from the Indians' historic occupation and possession of their tribal lands.⁶³

Chief Justice Dickson rejected the colonial characterization of Indian title as "a personal and usufructuary right" as unhelpful.⁶⁴ This undermines the entire judicial foundation of Aboriginal title in Canadian jurisprudence that originates in the dissenting opinion of Strong J. in *St. Catharines Milling*⁶⁵ and developed by courts for over a century. In 1887, Justice Strong's dissenting opinion had constructed the usufructuary rights thesis on the idea that the relationship between the Crown and the Indians was "analogous to the feudal relation of lord and tenant, or in some aspect, to that one, so familiar to Roman law, where the right of property is dismembered and divided between the proprietor and a usufructuary."⁶⁶

However, it is important to note that Dickson C.J., in his rejection of Indian title as "a personal and usufructuary right",⁶⁷ failed to recognize that the Privy Council had not used the concept of "title" to explain Aboriginal landholding. Rather, Lord Watson stated that "the tenure of the Indians [is] a personal and usufructuary right."⁶⁸

62. *Ibid.* at 377 and 379.

63. *Ibid.* at 335.

64. *Ibid.* at 381. In an Australian case, *Mabo v. Queensland*, [1992] 66 A.L.R.J. 408 at 489, [1992] 5 C.N.L.R. 1, Mr. Justice Toohey also observed that "an inquiry as to whether it is 'personal' or 'proprietary' ultimately is fruitless and certainly is unnecessarily complex." As applied to Aboriginal tenure or title, "personal" is not used in opposition to a "real" right in land. In *Quebec (A.G.) v. Canada (A.G.)*, the Privy Council interpreted "personal" to mean that Indian title was inalienable except to the Crown ((1920), [1921] 1 A.C. 401 at 410–11). This is a restatement of the prerogative Doctrine of the Imperial Crown's pre-emption of Indian title explicitly stated in the *Royal Proclamation of 1763* (reprinted in R.S.C. 1970, App. 1.) and Section 91(24) of the *Constitution Act, 1867* (U.K.) 30 & 31 Vict. c. 3 and implicitly in section 109 of the *Constitution Act, 1867* (U.K.), *Guerin*, *supra* note 54 at 380. See also *R. v. Smith*, [1983] 1 S.C.R. 554 at 569 (Indian title is inalienable to anyone, whether to an individual or to the Crown).

65. *Supra* note 5.

66. *Ibid.* at 604. Strong's analogies, I will argue in the concluding section, are wrong. Under the lure of feudal legal thought, Strong characterized the *1763 Proclamation* as evidencing "... the recognition by the Crown of a usufructuary title in the Indians to all unsurrendered land. This title, though not perhaps susceptible of any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indian in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the Crown itself, in whom the ultimate title was, in accordance with the English law of real property, considered as vested" (*ibid.* at 608).

67. *Guerin*, *supra* note 54 at 379.

68. *Supra* note 5 at 54. The tenurial concept ignored by Dickson C.J. was noted, but not explained, by Wilson J.'s opinion at 151. Lord Watson also referred to Indian title in another context: "the right of the Provinces to a *beneficial interest* in these lands [ceded by prerogative

Although the terms tenure and title are used interchangeably in modern law, there is a substantial difference between the historical notions of tenure and titles or estates in British land law. This was especially distinct at the time of the Wabanaki and Mi'kmaq treaties. The English doctrine of tenure asserts a fiction that all land is owned by the Crown, i.e. the original title of the Crown,⁶⁹ and every other interest is a derived from holding estates either directly or indirectly from the Crown.⁷⁰ Correspondingly, the English doctrine of estates asserts that a subject cannot own land, but can merely own an estate in it, authorizing him to hold it for some time.⁷¹ In modern English land law, the Crown has an exclusive tenure or title, under which all derivative freehold estates are held.⁷² These estates are essentially an interest in land of defined duration.⁷³

In Canadian law, 'title' is a matter of registration statutes, an issue of recorded evidence. The systems of registration of title are not a separate code of land law. Registration of title concerns delegated rights to subjects. They record the actual or potential transfer of rights existing under the Crown's tenure, which leaves the main basis of the land law unaffected.⁷⁴ However, in Canadian law, the registration system has

Treaty], available to them as a source of revenue whenever the *estate* of the Crown is disencumbered of the Indian *title*" (*St. Catharines Milling*, *supra* note 5 at 59 [emphasis added]). Compare to *Delgamuukw*, *supra* note 26 and *Guerin*, *supra* note 54, the assertion that Aboriginal interest does not amount to beneficial ownership (*Delgamuukw*, *ibid.* at 27). In *St. Catharines Milling*, the contingent beneficial interest in the lands in the province was created by the preexisting act of the United Kingdom Parliaments with regard to waste lands prior to *Constitution Act, 1867*. The Aboriginal tenure protected under section 91(24) of the *Constitution Act, 1867* was an interest other than that of the Province within the meaning of section 109 of the *Constitution Act, 1867* (*supra* note 5). Compare to Justice Le Dain's opinion in *Guerin* at the Federal Court of Appeal: "[I]f the Indian title cannot be strictly characterized as a beneficial interest in the land it amounts to the same thing. It displaces the beneficial interest of the Crown. As such, it is a qualification of the title of the Crown of such content and substance as to partake, in my opinion, of the nature of a right of property" ([1983] 2 F.C. 656 at 711). If Aboriginal tenure has not been surrendered to the Crown by treaty, it is a beneficial interest equal to the Crown and the provinces. If there is a surrender of Aboriginal tenure to the Crown, the administrative interest operates according to constitutional legislation.

69. *Supra* text and note 20. Tenure is derived from the Latin *tenura* or *teneo*, which means holding or possessing the land. In English law, the term implies a holding of some real property under a superior lord in return for services to be rendered.

70. F. Pollock & F. Maitland, *The History of English Law before the Time of Edward I*, vol. 1 (Cambridge: University Press, 1898) at 232–33; *Baker*, *supra* note 22 at 9–13.

71. *Baker*, *ibid.* at 10.

72. See above notes and text of notes 18–20.

73. *Baker*, *supra* note 22 at 14.

74. *Ibid.* at 513–19.

affected Aboriginal title.⁷⁵ The Supreme Court of Canada in *R. v. Paulette*⁷⁶ held that such a common law title was not sufficient to file a caveat (or warning) upon unpatented Crown lands under the federal Land Titles Act.⁷⁷ Similar decisions have denied a caveat in the Alberta and British Columbia land titles legislation.⁷⁸

In North America, a proprietary, alienable tenure in the Aboriginal Nations has always been supported by case law.⁷⁹ At the beginning of Confederation, the Privy Council in *St. Catharines Milling* affirmed prior to a treaty cession to the Imperial Crown that the Aboriginal peoples had the exclusive tenure that was alienable only to the Crown by British law.⁸⁰ However, this critical insight has been ignored over the last century by the colonial courts. To correct this predicament, Dickson C.J. noted that Aboriginal title is distinct from English land law concepts, but he did not describe its relation to English land law. He stated that the Indians' interest in their lands is a preexisting legal right not created by Royal Proclamation, but by s. 18(1) of the *Indian Act* or by any other executive order or legislative provision.⁸¹ This holding clarifies part of the relationship of Aboriginal tenure to British law, and establishes that formal

75. These systems do not validate Aboriginal tenure. Cession to the Crown, reservations of land to themselves and the registration system must be seen as acts of colonialization and racially biased as they protect the immigrants, but not the aboriginal peoples. For an analogy see "Exclusionary Zoning Litigation in State Courts" in D. Bell, *Race, Racism and American Law* (Boston: Little, Brown & Co., 1980) at 578–84.

76. [1977] 2 S.C.R. 628.

77. R.S.C. 1970, c. L-4.

78. *Ominayak v. Norcen Energy Resources* (1985), 29 Alta L.R. (2d) 151 (Q.B.), aff'd (1985), 36 Alta. L.R. (2d) 137 (C.A.) leave of appeal refused by Supreme Court of Canada (1985), 58 N.R. 122n (S.C.C.). The Alberta government amended their legislation when challenged by the Lubicon Indians. *Land Titles Amendment Act 1977*, S.A. 177, c. 27; see *Uukw v. B.C. (Govt.)*, [1987] 6 W.W.R. 240 (B.C.C.A.) (aboriginal title can have no place in the Torrens system).

79. *Calder*, *supra* note 5 at 151 and 193–96. *U.S. v. Santa Fe Pacific Railroad Co.*, [1941] 314 U.S. 339 at 347; *St. Catharines Milling*, *supra* note 5; *Symonds*, *supra* note 5 at 390; *Mitchel v. U.S.*, [1835] 34 U.S. 711 at 745–58; *Worcester v. Georgia*, *supra* note 5 at 544–46 and 559–61; *M'Intosh*, *supra* note 5 at 587–88.

80. *Supra* note 5 at 608–16. However, Lord Watson asserted Aboriginal tenure had its origins in British law in the 1763 Proclamation, other courts have argued it was recognized in the prerogative legislation: see *Guerin*, *supra* note 54, and *Calder*, *supra* note 5.

81. *Guerin*, *supra* note 54 at 379. Justice Wilson states that Indian title has an existence apart altogether from s. 18(1) of the *Indian Act* (*ibid.* at 352). The Supreme Court in *Calder*, *supra* note 5 had already conceded that Aboriginal title derives from sources independent from the Crown. As a legal right, the ultimate source of Aboriginal title is derived from historical occupation and use of the land, independent from treaties, executive orders, or legislative enactments. Accord *M'Intosh*, and *Worcester*, *supra* note 5. In *Mitchell*, *supra* note 48 at 382 Dickson C.J. restated this position "...that aboriginal understanding of words and corresponding legal concepts in Indian treaties are to be preferred over more legalistic and technical

recognition by treaty, executive order or legislative enactment is not required for the legal enforcement of Aboriginal tenure or title in Canada.⁸² But, this is a negative definition, saying what Aboriginal tenure is not rather than what it is.

Unfortunately, the negative concept of *sui generis* title is not all that helpful; it continues colonial traditions rather than resolving them. Although the concept provides the courts with an opportunity to articulate Aboriginal visions of the land, they have not done so. They have continued to follow colonial law, for example, by inquiring whether the Aboriginal plaintiffs and their ancestors were an organized society occupying and claiming a specific territory to the exclusion of other organized societies at the time sovereignty was asserted by England.⁸³ If this Eurocentric test is met by Aboriginal claimants, the courts remain vague about the incidents and rights of an Aboriginal tenure. They have refused to restrain non-proprietary governments or the Minister of Indian Affairs and Northern Development from issuing competing permits to companies.⁸⁴ Permits on reserved Aboriginal lands may be restrained if sufficient evidence shows the activities will interfere with the exercise of Aboriginal rights or uses.⁸⁵

The courts have merely characterized Aboriginal tenure in Canadian law by its general inalienability to anyone other than the Imperial Crown, and the Crown's obligation to deal with the land on the Indians' behalf when the interest is surrendered. Courts are content to describe the difficulty that Aboriginal tenure establishes in the British schema of land tenure.⁸⁶

constructions. This concern with aboriginal perspective, albeit in a different context, led a majority of this Court in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 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."

82. Moreover, Dickson C.J. rejects the concept of recognized and unrecognized Indian title. He stated, "It does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than with the unrecognized aboriginal title in traditional tribal lands." The Indian interest in the land is the same in both cases: see *Quebec (A.G.) v. Canada (A.G.)*, *supra* note 64 at 379. The collapse of the recognized-unrecognized distinction argues for the concept of tenure rather than title, since registration is not at issue. To avoid confusion I will use both tenure and title to discuss how land is held.

83. *Baker Lake*, *supra* note 58.

84. *Ibid.*; *Ominayak*, *supra* note 78.

85. *Kanatewat v. James Bay Development Corporation*, [1974] R.P. 38 (C.S.) (interim injunction). The Quebec Court of Appeal suspended the interim injunction a week later (on November 22, 1973). In an unreported decision, the Supreme Court of Canada affirmed the suspension of the interim injunction, (1974) 41 D.L.R. (3d) 1. A year later the Quebec Court of Appeals overturned the decision on its merit, [1975] C.A. 166. See *Macmillan Bloedel Ltd. v. Mullin*, [1985] 2 W.W.R. 723 (B.C.S.C.); *Hunt v. Halcan Log Services Ltd.* (1986), 34 D.L.R. (4th) 504 (B.C.S.C.).

86. In *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654 at 678, the Supreme Court reaffirmed this idea. The inescapable conclusion from the Court's analysis of Indian title up to

In *Delgamuukw*, MacFarlane J.A. stated that “[t]he courts have identified aboriginal rights as *sui generis*. Their unique nature has made them difficult, if not impossible, to describe in traditional property law terminology.”⁸⁷ The notion of *sui generis* title completes the terminological journey from British “uses”, to French or civil law *usufruct* derived from Roman law, to Latin uniqueness. This is a strange linguistic journey to explain Aboriginal concepts of land; it implicitly suggests that Aboriginal people have no linguistic conceptions of their land.

To understand the new *sui generis* order of aboriginal and treaty rights, however, the courts and their legal analysis will have to understand bi-cognitive contexts and interrelated aboriginal worldviews. In other words, they will have to overcome their Eurocentric biases and prejudices and see the deep structure or “big picture”.⁸⁸

In its first post-colonial judgment, in *R. v. Sparrow*, the Supreme Court of Canada began to take tentative steps toward understanding aboriginal proprietary rights under the strength and scope of section 35(1). It emphasized the importance of context and a case-by-case approach to s. 35(1).⁸⁹ The context of the appeal was the aboriginal right to fish for food, which is a very basic human right and crucial for social and ceremonial purposes. The Court noted,

Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgment in *Guerin, supra* at p. 382, referring to as the “*sui generis*” nature of Aboriginal rights. . . .

While it is impossible to give an easy definition of fishing rights, it is possible, and indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake.⁹⁰

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 that is in traditional [English] property terminology.

87. *Supra* note 26 at 23 and Hutcheon J.A. at 262–64 (The Aboriginal rights to land are of such a nature as to compete on an equal footing with proprietary interests). Similarly, in the Australian case *Mabo*, *supra* note 64, Deane and Gaudron JJ. observed that “The preferable approach is that adopted in *Amadu Tijani* and by Dickinson J. in the Supreme Court of Canada in *Guerin v. The Queen*, namely, to recognize the inappropriateness of forcing the Native title to conform to traditional common law concepts and to accept it as *sui generis* or unique” (at 156–57).

88. See C. Bell, Book Review of *Native Law*, by J. Woodward, [1990] 3 C.N.L.R. at 6.

89. *Supra* note 7 at 1109 and 1119; [1990] 3 C.N.L.R. 181.

90. *Ibid.* at 1112; [1990] 3 C.N.L.R. at 182. The Court never defined Aboriginal rights, it was content to stress the importance of the context of Aboriginal rights. The evidence presented was that the fishing for salmon was in ancient Musquem territory where they had fished from time immemorial, and that salmon has always been an integral part of Musquem culture and life. The Privy Council had held that the constitutional federal authority to legislate respecting the fisheries under section 91(12) of the *Constitution Act, 1867* was regulatory not proprietary;

Still, the court never addresses the issue of whether the aboriginal right to fish for food is a property right in the Musquem worldview. It refocused the issue to federal legislative powers and the fiduciary duty of the Crown toward the Musquem.

Building on these post-colonial judicial insights of *Guerin* and *Sparrow*, I want to explore the interpretative context of Indian title from a post-colonial constitutional perspective and an Algonquian linguistic perspective. I will then return to the transformation of aboriginal tenure of the Wabanaki and Mi'kmaq into vested tenures under treaties with the Imperial Crown in the eighteenth century. Consequently, the following portion of this essay seeks to explain an Aboriginal vision of "property". From an Algonquian linguistic perspective, we will look at the Aboriginal landscape of property in North America and the initial relations of Mi'kmaw territory and tenure and English law in North America. My approach is necessarily selective, based on personal experience and competencies.

II. *Aboriginal Visions of Land*

We are the land. To the best of my understanding, that is the fundamental idea embodied in Native American life and culture. . . . More than remembered, the earth is the mind of the people as we are the mind of the earth. The land is not really the place (separate from ourselves) where we act out the drama of our isolate destinies. It is not a means of survival, a setting for our affairs, a resource on which we draw in order to keep our own act functioning. It is not the ever-present "Other" which supplies us with a sense of "I." It is rather a part of our being, dynamic, significant, real. It is ourselves, in as real a sense as such notion as "ego, libido" or social network, in a sense more real than any conceptualization or abstraction about the nature of human being can ever be. . . . Nor is this relationship one of mere "affinity" for the Earth. It is not a matter of being "close to nature." The relationship is more one of identity, in the mathematical sense, than of affinity. The Earth is, in a very real sense, the same as ourself (or selves).

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such constitutional authority does not necessarily empower the federal Government to affect existing proprietary rights or confiscate property. (*Canada (A.G.) v. Ontario (A.G.)*, [1898] A.C. 700 at 712).

91. "Iyani: It Goes This Way" in G. Hobson, ed., *The Remembered Earth: An Anthology of Contemporary American Indian Literature* (Albuquerque: University of New Mexico Press, 1980) at 191.

To speak of modern legal notions of “ownership”⁹² and “property” rights⁹³ in the context of Aboriginal languages or worldview is very difficult, if not impossible. Except for the colonial and racial assertion that indigenous peoples did not have a system of property rights⁹⁴ and the current indeterminate *sui generis* characterization, this issue might not even be important. Aboriginal visions of land and entitlements within their indigenous federation were unlike the European legal notion of “property”. The Aboriginal vision of property was ecological space that creates our consciousness, not an ideological construct or a fungible resource. Upon being asked to sign a land cession treaty, a Blackfoot chief summarized the differences:

92. *Delgamuukw*, *supra* note 26 at 27–40. In modern legal practice, however, it is seldom necessary in the course of pleading to set up a claim of ownership of a disputed resource or good. Litigation revolves around evidence of possession and rights. Ownership itself is not litigated. The word “owner” is an organizing idea of modern property systems that operates as a popular summary of the technical rules of real property. It expresses the idea of an object being associated with a particular noun or name of some individual, supported by a rule that says that society will uphold most of an individual’s or entity’s decisions about the use of the object. For an account of the different views of the relations between the legal term “ownership” and ordinary language, see B. Ackerman, *Private Property and the Constitution* (New Haven: Yale University Press, 1977) at 10ff.

93. *Ibid.* at 41. No comprehensive definition of “property” exists. In Eurocentric thought, the concept has never had any unitary meaning. The use of a French term *propriété* to describe British land law remains a legal mystery. Even accounting for the fact that French was the legal language of England until the seventeenth century, the two words had little in common. The French word “property” has never been translated as “land” in Anglo Saxon or Old English. The term is translated as “goods” or “movable” (*Oxford English Dictionary*), while land informs the idea of “whatsoever may be plowed” or arable land. Lord Coke extended the definition to “comprehendeth any ground, soil or earth whatsoever” (E. Coke, *The First Part of the Institutes of the Law of England: or a Commentary on Littleton’s Tenures* 15th ed. by F. Hargave & C. Butler, eds., (London: E. & R. Brooke, 1794) at 4a).

94. Long after the Wabanaki and Míkmaq treaties with the Crown, in the middle of the nineteenth century, European colonial lawyers and administrators in the European colonial corporations and colony offices formulated the myth that Aboriginal peoples did not have developed concepts of land or property. The purpose behind this strategy of denial was to establish the legal basis for expropriating land from Aboriginal peoples around the world. Colonialist jurists asserted that private property emerged from ancient European roots, notably Roman land law and various putative Germanic traits related to individualism. In contrast, Aboriginals lacked this history and, by implication, lacked the mental and cultural qualities associated with this history, because of their lack of evolution. R. Thapar, *Ancient Indian Social History: Some Interpretations* (New Delhi, India: Orient Longman, 1978). The myth that Aboriginal peoples had no concept of property rights in the land became an axiom in nineteenth-century intellectual history. Karl Marx accepted this axiom and produced a broad theory about the evolution of private property as a major part of his theory about the origins of capitalism. He argued that this evolution was a peculiarly European phenomenon and that colonialism did bring about the diffusion of capitalism to the non-European world, a necessary though painful process for Aboriginal societies. The result of the acceptance of this axiom was a legal theory that asserted that since the Aboriginal peoples had no concept of private property rights in land, they did not have any property rights at all. *Blaut*, *supra* note 31 at 15 and 81.

Our land is more valuable than your money. It will last forever. It will not even perish by the flames of fire. As long as the sun shines and the waters flow, this land will be here to give life to man [sic] and animals. We cannot sell the lives of men and animals; therefore we cannot sell this land. It was put here for us by the Great Spirit and we cannot sell it because it does not belong to us. You can count your money and burn it within the nod of a buffalo's head, but only the Great Spirit can count the grains of sand and the blades of grass on these plains. As a present to you, we will give you anything we have that you can take with you; but the land, never.⁹⁵

Generally, the Algonquian people and their linguistic worldview⁹⁶ do not have a defined concept of territory or land. Instead they had a concept of space.⁹⁷ Their vision is of different realms enfolded into a sacred space. Their Earth is a series of ecological spaces; each filled with natural resources, sights and sounds, and memories. The relationship between the life forms of the earth informs the Algonquian worldview.

This relationship has been noted by anthropologists, Aboriginal authors, and recently by the legal profession. For example, in the anthropological context, Ruth Underhill in *Papago Woman* writes:

“I was born her,” breathed Chona reverently, “on the Land.”

I wish I had some magical, some almost holy translation for the Indian word she used. Land, to me, was a possession to be claimed and fought over by farmers, builders, exploiters—yes—and patriots. For this old Papago

95. T.C. McLuhan, *Touch the Earth* (Toronto: New Press, 1971) at 53. Like all the Algonquian languages, the Blackfeet languages originally have no gender distinction, only balanced responsibilities.

96. The Algonquian language family is spoken along the Atlantic coast and across North America to the foothills of the Rocky Mountains, from Labrador south to North Carolina and Tennessee. This language group of more than fifty aboriginal nations completely surrounds the linguistic islands of the Iroquoian and Lakota confederacies in North America. The word “Algonquian” is said to be derived by the French understanding of the sounds that referenced the distinct rock formation around the Great Lakes where the ancient ideographic script or rock drawings were carved. The Champlain explorers mistook the sound for the name of the First Nations of the place (*Algounequins*). H.P. Biggar, ed., *The Works of Samuel de Champlain* (Toronto: Champlain Society, 1922–36) at 105ff. It is often spelled Algonkin or Algonkian. Later anthropologists used the word for the common language group. Some assert that the word is derived from the Mi'kmaq term *alkoome* which referred to people who stand in the canoe and spear fish in the water or *âlegonkin* the dancers or *ellegom'kwin* (friends, allies). See P. Vessel, *The Algonkin Nation* (Arnprior, Ontario: Kichesippi Books, 1987) at 11–14. This is a typical chicken and egg issue in linguistics. In addition to the Mi'kmaq, there are the Wabanaki (Abenaki), Maliseet, Montagnais-Innu, Naskapi, Odawa, Algonkians, Ojibwa, Saukteaux, Cree, Blackfoot, Blood, Peigan to mention a few. O.P. Dickason, *Canada's First Nations* (Toronto: McClelland & Stewart, 1992) at 63.

97. Interestingly, most studies provide little insight into Aboriginal peoples’ spatial concerns. They provide little understanding into ecological or Aboriginal worldviews and settlement patterns or use of resources. For example, knowing where to harvest or hunt your needs is to know where to place yourself within a sacred space. Thus, living in a particular space and being expected to share that space are the controlling concerns.

woman and her kind, I was to learn, it is the land that possesses the people. I was to learn, it is the land that possesses the people. Its influence, in time, shapes their bodies, their language, even, a little, their religion.⁹⁸

Similarly, the Anishinaki poet and writer, Gerald Vizenor, summarizes an Ojibwa vision of the land:

The land is everything to me. The land is part of my language, part of the way I perceive the world. The water, the trees, the smell of pine, the smell of autumn, the smell of wet leaves in the springs. It is all part of my imagination, part of my dreams.⁹⁹

As these perspectives illustrate, an Aboriginal worldview is a spatial consciousness rather than material consciousness. Sharing and mobility discourages the accumulation of inessential resources. The sharing of space, then, is the meaning for all of Aboriginal life. The relations contained in those spaces shape both choice and placement and ultimately group life. Aboriginal people do not speak of living “there”; rather, each family or person “belongs” to the space. Belonging, then, is directly tied both linguistically and experientially to a space as well as to shared knowledge of a series of common places. Belonging to a space is more than just living in a place or using its resources; it is attendant with benefits and obligations. Belonging is viewed as a special responsibility.

Aboriginal societies are usually based on kinship ties, specialized access to resources, and a high degree of social equality. While they are a family centered people, they are not an isolated or stationary people. Aboriginal peoples live and work in difference places. They did not randomly travel as Eurocentric thought suggests,¹⁰⁰ but they travelled to the resources as a way of creating and harvesting bio-diversity and to trade. Mobility among the Aboriginal peoples is neither recent, nor was it introduced by modern means of travel; it was a sustainable way of life.

Aboriginal space is never at rest. It is assumed eternal, yet remains tolerant to flux (*muspekjamkewey*). It is a place where a matrix of life forces generates changes. It is a whole that must be refined by endless ceremonies of renewal and realignment. These ceremonies represent a catalyst or an integrating force that unites Aboriginal peoples with its uniqueness or topistic¹⁰¹ integrity. The forces within a space can be visualized as frequencies from an enfolded realm.

98. (New York: Holt, Rinehart and Winston, 1979).

99. Quoted in *Native Peoples*, Spring 1993 at 35.

100. See Boyd, *supra* note 59.

101. Topistic is a holistic model of inquiry designed to make the identity, character, and experience of a place intelligible. It is derived from the Greek word *topos*, as an adjective associated with place, and the noun ‘topistics’ for the study of placeways. See, E.V. Walter, *Placeways: A Theory of the Human Environment* (Chapel Hill: University of North Carolina Press, 1988) at 215.

The sharing of space links those who belong to the land. In this sense, belonging to the land means maintaining a series of spaces, such as fishing stations, hunting stations and harvesting stations, that each have to be renewed again and again in certain ways by specific kinds of behaviours and ceremonies. These spaces are not self-renewing. Shared knowledge about maintaining a particular space penetrates Aboriginal consciousness and creates languages, beliefs and behaviours.¹⁰² They not only used what is physically available to them, but they made choices about the rate of resource use, within durable limits, and modified their resources, in selective and sustainable ways, to increase the availability of useful resources.¹⁰³ They allocated among themselves and managed the resources for the allied families and their friends. They created a customary trading code to increase choices and resources.

The series of spaces orders Aboriginal languages, forming a landscape. The land creates Aboriginal consciousness through languages and a unified structure of being. Out of the sounds of the life forces in the ecology, for example, the structure of Algonquian languages are centered on the process of being or the verbs.¹⁰⁴ A cognitive recognition and acceptance of the interrelations of the shared space inform their languages,

102. For example, consider the Mi'kmaq relationship with "animals." They see each species as constituting a special life form, or *nation*: they live in their own realm or village, and have their own chief and holy people. LeClercq commented that they thought "the Beavers had sense, and form a separate nation; and they say they could cease to make war upon the animals if these would speak, howsoever little, in order that they might learn whether the Beavers are among their friends or enemies." LeClercq, *The New Relation of Gaspesia with the Customs and Religion of the Gaspesian Indians*, trans. by W.F. Ganong, 1691 ed., (Toronto: Champlain Society, 1910) at 225; C.G. Leland, *The Algonquin Legends of New England: or, Myths and Folklore of the Micmac, Passamaquoddy & Penobscot Tribes* (London: Low, Marston, Searle & Rivington, 1884) at 31.

103. Often anthropologists have sought to define the use of the resources by indigenous people too narrowly, thus restricting an understanding of land tenure and its development. Suggested readings are: J. Inglis, ed., *Traditional Ecological Knowledge, Concepts and Cases* (Ottawa: International Program on Traditional Ecological Knowledge, 1993); C. Vecsey "American Indian Environmental Religions" in *American Indian Environments: Ecological Issues In Native American History* (Syracuse, N.Y.: Syracuse University Press, 1980) at 1-45; A. Tanner, *Bringing Home Animals: Religious Ideology and Mode of Production of the Mistassini Cree Hunters* (London: Hurst, 1979); A. Tanner, "Significance of hunting territories today" in B.A. Cox, ed., *Cultural Ecology: Readings on the Canadian Indians and Eskimos* (Toronto: McClelland and Stewart, 1973) at 101-14.

104. This is a distinct process from the noun-object orientation of English. Many noun-ideas in English are expressed in Mi'kmaq as verbs. English nouns can be created out of Mi'kmaq verbs. See Battiste, *supra* note 8; J. Fidelholtz, *Micmac Morphophonemics* (1973) 5 Abstracts Int'l 34; J.Y. Henderson, "Governing the Implicate Order" (Centre of Linguistic Rights, University of Ottawa) [in press].

thus creating a shared worldview, a cognitive solidarity, and a tradition of responsible action.¹⁰⁵

It also creates a series of visual descriptions that are clearly identifiable within the space, and has specific visual boundaries and uses embedded in the aboriginal languages. These descriptions make a knowable space that are interconnected with paths of movement and the cycles of existence. These cultural descriptions and paths created a specialized cognitive map of their space.¹⁰⁶

Aboriginal consciousness is more an emotional response to a place that acknowledges the ability of the forces in a space to move the soul. A consciousness that honours processes and relationships rather than fixed rules, leads to an understanding and acceptance of the interrelated relationships and expressive energies and experiences. This generative order is the source of all Aboriginal law.¹⁰⁷

To understand the shared spatial order of any Algonquian community is to identify the basic processes of linguistic responsibilities, descriptions and pathways. To understand the order, one must live within it. Belonging is tied to spaces that make up their consciousness, spaces that extend throughout the community to their experiences with the land. These experiences are not lifeless terms connected to landscape features; they describe the land or its character or common resources.

To those unfamiliar with the space, the Aboriginal landscape seems confusing; the subtle order of their experience often looks natural to a stranger. Their ordering of space appears to have given way to the disorder of use. Yet within a sacred space, every resident knows the order that makes all places familiar. How they live in their space indicates how to “organize” their day-to-day life, and establishes how to maintain, protect, and renew their spaces. Such knowledge is fundamental to their identity, personality and humanity.

How Aboriginal languages appropriate a space and attach responsibilities to it also reveals their ecological consciousness. Their notion of self does not end with their flesh, but continues with the reach of their senses into the land. Thus, they can speak of the land as their flesh. Their notion of the space is more than vision; it includes the other non-visual senses.

105. See J.Y. Henderson, “First Nations Legal Inheritances in Canada” (1995) *Man. L.J.* [in press].

106. See e.g. Yi-Fu Tuan, “Images and Mental Maps” (1975) 65 *Annals of the American Association of Geographers* 210; R.M. Downs & D. Stea, *Maps in Minds: Reflections on Cognitive Mapping* (New York: Harper & Row, 1977) at 7 and 30–60.

107. Often this is interpreted as the natural law by outsiders. Among the Cree it is called “*wak-koo-towin*”.

To come into a relationship with the ecology signifies one's discovery of what there is in one's world and self that is sacred and spiritual. Some relationships of a space were produced through agreements with the Keepers of the forces.¹⁰⁸ These ecological covenants determine the consciousness and actions of the people toward the resources. These spaces are often thought of by strangers as natural, but to the Aboriginal people they are created places by agreements. Other spaces were ordered for ceremonies and rituals that reflected the teaching of the covenants and are required for renewal of the resources. Cultural consumption was not limited to the intentions of those who produce it, be it with an object or space.¹⁰⁹

The entire community's daily existence is based fundamentally on the spatial concerns of shared resources through a certain space. They depend on the equal allocation of resources in their midst for daily livelihood, and must share a series of resources. Aboriginal peoples do not manage the resources; rather, they manage their space. This spatial consciousness shapes cultural and resource utilization and innovation.

The prime spaces of an ecology are equally divided by a council of elders, everyone having a fair share. Participation in Aboriginal life is accompanied by rights in spaces. The spaces are allocated so that general community livelihood is ensured, in contradistinction to the common Western pattern, which guarantees individual livelihood through the institution of private property. The sense of community solidarity is enhanced not only by this common property situation, but also by the family right to secure certain space. This is different from the Eurocentric ideal of common property or resource usage.¹¹⁰

This spatial consciousness shapes responses to innovations. New resources that facilitate the sharing of traditional resources can be accepted, while objects that strain the communal solidarity have little impact. When new resources find their way into Aboriginal life, they are typically subservient to their awareness of space usage and the enfolded realms, no matter how they might be used in the context of other cultures.

108. *Supra* note 75. These Keepers are not seen as supernatural forces, instead they are seen as natural forces in the ecology.

109. R. Chartier, "Culture as Appropriation: Popular Culture Uses in Early Modern France" in S.L. Kaplan, ed., *Understanding Popular Culture: Europe from the Middle Ages to the Nineteenth Century* (New York: Mouton, 1984).

110. B.J. McCay & J.M. Acheson, "Human Ecology of the Commons" in B.J. McCay & J.M. Acheson, eds., *The Question of the Commons: The Culture and Ecology of Communal Resources* (Tucson: University of Arizona Press, 1987) at 16.

The established Eurocentric chronology of time is not the Aboriginal peoples' own version of its past.¹¹¹ The Aboriginal peoples' version of time is filled not with bold sweeping trends over long periods, but rather with a specific space filled with experiences and feelings. Past experiences inform modern discussions about these places.

Through their landscape, the naming of the land, the Aboriginal peoples experience and wisdom continues. Aboriginal people talk about past experiences motivated by specific concerns, for example, the snow blinding moon or February. Ultimately their lives revolve around specific places in their sacred space. Objects come and go, but places in the sacred space continue as essential to explanation and descriptions. The places are not transitory; they remain the focal point of the past. The past is spatial and oral.

Aboriginal past is talked about, with the locational components being the unifying factor. This factor covers space, time, and motivation. Talking about the past involves experiences: characters, events, and objects. Actions from the past involve causation rather than logic. Not everyone knows precisely the same amount of detail or the same version, but they take certain places as starting points for discussion. Sometimes the discussion is a narrative; sometimes it is not.

Often in Aboriginal peoples' discussion of the past, the topics turn to "the first" or spatial anomalies. An example of a first is the Míkmaq district of *Sikniktewaq* (roughly New Brunswick) describing the low grumbling sounds that the glacier made as it turned a river into a gulf, splitting Prince Edward Island (*Epekwith*) from the continent.¹¹² Spatial anomalies provide an explanation about new experiences.¹¹³ Spatial questions provide the impetus for Aboriginal peoples to ask why something is there, and perhaps to correlate it with a certain time period or to reinforce a narrative *per se*. Through this endless process, Aboriginal people come to know about their sacred space, and fill it with culture

111. For example, Míkmaq have always been unconcerned with their creation or genesis. They were content in knowing that they had received a precious gift at birth, a gift they struggled hard to understand and discovered the mysteries of maintaining harmony with realism. They told Father Maillard, one of the first priests to live with them, and to comprehend their language, that they were part of the light. "[A]s for us," they were recorded as saying, "we can know no origin but that which thy rays have given us, when first marring efficaciously, with the earth we inhabit, they impregnated its womb, and caused us to grow out of it like the herbs of thy field, the trees of thy forest, of which thou art equally the common father." A.S. Maillard, *An Account of the Customs and manners of the Mickmakis and Maricheets Savage Nations, New Dependent on the Government of Cape Breton* (London: S. Hooper & A. Morley, 1758) at 25.

112. As explained by Kep'ten Steve Augustine of Big Cove Reserve.

113. See *supra* note 96 describing the term Algonkin.

knowledge and values. Most Aboriginal peoples know which families to ask for detailed knowledge. No one account explains their collective past, nor does everyone know every specific detail. Often neither account deals with any fixed chronological time; dates for events can be only approximated. Progression of time is connected to the specific lives of known humans, in other words, linked with memory. It is a matter of culture, not chronological time.

Memory is measured chronologically in terms of generations or winter counts or ancestors' lives. If the event happened during the lifetime of a certain person, then it is usually linked to certain events during that lifetime. If the event is not located with the family history, then the actual date is not important or not remembered. It is part of daily life. As each generation passes on, past events separate from individual lives and enter the great store of experiences that occurred "before my time". Thus my time is current experience, before my time is the collective oral traditions held by the families. Time and event are linked in memory or symbolic literacy, not in written literacy.

Discrepancy arises, but no one is concerned with consistency. Aboriginal peoples accept inconsistency in the broad understanding of cycles and the living past.¹¹⁴ Each version provides different perspectives on past values and events. They do not have a concept of a "true" history. Instead they have an account of experiences or topistic space. Validity or justification of historical descriptions rests on family relationships rather than on content.¹¹⁵ They usually say "that was the way it was told to us or me."¹¹⁶

To concretely illustrate this broad Aboriginal worldview, I will discuss the Mi'kmaq version of their ecology (*nestumou*) and their understanding about their Living Lodge (*maqmikewíkam*). My brief sketch is incomplete,¹¹⁷ but it may help others grasp the nature of a particular Algonquian worldview of "property".

114. Some cultures, especially literate cultures, identify contradictions and claim to isolate what is true from what is not true. This discounting one version for another for the Mi'kmaq is to act in a God-like manner (*mntukasowin*).

115. S. Schrager, "What is Social in Oral History?" (1983) 4:2 Int'l J. of Oral History 78.

116. They merely claim that the story was handed on to them, that it was important for their elders that they remembered it and passed it on to them for whatever reasons. As Black Elk stated to John Neihardt: "This they tell, and whether it happened so or not I do not know; but if you think about it, you can see that it is true." *Black Elk Speaks* (Lincoln: University of Nebraska Press, 1961).

117. E.g. R.H. Whitehead, *Stories from the Six Worlds: Micmac Legends* (Halifax: Nimbus, 1988).

1. *Míkmáki: the Sacred Space*¹¹⁸

“Míkmáki” became the concept that the allied people (Míkmaq) called their national territory. It is not the usual land description, but rather is translated as the “space or land of friendship”. It stresses the voluntary political confederation of the various Algonquian families into the Holy Assembly or *Santé Mawíomi* and their shared worldview. Wherever their language was spoken was *sitgamúk*, their ancient space, and every part of this territory is sacred to the allied people. This space extended approximately twenty thousand square miles. In modern terms, Míkmáki described the territory now called Newfoundland, St. Pierre de Miquelon, Nova Scotia, New Brunswick, northern Maine, Prince Edward Island, the Magdalene archipelago, and the Gaspe Peninsula of Quebec.

a. *Nestumou*

Although it is possible to view Míkmáki as a territorial concept, in the Míkmaw context or langscape it expresses their sacred order. Their sacred order is not a cosmological order; it is the result of millennia of field observations and direct experience by their ancestors. These experiences are directly encoded within their language and symbolic literacy. These understandings or sentiments are an important part of the implicit order in which they live as well as practical knowledge.

The sacred order in which the Míkmaq live is expressed as a sustaining relationship. Consistent with their verb-oriented reality, a process of being with the universe, the order was and is a widely shared, coherent, and interrelated worldview connecting all things. For example, the Míkmaq conceptualized every animal with a certain *mntu* and considered them a “separate nation”.¹¹⁹ An important feature of this order is the use of human kinship as a general analogy for ecological relations.¹²⁰ The most obvious and widespread manifestation of this reciprocal relationship is the totemic clan system. The totemic clan system categorized social obligations, such as sharing and deference, as well as proper moral and ethical considerations, to the ecological relationship. Plants, animals,

118. This section is derived from discussions with Kep’ten Steve Augustine, Dr. Marie Anne Battiste, Jikap’tin Alex Denny, Patrick and Eleanor Johnson, John J. and Sharon Paul, Kep’ten Noel Marshall, Professor Joe B. Marshall, and Professor Murdena Marshall and students at Míkmaw Studies of the University College of Cape Breton.

119. LeClercq, *supra* note 102 at 277.

120. Vecsey, *supra* note 103; Tanner, “Significance of hunting”, *supra* note 103; F.G. Speck, *Penobscot Man, The Life Of A Forest Tribe In Maine* (London: Oxford University Press, 1940) at 208.

and humans are related, and each is both a producer and a consumer with respect to each other, in an endless cycle.¹²¹

The sacred order is also a place where the animate power of spirits (*mntu*) exists in harmony. The Míkmaq were conscious of and respected the animation of their environment. To them every stone, tree, river, coast, ocean and animal being had been isolated into discrete *mntu*.¹²² They strive to respect and live in harmony with these intelligible essences. Within their space, a respectful and sacred relationship between all life forms is the highest form of existence. Such relationships are not always achieved, but are the purpose of life.

Nestumou is the sound that describes the Míkmaq experiences on a part of the Earth. It is a sound that validates their identity within an ecosystem and a langscape that creates an appropriate cultural literacy with the ecosystem. Literally, the sound means the “understood realms”. *Nestumou* describes everything for which they have experiences, not everything that could exist. *Nestumou* includes both the visible and the invisible realms, and is discussed in terms of Lodges (*wikwóm*). *Nestumou* expresses their cumulative wisdom about eight levels of meaning or understandings (*nestunk*).¹²³ These levels are interconnected and transform each other. The nestunk are the Deep Earth Lodge (*lamqamuk*),¹²⁴ the Root Lodge

121. This is not the response of British society when Darwin suggested that Europeans and other peoples had evolved out of the animal world and could recognize the terrible and obsolete manlike ape as their distant cousin. His theories revolutionized European mentality creating scientific racism and creating a religious battle over creationism versus evolution. See J. Highwalker, *The Primal Mind* (New York: New American Library, 1981) at 17ff.

122. In English, this concept is often spelled “Manitou” or called “medicines” by the immigrants.

123. One who understands everything about the known world is called *Kaginestmu'k*; if one knows only a part of the known world, one is called *mukaginestmu'k*. Common sense is called *nsi-tuo'gn*, while the entire process of understanding is called *nestnnmk*. Thus, these sounds are often used to describe the world, or humankind.

124. The deepest part of Earth is said to provide sustenance to life on Earth. This Lodge is also analogized to Grandmother, which is often translated as Mother Earth. In the Deep Earth Lodge are sacred caves, where seekers may receive and be instructed by the animating forces (*mntu*). These forces work in all the realms, but are said to belong or reside in either the Deep Earth or Sky Lodges. The physical forms of rocks, plants, animals and humans are made possible by the potencies of these forces. These potencies can be known to humans, but only in prayers or appropriate ceremonies. There is an enigmatic side to animating forces that come into existence by the abuse or manipulation of the material resources: often these destructive forces are created by the misuse of gifts by humans. In the deep caves (*wlhusúkek*), such as Klooscaps's Cave, the original visions were given to the humans; they are the oldest spirit lodges, and provide the models for all other spirit lodges or ceremonies on the surface of the Earth. Each force is said to have a keeper or protector (*nujoteckwti*) who can punish or grant privileges to humans for their conduct toward the plant or animal form; these *mntu* can make themselves visible to humans on important occasions.

(*wjipisekek*),¹²⁵ the Water Lodge (*lampoqókóm*),¹²⁶ the Earth Lodge (*kinuwositagamino*),¹²⁷ the Ghost Lodge (*wskiékmujuiokóm*),¹²⁸ the Sky Lodge (*mooskoonwíkóm*),¹²⁹ the Light Lodge (*wásóqwíkóm*),¹³⁰ and the Ancestors' Lodge (*skiékmujuaawti*).¹³¹

125. This realm is above the Deep Earth Lodge, it is an unusual zone: little is currently remembered about it, but people are warned about venturing into it because of the presence of the *wjipiskek*, which can capture and contain the human *mntu*. This region demarcates the space of the roots of trees and grasses, the region where bears hibernate, the space of wolf and coyote dens, where rodents and ants and other insects live. It is a transitional zone to the Underwater and Earth Lodges. The life forms that live in this area are considered sacred because they traverse between the surface of the Earth Lodge and the depths of the Root Lodge. The stones, roots, and insects located in the Root Lodge are often considered a purer life form than those on the Earth Lodge; they are therefore considered better medicine for surface life forms.

126. This is an unknown realm. It cannot be directly experienced by humans, it can only be known through alliances with the keepers of this realm. It covers the oceans, lakes, rivers and streams as well as the fish lodges (*nméjuiókóm*). It is the domain of the ancient spirits, much like the parallel realm of the deep earth Lodge.

127. This is the realm of the air, water and surface which provides substance to life on and above the earth, and for all the things that grow out of the Earth. Within the realm of the Earth Lodge are four regions: the region of short grasses and plants, and small animals; the region of the water; the region of tall grasses, humans and large animals; and the region of trees and forests (*nipuktuk*). The last region is important because their roots penetrate into the Deep Earth and extend into the Earth Walk. Places where the Deep Earth is directly accessible, including caves, deserts, bare mountain tops, etc., are considered sacred.

128. This is the realm of guardian forces that exist alongside the Earth Lodge; the watchers of the keepers of the sacred caves in the Deep Earth Lodges or the Light Lodges. They maintain the balance between life forms.

129. This realm contains the clouds, stars, sun and moon, and is associated with the flying beings. The mountains are considered part of this realm, and are often considered as sacred places, similar to trees, because they partake of three realms: their peaks appear as part of the Deep Earth Lodge that reaches into the Sky Lodge. The sky realms, like the deep earth realm, contain unique forces. Through the Winds, or Breath Regions (*júsen*), life is possible through the immortal gift of breath. This realm is also occupied by the forces of Thunder (*kaqtuko*), who directs Clouds (*alw' k*); and Rain (*kispesan*), who assists Thunder. In the Sky Lodge are Keepers of the Winds (*wjúsen*). They have personal spirit names because they have often revealed their physical form to the people. The east wind is called *wejipek*. The south winds are called either *wsaqniaq*, the sunny, winter winds, or *putuesk*, the cloudy, warm winds. The west wind is called *ekesnuk*. The north wind is called *oqatlk*. In the highest realm above Sky Lodge live the creative forces of the universe (*nákus' set*) which creates consciousness and gives it order, but not stability.

130. From this creative realm comes the cosmic forces of light which permeate and maintain the world and the immortal spiritual potential. Collectively, these forces and potentials are said to direct all the material and spiritual forces of the universe. It contains the source of all light and darkness: it holds the visible lights, the sun (*nákuset*), moon (*tepkuset*), and stars (*kulokoquxh*), as well as the invisible cosmic forces (*wasitpág*) behind the light and the blue darkness (*quijitpaqtek*).

131. Above the Light Lodge this realm is connected to the Milky Way, the spirit's path, and is considered much like the Earth Lodge, except the being has much greater magic. Plants, animals, and human souls all travel this realm, called by missionaries the "Land of the Souls" (Maillard, *supra* note 111 at 4–6).

The center of the sacred realm is viewed as the Living Lodge (*maqmikewíkam*). The Living Lodge is composed of three realms: the underwater lodge, earth lodge and ghost lodge. It is comprised of the spirals of the unfolding realms of daily Míkmaq life and the immanent enfolded realms of intuitive and transcendental experiences. Surrounding these realms are five other realms: the deep earth, root lodges, the sky lodge, the light lodge and the ancestors' lodge. Interconnecting each of these lodges are the forces (*mntu*), and each of these Lodges is associated with certain keepers of forces, regardless of form.

b. *Maqmikewíkam*

The Míkmaq relations to the forces of the Living Lodge realm (*maqmikewíkam*)¹³² are direct and extremely complex. This is often simply called *nature* in English; but it is a very difficult concept in Míkmaw thought, perhaps best expressed as *niskammelkikóim* (creation space). The Living Lodge is a spiritual realm, a sacred space; it is a place for reverence and respect that reveals a natural truth and way of life. These understandings are woven throughout Míkmaw consciousness and form their human order. This space is understood to have the power to shape the identities of the people who live there.

The Míkmaq understand how limited their knowledge is about this realm. Their space in the Living Lodge is always in a state of flux: it has always been a place of forms that dissolve and flow into everything else, a realm characterized by its transformations—the changing of forms and shapes—known through observations. Their environment cannot be known except through their linguistic knowledge of the place where they exist. All aspects of existence in the Living Lodge merge in an ongoing, indivisible process: a realm fragile yet resilient, delicate yet tough, sacred yet changeable. The air, forest and sea are alive.

In this continual flow, the Living Lodge has always had many ways of creating harmony out of flux. It makes little sense to create any form of fixed worldview in this realm; the known truth is that unending change requires flexibility, both cognitively and physically. Míkmaw knowledge is not a description of reality; rather it is some perceptions about the nature of change, insights about patterns or styles of the flux. Life is not static. To see things as permanent is to be confused about everything; the alternative is to understand the need for creating temporary harmonies through alliances and relationships among all forms and forces.

132. Alternatively, it can be expressed as *mulginode tan wejeskalaegul must kogooaal*, or *meanooch niskam oomulgundim*.

The Míkmaq are content and comfortable with the Living Lodge's transformations. They understand life and death as nonparadoxical, understand that consciousness is their greatest gift, understand their role in renewing balance by sharing and communicating with everything. They have a transcendent view of the world that seeks harmony with all things around them. They understand that they have to bring together all those things that are essential for the regeneration of the Living Lodge; yet, they have no notion of any unique specialness in the realm over the rest of the breathers.

Míkmaw thought and language honour the vastness of the creative, mysterious flux rather than the greatness of any Lifegiver's power. Awareness of the sacred flux has always been a source of Míkmaw consciousness in the Living Lodge. Such awareness can be acquired or lost, and it creates an understanding of what are now called in English the environment and ecology. Understanding the holiness of the Living Lodge is so urgent, so utterly linked with the pulse of feeling in the indigenous soul, that it becomes the singular sign of life and knowledge. Even when every other aspect of nature has failed them, they do not reject the sacred processes.

The Living Lodge has all kinds of spiritual controllers, who create a sacred spectrum. Each deserves and receives respect for its abilities. Each spiritual controller or keeper is referred to as a member of one's own immediate family, as a close relative, as an ally of the Míkmaw. Curing human disease is understood as a function of understanding the relationship with the spirits of a particular ecology. A person's willingness to restore their identity with the land and its guardian spirits is essential to the healing process. It is a process of shaping one's vision and motion to a particular space or surrendering to the sustaining elegance of the space. The land and its spirits are a living reality that precedes human desires or values. It is the basis for all subsequent understanding of culture and self which, in turn, renews and humanizes the space. Cultural traditions are an articulation of the awareness of the space and its spirits, which confirm their spatial identity. This creates a feeling of rightness or certainty in their beliefs.

Regardless of form, these allies are parabolic: their meaning is discovered by experience rather than reflection. The heightened experience or awareness of one's allies often increases the power of introspection: by silent dialogues, allies allow one to be aware of what other life forms or forces are thinking, or how they are influencing the seeker. They provide sustained experiences that allow one to see and learn the sacredness of life on earth, to recognize the manifestation of the holy in Living Lodge.

The Living Lodge and all its spiritual controllers finds its highest expression in the creative processes of life (*e.g.* babies). Life generating processes exchange and mingle powers that produce Míkmaw consciousness and language, which reflects these forces. It is based on states of being or verbs, rather than nouns.¹³³ They hear singing in the wind not as poetry but as spirituality. From the sounds of the Living Lodge around them they create their speech and ideographs. Their consciousness or knowledge is contained as a form of aesthetic literacy—a symbolic literacy and an oral tradition—derived from the flux of the Living Lodge. Most Míkmaq favour subtlety and poetic understatement as modes of expressing the holiness of the Living Lodge. Meaning is derived from the context or relations of things. For the Míkmaq, symbolic literacy and prayer are considered art—an act of expression that makes evident much of the unique sensibility of their soul.

Similar to other indigenous people, the Míkmaq do not regard their territories as “natural”. Instead, they view it as created by interactions between their ancestors and the ancestors of other life forms or species. Every tree, every shore, every mist in the woods, every clearing is holy in their memory and experience, recalling not only their lives but also the lives of their ancestors since the world began. Hence, the entire landscape is a symbolic historical and educational record, testifying to the unique experience and identity of the people. All physiographic features within Míkmáki have ancient names in Míkmaq language that witnesses their knowledge of its resources and continuous use of the land.¹³⁴ These names have been transcribed by the explorers and missionaries.¹³⁵

133. Like the structure of Algonquian languages, Míkmaq language is distinct from English. They created sounds out of the forces in the ecology, the verbs, rather than the noun-object orientation of English. Thus many ideas in English are expressed in Míkmaq as verbs. English nouns can be created out of Míkmaw verbs. See Battiste, *supra* note 8; Fidelholtz, *supra* note 104 and Henderson, *supra* note 104.

134. For example, the names of the seven districts represent this knowledge system. *Sikniktewaq* district (now New Brunswick) is the name for the low grinding sounds the glaciers of the Ice Age made as it turned a river into a gulf and created *Epekwith* ([land] floating above the water, or Prince Edward Island). *Epekwith* and *Piktukeway* (explosion) comprise another district. *Piktukeway* is named for the big explosion that created the harbour, finished the gulf, and separated *Epekwith* from the mainland. *Kwapékewaq* (“last land of the people” or Gaspe Bay Peninsula) is named for the treaty with the Mohawk and the transfer of the land that ended a conflict. *Sipeknékatik* district (“place of wild potatoes or ground nut”) is known for the wild potatoes that grew there (Halifax to Amherst). *Eskikewag* district (“skin dresser’s territory”) district is named for its green lands and large animal population, and its fur skinning activities (Halifax to Canso). *Kespukwith* district is the “lands ending or end of territorial boundaries”(Annapolis Royal to Cape Sable). *Unamákik* district is the “place of fog” (from Cape Breton Island to Newfoundland).

135. P. Pacifique, “Le Pays des Micmac” (1927–1935) vols. 21–23, 25, 27 and 28 *Bulletin de la Société de Géographie de Québec*.

The Míkmaq are not inclined to make vast philosophical judgments or to create such an elaborate system of thought about the Living Lodge; they do not believe that the world placed some spirits in a superior position to others. Of course they're not perfect, but they have devised a code of behaviour to which they are equal—instead of a morality impossible to realize. This sacred order was never viewed as a commodity that could be sold, only shared.

c. *Netukulimk*

The allied people were organized through extended family structures. They identified with a hunting district (*sakamowti*), certain hunting and fishing stations under the responsibility of certain families, and the settlements (*wigamow*) that belonged to each of them. From each district, *wigamow* or settlement of kinsmen and their dependents, the Santé Mawiomi or Grand Council was created. The Mawiomi or Council recognize one or more *kep'ten* ("captains") to show the people the good path, to help them with gifts of knowledge and goods, and to sit with the whole Mawiomi as the government of all the Míkmaq. From among themselves the *kep'ten* recognize a *jisagamow* ("grand chief"), a *jikap'ten* ("grand captain"), both to guide them and one to speak for them, and from others of good spirit they choose advisers and speakers, or *putu's*, as well as the leader of the warriors or *smankus*.

The authority of this sacred order was never viewed as a commodity that could be sold, only shared. Government always has been and is spiritual, persuasive, and noncoercive. The cruelties of repressive laws and majoritarian oppression were unknown until the recent interventions of European habits and laws. The continuity and authority of the Mawiomi exist in Míkmaw culture, in a common bond and vision that transcends temporary interests. This bond arises naturally from the fate of being born into a family (*munijinik*), community (*wikamow*), territory (*míkmáki*), and people (*kinuk*).

A respectful human could participate in the consciousness and order, but could not possess or own them. The allied people felt they were held by the spiritual forces of the land. Inherent in their worldview is a conviction that the universe contained a limited amount of energy (*muntu*), that is continually running down¹³⁶ and hence requires renewal by all participants. This conception of a sacred order as dynamic, finite, and

136. Most indigenous people have traditional narratives of ecological catastrophes which taught them about what modern science calls "entropy".

fragile has important consequences for the way indigenous peoples manage and participate in the use of the resources.

The relationship between the Míkmaq and the land embodies the essence of the intimate sacred order. As humans, they have and retain an obligation to protect the order and a right to share its uses, but only the future unborn children in the invisible sacred realm of the next seven generations had any ultimate ownership of the land. In the custom of the Míkmaq, the Santé Mawíomi was and is the trustee of the sacred order and territory for the future generations. Part of its duty is to regulate the natural resources of Míkmáki among the allied people and through the Nikmanen trading customs increase the bio-diversity. This is more of a management right to ensure discipline in consumption of the resources, rather than the concept of ownership.

Inherent in this sacred order is the conviction that the resources had to be renewed as well as shared. Rather than managed, which implied human domination, the Míkmaq developed rituals for sharing or harmonizing the human and spiritual realms.¹³⁷ These renewal rituals and ceremonies brought the people and the land into balance thereby achieving basic subsistence and material well-being. These rituals and ceremonies created a harmony which emphasized stability and the minimization of risk for the harvesting of the resources rather than growth and the accumulation of wealth. The quest for harmony also created the need for diversification by trade and modification of habitats,¹³⁸ thereby developing surplus capacities and sharing.

Sharing of resources is the equivalent of consensus in creating governing structures. Just as the managers of shared resources sustain them, the leaders of communities, districts, and nations are managers of shared authority and spaces.¹³⁹ Sharing of the harvest is neither random nor universal, but based on patterns, kinship and correspondence.¹⁴⁰ It is an honour, a duty and a privilege; those who have a little more to share may gain prestige, influence and dignity.

137. For example, the Mawíomi among the Míkmaq became the keeper of the game, and the Crees have an elder as the hunting boss which adapts their thinking to the land [*tapitam*].

138. Fire, for example, was a widespread use of niche modification which maintained forest bio-diversity. It was important for collecting plants as medicines and for creating fields and traps for game animals, such as deer, elk, and moose.

139. R. Barsh, "The Nature and spirit of North American political systems" (1986) 10:3 Am. Indian Q. 181.

140. R. Barsh, "Backfire from Boldt: The judicial transformation of a Coast Salish proprietary fishery into a commons" (1991) 4 Western Legal History 1; A. Sillitoe, *Roots Of The Earth: Crops In The Highlands Of Papua New Guinea* (Dover, N.H.: Manchester University Press, 1983).

Managing a space and sharing is viewed as an integral part of the ethical development of a Míkmaq. It is important for the development of family, friendship and self. Míkmaq see no distinction between collective or individual interests. The goal of creating a sustaining space and a sharing and caring community in which everyone can participate and belong is the ultimate interest. Everyone must come to this realization; they must come to understand the beauty and dignity of maintaining, protecting, and renewing their family space and traditions. Through this developmental process, Míkmaq establish a clear understanding of oneself as a human and in relation to the environment. Through this process, Míkmaq understand the needs of the biological realms and the ethical significance of their desires, freedoms and responsibilities.

In Míkmaq language, “*netukulimk*” refers to the responsibility of a Míkmaq user to be mindful that the Life Givers and the keepers have consented to the conditional use of the resources being managed. The prime condition was sharing of the harvest among the communities of the place. Feasts were an integral part of the sharing of the resources. Míkmaw could rarely understand the possessive nature of the Europeans.¹⁴¹ Moreover, sharing manages demand, and serves to mitigate many of the incentives to consume a resource.

These sentiments of sharing are generated by the Míkmaw concept of space. Space is described as spirals of a relative network of family sites and paths among resources.¹⁴² Within the Míkmaq words for particular locations are encoded not only the use of the land but also its special significance for families. Certain families or peoples had “rights” to use certain animals, plants, materials and access sites (hunting and fish traps) because of their particular relationship. Their indigenous narratives, comprised in songs and stories, and the ceremonies associated with each space, link the present and the past.

Conceptually, these differences reflect the difference between the Míkmaw worldview and the European worldview. In the Euro-British

141. As one missionary stated “With all their vices, they are exceedingly vainglorious: they think they are better more valiant and more ingenious than the French; and, what is difficult to believe, richer than we are. They consider themselves better than the French; ‘For,’ they say, ‘you are always fighting and quarreling among yourselves; we live peaceably. You are envious and are all the time slandering each other; you are thieves and deceivers; you are covetous and are neither generous nor kind; as for us, if we have a morsel of bread we share it with our neighbor.’” R.G. Thwaites, ed., *Jesuit Relations and Allied Documents*, 73 vols. (Cleveland: Burrows Brothers, 1869)(Reprinted: Pageant, N.Y.: 1959) at 1:173) [hereinafter JR].

142. T. Ingold, *The Appropriation of Nature: Essays on Human Ecology and Social Relations* (Iowa City: University of Iowa Press, 1987); H. Brody, *Maps and Dreams: Indians and the British Columbia Frontier* (N.Y.: Pantheon Books, 1982); Tanner, *supra* note 103; Speck, *supra* note 120 at 206.

world, sharing has traditionally been seen as a threat to the personal autonomy or choice, thus a threat to legal rights and responsibilities.¹⁴³ Altruism, a European morality of sharing and sacrifice within a particular relationship, is usually seen as inconsistent with the modern theory of individualism.

The Míkmaw view provides an alternative vision of a proper social order. The indigenous nations were generous, sharing whatever they possessed with an open handedness that amazed the immigrants. Greed was always considered a wrong, while private management of the resource, along with a bundle of rights and duties, was the legal norm.

Míkmaw “property rights” were usually obtained through kinship rather than use or purchase. They were endowments or legacies. Everyone has relative claims, through birth and marriage, to the use of a great variety of sites and resources, which can also be claimed by others on the same ground. Often the word for kinship and ownership are the same. It is inconceivable in a Míkmaq worldview, however, that an individual could claim an exclusive use or entitlement to a particular site or that any family could lose their relationship to a site. This concept applied both to men and women.

Renewal ceremonies also emphasize the relationship between space and claims in the indigenous Míkmaw worldview. The places of certain ceremonies are bounded to a specific location and can be transported. They symbolically reiterated and renewed the ancient relationships between a particular family and people and a particular ecosystem. The grounding in a particular ecosystem has been categorized as “geopietry”.¹⁴⁴

In the renewal ceremonies, various family claims are continually being asserted and adjusted. While each renegotiation affects family allegiance and identity, this is seen as relatively unimportant; the crucial factor is the periodic equalization of shared rights among the collective families.

This process of resource adjustment created considerable self-serving confusion among the Europeans. They deduced that the indigenous Míkmaw tenure systems were essentially collective or communal and that no individual owned the land.¹⁴⁵ Indeed that is the case, but what

143. A similar tension is present in the modern general redistributive welfare scheme, equalization payments and external standards of sharing in the private market autonomy theories.

144. Inglis, *supra* note 103; Vecsey, *supra* note 103; see also J.E. Brown, *The Spiritual Legacy of the American Indian* (New York: Crossroad, 1982). In practical terms, this grounding in a space means that indigenous people attribute great significance even to minute changes in the ecosystem, and carefully note its condition as they move through it. Observation was recalled every night around the campfire and passed on to all family and friends. The same process still happens in most reserves.

145. See Bault, *supra* note 31.

created the perplexity was that those resources were a private family entitlement. The confusion is unraveled when one understands that in an indigenous tenure the role of the family or individual is more managerial rather than proprietary.

What is not understood by outsiders was that each family or personal claim to a resource or space is based on permissions by local, regional or national consensus. While these boundaries may be imprecise or shifting to an outsider, they are part of a complex tenure based on sharing rather than exclusive use. Very few distinctions exist between personal and real property. If these distinctions exist it is to give dignity and honour to the Míkmaw or family by sharing them, *e.g.*, to exhibit their generosity to others.

The sacred order itself is never individualized. The tenure is held for future generations. A family or an “individual” might enjoy wide administrative authority over a resource or space (*a legacy*), but they have no right to withhold the use of the resources or the products of their use to another insider. The system of kinship relations unites everyone in a web of complementary rights and responsibilities. Each person is simultaneously a parent, child, uncle, aunt, or cousin to others. This implicit order is non-hierarchical and reproduces itself without the need to accumulate more people, land, or goods. The continued strength of any claim in the indigenous tenure is a function of sound management and generosity. These legacies are “strong” enough to create incentives to conserve, but “weak” enough to create incentives to share.

The Míkmaq legacy became vested in a family or person after seven generations of sound management and generosity. A right of succession or inheritance is based on actual services to the elderly managers as well as management of the resource, rather than kinship.

Due to their understanding of the surrounding ecology and their value system of the Living Lodge, scarcity of resources was rare among the Míkmaq. Each family and person had a unique role in harvesting the ecology.¹⁴⁶ There were few customary principles that governed access to and control of material resources; however, there were clear rituals about

146. This map is a duplication of Speck’s map found in Crown Land Rights and Hunting and Fishing Rights of Micmac Indians in the Province of Nova Scotia (Membertou: U.N.S.I., 1976). See Map I and II on back cover of monograph: F.G. Speck, *Beothuk and Micmac* (1922) [monograph]. This book is a survey of family hunting territories in Nova Scotia, Prince Edward Island and Newfoundland for the Division of Anthropology of the Geological Survey of Canada. Other literature suggests that there exists a similar survey of New Brunswick, but it has not been found. The allocation of hunting districts was originally mentioned in Le Clercq, *supra* note 101 at 234–38. Although not included there were similar allocations of river systems and their surrounding lands or fishing stations for fishing, and for harvesting the bounty of the land.

sharing the resources. Each family leader and their resources were linked. If one family faltered in the management of their resources, for any reason or in any manner, their extended family or allies in other districts united with the family to resolve the problem. If family management of a resource was a persistent problem creating scarcity or discomforts, the *saya* or *sakamowti* was criticized and if necessary the situation adjusted by the Mawíomi.

There are other examples in Míkmaw order that address the root causes of scarcity, thus preventing it from becoming a problem. In the difficult situations where any Míkmaw took food or clothing, the local settlement (*wikamou*) discussed the reasons something was taken, and if poverty or need was found, then the taker was not punished. In these situations, typically the extended family and settlement were criticized, since they failed to be aware of the poverty and had not taken care to provide for the needs of its members or visitors. If the predicament continued, the district leaders (*sakamowti*) or Mawíomi provided the takers with necessary space and responsibilities to harvest food, build shelter or make a new settlement.

Additionally, any district chief or family leader who was negligent or careless with the resources or did not deal in a generous and fair manner with other Míkmaq was deprived of respect, dignity, and ultimately their responsibilities. Similarly, if travelers or visitors within the sacred space had anything taken from them, the district chief and local community were responsible, because of their negligence and lack of watchfulness. These were grand and fundamental maxims of the customary law among the Míkmaq in the land of friendships.¹⁴⁷ Most of these maxims were directly incorporated in the treaties with the Imperial Crown and form the context of the treaties.

147. See *supra* note 104.

III. *Míkmaw Tenure in Prerogative Treaties*

[I]ndians were protected in the possession of the lands they occupied, and were considered as owning them by a perpetual right of possession in the tribe or nation inhabiting them, as their common property. . . . Subject to this right of possession, the ultimate fee was in the crown. . . . Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected. . . .

Justice Baldwin of U.S. Supreme Court¹⁴⁸

Míkmaw attitudes toward sharing of the sacred space are evident in almost every treaty with the British Crown. The prerogative Treaties reserve their land tenure and beneficial interest under the protection of the Crown and separate from the provinces.¹⁴⁹ These Treaties were forged from the ancient ecological covenants with the Keepers of the *Mntu* and from their *Nikmanen* law. The context for the prerogative Treaties was the ancient Nikmanen Order.

1. *Nikmanen Order*

The boundaries of the Míkmaw Nation remained unchanged for centuries, despite shifting alliances among their allies.¹⁵⁰ They were surrounded by either their Nikmaq or the ocean. The *Nikmaq* [allies or friends] of the Míkmaw Nation included: the *Beothuk* (up river people) in Newfoundland; the *Wulustukw keuwiuk* (beautiful river people or Maliseet-Passamaquoddy) of southwestern New Brunswick and northeastern Maine; the Eastern “*Abanaki*” of Maine to Ottawa valley, various

148. *Mitchel*, *supra* note 79 at 745–46. Strong J. in *St. Catharines Milling*, *supra* note 5, after noting Chancellor Kent Commentaries summary of the *Worcester* and *Mitchel* decisions, stated that the traditional colonial policy relative to Indians and their lands “had ripened into well established rules of law, and that the result is that the lands in the possession of the Indians are, until surrendered, treated as their rightful though inalienable property, so far as the possession and enjoyment are concerned; in other words, that the *dominium utile* is recognized as belonging to or reserved for the Indians, . . .” (cited to S.C.R. at 612).

149. Imperial treaties of a political nature are usually called prerogative treaties and labeled “sovereignty” treaties (*R. v. Francis*, [1956] S.C.R. 618 at 625 per Rand J.). Prerogative treaties are documents of peace that recognize the independence of states, or establish boundaries, or establish privileges and immunities, or deal with the rights of belligerents (*ibid.* at 626). It is said that the essential feature of a prerogative treaty is the “exceptional” or “extraordinary” nature of the circumstances of its formation (A.M. Jacomy-Millette, *Treaty Law in Canada* (Ottawa, University of Ottawa Press, 1975) at 207).

150. See generally Míkmaw society in Eurocentric literature, P. Nietfeld, “Determinants of Aboriginal Micmac Political Structure” (Ph.D. dissertation, University of New Mexico, 1981); B. Hoffman, “The Historical Ethnography of the Micmac of the Sixteenth and Seventeenth Centuries” (Ph.D. dissertation, University of California, Berkeley, 1955).

Montagnais groups north of the Saint Lawrence River, “Eskimo” or Inuit for the Strait of Belle Isle; and in the 1500s, the Saint Lawrence *Haudenosaunee* (Mohawk).

The *Nikmaq* of the Míkmaw Nation usually spoke a similar language and lived in similar maritime and forest environments. In the past, the allies had consensually united and disunited with the Míkmaw Nation according to their desires. Still, a cultural consciousness maintained unity between the allies, although each respected the other’s diverse responses to common problems and experiences. Their shared language and consciousness formed the basis of a transnational order.

The *Nikmanen* Order illustrates the development of a voluntary transnational law that was not based on the family structure. Instead the order was based on consensual agreements among the indigenous federations and European monarchies.¹⁵¹ The Europeans were careful to record the Míkmaq’s *Nikmanen* or transnational confederations.¹⁵² Confronted with a well-populated land, an organized government and an elegant economic order, the Europeans were forced to develop new concepts of law and rights to deal with the allied people and their vast system of “friends”. From a *Nikmanen* perspective, relations with the Europeans or guests were part of a continuous process of trying to make peace or staying neutral in European conflicts.

Sometimes the allies cooperated in raids (called “wars” by Europeans) against common enemies, particularly against the Mohawk and the “*Armochiquois*”.¹⁵³ The purposes of these raids were not for territorial acquisition or wealth, but rather they were seen as means to end a conflict or enforce customary international trading laws.¹⁵⁴ The *Nikmanen* order was not based on a negotiated peace, but rather maintaining and strengthening the peace. They saw peace as a state of mind calling for self-discipline and forgiveness. They understood that a crisis-based council

151. For a description of the Eastern confederacies, see F.G. Speck, “The Eastern Algonkian Wabanaki Confederacy” (1915) 17 Am. Anthropologist 492; W. Walker, G. Buesing & R. Conkling, “A Chronological Account of the Wabanaki Confederacy” in E.L. Schusky, ed., *Political Organization of Native North Americans* (Washington D.C.: University Press of America, 1980) at 41. The Confederacy was called *lakutuwi* (or kinship) in Passamaquoddy-Maliseet dialect of Algonquian language, and *lakuti* in Míkmawq.

152. JR, *supra* note 141 vol. 3 at 87 and 90; Le Clercq, *supra* note 101 at 234.

153. Southern members of the Wabanaki Confederacy that were named by Champlain. They lived from the Saco River in extreme southwest Maine to Cape Cod. They were primarily an agricultural people with whom the Míkmaw traded. The northern members addressed them and their more southern allies to the Delaware Nation (*Lenape*) as *sawonehsonuk*.

154. See A. Morrison, ed., “Membertou’s Raid on the Choacoet Almouchiquois: the Micmac Sack of Saco in 1607” trans. by C.J. Goetz, in W. Cowan, ed., *Papers of the Sixth Algonquian Conference* (Ottawa: National Museums of Canada, 1975); Hoffman, *supra* note 150.

could not implement a policy of disengagement. Presents and satisfactions for the military raids and the loss suffered encouraged good feelings, amity, and international harmony.

A united Confederacy emerged from these conflicts, and created the Nikmanen Order. At the time of the arrival of the Europeans, the Wabanaki Confederacy comprised the Penobscot, Passamaquoddy, Malecite, and the Míkmawq.¹⁵⁵ It was united with the Ottawa Confederacy, comprising the Mohawk of Caughnawaga and Oka, the Têtes de Boule, and the Ottawa.¹⁵⁶ The extended confederacy of more than fourteen nations¹⁵⁷ had several descriptions.¹⁵⁸ This continental Confederacy, usually called Great Council Fire by the Wabanaki, was renewed in 1701

155. As a confederacy they were addressed as *Waponahkiyik*; Penobscot are called *Panwapskewiyik*; Passamaquoddy are *Peskotomuhkatiyik*; Malecites are *Wolastoqiyik*; and Míkmawq were *Mihkomak*.

156. The Wabanakis addressed the Mohawks as *Meqiyik*, those of Caughnawauga as *Kanawkiyik*, those of Oka as *Kanasatakiyik*, the Têtes de Boule as *Epokatpacik*, and the Ottawa as *Atuwak*. See Leavitt & Francis, *Wapapi Akonutomakonol, The Wampum Records* (Fredericton: Micmac-Maliseet Institute, University of New Brunswick, 1990) at 13. *Wapapi Akonutomakonol* is “talking white beads” that comprised the records of the reason and purpose for the confederation.

157. “Nit lahalusonikikon olu nit nit mawe laukutuwaki kisolutomuwakon. Skicinuwok newanku kehsuhkomksuwok kenu olu kceyaw i milicoposultuwok. Msi te yuktok skicinuwok ‘tahuwi oliyania naks wikiniya tepahkalusioniw. . . . Nit olu tan tehpw wikit tepahkalusioniw ‘tahuwi ciksotonomon tan eyikil tpaskuwakonol, or kosona osemha. Nit wikuwam tepahkalusioniw itomuiw msi te kehsit skicin kisihtaq cuwi sankewi pomawsu. Katama apc cikawiyutulitiwon. Cuwi oli pomawsuwok tahuwu weswestulticik[,] witsehkehsulticik peskuwol te ‘nikihuwal’.

(As for the fence implemented, that [is] that confederacy agreement. The Indians [are] fourteen tribes, but many different groups. All of the Indians had to go and live inside the fence. . . . And as for whoever dwelled within the fence, he or she had to obey whatever laws were there or be whipped. That house within the fence signifies every individual Indian who made it must live peacefully. There would be no bothering one another anymore. They had to live like brothers, sisters, [with] the same parent) (*Ibid.* at 57).

158. The Wabanaki concept for joining one another in a confederacy is ‘tolakutiniya (literally they be related by kinship ‘one other they were’). The Passamaquoddy, Malecite and Míkmaw called it the *Putusosuwakon* or the Convention Council or *kcimawe putuwosuwakon* that is a great joint council meeting. To meet in council is *Putuwosin*; when everybody meets in council it is *Putuwosiniya*, and their councilors were addressed as *putuwosiwinum*. In a council meeting, the alliance was addressed as *kcilakutuwakon* or Great kinship or Confederacy. However, the Penobscot as speakers for the Wabanakis often used the terms *Peskuwok* (those united into One) or *Kisakutuwok* (They are Completely United or already related). The Confederacy laws were called *tpaskuwakonol*, or measures. All these laws had to be made in wampum, they would be read annually or when someone asked what had happened on that occasion (*Msiw yuhtol tpaskuwakonol cuwi lihasuwol wapapik wecihc kisokitasik tan tehpw eli kinuwi tpiyak*) See *Ibid.* at 51–61. After King William’s War (1688–1699) and King Georges’s War (1744–1749), this Confederacy was extended to manage the European warfare that affected the nations, this continental Confederacy was called the Great Council Fire. Because of unfamiliarity with the Aboriginal languages, researchers often confuse the Great Convention Council with the Great Council Fire. The Great Council Fire was the first confederacy in Canada. See Speck, *supra* note 151.

and 1749, and extended the alliance to the Lakes Confederacy of the Obijwa¹⁵⁹ and the Cree (*Nehiyaw*) Confederacy,¹⁶⁰ who were related to the Blackfoot and Lakota Confederacies.¹⁶¹ This interconnectedness was continued in the treaty process with the Crown.

The extension of indigenous transnational law to include the British Sovereign is reflected in the Treaties. The early Treaties can be viewed as an extended Aboriginal system of tensions or bridges linking different worldviews to a consensual order. The Georgian treaties typically were made according to Aboriginal, rather than European, protocols.¹⁶² The Aboriginal Nations conceived of Treaties as living agreements rather than mere documents. Often the cordiality of the annual meeting and discussion was seen as more important than the substance of the terms. Propositions were made orally at conferences and agreed to one by one with the exchange of symbolic gifts or wampum. Beyond the particular framework of obligations or rights agreed upon, the agreements created a permanent, living relationship. Typically this relationship was expressed in terms of an extended kinship—the King as “father” and the colonist as “brothers”. This is consistent with an indigenous worldview.¹⁶³

To preserve the kinship, as within a natural family, the Aboriginal nations and the representatives of the King were obliged to meet from time to time to renew the friendship, to reconcile misunderstandings, and to share with each other understandings, experiences and wealth. Thus most of the treaties were in reality renewal ceremonies of subsisting relationships. In documentary form these ceremonies mostly consisted of a transcript of the proceedings and the substance of the agreement summarizing the nature of the international kinship. This was often characterized by the metaphor of the chain. By European standards the agreements were often unnervingly succinct, even vague, but this was not the result of failure to agree, nor of naiveté. It was the result of abiding by tribal protocol and worldviews, the acceptance by the British Sovereign of the aboriginal flexible, kin like nature of the confederation. These treaties were never intended to locate the Aboriginal nations under the Crown’s direct authority or under the immigrant governments, since they

159. The Wabanaki addressed these Confederacies as *Sonutsekotonuk*.

160. The Wabanaki addressed this Confederacy as *Oquathu'kuk*.

161. The Wabanaki addressed these Confederacies as *Ksiyahsonuk*.

162. The use of First Nations’ protocols was a common treaty practice. See Leavitt, *supra* note 156; J.G.A. Pocock, “Law, Sovereignty and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi” (Irdell Memorial Lecture, Department of History, University of Lancaster, 10 October 1991) [unpublished].

163. R.L. Barsh & J.Y. Henderson, “Aboriginal Rights, Treaty Rights, and Human Rights: Indian Tribes and Constitutional Renewal” (1982) 17:2 J.Can. Studies 55.

had no concept of rules from above and did not tolerate such a conception of rule. The treaties were a partnership. They merely created a consensual order and a protective relationship¹⁶⁴ reflecting both an Aboriginal view of order and procedure, and a Eurocentric view of order.¹⁶⁵

The prerogative Treaties enabled the two worldviews and different societies to make a new normative world using the irony of jurisdictions, obligations and rights. To live in the new legal world required each culture to know not only the meaning of the alliance and its terms, but also the connections or transformations that resulted when one normative system passed through another. The prerogative Treaties constructed, through mutual consent, a new normative system out of the various constructions of reality and visions of what the world might be.

For example, the Wabanaki and Míkmaq applied the customary concept of harmony and forgiveness to the English. Specifically, article 2 of the *Míkmaw Compact, 1752*, stated that “all Transactions during the Late War on both sides be buried in Oblivion with the Hatchet.”¹⁶⁶ This fragile quest for an explicit order between the diverse federations through consensual Treaties provided the foundation upon which developed the first British Empire and their colonies, and eventually the United Kingdom.¹⁶⁷

2. *Prerogative Treaties*

Since the mere acquisition of sovereignty by European powers over Aboriginal lands by European treaties or conquest did not extinguish

164. See H. De Puy, ed., *Bibliography of the English Colonial Treaties with the American Indians* (1917); J. Borrows, *supra* note 47; Slattery, *supra* note 61; B. Wildsmith, “Treaty Responsibilities: A Co-Relational Model” (1992) special ed. U.B.C. L. Rev. 324; B. Slattery, “Aboriginal Sovereignty and Imperial Claims” (1991) Osgoode Hall L.J. 681 at 683.

165. RCAP, *supra* note 47.

166. In Leavitt, *supra* note 156 at 54, the idea of creating the Convention Council was expressed “Yuhtol pekankonikil tomkikonossis olu naka tapihik pahqilil cuwi puskonasuwol askomiw” or in translation “These bloody hatchets, bows, and arrows, however, must be buried forever.” Compare to Míkmaw Compact, 1752, art. 2, text and note *infra* 177.

167. J.Y. Henderson, “The Status of Indian Treaties in International Law” (Paper presented to the 1993 Conference of the Canadian Council of International Law, Ottawa, 21–23 October 1993) at 132; D.V. Jones, *License For Empire: Colonialism By Treaty In Early America* (Chicago: University of Chicago Press, 1982); See C. Alexandrowicz, *The European-African Confrontation: A Study in Treaty-Making* (Leiden: A.W. Sijthoff, 1973); C. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (Oxford: Clarendon Press, 1967); F. Cohen, *Federal Indian Law* (Washington: Govt. Printing Services, 1942); M.F. Lindley, *The Acquisition of Backward Territory* (London: Longmans, Green & Co., 1926); A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories*, rev. ed. (Saskatoon: Fifth House Publishers, 1991).

Aboriginal tenure,¹⁶⁸ the source of British authority in North America was created by confederations with the Aboriginal peoples around prerogative Treaties. In the North Atlantic territory, the fundamental principles of the treaty order were forged in the Treaty of Utrecht (1713), and realized in the Wabanaki Compact (1713–1725), and the Mi'kmaq Compact (1752–1789). Conforming with the holistic Aboriginal consciousness, the Wabanaki and Mi'kmaq Compacts were interconnected and complementary; they were not autonomous agreements. Between 1693 and 1786, more than fifty treaty conferences defined the relationship between the Aboriginal nations of Atlantic Canada and the Imperial Crown.¹⁶⁹ These documents are called the Georgian treaties. These treaties will be closely examined to ascertain the context of the Aboriginal-Crown relationship.

a. *Treaty of Utrecht (1713)*

This was the first European treaty to acknowledge English political authority in North America. In section XII, the French granted to the British political authority all their rights and pretension to the ancient limits of L'Acadie, which was renamed Nova Scotia; the City of Port Royal, now called Annapolis Royal and to the Island of Newfoundland. Britain promised, in turn, not to disturb the Aboriginal nations, who had been “Friends” to France during the war.

In practice, the “Friends”¹⁷⁰ of Great Britain and France continued their freedom of trade, protected by section XV (15) of the *Treaty of Utrecht* which stated:

168. In British law, a cession of territory by a treaty is a public international law concept. As I. Brownlie, *Principles of Public International Law*, 4th ed. (Oxford: Clarendon Press, 1990) explains “The term ‘cession’ is used to cover a variety of types of transactions, and it is important to seek the legal realities behind the term in each case.” (at 133, n.36). Both treaties of cession and conquest do not terminate the original rights in the territory, expressions of positive law are required to extinguish those rights. In British law, the reserved rights doctrine is called the doctrine of continuity in the classic theory of the common law, (*Campbell v. Hall* (1774), Loftt 655, 1 Cwop. 204 (K.B.)), and in United States’ law it is called the doctrine of tribal sovereignty (Cohen, *supra* note 167 at 122).

169. A. Levi et al., “We Should Walk in the Tract Mr. Drummer Made” (Distributed at New Brunswick Chiefs’ Forum on Treaty Issues, St. John, New Brunswick, 1–2 October 1992) [unpublished]. See also *The Mi'Kmaq Treaty Handbook* (Native Communication Society of Nova Scotia, 1987); W.E. Daugherty, *Maritime Indian Treaties in Historical Perspectives* (Canada: Indian and Northern Affairs, 1981); *Crown Land Rights and Hunting and Fishing Rights of Micmac Indians in the Province of Nova Scotia*, rev. ed. (Union of Nova Scotia Indians, 1976).

170. This phrase is derived from Algonquian language and the Crown’s “alien friend in league” in *Calvin's Case*, *supra* note 18.

The Subjects of France Inhabiting Canada and others, shall hereafter give no Hindrance or Molestation to the Five Nations or Cantons of Indians, Subject to the Dominion of Great Britain; nor to the other aboriginal of America, who are Friends to the same. In like manner, the Subjects of Great Britain, shall behave themselves Peaceably toward the Americas, who are Subjects or Friends to France; and on both Sides, they shall enjoy full Liberty of going and coming on Account of Trade. As also the aboriginal of those Countries shall, with the same Liberty, Resort, as they please, to the British and French Colonies, for Promoting Trade on one Side, and the other without any Molestation or Hindrance, either on the Part of the British Subjects or of the French.¹⁷¹

In the eighteenth century, the terms “liberty” and “franchise” were used interchangeably to denote royal grants of exclusive economic rights. Sir Matthew Hale wrote that “liberties or preeminences” were created under the King’s *jura regalia*. Liberties included “jurisdictions, franchises, and exemptions” that are grounded in express grants or charters or in the presumption of long usage.¹⁷² These liberties were exclusive, inviolable prerogative franchises which limited both the Sovereign, and subsequent Parliamentary or Colonial legislation.¹⁷³ Thus, section XV recognizes and affirms a prerogative franchise of free trade across the treaty borders to the Aboriginal nations.

Additionally, as a part of the free trade agreement the European Crowns agreed in section XV that Aboriginals “shall, with the same Liberty, Resort, as they please”. This prohibits the Crown or colonists from dispossessing the Aboriginals within their agreed upon borders, thus affirming their aboriginal entitlement to their lands under treaty boundaries.

Moreover, a commission was established to define the scope of the “ancient limits of Acadia” and to determine who were the subjects and friends of the respective crowns.¹⁷⁴ The French commissioners interpreted the claim to pertain only to actual French settlements, stressing the unextinguished Aboriginal dominion of the Míkmaq. The British commissioners argued for a broader interpretation, including absentee French seigniorial grants.¹⁷⁵ However, as I shall argue in the following two sections, the prerogative Treaties with the Wabanaki and Míkmaw nations independently resolved the jurisdictional quandary.

171. A. Toynbee, *Major Peace Treaties of Modern History 1648–1967*, ed. by F.L. Israel, vol. 1 (N.Y.: McGraw-Hill, 1967) at 179.

172. *The Prerogative of the King D, Yale*, ed., vol. 92 (London: Seldon Society, 1976) at 201.

173. E. Chitty, *Treaties of the Law of the Prerogatives of the Crown: and the Relative Duties and Rights of the Subject* (London: Joseph Butterworth & Son, 1820) at 119.

174. See Toynbee, *supra* note 171 at section XV.

175. W.S. McNutt, *The Atlantic Provinces: The Emergence of Colonial Society 1712–1857* (Toronto: McClelland & Stewart, 1965) at 10–14 and 38–41.

b. *Wabanaki Compact (1713–1760)*

After European ratification of the Treaty of Utrecht, the Crown extended the ratification process to America. This was an attempt to consolidate British external authority through the voluntary consent of the Aboriginal nations. This transfer of authority between European Crowns was ratified by the Wabanaki Confederacy¹⁷⁶ in 1713 and 1714.¹⁷⁷ At Portsmouth, New Hampshire, in 1713, each of the member tribes expressed the “free consent of all the Indians” belonging to their “several rivers and places” to be the lawful subjects of Queen Anne, with each tribe promising its “hearty Subjection & Obedience unto the Commonwealth at Boston” as well as the Crown of Great Britain.¹⁷⁸ The tribal delegates agreed to “cease and forbear all acts of hostility” towards British persons and their estates and to “maintaine a firm & constant amity & friendship” with them. They agreed not to entertain any treasonable conspiracy with other nations to disturb the British inhabitants.¹⁷⁹

Article 3 of these treaties clarified the scope of the British settlements in Wabanaki dominion and, at the same time, reserved Aboriginal dominion and liberties as separate from those of the British.

That her Majesty’s Subjects, the English, 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

176. Wabanaki (*waponahkik*) is the sound describing the space of the dawn or land of dawn. *Uhkomiks* is their name for a related group, *kehsuhkomiksit* is many related groups or tribes. *Sakamo* is a chief, *sakamoak* is chiefs; *kcisakomak* is great chiefs. *Skicinu* is a term for the Indians, *skicin* is an Indian.

177. R.A. Cumming & N.H. Mickenberg, eds., *Native Rights in Canada* (Toronto: Indian-Inuit Assoc. of Canada, 1972) at 295ff [hereinafter CM]. The Wabanaki Treaties with the Crown begin with the Treaty of 1676 with the Sacos, Androscoggins, Kennebecs, and Penobscots. In the Treaty of 1678 the English Crown recognized Wabanaki sovereignty and dominion in New England. The Wabanaki also entered into treaties in 1690, 1693, 1699. (*The Wabanakis of Maine and the Maritimes* (Bath, Maine, Maine Indian Program, 1989) at D89–90. Manuscript copies of the treaties are in Public Record Office (PRO), Colonial Office Series (CO), organized by date. The principal colonial correspondence is contained in the Colonial Office Series. They were reorganized by the Public Record Office in England earlier this century. Prior to this Nova Scotia had organized its records in Public Archives of Nova Scotia [PANS]. French sources are Archives Nationales, Paris [AN], Archives des Colonies [AC], Canada [C11A]. Other sources are the Public Archives of Canada [PAC], and Baxter, *Documentary History of the State of Maine* (Portland: Fred L. Tower Co. & Maine Historical Society, 1916) [DHM].

178. CM, *ibid.* at 296–99 in Article 1 and 7.

179. *Ibid.* at Article 2. This is similar to the *Wapapi Akonutomakonol* agreement (Leavitt, *supra* note 156 at 60), that if any nation or group disobeyed the Confederation or Wampum laws, the others together would watch them. (*Nit ha lohkalusonihikon naka ipis nihtol nit Wapapi Tpaskuwakonal. Tan wot pelsotok, ‘tahcuwi mawe skiyawal kehsuhkomiksicik.*)

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.¹⁸⁰

Misunderstandings and violations of the Wabanaki dominion protected by these Treaties created many military conflicts. The English assumed that the Wabanaki's permission gave them the sole and exclusive estates of the land, thereby renouncing any claim to the land.¹⁸¹ Under Nikamen law, the Wabanaki viewed the English settlements as "guests" with a right to share the land. In their view, they had given the colonists a chance to enter into a particular kind of relationship with the land.¹⁸² The treaty conference and treaties of 1717 were a way of working out this understanding and affirming the issue of land tenure and title.¹⁸³

180. *Ibid.* at 297 in Article 3. While this article is more specific than the *Wapapi Akonutomakononol*, it is similar. It creates an "implemented fence" or boundary between the British and the Wabanaki legal jurisdictions, so that there would be no bothering one another anymore (*supra* note 141). The concept of forever is *askomiw*. Compare the original Treaty of Falmouth, 1678 between the Abenakis and English that concluded King Philips War (1675–78) where it was agreed that the settlers were to enjoy their habitations and possessions unmolested, but Massachusetts Bay agreed to pay the Indians an annual quit rent "of a peck of corn" for every English family (K.M. Morrison, *The People of the Dawn: The Abenakis and their Relations with New England and New France 1600–1727* (Ph.D. Thesis, University of Maine, 1975) at 152).

181. See DMH, *supra* note 177 F16–M33, vol. 3 (Treaty Conference held 9–10 August, 1717). *E.g.* "The Gov.: They must Desist from any Pretension to the Lands which the English own."; "They must not call it their Land, for the English have bought it of them and their Ancestors"; "Tell them they must be sensible and satisfied that the English own this land, and have Deeds to shew, and set forth their Purchase from their Ancestors."

182. *Ibid.* *E.g.* *Wiwuran*, spokesman for the Wabanaki stated "We can't understand how our Lands have been purchased, what has been Alienated was by our Gift"; "We are a little uneasy concerning these Lands, but are willing the English shall possess all they have done, excepting Forts" (*ibid.*). See above part II.

183. *Ibid.* "Gov.: Tell them we will not take an Inch of their Land; nor will we part with an Inch of our own." The evening of August 10, the Governor received a letter from French Governor Vaudreville from the Wabanki priest. The letter stated that when Vandreville was lately in France, he enquired of the King of France, whether he had in any Treaty given away the Indians' Lands to the English, and that the French King told him, he had not, but was ready to succour the Indians, if their Lands were encroacht upon. (*ibid.*) The Governor rejected the letter as not worthy of his regard. However, the following day, August 11, the Wabanaki and the Crown "agreed in the Articles of Peace, that the English should Settle, where their Predecessors had done." (*ibid.*) In the 1717 Treaty they confirmed article 3 of the 1713 Treaty and added "And whereas, some rash and inconsiderate Persons amongst us, have molested some of our good fellow Subjects, the English, in the Possession of the Lands, and other illtreated them;—We do disapprove & condemn the same,—and freely consent that our English friends shall possess, enjoy & improve all the Lands which they have formerly possessed, and all which they have obtain a right & title unto, Hoping it will prove of mutual and reciprocal benefit and advantage to them & us, that they Cohabit with us" (CM, *supra* note 177 at 299.)

The Wabanaki Compact (1725) concluded at Boston ended Drummer's War.¹⁸⁴ It reflected a union of the terms of the Treaties of Utrecht, the *Wapapi Akonutomakonol*, and the previous Wabanaki Treaties. The "Several Tribes of Eastern Indians" were represented by the Wabanaki Confederacy; His Majesty was represented by the Lieutenant Governor Drummer of Massachusetts Bay. The *Wuastukwuk* or Malecite Nation of the Saint John River (*Wulstukw*) was also part of the Confederacy. The Wabanaki Compact renewed the 1693 political and geographical status quo of the existing treaties. To clarify its dual topics, the existing article 3 of the 1713–14 treaty was divided into two separate articles, 3 and 4, in the Wabanaki Compact. Article 3 of the compact promised that the English 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, inlets[,] Shoars [,] 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.¹⁸⁵

The Confederacy's predominant concern was intrusion on established territorial boundaries by the British settlers.¹⁸⁶ One of the spokesmen directly asked the treaty commissioners if the term "settlements" meant that the "English design[ed] to Build Houses further than there are any Houses now Built or Settlements made?" "When we come to settle the bounds" the treaty commissioners answered, "we shall neither Build or Settle anywhere but within our Bounds so settled [under the 1693 treaty] without your consent."¹⁸⁷ Later in the negotiations, the Confederacy sought to clarify the concept of "former Settlements" in Article 3:

We desire to know the right meaning and understanding of two words. As to the Deed of Land as far as St. Georges Fort, whether Houses will be built & Settlements made as far as the English have purchased. We are free & plain in our discourse that there may be no misunderstanding afterward. As to the Lands that have not been purchased that lye Vacant in spaces

184. E.g. CO, *supra* note 184 at vol. 5 (1898) 173–74v.

185. CM, *supra* note 177 at 300, Treaty of 1725, Article 3.

186. In the *Wapapi Akonutomakonol* (Leavitt, *supra* note 156 at 56), the idea for creating the Convention Council was expressed "*Nit Msiw mehtewestuhiihit[,] nit oli kisolutomuk 'tolithuniya kci lahkahusonihiikon naka tuciw 'punomoniya epahsiw kci wikuwam tepakhalusoniw*" or "Then when they were finished talking, all decided to make a big fence and besides they put in the middle [of it] a big house within the fence." The same approach was taken with the British Crown.

187. CO, *supra* note 177, vol. 5 173–74v (20 November 1725). This issue was also the topic of 1726 Treaty Conference at Falmouth in Casco-Bay (DMH, *supra* note 177 F16–M33, vol. 3 1–5 August 1726).

between what has been purchased, whether when the English come to Settle there shall not bear a consideration for that Land. And whether we shall not have a further gratuity or acknowledgment made to us for what has been purchased of our Fore Fathers. The reason of our Enquiring into this is, that we may be able to tell it right when we come home to the Tribes.

The British commissioners, after consulting the governor, responded concerning future settlements as far as St. George's Fort, so far as the English had purchased by deed:

Those Lands are the property of particular Persons who have the Indian right by fair purchase, as you are sensible by the Deeds which have been shown you, & you Cannot reasonably Expect that the sd. Proprietors should be hindered of making Improvemt. of what is their own however care will be taken by the Government That no Encroachmt. shall be made on you, and that they do not any wise Injure you, but treat you as Friends & good Neighbours.¹⁸⁸

Addressing the Confederacy's question concerning the "Lands that have not been purchased which lye Vacant in spaces between what hath been purchased"; the commissioners stated that the British subjects would have to purchase it from the tribes. "[I]f the English should have a mind to purchase any of it, when they come to settle, you shall hereafter Dispose of to the English, and therefore when ever you sell any Land, it will be best for you to acquaint the Government thereof, & they will take care that you be not wrong therein."¹⁸⁹

188. *Ibid.* (26 November 1725). An example of one of these deeds is "... Madockawando, [one of the Wabanaki treaty negotiators in 1693] deed to Sir William Phipps, Knight . . . dated May 9th, 1694, Land both sides of St. Georges River bounded Eastward by Westsouwestkeeg and westward of the west of Hatches Cove Island . . ." cited in Levi, *supra* note 169 at 26 this was taken from Descriptions of English Deeds in the Province of Maine drawn from Proceedings of the English "land claims" Committee established pursuant to the Peace of 1725/26. Loron, the spokesman, stated "We can't find any Record in our Memory, nor in the Memory of Our Grand Fathers that the Penobscutt Tribe have sold any Land, as to the Deed mention last Winter, made by Medockewanda and Sheepscutt John they were not Penobscutt Indian, one belonging to Mechias Medockewondo, the other towards Boston, if we can find in reality that the Lands were Purchased of the right Owners, we should not have insisted upon it, nor have opened our Mouths, we would not pretend to tell a Lye about it" (DMH, F16-M33, vol. 3, 3 August 1726). See also J.W. Springer, "American Indians and the Law of Real Property in Colonial New England" (1986) 30 Am. J.L. History 25; H.R. Shurtleff, ed., *Record of the Governor and Company of the Massachusetts Bay in New England, 1628–1686* (Boston: Press of William White, 1853–54) vol. 4, Part II, at 213 (Royal Commissioners reaffirmed Indian title to all their lands).

189. *Ibid.* 26 November 1725. In the Treaty Conference held at Falmouth in Casco-Bay, in July and August 1726, Lt. Gov. Drummer told the Wabanaki "you shall have equal Justice in all Points with the Subject of His Majesty King George, either in Controversies respecting the Property of Land, or any other matters whatsoever, we don't suppose that any Gentlemen that come to produce or offer Claims of Lands there shall be their own Judges, but it shall be determined by Lawful Authority, wherein the Indians shall have the Benefit of the Law, equal

Article 4, following Article 3 of the 1713 treaty, stated:

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 English subjects as aforesaid. As also the privilege of fishing, hunting, and fowling as formerly.¹⁹⁰

The treaty acknowledged they were friends and subjects of the King. However, 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.¹⁹¹

In 1743, a prerogative Court of Appeal heard the complaints of a southern member of the Wabanaki Confederacy against a royal colony, and held that the aboriginal nations had the property of the soil, thus affirming the treaties terms.¹⁹² The Royal Court of Commissioners in the *Mohegan Indians v. Connecticut* case held, over one dissent, that:

The Indians, though living amongst the king's subjects in these countries, are *a separate and distinct people from them*, they are treated as such, *they have a polity of their own*, they make peace and war with any nations of Indians when they think fit, *without control* from the English.

It is apparent the crown looks upon them not as subjects, *but as a distinct people*, for they are mentioned as *such* throughout Queen Anne's and his present Majesty's commission by which we now sit. And it is plain, in my conception, that the *property of the soil* of these countries; and that their lands are not, by his majesty's grant of particular limits of them for a Colony, thereby impropriated *in his subjects* till they have made *fair and honest purchase* of the natives.¹⁹³

They concluded that controversies with the tribes of Indians protected by treaty were neither controlled by the laws of England nor colonial laws, but rather by "a law *equal to both parties*, which is the law of *nature* and of *nations*".¹⁹⁴

with any Englishmen whatsoever, and this you may be assured of, for we don't expect a Peace to last on any other footing than that of Justice." DMH, *supra* note 177 at F16–M33, vol. 3 (Treaty Conference, 4 August 1726).

190. CM, *supra* note 177 at 301, Treaty of 1725, Article 3.

191. PAC, *supra* note 177 at RG 1, vol. 12 (15 December 1725).

192. J.R. Smith, "Appeals from Royal Commissions" in *Appeals to the Privy Council for the American Plantations* (New York: Columbia University Press, 1959) at 417.

193. *Ibid.* at 427–28; Certified Copy Book of Proceedings Before Commission of Review 1743 (1779) at Houghton Library, Harvard University. See 1773 Proclamation, *supra* note 64. See also less than a century later, United States Supreme Court reached the same conclusions in *Worcester*, *supra* note 5.

194. Smith, *ibid.* at 434; Certified Copy Book of Proceedings Before Commission of Review 1743 (1779:118). See also B.A. Clark, *Native Liberty, Crown Sovereignty* (McGill-Queen's University Press, 1990) at 37.

This decision affirmed that in British law the Aboriginal nations were a separate and foreign jurisdiction from the colonies. It recognized their disputes were “controlled” by the law of nature and nations and under the protection of the Crown in Council in London, under the Crown’s prerogative jurisdiction of foreign affairs, rather than through local colonial officers. The Governor of Connecticut appealed this decision to the Privy Council where the case lingered until 1771 when the Privy Council affirmed the 1743 Commission’s decision.¹⁹⁵

Further ratifications of the Compact by southern Wabanaki tribes of the Compact were held at Casco Bay in 1727, 1728, 1732; at Annapolis Royal in 1728 and 1735; and at Deerfield in 1735. Treaty Conferences were held with the Wabanaki tribes at Boston in 1740; St. George’s Fort (Maine) in 1742; Annapolis Royal in 1744; Falmouth, Boston and Halifax Harbour in 1749; and St. George’s Fort in 1751, 1752, 1753 and 1754; Falmouth in 1754, Halifax and Fort Frederick in 1770; Boston in 1773; Halifax in 1775, 1778, 1776; St. John River in 1777; Fort Howe (Saint John) in 1778; Aukpaque in 1780; and Oromocto in 1781.¹⁹⁶ Míkmak delegates attended each of these treaty conferences. Some of the Míkmak district chiefs acceded to the Compact in 1726 at Annapolis Royal and 1749 at Halifax.¹⁹⁷

After the 1726 ratification conference at Casco Bay, the spokesperson for the Wabanaki Confederacy, Loron Sagourrat, wrote Lieutenant-Governor Drummer objecting to the written treaty. He wrote that, “Having hear’d the Acts read which you have given me I have found the Articles entirely differing from what we have said in presence of one another, ’tis therefore to disown them that i write this letter unto you.¹⁹⁸ In particular, he challenged the addition of a statement that the Wabanaki acknowledge King George to be their King and had “declar’d themselves to the Crown of England”. Loron wrote that during the treaty negotiations

when you hae ask’d me if I acknowledg’d Him for king i answer’d yes butt
att the same time have made you take notice that I did not understand to

195. 15 January 1771 [P.C.]; Order in Council Sustaining a Report of a Board of Review of a Decision of Board of Enquiry into Complaints of the Mohegan Indians, 1773.

196. Levi, *supra* note 169 and *The Wabanakis of Maine*, *supra* note 177. During this time, British Treaties with the Six Nations in 1740 (Albany), 1744 (Lancaster), 1752 (Logstown) and 1778 (Fort Stanwix) were concluded, extending their Covenant Chain. They provided for the protection of the King and promises that the King will always purchase their lands and never take them from them. See A.T. Vaughan & W.S. Robinson, eds., *Early American Indian Documents: Treaties and Laws, 1607–1789* (University Publication of America) (Virginia Treaties, 1723–1775) vol. 5 at 26–30 and 51–89; J. Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquoia* (Saskatoon: Native Law Centre, 1985).

197. CM, *supra* note 177 at 302–06.

198. DHM, *supra* note 177 at vol. 23 at 208.

acknowledge Him for my king butt only that I own'd that he was king his kingdom as the king of France is king of His.¹⁹⁹

The Míkmaq Delegation at the Wabanaki Treaty Conference asserted the same position. On December 1, 1725, when Lieutenant Governor Mascarene read to the Míkmaq Delegates a proposed ratification Treaty (often labeled Number 239), 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.”²⁰⁰

The prerogative Treaties, the “great King’s Talk” with the Wabanaki displayed the four distinctive characteristics of the Aboriginal legal mind in the Nikmanen and aboriginal order: a reliance on consensual jurisdictions rather than rule from above; a quest to share peace and friendships in the Wabanaki territory through insular, collective autonomy and boundaries; an abhorrence of warfare and quest for harmony; and, an elastic respect for legal transformations of each people. Additionally, the treaties recognized and affirmed aboriginal tenure as a distinct tenure. According to their traditional concept of sharing, they granted peaceful occupation to those English minorities who had acquired an interest in Wabanaki tenure by a fair, honest, and consensual purchase from the Wabanaki nations. The Wabanaki treaty created the foundation for the Míkmaw Compact.

c. *Míkmaw Compact (1752–1789)*

After the War of Austrian Succession, the French and English sovereigns mutually restored all conquests made during the war in the Treaty of Aix-la-Chappelle (1748). Acadia was returned to England. Article III renewed and confirmed the terms of the Treaty of Utrecht, “as if they were therein asserted, word for word. This renewal included Article XV,

199. *Ibid.* (1916) at 209. The French-speakers present at the ratification confirm that the Wabanaki had “come to salute the English Governor to make peace with him and to renew the ancient friendship which has been between them before”, not to submit themselves to the English King or accept responsibility for beginning the hostility with the English, or that they would live according to English law (“Traité de paix entre les anglois et les abenakis” (1727), in *Collection de manuscrits*, vol. 3 (Québec, 1884) at 134–135). Compare to article 7 of the Article of Capitulation of Grenada and judicial interpretation of that phrase in *Campbell v. Hall*, supra note 167 at 205.

200. (2 December 1725) 17PAC NS “A” MG11 CO 217. In 1752, the Abenakis gave a similar description of the relations to the King of France to the Governor of Massachusetts representative “We are entirely free, we are allies of the King of France, from whom we have received the Faith and all sorts of assistance in our necessities; we love that monarch, and we are strongly attached to his interest.” (C. Jaenen, “French Sovereignty and Native Nationhood during the French Regime” in J.R. Miller, ed., *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991) at 32).

protecting Aboriginal sovereignty, dominion and trading liberties as allies or “Friends” of either the British or French.²⁰¹

The original Commissions to the Governors of Nova Scotia in 1719 ordered the Governor to send for the several heads of the said Indian Nations or clans, and promise them friendship and protection on His Majesty’s part.²⁰² The 1749 Commission to Cornwallis, establishing the royal colony of Nova Scotia, renewed the 1719 order and provided for the preconditions of grants of land in fee simple to the colonialists. The first condition was that the Governor was conditionally “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.”²⁰³ Secondly, as a condition antecedent, the Commission required that before the Governor could grant any such land to English 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.”²⁰⁴ Reading these provisions together, they confirm that the Míkmaw Nation were entitled to their reserved lands under their existing treaties with the Crown in 1726 until they were purchased by the Crown.

This ‘settle and agree’ provision was an important condition antecedent, and an explicit constitutional limitation on the colonial Crown’s authority to establish these estates in Nova Scotia. It witnessed an elaboration of the requirement of fair and honest purchase of tribal

201. C.M. Parry, ed., *The Consolidated Treaty Series* (Dobbs Ferry, N.Y.: Oceana Publications, 1969) vol 38 at 305.

202. 1719 Instruction to Governor Philips of Nova Scotia, 19 June 1719; L.W. Labaree, *Royal Instructions to British Colonial Governors, 1670–1776* (N.Y.: D. Appleton, Century Co., 1935) vol. 2, No. 673 at 469. See Statement prepared by the Council of Trade and Plantations for the King, 8 September 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 in Levi, *supra* note 169 at 35.

203. Labaree, *ibid.* at 581; See generally L.W. Labaree, *Royal Government in America* (New Haven: Yale University Press, 1930).

204. *Ibid.*, emphasis added. 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, supra* note 168 at 895). This principle has been held to apply to aboriginal title by the highest courts in the United States, Great Britain, and Canada (*Worcester, supra* note 5 at 544 and 559; *Mitchel, supra* note 79 at 734; *Symonds, supra* note 5; *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, supra* note 43; *Calder, supra* note 5 at 383 and 401 per Hall J.; *Guerin, supra* note 54 at 377). The Crown provided the correct procedure for settling and agreeing with the Inhabitants by public cession provisions in the 1773 *Proclamation, supra* note 64.

dominion by the Governor for the British Sovereign. It also prevented any private purchase of tribal dominion. Only if the Mi'kmaq Nation sold their ancient dominion and the Governor bought it for the Crown through prerogative Treaties²⁰⁵ could the Governor have granted lands to the British settlers in fee simple. In the subsequent treaties, however, the Mi'kmaq Nation did not cede or sell their land to the Crown; they only agreed to small British settlements within their Aboriginal dominion.²⁰⁶

The Wabanaki Compact served as an archetype for the Mi'kmaq Compact (1752), that recognized the British sphere of influence in Acadia.²⁰⁷ In September of 1752, the Grand Chief Cope of the Mi'kmaq Nation arrived in Halifax with his delegation to establish the terms of peace with the British Sovereign.²⁰⁸ The Council stated that they were happy to have the Mi'kmaq come to bury the hatchet between the "British

205. Labaree, *ibid.* at 469.

206. 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 supervision 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. A crucial part of the Statutes of Great Britain was the 1677 *Statute of Frauds* (29 Car. 2, c. 3), which made written documents necessary in all transfers of legal estates. This therefore applied to Aboriginal dominion transfers to the Governor, as well as to the Crown. The sanctity of the *Commission* was assured by this Imperial review process. It required that all exercises of legislative powers had to be transmitted for royal approbation or disallowance within three months of their passage or they were "utterly void and not effect any thing to the contrary." Under this limitation, the Governor of a colony could assent to colonial legislation, withhold assent and thereby veto the legislation or reserve it for the signification of Her Majesty's pleasure in London. With respect to colonial legislation assented to by the Governor, nevertheless, such could be disallowed by Imperial Order in Council in London after it was reported. With respect to colonial legislation reserved for London's approval, it did not become law unless and until that approval was given by Imperial Order in Council.

207. CM, *supra* note 177 at 307.

208. NSA, *supra* note 177, at vol. I at 594; PANS, *supra* note 177 MSS. Documents, vol. 35, Doc. 71; Hopson to Board of Trade, 16 October 1752. Nova Scotia Council Minutes on the 14th of September recorded the Grand Chief stating he was empowered by the Mi'kmaq to treaty with the Crown. The Council Minutes stated: "He was also asked. How he proposed to bring the other tribes of the Mickmack Nation to a Conference here [Halifax]—who replyd That he would return to his own people and inform them what he had done here, and then would go to the other Chiefs, and propose to them to renew the peace, and that he thought he should be able to perform in a month, and would bring some of them with him if he could, and if not would bring their answer." (T.B. Akins, *Selections from the Public Documents of the Province of Nova Scotia* (Halifax: Annand, 1869) at 671). It was apparent that Nova Scotia's Council knew about the federated structure of the "Mickmack Nation", but little about its actual procedures.

Children of His Omnipotent Majesty King George and His children the Mickmacks of This Country.” They assured the Míkmaq that King George had declared that they were “his Children” and asserted that the Míkmaq “have acknowledged him for your great Chief and Father” presumably in the prior ratification of the Wabanaki Compact. The Council stated that King George has ordered us to treat you as our brethren. Moreover, they explained that “what is past shall be buried in oblivion and for the time to come we shall be charmed to live together as Friends.”²⁰⁹ Friendship and burying the past in oblivion are ideas derived from the wording of the Treaty of Utrecht and Nikmanen law.²¹⁰

The Míkmaw Compact, known to Míkmaq as *Elikawake* (in the King’s House) was a direct political union between the heads of states of the two nations.²¹¹ The Grand Chief (“Chief Sachem of the Tribe of Mick Mack Indians”)²¹² and Delegates, were formally recognized as the proper representatives of the Míkmaw Nation, marking the acquisition of a separate legal personality for them in the Law of the Nations and of Great Britain.

The Míkmaw Compact fulfilled the previous prerogative Instruction to the British governors to enter into a treaty of protection and friendship with the Indian nations and clans.²¹³ His Majesty promised them that they

209. *Ibid.* at 673; CO, *supra* note 177 at 217/13. The Council accepted Cope’s authority to carry the treaty proposal to the other Míkmaq chiefs. “We approve of your engagement to go first and inform your people of this our answer and then the other Tribes, with the promise of your endeavors to bring them to a Renewal of the Peace. When you return here as a mark of our good Will we will give you handsome presents of such Things whereof you have the most need: and each one of us will put our Names to the Agreement that shall be made between us. And we hope to brighten the Chain in our Hearts and to confirm our Friendship every year; and for this purpose we shall expect to see here some of your Chiefs to receive annual presents whilst you behave yourselves as good and faithful children to our Great King and you shall be furnished with provision for you and your Families every year. We wish you a happy Return to your Friends and that the Sun and the Moon shall never see an End of our Friendship” (*ibid.* at 673). Compare with Article II of Míkmaw Compact, CM, *supra* note 177 at 307.

210. See above section A and B (1). Compare to Article II of Míkmaw Compact, *supra* note 177 at 307 and *supra* note 166 and *infra* note 239.

211. CM, *supra* note 177 at 307, Treaty of 1752.

212. The title of “Chief Sachem” was new to prerogative treaties. In European writing, the concept was first applied to the Míkmaq in Bertrand’s letter concerning Grand Chief Membertou’s baptism in 1610 the Grand Chief was labeled “du grand sagameos” (JR, *supra* note 141, vol. 2 at 89). The concept of Chief Sachem was not used in the Wabanaki Compact. The 1693 Treaty was with the “Sagamores and Chief Captains”, the accessions of 1713 and 1714 with the “Delegates”, the 1717 Compact with the “Sachems and Chief men”, the 1725 with the “Delegates” of the Wabanaki Confederacy, and the Míkmaq accessions of 1728 and 1749 with the “Chiefs”. In the same manner as the four Delegates who spoke for the Wabanaki in the 1725 Compact, the Grand Chief and the three Delegates spoke for “themselves and their Tribes[,] their heirs and the heirs of their heirs forever” (CM, *supra* note 177).

213. *Supra* note 209.

“shall have all favor, Friendship and Protection shewn them from this His Majesty’s Government.”²¹⁴ The concept of “Protection” had been introduced in the 1713 Treaty with the Wabanaki, although the 1725 Compact promised only His Majesty’s “Grace and favor” (Article 1).²¹⁵ The promise of “Protection” in the Wabanaki and Míkmaw Compact is significant because it is one of the first examples of protectorates in the Law of the British Empire.²¹⁶ The separate promise by the Grand Chief Cope represented the jurisgenesis of the Míkmaw Nation under the protection of the British Sovereign.

As a treaty of peace and protection, The Míkmaw Compact created boundaries for communities which respected their autonomous political and legal systems. The Compact constituted an integrated legal order based on mutual obligations recognizing sharing, autonomy and freedom of association.²¹⁷ In order to “Cherish a good Harmony” created by the new relationship, the Crown promised that “so long as they shall Continue in Friendship” the Míkmaw would annually receive “Present of Blankets, Tobacco, some Powder & Shott.”²¹⁸ These provisions were consideration for British settlements and trading rights with the Míkmáki.

The Míkmaw Compact explicitly incorporates the Wabanaki Compact which reserved all Míkmaw lands, liberties, and properties that had not been conveyed or sold to the English or possessed by any of the English subjects before 1693.²¹⁹ Thus it continues the existing judicial precedent

214. CM, *supra* note 177 at 307, Treaty of 1752, Article 2. The Míkmaw district chiefs ratified of the Wabanaki Compact in 1726 and 1749, the Crown explicitly promised them “all Marks of Favour, Protection & Friendship” (CO, *supra* note 177, vol. 217/4 at 82; PAC, *supra* note 177 at NS “A”, MG 11). These Treaties were reaffirmed as part of the Míkmaw Compact in 1752.

215. *Ibid.* at 1713 Treaty and 1725 Treaty (Article 1).

216. Similar wording was used in the southern district of British North America, e.g. Cherokee Nation treaties, *infra* note 249. E.g. the 1886 treaties that set up a protectorate among the native chiefs of the Somali Coast of Africa. “The British Government, in compliance with the wish of the undersigned Elders . . . hereby undertakes to extend to them, and the territories under their authority and jurisdiction, the gracious favour and protection of Her Majesty the Queen of England” (*R. v. Crewe* (1910) 2 KB 619 at 619; 77 S.P. 1265).

217. In Niknanen law, this was the standard measure (Leavitt, *supra* note 156).

218. Míkmaw Compact 1752, article 6. These terms are often called “annuities”.

219. Míkmaw Compact, 1752 by article 1. The date of possession had to be before 1693 according to the Wabanaki Compact, *supra* text of note 146. See especially article 5 of the 1795 Treaty between the United States and the Wyandots, Delawares, Shawanoes, Ottawa, Chipewas, Putawatimes, Miamis, El-River, Wee’s, Kickapoos, Piankashaw, and Kaskaskia for a concise summary of the status of reserved land in a treaty article. The United States and the “Friends” of the Míkmaw Nation stipulated: “The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be despoled to sell their lands, or any part of them, they are to be sold only to the United States; and until such sale, the United States will protect all of the said Indian tribes in the quiet enjoyment of

of Míkmaw having the property in the soil and the fair, consensually and honest purchase standard for land acquisition.²²⁰ Additionally, it established a boundary between the reserved Míkmaw lands and the sparse English settlements.²²¹ Consistent with the Míkmaq landscape and Nikmanen law, the peaceful enjoyment of the British settlement was confirmed by the Crown's promise that,

provisions, as can be procured, necessary for the Familys and proportional to the Numbers of the said Indians, shall be given the Indians half Yearly for the time to come; and the same regard shall be had to the other Tribes that shall hereafter Agree to Renew and Ratify the peace upon the Terms and Conditions now stipulated.²²²

Thus, the Compact did not convey any land or property interest to the Crown. The Compact reserved all the sacred space of the Míkmaq for their descendants. In the 1726 and 1749 Míkmaq ratification of the Wabanaki Compact, the Míkmaq district chiefs only promised that they "shall not molest any of His Majestie's subjects or their dependents in their settlements already made or lawfully to be made, or in their carrying on their traffick and other affairs within the said Province [of Nova Scotia or Acadia]."²²³ Moreover, it is to be noted that, in the 1752 negotiations, Grand Chief Cope told the Nova Scotia authorities that the Míkmaq "should be paid for the land which the English had settled upon in this Country."²²⁴ However, the Crown did not respond to this request.

Article 8 of the Compact provided that the Míkmaq were to be treated as equals of English subjects and that in any controversy the Míkmaq would be protected in their tort, contract and property rights in His Majesty's Courts of Civil Judicature.²²⁵ This is a unique provision in the

their lands against all citizens of the United States, and against all other white persons who intrude upon the same." (3 August 1795, 7 U.S. Stat. at 49).

220. See *Mohegan Indians*, *supra* note 5, for a discussion of this point, *supra* text of notes 157–160.

221. For actual possession in 1693 to 1770, see A.H. Clark, *Acadia: The Geography of Early Nova Scotia to 1770* (Madison: University of Wisconsin Press, 1968).

222. Míkmaw Compact (1752) article 5. This is the start of the Crown's notion of equalization payments and a redistributive economy.

223. This was also incorporated into the Míkmaq Compact, 1752 by article 1. CM, *supra* note 177 at 307, Treaty of 1752. The promise not to molest any of His Majesty's subjects is similar to the *Wapapi Akonutomakonol* law that in united Aboriginal nations territory there would be no bothering one another anymore (*Katama ape cikawiyutultiwon*) (Leavitt, *supra*, note 156 at 59).

224. This is the English version. Akins, *supra* note 208 at 671. Míkmaq tradition says that the Grand Chief required payment for the English settlements. See above part II (B)(2) for Wabanki precedent for purchase.

225. Article 8 clarifies article 6 of 1725 Compact and article 4 of 1726 and 1749 Míkmaq Treaties. See also *supra* text and notes 155 and 159 for the context of these articles. Article 6 the Wabanaki Compact, 1725 provided that "no private Revenge shall be taken" by either the

Georgian treaties, because it rejects political solutions and criminal law in favor of civil remedies.²²⁶ At the same time, the Míkmaq leaders continued to assume responsibility for “any robbery or outrage” committed by their members against His Majesty’s subjects within their settlements as in their 1726 and 1749 Treaties.²²⁷ The district chiefs remained responsible for their own communities and family conflicts.²²⁸ The terms of the Treaty established the retraction of the Míkmaq’s consent to British legal remedies and political solutions in the Wabanaki Compact.²²⁹ This reflects Míkmaw abhorrence of state-imposed violence—that is, both the *Putuwosuwakon’s* (Convention Council) practice of whipping and British criminal law. They rejected the idea of law as political power or command, and instead asserted an idea of law as shared meanings.²³⁰

Wabanaki or the English. 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. Compare 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 (Toynbee, *supra* note 171 at I.207). The Treaty of Paris continued this article (*ibid.* at 314, Article XVI), but also began a reference by applying “the Law of Nations” to the disputes which might arise in the future.

226. The Nova Scotia Assembly acknowledged the Sovereign’s legal responsibility to protect treaty obligations and rights within its jurisdiction in an *Act to Prevent Fraudulent Dealing in Trade with the Indians*, S.N.S. 1772, c. 3.

227. In these treaties, the chiefs promised to give satisfaction and restitution to be made to the parties injured (Article 1 confirming Article 2, 1726 Treaty). In the 1726 and 1749 Accession, the Míkmaq district chief took responsibility for “any robbery or outrage” in the English reserves. They expressly promised to make satisfaction and restitution to the “parties injured”. This was an extension of the customary law of the Míkmaq to the new settlements. Thus, when a Míkmaw robbed or committed an outrage against any Englishman, even if it happened in the settlements, British criminal law could not be applied. These terms affirmed the autonomy of the diverse legal orders. It was a positive attempt to prevent a Wabanaki or Míkmaq from asserting their law if an Englishman offended a Míkmaq as well as in the opposite case. Under the Treaties the indigenous law was suspended in these cases and transferred to His Majesty’s justice. Controversies between “Indians”, however, the law of private revenge and family justice was and is still operative. Similarly, controversies among English settlers, were settled by His Majesty’s law.

228. As far back as the Great Convention Council, the families retained jurisdiction over wrongs committed by their children. “*Tokec wen keq oli wapololuhketif.] cuwi semha. ‘Nikihkul ‘tosemhukul nit ipis*” (“Now [when] someone did something wrong (wapol), and he or she had to be whipped, his or her parent whipped him or her [with] that whip”) (Leavitt, *supra* note 156 at 58).

229. *Supra* text and note 192.

230. The political importance of the Míkmaq Compact to His Majesty is illustrated by the manner in which it was widely published in the British Empire. It was made public by a Nova Scotia Proclamation in 1752 (*Proclamation* (24 November 1752) PANS, *supra* note 177 at MSS. Documents, vol. 35, Doc. 77; Letter from Hopson to Board of Trade, 6 December 1752), sent to the Colonial Office (NAS, *supra* note 177 vol. 1 at 685), and printed in French and English by the Crown (De Puy, *supra* note 164).

After the end of the Seven Years war between the English and French,²³¹ in 1770, a Míkmaw delegation from both French and English jurisdictions met with Governor Belcher and the Legislative Assembly to renew and extend the Compact.²³² Father Maillard participated in the conference, interpreting the comments of each party.²³³ His official notes further reveal the legal nature of the Compact as explained by the man who was the first Chief Justice in Canada.²³⁴

Belcher began with a description of the nature of protection and allegiance under the 1752 Compact. “Protection and allegiance are fastened together by links,” he told the Míkmaq chiefs.²³⁵ Then he explained the ratification process to the Míkmaq district chiefs:

[i]f 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 English Liberty.²³⁶

The “Field of English Liberties”, Belcher promised the assembled chiefs, would be “free from the baneful weeds of Fraud and Subtlety.”²³⁷ To ensure this, “The 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

231. In Article 40 of the French Capitulation to the British in 1770, the King promised to maintain the tribes in their Aboriginal lands. See A. Shortt & A.G. Doughty, eds., *Documents Relating to the Constitutional History of Canada 1759–1791*, 2d ed., (Ottawa: J. de L. Taché, King’s Printer, 1918) Vol. 1, Pt. 2, Sessional Papers No. 18 [hereinafter S & D]. Article 40 continues the terms of the Treaty of Utrecht, *supra* note 154, and Article II the Treaty of Paris, 1773, *supra* note 190 at 314 also reaffirmed it. Additionally, Article XXIII of the Treaty of Paris confirmed article 40 of the Capitulation (*ibid.*). Both the Articles of Capitulation and the Treaty ends any arguments about abrogation by hostilities or conquest. See especially *Campbell*, *supra* note 168 at 895 (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).

232. For a list of the chiefs who had to ratify the Compact, see letter of Col. Fry to Governor Belcher (7 March 1770) in (1770) London Magazine 377 and (1809) 10 Collections of the Massachusetts Historical Society, First Series 115. The Wabanaki reaffirmed peace on the basis of their 1725 Compact on 13 February 1770 (B. Murdock, *A History of Nova Scotia*, 3 vols. (Halifax: J. Barnes, 1865) at 384).

233. PANS, *supra* note 177 at MSS. Documents. vol. 37, Doc. 14.

234. Installed as Chief Justice of Nova Scotia Supreme Court in October 1754. “Jonathan Belcher” *Dictionary of Canadian Biography* vol. 4 (Toronto: University of Toronto Press, 1979) at 51.

235. *Ibid.*

236. *Ibid.*

237. *Ibid.*

of the Law will fall upon them and furnish their disobedience.”²³⁸ The separate dominions of the district chiefs and the British settlements was affirmed and would be strictly protected by His Majesty’s law.

Following customary procedures, the Governor and district chiefs buried the hatchet and washed the war paint from their bodies in token of “a peace that would never be broken.”²³⁹ The Governor interpreted these symbolic acts as a guarantee of:

English protection and Liberty, and now proceeding to conclude this memorial by these solemn instructions to be preserved and transmitted to you with charges to your Children’s, never to break the Seals or Terms of this Covenant.²⁴⁰

In this way, the metaphor of the “Covenant Chain” entered into Míkmaw sacred order.

The chief from Cape Breton Island, a French jurisdiction, speaking for the rest of the assembled chiefs, responded to Governor Belcher’s commitments by promising that the Míkmaw Compact would be “kept inviolable on both Sides.” He accepted His Majesty as “friend and Ally”, and placed the Míkmaw into His Majesty’s protection as “a safe and secure Asylum from whence we are resolved never to withdraw or depart.” In the name of all Míkmaw, he stated that, “As long as the Sun and Moon shall endure, as long as the Earth on which I dwell shall exist in the same State, you this day see it, so long will I be your friend and ally. . . .”²⁴¹ In the subsequent ratification Treaties with the several “Districts of the Michmack Nation and the Crown”²⁴² the existing Compact and its obligations were continued as legal and private obligations for the Crown to defend by prerogative law and civil law.

238. *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, *supra* note 156 at 56–57).

239. Compare *supra* notes and text 166 and 210. The Míkmaw understanding of burying the hatchet and washing the war paint was to bar any future references to the hostilities. Yet, in attempting to extinguish the Compact and Treaties, provincial Attorneys General have raised the hostilities that were supposed to be buried, see *Simon*, *supra* note 26. The introduction of such evidence in a court of law is contrary to a strict construction of the terms of the Compact and Treaties as understood by the Míkmaw at the time of the treaty.

240. *Ibid.*

241. *Ibid.*

242. PANS, *supra* note 177 at MS. Doc. vol. 37, No. 14. Additional ratification treaties were made with the “Merimichi, Jediack, Poginouch & Cape Breton Tribes” (CO, *supra* note 177 at 217/8 and 276–84) and “Pictou and Malegomich” in 1771 (*Piktukewaq aqq Epekwith*) (PANS, *supra* note 177 at RG1 165:160–66, 187 and RG1 430:20–21); with the Newfoundland Míkmaw (*Ktaqmkuk of Unamálik*) (CO, *supra* note 177 at 218/6 ff. 203–06; see also E. Chappell, *Voyage of H.M.S. Rosamound to Newfoundland and Southern Coast of Labrador* (London: J. Mawman, 1818) at 82 for another treaty that has not been found during the American Revolution); with “Miranichi, Restigouche, Richibucto, and Shediac Indians,”

In sum, in all of the Georgian treaties the Míkmaw retained their sacred order for themselves and made no mention of sale of lands to the Crown. They agreed to allow the British coastal settlements – that is, English reserves within Míkmaw land tenure. The peaceful enjoyment of the existing settlements cannot be equated with a purchase or cession of Míkmaw tenure, nor controlled by English law.²⁴³ Under the treaties, these English reserves should be viewed as a secular refuge carved out of the general sacred space. The peaceful enjoyment by the English of the settlements was derived from the treaty by the consent of the Míkmaw. This privilege within Míkmaw tenure was not created nor controlled by English law; it was controlled by Míkmaw law, the Compact, and the law of nations. At the time of the Compact, moreover, the English settlements were under prerogatives of the Crown in foreign affairs.

3. Legal Construction of the Georgian Treaties

Since the *Constitution Act, 1982*, the courts have confirmed the validity of the central treaties of the Compacts.²⁴⁴ The Supreme Court of Canada has identified these treaties as having a *sui generis* character,²⁴⁵ and established new principles of *sui generis* treaty interpretation.²⁴⁶

In establishing these interpretive principles, the Supreme Court of Canada has followed the United States Supreme Court construction of British treaties of peace and friendship in the southern district,²⁴⁷ and

"Micmac Tribes residing between Cape Tormentine and the Bay de Chaleur" at Windsor in 1779 (*Sikniktewaq & Kespékewaq*) (CO, *supra* note 177 at vol. 217/54: 1252–57), and "MicMac Tribe of Restigouche" in 1786 (*Kespékewaq*) (PANS, *supra* note 177 at 3–5, 29 June and 7 July 1786). The confusion of names is part of the colonialized landscape of the treaty era.

243. This is the problem of Locke's theory of tacit consent in property law, see J.Y. Henderson, "The Doctrine of Aboriginal Rights in the Western Legal Tradition" in *Quest For Justice For Native People* (Toronto: University of Toronto Press, 1986).

244. *R. v. Paul* (1986), 58 N.B.R. (2d) 297 (Prov. Ct.), [1986] 1 C.N.L.R. 105 (Treaties of 1726 and 1749); *Simon*, *supra* note 26 (Treaty of 1752). The Canadian courts, however, are still cautious in their application of the new constitutional standards. They will not enter upon questions of constitutionality unless it is absolutely necessary in the litigation. In *R. v. Vincent*, [1993] 2 C.N.L.R. 165 (Ont. C.A.) the Ontario Court of Appeals has stated that the term "treaty" in section 35(1) means treaties entered into between the British Crown and the Indians.

245. The Supreme Court of Canada has recognized that the integral elements of these treaties are the mutual intentions to create obligations at the time of the agreements, the presence of mutual binding obligations, and a certain measure of solemnity. *R. v. Sioui*, [1990] 1 S.C.R. 1025, [1990] 3 C.N.L.R. 127 at 139–40 [hereinafter *Sioui* cited to C.N.L.R.] citing *Simon*, *supra* note 26 at 401 and 410.

246. *Simon*, *ibid.*

247. *Sioui*, *supra* note 245. See A.T. Vaughan & J.T. Juricek, eds., *Early American Indian Documents: Treaties and Laws, 1607–1789* (University Publication of America) (Georgia Treaties, 1733–1763). The prerogative administrative order in continental British North America was divided into a southern district and a northern district (Plan for the future

United States treaties with the eastern Aboriginal nations.²⁴⁸ Because the terms of the treaties were similar to the Wabanaki and Mi'kmaq treaties, with some articles being identical, they can provide crucial guidance in the juridical interpretation of the Georgian treaties. .

Similar to post-colonial litigation, the United States Supreme Court originally considered their “peace, favour, and protection” treaties as *sui generis*.²⁴⁹ A year later, the Court held they were modeled after and similar to European treaties.²⁵⁰ It emphasized the equality and “mutual consent” of the parties to these treaties and described the agreement as containing “stipulations which could be made only with a nation admitted to be capable of governing itself.”²⁵¹

These various treaty obligations were the source of federal legislation over Indian tribes.²⁵² Without them there was no independent federal or

management of Indian Affairs, 1774, CO, *supra* note 177 at 324/77). These district superintendents created the alliance with the Aboriginal people by treaties. “Micmacs” were placed in the northern district, the “Cherokees” were placed in the southern district.

248. C.J. Kappler, *Laws and Treaties* (Washington: Govt. Printing Press, 1902) vol. 2. See e.g. treaty between United States and Wyandots, Delaware, Chipewas, and Ottawas Nation (1785); Choctaw Nation (1786: Article 2); Chickasaw Nation (1786); Pattawatimis and Sacs Nation (1789); and Creek Nation (1790).

249. In *Cherokee Nation v. Georgia*, (1831) 5 Pet. 1 (U.S.S.C.) the United States Supreme Court held it lacked original jurisdiction to hear a criminal dispute between the Cherokee Nation and the State of Georgia. In its analysis it stated that “[t]he conditions of the Indians in relation to the United States is perhaps unlike that of any other two peoples in existence” (at 16). See *infra*, text and notes 263–65 for the key treaty clause. Still the majority confirmed that the Cherokee Nation was a sovereign—“a distinct political society, separated from others, capable of managing its own affairs and governing itself” (*ibid.*). The two dissenting Justices stated it is not “denied by the majority of the court that the Cherokee Indians form a sovereign state, according to the doctrine of the law of nations; but that, although a sovereign state, they are not considered a foreign state, within the meaning of the constitution” (*ibid.* at 53–53). See also *supra* note 238.

250. In *Worcester*, *supra* note 5 at 550 the Court said that Indian “treaties, in its language, and in its provisions, is formed, as near as may be, on the model of treaties between the crowned heads of Europe.”

251. *Ibid.* at 555. E.g. article 8 of the 1791 Treaty provided that any United States citizen settling on Indian land “shall forfeit the protection of the United States, and the Cherokees may punish him or not, as they please” (*ibid.*).

252. See, U.S. Const. art. III, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate to make Treaties provided two-thirds of the Senators present concur . . .); art. VI, § 2 (“[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ”) The United States Supreme Court in *Cherokee Nation*, *supra* note 249 stated: “The numerous treaties made with them by the United States recognized them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the Courts are bound by those acts.” (*ibid.*) See also *Worcester*, *supra* note 5 at 561–62. Some of these obligations toward Indians are “to secure them in the title and possession of their lands, in the exercise of self-government, and

state source of legislation over treaties.²⁵³ The implementation of the spirit and obligations of these treaties into federal laws was through the constitutional allocation of authority.²⁵⁴

None of the treaty obligations between the Aboriginal nations and the Crown or the United States was more important than its obligation of protection.²⁵⁵ The United States Supreme Court has also been clear that the “protectorate relationship” did not extinguish Aboriginal sovereignty, or abolish their governmental powers, or make them dependent upon federal law. Treaties of protection were judicially construed as “a[n Aboriginal] nation claiming and receiving the protection of one more powerful, not that of individuals abandoning their national character, and submitting as subjects to the laws of a master.”²⁵⁶ Therefore, they remained “distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.”²⁵⁷

to defend them from domestic strife and foreign enemies; and powers to the fulfillment of these obligations are necessarily reserved . . .” (U.S. H. Rept. No 474, Comm. Ind. Aff., 23d Congress, 1st session, May 20, 1834 at 17). In the Constitution of Canada there is no express provision for treaty making, but section 35(1) and 52(1) of *Constitution Act, 1982* affirm treaties as part of the supreme law of Canada.

253. In *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973) the Supreme Court observed: “The source of federal authority over Indian matters has been the subject of some confusion, but it is generally recognized that the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making” (*ibid.* at 172, n. 7).

254. *Cherokee Nation*, *supra* note 249 at 16 (“Laws have been enacted in the spirit of these treaties”). *Worcester*, *supra* note 5 at 561. Congressional power is under art. I, § 8, cl. 3 of the U.S. Constitution, that permitted Congress to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes.” The treaty obligations to the Cherokee Nation and other Aboriginal nations were originally implemented by Congress in the *Indian Trade and Intercourse Act*, 1 Stat 469 (1796). Equivalents in the Constitution in Canada are the federal authority over “Indians and Lands reserved for Indians” in section 91(24) and implementing treaty obligations of the Crown in section 132 of the *Constitution Act, 1867*.

255. See F. Cohen, *Handbook of Federal Indian Law* (Washington D.C.: U.S. Government Printing Office, 1942) held that the chief source of Federal Power was the treaty-making power of the President and Senate with its corollary of Congressional power to implement by legislation the treaties made (at 33 and 89, quoting Rice, “The Position of the American Indian in the Law of the United States” (1934) 16 J. Comp. Leg. 78); see also R. Stirickland, ed., *Felix S. Cohen's Handbood of Federal Indian Law* (Charlottesville: The Michie Company, 1982) at 207. (“Carrying out the obligations and executing the powers derived from these treaties became a principal responsibility of Congress, which has enacted many statutes relating to or implementing treaties” *ibid.* at 208).

256. Marshall C.J., *Worcester v. Georgia*, *supra* note 5 (Treaty of Hopewell, 1785, 7 Stat. 18, 20). Also “a weak State in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government, and ceasing to be a State” (at 561). Also see, dissent in *Cherokee Nation*, *supra* note 249 at 552–55.

257. *Cherokee Nation*, *ibid.* at 557. The Court stated that “The Cherokee nation . . . is a distinct community occupying its own territory, with boundaries accurately described, in

In this specific context, the Court was interpreting the Cherokee Nation treaty (1785) with the United States. The preamble stated the United States promised to “give peace to all the Cherokee, and receive them into the favour and protection of the United States of America on the following conditions.”²⁵⁸ Article 3 of the Treaty of Holston (1791) provided:

The said Indians do acknowledge themselves and all their tribes to be under the protection of the United States and no other sovereign.²⁵⁹

The Court reinforced these points in its decision in *Worcester* when it interpreted Article III of the 1791 Treaty:

The third article acknowledges the Cherokees to be under the protection of the United States of America, and no other power. This stipulation is found in Indian treaties, generally. It was introduced into their treaties with Great Britain; . . . Its origin may be traced to the nature of their connection with those powers; and its true meaning is discerned in their relative situation. . . . The Indians perceived in this protection only what was beneficial to themselves—an engagement to punish aggression on them. It involved, practically, no claim to their lands—no dominion over their persons. It merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character. This was the true meaning of the stipulation, and is, undoubtedly, the sense in which it was made. Neither the British government nor the Cherokees ever understood it otherwise. . . . Protection does not imply the destruction of the protected.²⁶⁰

which the law of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress” (*ibid.* at 561). See *supra* notes 192–94.

258. 7 Stat. 18 (1785); renewed (1791) (art. 1, “perpetual peace and friendship”, renewed (1794)). This is similar to the Wabanaki and Mi'kmaq Compacts. See Vaughan, *supra* note 247 for the British treaties with the Cherokee Nation, beginning in 1756 which their “ancient Alliance be renewed, and the old Chain, brightened between the English and the Cherokees” (vol. 5 at 220). In 1773, the Cherokee Nation, Chactahs [Choctaw] Nation, Chicassah [Chickasaw] Nation, Creek Nation, and Catawbas Nation entered into a “perfect and perpetual peace and sincere friendship with King George III” and established a boundary between the British colonists and the Aboriginal nations (*ibid.* at 296). In addition, the Cherokee Nation entered prerogative Treaties for the “preservation of peace and friendship” in 1776, 1777, 1778 and 1770 that ceded lands to the Crown in the provinces of South Carolina, North Carolina and Virginia, while it reserved lands for the Cherokee Nation (*ibid.* at 326 and 367). For provisions concerning peace and friendship treaties with the United States, see e.g., 1778 Treaty with United States of America and Delaware Nation (art. 2 “perpetual peace and friendship”); Six Nations (1784, Preamble; renewed 1789: art. 1, “friendship and protection”; renewed in 1794 “perpetual peace and friendship”); Choctaw Nation (1786: Preamble, “favor and protection”); Chickasaw Nation (1786: Preamble, “favour and protection”); and Creek Nation (1790: art. 1 “perpetual peace and friendship”, renewed in 1797: Preamble).

259. 7 U.S. Stat. at 39. The Wabanaki or Mi'kmaq Compact does not have similar treaty terms. This was a common treaty article in the United States.

260. *Ibid.* at 551–52.

Finally, the Supreme Court stated that an Indian “treat[y], in its language, and in its provisions, is formed, as near as may be, on the model of treaties between the crowned heads of Europe.”²⁶¹ He pointed out that

the words ‘treaty’ and ‘nation’ are words of our own [English] language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth; they are applied to all in the same way.²⁶²

As Professor Frickey has recently argued, such an egalitarian approach encourages judges

to challenge rather than to accept blindly assumptions rooted in colonialism, of which there are many today; to interpret documents of positive law flexibly in order to promote the ongoing sovereign-to-sovereign relationship of the tribe and the federal government; to keep the judiciary out of the business of imposing new forms of colonialism; and to refuse to relieve Congress of the responsibility to determine expressly whether future exercises of colonialism should occur.²⁶³

Since the affirmation of existing Treaty rights in the Canadian constitution in 1982, the Supreme Court of Canada has established a similar context for Aboriginal and Treaty rights. The Supreme Court of Canada has interpreted prerogative Treaties as constitutive documents,²⁶⁴ but the Canadian courts have not decolonized the prior contractualist precedent²⁶⁵ to a clear sovereignty position.²⁶⁶ In construing the 1770 treaty with the Hurons, Mr. Justice Lamer, speaking for the unanimous Supreme Court of Canada in *R. v. Sioui*,²⁶⁷ stated:

261. *Ibid.* at 550.

262. *Ibid.* at 559–60.

263. P.P. Frickey, “Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law” (1993) 107 Harv. L. Rev. 381 at 428.

264. *Ibid.* at 408–11; *Simon, supra* note 26 and *Sioui, supra* note 245.

265. In *Canada (A.G.) v. Ontario (A.G.)*, [1897] App. Cas. 199 the Privy Council stated that an Indian treaty is a mere promise and agreement and the duty to compensate merely a personal obligation by the governor. In *R. v. Syliboy*, [1929] 1 D.L.R. 307 the County Court of Nova Scotia held that Indians were never regarded as an independent power capable of making treaties, reversed by *Simon, supra* note 26. In *R. v. Wesley*, [1932] 4 D.L.R. 774 this Court held that Treaty 7 is a contract. In *R. v. Pawis*, [1980] 2 F.C. 18, [1979] 2 C.N.L.R. 52 at 58 the federal court held that the Robinson-Huron Treaty is a contract. In British law contracts are not sources of law, they are legal transactions. Similar rules have been applied to treaties between the United States and the Crown.

266. In the United Kingdom, according to Lord McNair, the Courts dealt with initial treaties made with native tribes “in the same way as they would have dealt with a treaty with a foreign state.” *Law of Treaties* (1961) at 54. See also H. Reiff, “The Proclaiming of Treaties in the United States” (1936) 30 Am. J. Int’l L. 67.

267. *Supra* note 245.

we can conclude from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations. The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.²⁶⁸

There are reasons why the Canadian courts ought to be more vigorous in their interpretative canons than the Supreme Court of the United States. The interpretative canons in *Worcester* are based on a quasi-constitutional clear-statement rule,²⁶⁹ while the emerging Canadian interpretative canons are explicitly derived from a constitutional imperative of section 35(1).

Moreover, Canadian courts have made it clear that since the honour of the Crown is involved in treaties no “sharp dealings” or unjust constructions can be used to invalidate the terms as they were originally understood.²⁷⁰ Where a treaty was negotiated by the Crown in the context of a grossly unequal bargaining, the courts will not allow an interpretation to prevail that suggests sharp dealing or trickery.²⁷¹ Yet, in the colonial era the courts have allowed federal acts, international Conventions, and constitutional amendments to modify or suspend some Aboriginal treaty obligations.²⁷²

268. *Ibid.* at 1052.

269. Frickey, *supra* note 263 at 412–18.

270. *R. v. Taylor and Williams* (1981), 34 O.R. (2d) 360. In *Re Kane*, [1940] 1 D.L.R. 390 (N.S. Co. Ct.), Justice McAuthur “assumed that the Dominion Parliament in its legislative enactments regarding ‘Indians and Lands reserved for the Indians’ [Section 91(24) of the Constitution Act, 1867] constantly kept in mind the duty and obligation of the Crown to safeguard all Indian rights, and fulfill all promises contained in those treaties with the exactness which honor and good conscience would dictate . . .”(*ibid.* at 395).

271. *Ibid.*

272. Aboriginal treaties have been held to be sources of law that produce rights which the federal legislature can modify or cancel, but not provincial legislatures. (*Daniels v. White and the Queen*, [1968] S.C.R. 517 at 521, Cartwright C.J.; *R. v. Sikyea*, [1964] S.C.R. 642; See K. McNeil, *Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada* (Saskatoon: Native Law Centre, 1983). These decisions assert the treaties as governed strictly by British law, not a law compatible with both nations. In British constitutional traditions, any act of Parliament could be repealed by a subsequent act, thus they assumed that Aboriginal treaties could be amended or extinguished by subsequent federal statute or agreements. Other judges consider that such instruments are a matter of honour between Canada and the First Nations, thus a moral obligation (*R. v. George* (1963), 14 D.L.R. (2d) 31); compare to *Guerin*, *supra* note 54.

In 1985, the Supreme Court of Canada responded to the opportunity of interpreting the 1752 Treaty in the *Simon* case,²⁷³ thereby heralding a post-colonial judicial era.²⁷⁴ Chief Justice Dickson, speaking for an unanimous court, overruled a colonial precedent in *Syliboy* which held “[t]he savages’ right of sovereignty even of ownership were never recognized” by the Crown or international law.²⁷⁵ Dickson characterized the *Syliboy* decision 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.²⁷⁶

Additionally, Chief Justice Dickson stated that “[w]hile it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties, these principles are not determinative.”²⁷⁷ Instead, he held that the Indian treaty is unique in Canadian law, it was characterized as “an agreement *sui generis*, which is neither created nor terminated according to the rules of international law.”²⁷⁸

In addition, the Supreme Court of Canada has held that the particular terms of each treaty must be construed in a “fair, large and liberal” method in the sense they would have been naturally understood by the particular Aboriginal grantors at the time of the treaties,²⁷⁹ but not in a way that

273. *Simon*, *supra* note 26 rev’g *Syliboy*, *supra* note 265 and the Nova Scotia Court of Appeals on treaties in *Isaac*, *infra* note 292; *Cope*, *infra*, note 293.

274. The *Simon* rules of construction applied to treaty interpretation are consistent with those that prevail under post-colonial international treaty law. See *Right of Passage over Indian Territory* (1960) I.C.J. Report 6; *Advisory Opinion on Western Sahara* [1975] I.C.J. 3 at 39; and the 1970 Vienna Convention on the Law of Treaties, 23 May 1969, U.N. Doc. A/CONF.39/27 at 289 (1969), 1155 I.N.T.S. 331, reprinted in 8 I.L.M. 976.

275. *Syliboy*, *supra* note 265 at 313. In *Isaac*, *infra* note 292 at 481, Chief Justice MacKeigan overruled *Syliboy* on its conclusion that the 1773 *Proclamation* was not applicable to Cape Breton, but the Nova Scotia Court of Appeal in *Cope*, *infra* note 293 and *Simon*, *supra* note 26 had affirmed *Syliboy*’s interpretation of the treaty.

276. *Simon*, *ibid.* at 399.

277. *Ibid.* at 404. Similar principles have been affirmed by the First Ministers of Canada in section 35.6(1) of the *Charlottetown Accord*, 1992 (Draft Legal Text, 9 October 1992) that arguably remains a constitutional convention of Canada with the First Nations. See A. Heard, *Canadian Constitutional Conventions*, (Toronto: Oxford University Press, 1991); *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 (no legal requirement for consent of provinces to enact constitutional amendments, but convention required substantial degree of provincial consent).

278. *Simon*, *ibid.* See *supra* notes 166 and 210 for the United States’ version of this idea.

279. *Ibid.* See *Worcester*, *supra* note 5 at 515 and 551–54; *Jones v. Meehan*, 175 U.S. 1 at 10–11 (1899), followed in *Simon* and *Sioui*, *supra* notes 26 and 243 established the importance of language construction and linguistic inequities in the Indian treaties. See also *Whitefoot v. United States*, 239 F.2d 658, 667 n.15 Ct. Cl. (1961), cert. denied 369 U.S. 1818 (1962); *Duwamish Indians v. United States*, 79 Ct. Cl. 530 (1934). The lack of skilled interpreters and the failure to translate the treaty into the languages of both parties are unique factors to Aboriginal treaties.

should make the treaty promises ineffective in their modern application.²⁸⁰ The treaty terms must be interpreted according to the sense or spirit in which the Aboriginal negotiators would have naturally understood them, rather than the technical English meaning of the words.²⁸¹ Thus, ambiguous expressions in terms of treaties must be construed in favor of the Aboriginal people.²⁸²

In construing older Indian treaties, the Canadian courts have required that their terms must be liberally construed in the light of the law and facts existing when the treaty was signed.²⁸³ In *Sioui*, Mr. Justice Lamer acknowledged and confirmed the importance of the historical context in trying to determine if an instrument is a treaty.²⁸⁴ However, *Simon* limits parts of the historical context by rejecting interpretations that continue colonial or racist biases and prejudices.²⁸⁵

In the judicial construction of treaties, these interpretative rules empower Aboriginal languages, langscapes, and worldviews. Moreover, they create a compelling interpretative presumption against reading any Aboriginal right or treaty provision according to standards developed after the treaty that might be interpreted as effectuating an abandonment of aboriginal sovereignty or rights.²⁸⁶ Prerogative Treaties must also be read as unique delegations from the Aboriginal nations to the Crown that establish a legal relationship and the most exacting fiduciary standards, not as typical derivative grants of rights from the Crown to the Indians.²⁸⁷

280. *Sioui*, *supra* note 244; *Simon*, *supra* note 26; *R. v. Nowegijick*, [1983] 1 S.C.R. 29. See also *Choctaw Nation v. Oklahoma*, 397 U.S. 620 at 631 (1970); *Choctaw Nation v. United States*, 318 U.S. 423 at 431–32 (1943); *Worcester*, *supra* note 5 at 582. Similar principles have been affirmed by the First Ministers of Canada in section 35.6(1) of the *Charlottetown Accord*, 1992, *supra* note 277.

281. *Supra* note 279.

282. *Simon*, *supra* note 26; *Nowegijick*, *supra* note 280 at 198; relying on *Jones v. Meechan*, *supra* note 279, which followed *Worcester*, *supra* note 5.

283. In international law, this canon is called the rule of intertemporal law. *Right of Passage*, *supra* note 272.

284. *Supra* note 245 at 1045, quoting Mr. Justice Norris in *R. v. White and Bob* (1964), 50 D.L.R. (2d) 613 at 649 (B.C. C.A.) aff'd in the Supreme Court of Canada [1965] S.C.R. vi [unreported], (1965), 52 D.L.R. (2d) 481. *Nowegijick*, *supra* note 280 affirmed the same principle that Indian instruments with the Crown must be construed in light of the law and fact contemporary to them as part of the law of Canada.

285. *Supra* note 26 at 399.

286. This follows international law where the traditional legal presumption is against any implied relinquishment of State sovereignty. *Polish War Vessels* (1931), P.C.I.J. Ser. A/B, No. 43 at 142; *The River Oder Commission* (1929), P.C.I.J. Ser. A, No 23, at 26; *S.S. "Lotus"* (1927), P.C.I.J. Ser. A, No. 10 at 18; *Polish Postal Service* (1925), P.C.I.J. Ser. B, No. 11 at 39; *S.S. "Wimbledon"* (1923), P.C.I.J. Ser. A, No 1 at 24–25.

287. *Guerin*, *supra* note 54; *Sparrow*, *supra* note 7; *Cohen*, 1982, *supra* note 255 at 220–28 and 232–35. *United States v. Wheeler*, 435 U.S. 313 (1978) (interpretation of source of inherent sovereignty); *McClanahan v. State Tax Comm'n*, 411 U.S. 164 at 174–75 (1973).

Courts in both the United States and Canada have been suspicious of arguments that the Aboriginal nations had agreed to relinquish sovereignty or Aboriginal rights under any term of the treaty,²⁸⁸ because the Aboriginal negotiators could not be held strictly accountable for the nuances of the foreign English treaty text.²⁸⁹ In sum, these canons of treaty construction establish a fundamental method of equitable treaty interpretation. More ambitiously, these post-colonial rules of interpretation can be invoked to combat political powerlessness, and to be a remedy for the toxicity of colonization and Eurocentric thought.²⁹⁰

IV. *Míkmaw Tenure as Allodial Tenure*

The place where you are, where you are building dwellings, where you are now building a fort, where you now wish to establish your authority, this land of which you now wish to become the absolute master, this land belongs to me, I have come from it as surely as the grass, it is the proper place of my birth and of my residence, this land belongs to me, the Indian; yes I swear, that it was given me by God to be my homeland in perpetuity.

Santé Mawíomi Declaration to the new
Governor of Kchibouktouk 1749²⁹¹

On the basis of the foregoing review of the terms of the Míkmaw Compact and the rules of treaty interpretation, it can be argued that the Crown clearly has affirmed, recognized, and reserved the original tenure of the Santé Mawíomi of the Míkmaw Nation. Part I of this essay described the imported fictions, contradictions and fragility of Canadian property law, while Parts II and III outlined the dynamic elements of Míkmaq tenure and the interpretive rules. In this section, I will attempt to bring them together to provide legal meaning for Míkmaw tenure as it is encoded in the prerogative Compact and treaties. In determining its *sui generis* meaning, I will be looking at all forms of law, rather than British and Canadian law. These positive laws leave no authority for the fiction of original title in the Imperial Crown. Thus, ancient prerogative law of the Crown, Imperial Acts, and English and Canadian law will be used to determine the legal meaning of the reserved and protected Míkmaq

288. *Simon, supra* note 26; *Sparrow, supra* note 7; *Sioui, supra* note 245; and *Worcester supra* note 5 at 551–61.

289. *Ibid.*; *Frickey, supra* note 263 at 397–98.

290. Post-colonial international treaty law reaches a similar position, but does not address situations typical of “indigenous treaties” where the parties lacked a common language of negotiation, the agreement was recorded by only one party, and it was couched in technical vocabulary which was almost certainly unfamiliar to the opposite party. See Articles 27 and 31 of the *Vienna Convention, supra* note 274.

291. 24 September 1749. Original in Míkmaq and French in (1988) 1 *Le Canada Francais* 17.

tenure. Each source of these laws has limits, but a sensitive and integrative approach can overcome the limitations.

It is well settled in law that the protected Mi'kmaq tenure in prerogative Treaties and Legislation was never formally or explicitly ceded or purchased by the Imperial Crown. The first comprehensive review of Mi'kmaq legal history in Nova Scotia, was conducted by Chief Justice MacKeigan in 1975 in *R. v. Isaac*.²⁹² He concluded that original Indian rights as defined in *Worcester* existed among the Mi'kmaq.²⁹³ He held these original rights arose in English customary or common law and were confirmed by the *Royal Proclamation of 1773* and other authoritative declarations.²⁹⁴ He further declared that the *Royal Proclamation of 1773*

292. [1976] 13 N.S.R. (2d) 460 (C.A.).

293. *Ibid.* at 475. Because of the infamous *R. v. Syliboy* decision denying the 1752 Treaty was valid (*supra* note 265), the Chief Justice did not consider the treaty rights aspect of hunting. Ironically, however, the Chief Justice did reverse the *Syliboy* ruling that the *1773 Proclamation* did not apply to Nova Scotia (*ibid.* at 481). In 1982, the Chief Justice affirmed the *Syliboy* decision in *R. v. Cope* 49 N.S.R. 555 at 564 (C.A.); as did Hart and MacDonald JJ.A. in *R. v. Simon* 49 N.S.R. (2d) 566, at 572–77 (C.A.). In 1985, the Supreme Court of Canada in *Simon*, *supra* note 26, reversed these decisions.

294. The Chief Justice stated that “The Proclamation was clearly not the exclusive source of Indian right . . . but rather was ‘declaratory of the aboriginal rights’ . . . I am of the opinion that the Proclamation in its broad declaration as to Indian rights applied to Nova Scotia including Cape Breton. Its recital (p.127) acknowledged that in all colonies, including Nova Scotia, all land which had not been ‘ceded to or purchased by’ the Crown was reserved to the Indians as ‘*their Hunting Grounds*’. Any trespass upon any lands thus reserved to the Indians was forbidden” (*Isaac*, *ibid.* at 478). This passage was cited with approval by the Nova Scotia Appeal Division in *R. v. Denny* (1990), 94 N.S.R. (2d) 253 at 260, [1990] 2 C.N.L.R. 115 (C.A.). (Aboriginal right to fish beyond the strict perimeter of Reserved lands). In the Chief Justice’s analysis of the *1773 Proclamation* he stated “The ‘lands reserved’ apparently included all lands in Nova Scotia which the Indian had not ceded or sold to the Crown. ‘Ceded land’ presumably included lands then occupied with the assumed or forced acquiescence of the Indians, such as those at Halifax, Lunenburg, Liverpool and Yarmouth, and the former Acadian lands taken over by New England ‘planters’. Later the ‘land reserved’ as ‘Hunting Grounds’ were, of course, gradually restricted by occupation of the white man under Crown grant which extinguished the Indian right on the land so granted. Indeed, the land where the rights exists may have in time become restricted in Nova Scotia to the reserved lands which we now know as ‘Indian reserves’.” (*Ibid.* at 479) This explanation of ceded is another part of the colonial landscape problem in Canadian property law. MacKeigan does not attempt to resolve the inconsistency between the *1773 Proclamation* or the *Statutes of Frauds*, and the lack of written cessions or purchases. This belief in implied extinguishment theory of Crown grants and white occupation is inconsistent with the prerogative law and English law, and is probably built on a white supremacist doctrine of colonialization theory. Such reconciliation is particularly difficult when the prerogative law, the constitutional law of the colony, prohibited anyone from trespassing or purchasing land from Indians (below part III (C)). His interpretation of extinguishment by occupation under Crown grants or leases was raised before the Supreme Court of Canada in *Simon*, *supra* note 26. The Court did not make a decision on this issue, but they stated that extinguishment cannot be lightly implied.

had not been altered by subsequent treaty, agreement or competent legislation.²⁹⁵ In conclusion, MacKeigan C.J. 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.²⁹⁶

MacKeigan C.J. did not examine the treaty reservation of Míkmaw lands, liberties, and property issues.²⁹⁷ This oversight enabled the Chief Justice to hold that Indians on Nova Scotian reserves had a usufructuary right in the reserve land, the legal right to use that land and its resources, including, the right to hunt on that land.²⁹⁸ He acknowledged that original rights were preserved when the colonial governments set apart reserve

295. *Isaac*, *ibid.* at 478. See especially section 25 of the *Charter* that continued the validity of the rights arising from the 1773 Proclamation.

296. *Ibid.* at 478–79, 483 and 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” (*ibid.* at 483–84). Before the Supreme Court of Canada in *Simon*, *supra* note 26 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 it unnecessary to come to a final decision on extinguishment by occupation of Crown grant or lease (*Isaac*, *ibid.* at 405–406).

297. This issue had continued to be avoided by the courts. In 1982, in the Court of Appeals decision in *R. v. Cope*, *supra* note 293, MacKeigan rejected the Treaty liberties argument as well as the Aboriginal rights argument. Chief Justice MacKeigan said that clause 4 that recognized the “liberty to hunt and fish” in the 1752 Treaty was “very far short in words and substance from being a grant by the Crown of a special franchise or privilege replacing the more nebulous aboriginal rights”; or that the treaty could not “be considered a treaty granting or conferring new permanent rights” (*ibid.* at 564). In the same year, section 35(1) of the *Constitution Act, 1982*, *supra* note 1, transformed the nebulous existing aboriginal rights as well as the positive treaty rights into synchronic constitutional rights. In the subsequent Appellate Division decision in *R. v. Simon* (1982), 49 N.S.R. (2d) 566 (C.A.) Chief Justice MacKeigan did not write an opinion. Justice MacDonald, however, used MacKeigan’s decision as precedent in the companion case on fishing rights. On appeal, the Supreme Court of Canada in *Simon*, *supra* note 26 and *Sparrow*, *supra* note 7 overruled the Nova Scotia Appeal Division decision on both issues.

298. *Cope*, *ibid.* at 478 and 485.

lands,²⁹⁹ but he did not explain their authority to set apart lands reserved under the Compact. Moreover, he also held these customary original rights were implicitly continued and protected in section 18(1) the *Indian Act*.³⁰⁰ Since this decision, no further proof of cession or purchase of Mi'kmaq tenure has occurred, although there have been many implicate theories that attempt to justify the loss of use of the lands without providing compensation.³⁰¹

Since the *Isaac* decision, the Supreme Court of Canada has further defined the *sui generis* fiduciary duty of the Crown toward reserved lands in the context of the 1773 Proclamation and the *Indian Act*.³⁰² Moreover, the Supreme Court of Canada in *Simon* explicitly affirmed that the 1752 Treaty: created mutually binding legal obligations under federal law independent of the constitutional law;³⁰³ provided a civil mechanism for dispute resolution;³⁰⁴ has continuing validity and force as when it was concluded since it has not been terminated;³⁰⁵ established rules of fair, large and liberal construction of treaties in favour of the Indians;³⁰⁶ and demanded strict proof of extinguishment of a treaty-protected right.³⁰⁷ In *Sioui* the Court rejected the idea of third party extinguishment to a treaty right and added the requirement that Indians who are party to a treaty must consent to its extinguishment.³⁰⁸

Furthermore, in *Sparrow* the Supreme Court underscored the necessity for constitutional principles of interpretation regarding existing rights under section 35(1).³⁰⁹ Existing Aboriginal rights must be proven

299. *Ibid.* at 469 and 485.

300. *Ibid.* See *Guerin, supra* note 54 for an analysis of the fiduciary duty that arises under this section in a situation of non-recognized Aboriginal title.

301. A. Tanner & S. Henderson, "Aboriginal Land Claims in the Atlantic Provinces" in K. Coates, *Aboriginal Land Claims in Canada* (Toronto: Copp Clark Pitman, 1992) at 131–166. All these intricate theories are based on a self-interested and privileged colonial assumption: the force of colonial circumstances to allow courts to deny or regulate existing prerogative rights; for example European settlement in British North America is sufficient for a court to extinguish prerogative treaties and legislation protecting Aboriginal peoples. Not only is this contrary to the British rule of law but also the United States Supreme Court has consistently rejected this principle: *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *McClanahan, supra* note 253 at 173; *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968); *The Kansas Indians* 72 U.S. (5 Wall.) 737 (1866); *Worcester, supra* note 5.

302. *Guerin, supra* note 54.

303. *Supra* note 26 at 398–401.

304. *Ibid.* at 401, referring to art. 8.

305. *Ibid.* at 403–07.

306. *Ibid.* at 402–03.

307. *Ibid.* at 405–06. In *Sioui, supra* note 245, reaff'd *Simon, supra* note 26.

308. *Supra* note 45 at 1061–66; C.N.L.R. at 151–154.

309. *Ibid.* at 1101–1109; C.N.L.R. at 177–87. In this case the Court stated that section 35(1) must be interpreted in a purposive and liberal way so as to entrench the existing Aboriginal rights. These rights must not be viewed in a vacuum. Aboriginal history and traditions must be

to exist, that is to be unextinguished, and are to be interpreted with flexibility to permit their evolution over time.³¹⁰ The Court rejected the Crown's arguments that Aboriginal rights can be extinguished by federal Acts or regulations. Instead it stated that federal-provincial control of an Aboriginal right does not mean that the right is extinguished, even if the control is exercised in great detail.³¹¹ Finally, the Court stated that the Sovereign's intention is controlling and to extinguish Aboriginal rights the Sovereign's written command must be clear and plain.³¹²

In *Sioui*, the Supreme Court of Canada directed the legal profession not to ignore the land issues. It stated:

a treaty has to be interpreted by determining the intention of the parties on the territorial question at the time it was concluded. It is not sufficient to note that the treaty is silent on this point. We must also undertake the task of interpreting the treaty on the territorial question with the same generous approach toward the Indians that applied in considering earlier questions.

Now as then, we must do our utmost to act in the spirit of *Simon*.³¹³

Applied to the Míkmaw Compact that affirmed Aboriginal tenure and rights, these decisions establish three stringent tests (a strict proof of the fact; the Sovereign's clear and plain intention to extinguish; and consent of the Indians) that tend to diminish any theory of implied extinguishment

examined to determine the purposes of these rights. The section 35(1) rights are relative to other constitutional rights, in sections 91 and 92 of the *Constitution Act, 1867*. Aboriginal claimants must show they are a holder of a right and *prima facie* interference with the right, then any conflicting legislation, to be valid, must be constitutionally justified.

310. *Ibid.* at 1091–93; C.N.L.R. at 169–171. The Court refused to equate “existing” with the concept of being in actuality or exercisable (*R. v. Eninew* (1984), 10 D.L.R. (4th) 137, 32 Sask. R. 237 (C.A.)). This approach answers the problems of how law can persist as order in a world of pervasive change and progression.

311. *Ibid.* at 1095–1101, 1111–1119, C.N.L.R. at 173–76, 182–187. In *Denny*, *supra* note 294 at 263, the Nova Scotia Appeal Division affirmed the Aboriginal right to fish for food strictly on a constitutional interpretation of section 35(1) of the *Constitution Act, 1982*, and independent from the force and effect of the terms of the Míkmaw treaties. They stated “based upon the decision in *Isaac*, 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” (*ibid.* at 263).

312. *Ibid.* at 1098–99; C.N.L.R. at 174–175; *R. v. Alphonse*, [1993] 5 W.W.R. 401 (B.C.C.A.).

313. *Ibid.* at 213. This decision protects Aboriginal and Treaty rights and insulates it from past encroachment due to nonuse, subsequent colonial acts, and modern statutes. Additionally, the confirming prerogative legislation renders the implicate extinguishment theory unconstitutional. This decision is consistent with the International Court of Justice decision in the *Right of Passage over Indian Territory*, *supra* note 274. In interpreting an old indigenous treaty, the court ruled: “that the validity of a treaty concluded as long ago as the last quarter of the eighteenth century, in the conditions then prevailing on the Indian Peninsula, should not be judged on the basis of practices and procedures which have since developed only gradually.”

of Míkmaw tenure or rights as suggested by Chief Justice MacKeigan and so boldly asserted by the Province of Nova Scotia.³¹⁴

Faced with these judicial precedents, the meaning of the reservation of “all Míkmaw lands, Liberties, and properties that they had not conye’d or sold to or possessed by any of the English subjects” in the 1752 Treaty must be reconceptualized. In no case has the unity of the prerogative treaties and legislation been analyzed. In the cases to date, the courts have fragmented these protective documents thereby reaching narrow results. The governments and courts of the Atlantic provinces have virtually ignored or avoided the 1752 Treaty and its context or wording, that is, the only mutual expression of respective rights. This is of special importance since the 1752 Treaty is the central and unifying treaty of the Míkmaw Compact with the Crown.

Central to this reconceptualization is an understanding of the Míkmaw Nation’s relationship with the Imperial Crown at the time of the Compact. At this time neither the Legislative Assembly of Nova Scotia nor federal government of Canada existed. Additionally, this relationship was based on treaty or consensus in international law, exercised under the prerogatives of the Crown. The treaty relationship was a constitutional and legal alliance with the Crown as a whole, since it was undivided at the time of the Compact. The alliance was based on mutual respect and trust, not coercion or prudence. Moreover, this consensual relationship knew nothing of the Norman or feudal system of land tenure, emanating from one chief lord or king or the development of English land law. Instead, it was founded on a nation-to-nation relationship in the Law of Nations, the law of Great Britain, and by the explicit terms of the treaties by British civil law.

1. Allodial Tenure

In the context of the English schema of land law, the Compact clearly illustrates that the Míkmaw tenure was and is a protected *allodial* tenure.³¹⁵ Allodial tenure is an entire property in the land; a territory held

314. *Supra* text and notes 294 and 297; see *Hopton v. Pamajewon* (1993), 16 O.R. (3d) 390 (C.A.).

315. This is a late Latin term *alodium* or *allodium*. English also uses the Germanic term *lannemanni*, or *boclands*. Blackstone, *supra* note 19 at 105. In German it is also called *lebensfreies* or *Freiguterbgut*, in Spanish *alodio*, in French *propriété*. The concept is also called *odal* in Iceland or free inheritance in *Lex Scalia*. The reserved Míkmaw tenure in Atlantic Canada is similar to the concept of an allodial tenure in British law. I realize the risk of collapsing Míkmaq tenures into foreign theories, but I am arguing by analogy not appropriating an alien langscape. I am using the concept of allodial tenure as a metaphoric bridge between the distinct worldview and langscapes.

in absolute ownership without service or acknowledgement of any superior people.³¹⁶ Thomas Hobbes stated that “[w]hen a man holds his Land from the gift of God only, the lands Civilians call allodial.”³¹⁷ Lord Coke stated that in the Domesday Book the tenants in fee simple are called *alodarrii* or *aloarrii*,³¹⁸ while Stubbs refers to them as “alodiars of Domesday”.³¹⁹ English writers have called a territory allodial if possessed by a free title,³²⁰ or a full propriety³²¹ or if held of no one but enjoyed his land as free and independent.³²² Others noted that the King “might have his ancient allodial property.”³²³ Allodial tenure was also analogized as the rights held by the great proprietors of English land,³²⁴ or to the same privileges and rights as had been enjoyed by the original proprietors of England,³²⁵ before feudalism.³²⁶

In British land law, allodial tenure is an undiscussed and neglected tenure. Because of the fiction of the original title of the Crown of England and its feudal land traditions, allodial tenure became an inconceivable tenure in England, and thus a virtually irrelevant legal concept in British and Canadian legal analysis. It is an uncharted tenurial system beyond the competency or expertise of the British court or legal profession. Still the vague concept has haunted British legal history, and been a source of some judicial confusion.³²⁷

316. *Oxford English Dictionary*, rev. ed. (Oxford: University Press, 1961) at 237. Manley, *Interp.* (1672).

317. T. Hobbes, *A Dialogue between a Philosopher and a Student of the Common Law*, rev. ed. by J. Cropsey (Chicago: University of Chicago Press, 1971) at 1999.

318. Coke, *supra* note 93 at 1b.

319. W. Stubbs, *The Constitutional History of England in its Origin and Development*, 6th ed. (Oxford: Clarendon Press 1897, repr. New York: Barnes & Noble Inc. 1967) vol. 1 at 89.

320. D. Hume, *History of England from the Invasion of Julius Caesar to the Revolution in 1688*, rev. ed. (Indianapolis, 1983–5) vol. 1 at 246.

321. T. Keightley, *The History of England* (New York: Harper & Brothers, 1860) at 77.

322. Warmington, *infra* note 403 vol. 1 at 174.

323. Freeman, *infra* note 404 at vol. 3 at 95; E.A. Freeman, *English Constitution* (Toronto: J. Campbell & Son, 1872) at 77.

324. A. Smith, *An inquiry into the nature and causes of the wealth of nations*, rev. ed. (New York: Modern Library, 1937) vol. 1 at iii, vol. 4 at 413.

325. T. Carte, *History of England* (1747) vol. 1 at 364.

326. J.F. Kirk, *History of Charles the Bold* (1864) vol. 4 at iii; Stubbs, *infra* note 385, vol. 1 at vii and 297.

327. In the thirteenth century, in lowland Scotland, a number of free individuals held land for which they could not show a charter or claim to have been *infest* by any lord “de antiquo conquesto”, “per antiquam tenarum” or simply “de antiquo” (P. Vinogradoff, *Villainage in England: Essays in English Mediaeval History* (Oxford: University Press, 1892) at 199 and 452–56). Today, the folk-lands appear in the udal lands of the Orkney and Shetland Islands, acknowledging no feudal superiority or ultimate ownership of the sovereign, but with the kinsmen having a vague entitlement to reversion (C.F. Kolbert & N.A.M. MacKay, *History of Scots and English Land Law* (Berkhamsted: Geographical Publications, 1977) at 15–17); The courts have held that the mere long use of feudal conveyance is not enough to affect the allodial

Allodial tenure is the opposite of the feudal or fee tenure, which is derived from inheritance. Before the arrival of the Europeans, the Santé Mawíomi was the *allodarii*, or the Aboriginal lords of their “free manors” or absolute property of their ancient territory in America. As discussed earlier in this essay, the *sui generis* land tenure of the Mawíomi arose long before its relations with the Imperial Crown as a customary tenure created by the Mi'kmaq worldview. Its tenure in Atlantic Canada is the equivalent of the Crown's original title or tenure in England. For example, Lord Watson in *St. Catharines Milling* noted this when he stated that “the entire property of the land remained” with Indian nations and tribes under the *Royal Proclamation of 1773* and discussed their interests as “tenures”.³²⁸

The allodial tenure of the Mi'kmaq was confirmed by the prerogative Treaties. The treaties transformed this tenure into a vested tenure protected by civil law. Mi'kmaq tenure was not created by the Compact or subsequent Treaties, it was merely acknowledged by the Crown. Mi'kmaq tenure was not derived from a grant from the Crown; it arose in the customary worldview and law of the Mi'kmaq Nation and Nikmanen order.³²⁹ As illustrated earlier, Santé Mawíomi, like other Aboriginal nations, had an orderly notion of space and place, that was fundamental to their linguistic order and cultural coherence that could be translated into aboriginal law of property and into the allodial tenure in Roman and English law.

The Supreme Court of the United States affirmed the distinct theory of aboriginal title in *M'Intosh*,³³⁰ when Aboriginal title was seen as a distinct pattern of property tenures and rights derived solely from aboriginal authority, and not dependent upon either the state or federal land tenure

nature of the udaller's title (*Beaton v. Gaudie* (1832), 10 S 286). The Court of Session has affirmed allodial tenure and prevented the Crown from claiming ownership of the foreshore and salmon fisheries (W.P. Drever, “Udal Law and the Foreshore” (1904) Jur. Rev. 189; *Smith v. Lerwick Harbour Trustees* (1903), 5 F 680; *Lord Advocate v. Balfour* (1907), SC 1360). 328. *Supra* note 5 at 54–55. Chief Justice Marshall stated the universal conviction that the Indian nations possessed a full right to the lands they occupied (*Worcester*, *supra* note 5 at 560), the Indians were the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion (*M'Intosh*, *supra* note 5 at 574). Justice Clifford of the Supreme Court stated that apart from the pre-emptive right of purchase acquired by the United States as successor of Britain, the Indians retain their “absolute” original title as “owners and occupants of the territory where they resided” (*Holden v. Joy*, 17 Wall. 211 at 243–4 (1872)).

329. See above part II. “[A]ll thought is founded on [the] demand for order” Lévi-Strauss, *The Savage Mind* (London: Weindenfeld and Nicolson, 1966) at 10. Lévi-Strauss commenting on the Pawnee comment to an anthropologist that “All sacred things must have their place”, elaborated: “It could even be said that being in their place is what makes them sacred for if they were taken out of their place, even in thought, the entire order of the universe would be destroyed.” (*ibid.*)

330. *Supra* note 5 at 593–94.

systems. In *Cherokee Nation*, the majority stated: “Though the Indians are acknowledged to have an *unquestionable*, and, heretofore, *unquestioned right* to the lands they occupy, and that right shall be extinguished by a voluntary cession to our government.”³³¹ The two dissenting justices stated,

notwithstanding we do not recognize the right of the Indians to transfer the absolute title of their lands other than to ourselves, . . . the principle is universally admitted, that this occupancy belongs to them as a matter of right, and not by mere indulgence. They cannot be disturbed in the enjoyment of it, or deprived of it, without their free consent; or unless a just and necessary war should sanction their dispossession. In this view of their situation, there is as full and complete recognition of their sovereignty, as if they were the absolute owners of the soil.³³²

In *Worcester*, the Court held as a matter of law under the United States Constitution that: “The Indian nations had *always* been considered as *distinct, independent* political communities, retaining their *original* natural rights, as the undisputed possessors of the soil from time immemorial.”³³³ These descriptions correspond to the concept of allodial tenure.

Similar to British and Canadian judges,³³⁴ the American judges did not seem to find it necessary to make any detailed analysis of Aboriginal tenures. They were only concerned with their conveyance to private parties or the United States. All the common law courts in North America have recognized that Aboriginal land tenure was clearly not dependent on external policies, but rather on “original natural rights” recognized in the Treaties, prerogative laws, and federal common law.³³⁵ If they had understood the concept of allodial tenure, these courts could have unravelled their perplexity with aboriginal title.

Even if the Míkmaw tenure is seen as provisional or transitional and requires eventual ratification by the law of civil society, the prerogative treaties performed this act within British law, and the 1773 Proclamation

331. *Supra* note 249 at 17 (emphasis added).

332. *Ibid.* at 55.

333. *Supra* note 5 at 559–60 (emphasis added).

334. See above part I of essay.

335. B. Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: Native Law Centre, 1983) at 17–36; Henderson, “Unraveling the Riddle of Aboriginal Title”, *supra* note 60. See Justice Strong’s comments in *St. Catharines Milling*, *supra* note 5 at 631–32: “The words ‘rights’, ‘title’ and ‘possession’ [in section 3 of the *Quebec Act*, 1774] are all applicable to the right which the crown had conceded to the Indians by the proclamation [of 1773], and, without absolutely disregarding this 3rd section, it would be impossible to hold that these vested rights of property or possession had all been abolished and swept away by the statute.” Lord Watson agreed with this position in *St. Catharines Milling*, *supra* note 5 at 54.

affirmed that principle in prerogative law.³³⁶ Prerogative legislation vested the Mi'kmaq tenures under the protection of British public law.³³⁷ Indeed, the shared purpose for entering into a treaty of peace and protection with the Imperial Crown was to tighten up and protect these vaguely understood Aboriginal tenures in the territorial concepts of the Law of Nations and Nature as well as British law.³³⁸ The Imperial Crown reserved all the existing Mi'kmaq lands, liberties and properties not already purchased from Mi'kmaq, until the nation was willing to sell. Even if some doubt is raised, the Supreme Court in *Siouji*, just as in *Worcester*, has clearly stated that in the absence of any express mention of territorial scope of treaties, it has to be assumed that the parties to the treaties intended to reconcile the Aboriginal nations need to protect the exercise of their customs with the desires of the British to expand.³³⁹

If all Aboriginal territory and tenures were reserved for the Mi'kmaq nation then the Crown has a unique protective treaty obligation to preserve it. Through the clear wording of these Compacts and prerogative legislation, the British Crown can acquire a derivative estate or interest under Aboriginal dominion, but this does not affect the original territorial sovereignty of the Aboriginal nations. Aboriginal nations can share their original territories or rights with European nations and peoples, but their guests do not acquire their original title.

Even acquisition of such tenure through international agreements or prerogative Treaties creates derivative roots of title, and not original titles.³⁴⁰ Within the context of the fundamental principles of English tenure, the Crown could only acquire a derivative or jurisdictional title from an Aboriginal nation through a treaty of cession.

The Crown's future interest acquired by prerogative treaties of peace and protection, however, can never be complete ownership, because it is protective and conditional rather than absolute. If the Imperial Crown received cessions or surrenders of Aboriginal lands, it did so as a fiduciary or trustee, with legally enforceable fiduciary duties.³⁴¹ The Crown's

336. Article 8 of the Treaties itself, subsequent prerogative Instructions, and Proclamations implementing these Treaties within the law of Great Britain. Colonial law also implemented the prerogative Legislation in the provinces. *1762 Law*, *supra* note 191.

337. Clark, *supra* note 194 at 58–84.

338. *Mohegan Indians*, *supra* notes 158–161. See generally, J.Y. Henderson, "The Doctrine of Aboriginal Rights in the Western Legal Tradition" in *Quest For Justice For Native People* (Toronto: University of Toronto Press, 1986).

339. *Supra* note 5 at 157.

340. *Advisor Opinion on Western Sahara*, [1975] I.C.J. Rep. 3 at 39.

341. *Guerin*, *supra* note 54; *Seminole Nation v. US*, 316 US 286 at 296–7 (1942). See J. Hurley "The Crown's Fiduciary Duty and Indian Title: *Guerin v. The Queen*" (1985) 30 McGill L.J. 560; D.M. Johnson, "A Theory of Crown Trust Toward Aboriginal People" (1985) 18 Ottawa L. Rev. 307.

derivative use or allocation of the treaty lands is based on full performance of the delegations and obligations described in the Treaties.³⁴² Failure of the Crown to perform its treaty obligations would cause all its jurisdictional interests over the land to revert to the Míkmaw Nation by the fundamental elements of English land law. Because the Imperial Crown had a fiduciary duty toward the Míkmaw Nation to protect their Aboriginal tenure and rights in dealing with colonialists and third parties, it could not annex the protected tenures for its own uses or for any colony or dominion. It had to remain a foreign jurisdiction of the Crown. The Crown, however, could formally request a colony or dominion to administer these rights and obligations.

Moreover, unrelinquished Míkmaq lands were and are superior to either the Crown's interests or rights conveyed by the Crown to its subjects. While the Imperial Crown could assert a preemptive title against other European nations in the Law of Nations,³⁴³ under the express terms of the Compact Aboriginal tenure was reserved to the Míkmaq. The Compact and prerogative legislation denied the Imperial Crown any present interest in Aboriginal tenure, other than protection of the land. The future or ultimate interest of the Crown in the reserved Míkmaw tenure was an opportunity. Such opportunity is a concept of enablement rather than legal title or possession; it refers to doing more than having. Having opportunity certainly does not entail rights to land or material possession, it makes no sense to speak of future opportunities as proprietary. Being enabled or constrained refers to the rules and practices that govern the Crown's action. The structural and specific relations of the Crown to the acknowledged and reserved Míkmaq tenure had to be acquired pursuant to the rules established by the 1773 Proclamation, that is, through a consensual public purchase from the Santé Mawíomi when they were willing to sell.³⁴⁴ Until Míkmaq tenure is purchased by the Crown, it is protected allodial tenure in prerogative law and cannot be

342. In 1973, the Queen to the Assembled Chiefs in Calgary formally conceded that "her government in Canada understands the necessity of full compliance with the spirit and terms of the Treaties." As quoted by J. Chretien, Address (Statement made as Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People, 8 August 1973) [unpublished]. This position was not new, it was a consequence of the international affirmation in the 1969 *Vienna Convention on the Law of Treaties*. The Treaty Convention reaffirmed the principle that Treaties are absolutely obligatory on the parties. It universally recognized that "every treaty in force is binding upon the parties to it and must be performed in good faith." On October 14, 1970, the Federal Government of Canada unconditionally acceded to the 1969 Conventions. It made no distinct qualification about either the Georgian or Victorian Treaties, hence within the federal jurisdictions they have an obligatory force.

343. *Worcester*, *supra* note 5 at 542–44.

344. "[I]f at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in Our Name, at some public Meeting or Assembly

compromised by any other party without the mutual consent of the Mawíomi and the Sovereign of Great Britain.

Consequently, there is nothing in law to support the proposition that any British subjects have a general right to acquire any protected Aboriginal territories by any method.³⁴⁵ From the seventeenth century, the Crown and colonial legislation prevented private land purchases by requiring all acquisitions of Aboriginal land to be licensed or approved in advance. The reasons for these restraints on Aboriginal alienation to individuals and corporations lay with the Crown's right of preemption, created by the international discovery convention and treaties,³⁴⁶ to negotiate exclusively with the Aboriginal nations and tribes for extinguishment of their tenure.

In the Mi'kmaw context, the legal meaning of Aboriginal dominion may be best understood as operating within the context of *allodial* tenure, rather than fee simple title,³⁴⁷ in British law. Mi'kmaw tenure, whether protected by treaties or not, is an absolute property or free tenure, an independent and unique tenure system that acknowledges no external lord or superior. It was not part of the inheritance of the Imperial Crown. In feudal law, allodial tenure exists without any obligation of vassalage or fealty, and was not considered to be under the Crown. It is the converse of a fee simple tenure or estate,³⁴⁸ since it does not come to the Crown or lords by inheritance but from personal effort. If the Crown has any interest in the Mi'kmaw tenure as allodial lands, it is by treaty or contract. In prerogative Treaties and Legislation, as discussed previously, the Crown's exclusive method of acquiring the reserved tenure was by purchase.

of the said Indians, to be hold for the Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie" (CM, *supra* note 177 at 291).

345. *Worcester*, *supra* note 5 at 545; *The Seneca Lands*, 1 Op. A.G. 465 (1821); *Fletcher v. Peck* 10 U.S. (6 Cranch) 87, 142–48; *Mohegan Indians*, *supra* note 192 at 118. See also 25 U.S.C. 177, originally enacted in Indian Trade and Intercourse Acts of July 22, 1790; *Oneida Indian Nation v. County of Oneida* 105 S. Ct. 1245 (1985); *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), 388 F. Supp. 649 (D. Me 1975); and R.N. Clinton & M.T. Hotopp, "Judicial Enforcement of the Federal Restraints of Indian Land: The Origins of the Eastern Land Claims", (1979) 31 Maine L. Rev. 17.

346. *Worcester*, *supra* note 5 at 544 (discovery allocated the exclusive right to purchase, but did not find the right of the possessor to sell), at 546 (Crown charters and other European grants were mere blank paper, so far as the rights of the native were concerned).

347. Suggested by K. McNeil, *supra* note 24 at 304–06. This is a very valuable suggestion, but it presumes some inheritance from the Crown or title or interest under the British Crown. Because of these implications, I prefer allodial tenure. In practice, there may not be any significant difference.

348. These estates are derived from the Latin concept of *feodium*, the quality or descending to the heirs of a holder.

2. *Prerogative Laws of Great Britain*

The established prerogative regime, the Imperial Parliament's *Foreign Jurisdiction Act*,³⁴⁹ and the classic theory of the common law have been reinforced by the new constitutional order of Canada. All these acts are consistent with Míkmaw tenure being a protected allodial tenure. Neither the Crown nor its agents have authority to take away the rights of the protected Aboriginal nations or to modify their Aboriginal or treaty rights in any way by other prerogative acts.³⁵⁰ There is no evidence that the protection of unrelinquished Míkmaq tenure in Atlantic Canada was legally transferred to the possession of the general British colonizers to be allocated among British subjects by domestic positive law. Any claims by colonists, then, should be readily dismissed since they were prohibited by the prerogative legislation from acquiring title to land for themselves from the Míkmaq or their spokespersons.

In the eighteenth century, when the Míkmaw Compact was created, the prerogatives of the Crown were a residuary monarchical power and practice created by international law.³⁵¹ The entire executive authority of the Kingdom rested in the Imperial Crown, on the foundation of custom and the common law.³⁵² This prerogative component of the Kingdom is one of the three great constitutional powers in Great Britain.³⁵³ The

349. *Infra* note 385.

350. *Connolly v. Woolrich* (1867), 17 RJRQ 75 at 84 and 95 (relying on *Worcester*, *supra* note 5); *M'Intosh*, *supra* note 5 at 594–97.

351. Often the international law origins are neglected in English law. Typically English courts and lawyers conceptualize the royal prerogatives as a pre-eminence which the Sovereign enjoys over and above all other persons by virtue of the common law, but this traditionally includes international law. *Blackstone*, *supra* note 19 vol. 4 at 67–68. The prerogatives were not created by the common law, because it is the residue of royal authority left over from a time before it was effectually controlled by the common law or statute. *Case on Convocation* (1611), 22 Co. Rep 72; *Proclamations' Case* (1611), 12 Co. Re. 74. As to the source of prerogative authority, the best the English courts have said is that the King ought to be under no man, but under God and the law, because the law makes the King. Chitty, *supra* note 173 at 351. The prerogatives of the Crown are great constitutional principles that are, generally speaking “as ancient as the law itself” *R. v. McLeod* (1883), 8 S.C.R. 1. The law of the King can best be understood as an ancient branch of aristocracy law of nations and a separate realm from Parliamentary authority in English law, see, *Shaw*, *supra* note 14 at 11–16.

352. A.B. Keith, *Imperial Unity and the Dominions* (Oxford: Clarendon Press, 1916) at 35; Chitty, *supra* note 173 at 4. For Crown prerogative, see generally 8 *Halsbury's Law of England*, 3d ed. (London: Butterworth & Co., 1752–64) at 836.

353. B. Clark, *supra* note 194. The British Empire consisted of a mother country, the protected foreign states, and the colonies. The Imperial Crown exercised the right of concluding treaties on behalf of all parts of the Empire. Generally, the question of treaty making is derived from international law, rather than domestic law. While the latter developments of Parliamentary supremacy steadily diminished the scope of the royal Prerogative, the treaty-making power was not diminished. In the eighteenth century, the Crown exclusively exercised this power.

Prerogatives were exercised in relation to foreign affairs such as entering into treaties.³⁵⁴

As a matter of modern constitutional convention, it subsequently developed that Parliament may object to the substance of a treaty, but it is still generally true that its terms cannot be challenged in the courts.³⁵⁵ Since the days of Lord Coke, the English courts have held that they may determine the existence of a prerogative power or privilege, but could not control the manner of its exercise.³⁵⁶

a. *Prerogative Legislation*

The prerogative treaties of the Mi'kmaq Compact validated and protected the Mi'kmaq tenure by the prerogative law of Great Britain and international law. As an exercise of prerogative power, the treaty obligations protected Mi'kmaq lands, liberties, and properties.³⁵⁷ The prerogative treaties and legislation vested the original property in the Mi'kmaq Nation in the prerogatives jurisdiction of the Imperial Crown, with the civil courts the designated agent of the treaty relationship. The treaties and aboriginal rights were protected from English colonists by prerogative legislations, e.g., the Royal Instructions and Proclamation and from other nations by the customary international law.

The specific terms of the prerogative Mi'kmaq Compact and treaties, however, take us beyond the Court's *sui generis* analysis. By the treaties, the ancient tenure was transformed into a vested Mi'kmaq tenure protected by prerogative legislation and the civil laws. Six years after the

354. It is the sole prerogative of the Crown in British constitutional law to negotiate, enter, and determine the contents of a treaty, ratify the treaty, and provide for implementation of the treaty obligations. H. Evatt, *The Royal Prerogative* (Sydney, Australia: The Law Book Company Limited, 1987); A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed. (London: MacMillan, 1915) at 460 ("A treaty made by the Crown is valid without the authority or sanction of Parliament"); A. Keith, *Responsible Government in the Dominion* (Oxford: Clarendon Press, 1912) at 1102 ("There is no real doubt that treaties made by the Crown are binding on the Colonies whether or not the colonial governments consent to such treaties").

355. A modern court may challenge the legislation giving effect to a treaty, but not the treaty itself, that purported to bind the sovereign of Parliament for the future.

356. S.A. De Smith, *Constitutional and Administrative Law*, 4th ed. (Harmondsworth: Penguin Books Ltd., 1982) at 137.

357. Despite the interest of international and municipal law in treaties, no written constitutional rules control the definition of Treaties in the United Kingdom or Canada. Our guides to prerogative Treaties are unwritten constitutional conventions and actual historical practices. Therefore, the main rules followed in this area are based on unwritten customs of the Crown and First Nations. When the Canadian federation was instituted in 1867, more than a century later than the Compact, the Imperial Government preserved its responsibilities toward pre-existing treaties. The obligation of implementing these Treaties in Canada fell to the Parliament and Government of Canada through section 132 of the *Constitution Act, 1867*.

Compact, on 2 October 1758, and pursuant to the authority delegated to the Sovereign by the Míkmawq, the Legislative Assembly was convened in Nova Scotia. British constitutional conventions establish 1758 as the date of the reception of the English legal system in old Nova Scotia as a settled colony,³⁵⁸ which also included New Brunswick.³⁵⁹ At that time the entire body of English law was imported, except to the extent that the law was unsuitable to the circumstances of the colony, for example, due to the existence of compacts and treaties with the aboriginal people.³⁶⁰ Since the Compact was an existing prerogative Act made before the reception of the English common law of colonization,³⁶¹ it required no implementing by colonial legislation to be controlling. Indeed, the Compact and prerogative Legislation defined part of the suitability of the reception of English law, and a pre-existing Imperial obligation and part of the existing prerogative constitution of Nova Scotia.³⁶²

Without formal cession or purchase of Míkmaw tenure by the Crown, the effect of Article 8 of the Compact, the implemented 1771 Instructions,³⁶³ and the 1773 Proclamation³⁶⁴ was to protect the Aboriginal territories or properties from English colonialists and assemblies. These prerogative Legislations conferred upon the Crown a *sui generis* fidu-

358. *Uniacke v. Dickson* (1848), 2 N.S.R. 287 (S.C.); Hogg, *supra* note 46 at 30 finds this dubious and argues that dates of reception thus derived are quite artificial and are really cut-off dates.

359. This is different from the idea that the first colonist carried as a birthright the English law and filled any legal void in the new territory. This idea was also limited by the court's determination if they were suitable to the circumstance of the territory, such as prerogative treaties. Hogg, *supra* at 46. The 1773 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 English law. No other documents "annexed" the reserved Hunting Grounds to any colony or to the federal government.

360. Hogg, *ibid.* at 30 and 32.

361. *Ibid.* at 28.

362. *Commentaries*, *supra* note 21 vol. 4 at 67–68. See especially, Justice Strong in *St. Catharines Milling*, *supra* note 5 at 615–16 cited to S.C.R.: "[A]t the date of confederation the Indians, 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. . . ."

363. 3 Geo. III; CO, 217/19 at 27–28; PANS, Micro reel B-1028 (4 May 1772). See, J. Singer "Well Settled?: The Increasing Weight of History in American Indian Land Claims" (1994) 28 Georgia L. Rev 481 at 503–08.

364. 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*, (Worcester, Mass.: American Antiquarian Society, 1911) vol. 12 at 212–18; CM, *supra* note 177 at 285–92; Slattery, *supra* note 57; and Borrows, *supra* note 47.

ciary duty, both contractually and equitably, to protect the Mi'kmaw Hunting Grounds for the Crown under the law.³⁶⁵

In 1771 Additional Instructions to the Governor of Nova Scotia and the other colonies acknowledged the “inviolable” compacts and treaties that had been made with the Aboriginal nations. They stressed that the peace and security of the colonies “greatly depend upon the Amity and Alliance of the several Nations or Tribes of Indians bordering upon the said colonies.” British Governors were ordered to “support and protect” the Aboriginal nations in “their just Rights and Possession and to keep a just and faithful Observance of these Treaties and Compacts which have been heretofore solemnly entered into.”³⁶⁶ This affirms the legal force of the Mi'kmaw Compact in the constitutional law of Nova Scotia. It was a direct act of state ratifying the existing Compacts and Treaties, witnessing the consent of the Sovereign to be bound by the existing Treaties and Compacts. To ensure the treaties were respected, moreover, the Sovereign ordered that the Governors:

forthwith cause this Our Instruction to you to be made Public not only within all parts of your Province inhabited by Our Subjects, but also amongst the Several Tribes of Indians living within the same to the end that Our Royal Will and Pleasure in the Premises may be known and that the Indians may be apprized of Our determin'd Resolution to support them in their just Rights, and inviolably to observe Our Engagement with them.³⁶⁷

The 1771 Instructions were implemented in old Nova Scotia through the Nova Scotia Proclamation in 1772,³⁶⁸ thus legally prohibiting anyone from trespassing, surveying, possessing, confiscating, or managing the reserved Mi'kmaw tenure protected by the prerogative Treaties.³⁶⁹ Moreover, the Nova Scotia Assembly acknowledged the Sovereign's obligations to legally protect treaty obligations and rights within its jurisdiction

365. CM, *supra* note 177 at 285–86.

366. *Supra* note 328.

367. *Ibid.* PANS, *supra* note 177 RG1 30 at 58.

368. *Supra* note 329. To make the Instructions a legally enforceable document, the Sovereign commanded the Governor to make the instructions public and to issue a colonial Proclamation, in the name of the Sovereign, “strictly enjoining and requiring all persons whatever who may either willfully or inadvertently have seated themselves on any Lands so reserved to or claimed by the said Indian without any lawfull Authority for so doing forthwith to remove therefrom [;]. And in case you find upon strict enquiry to be made for that purpose that any person or persons do claim to hold or possess any lands within Our said Province upon pretense of purchases made of the said Indians without a proper licence first had and obtained either from us or any of Our Royal Predecessor or any person acting under Our or their Authority you are forthwith to cause a prosecution to be carried on against such person or persons who shall have made such fraudulent purchases to the end that the land may be recovered by due Course of Law.” (*Ibid.*)

369. *Worcester*, *supra* note 5.

in its *Act to Prevent Fraudulent Dealings in the Trade with the Indians*.³⁷⁰ This Act implemented Article 8 of the Mikmaw Compact. It stated that because the Indians

were unacquainted with the laws of this province, and in what manner they are to proceed in order to do themselves right, the Lieutenant Governor, Council and Legislative Assembly authorized the Governor, Lieutenant Governor, or Commander in Chief, upon complaint of any Indians within this province, made to him or either of them, that they have been wronged or cheated of their furs or any other merchandize, or in any other their trade and dealing with other His Majesty's Subjects; that the Governor, Lieutenant-Governor, or Commander in Chief, is hereby desired to direct His Majesty's Attorney General to prosecute the same, either before His Majesty's Justices, or in any of His Majesty's Courts of Record in a summary way, as the laws do direct, and such prosecution shall be deemed legal, and the judgment and execution shall issue accordingly.³⁷¹

In the *Royal Proclamation of 1773*,³⁷² the Imperial Crown described the reserved Aboriginal dominion or territory of the Santé Mawiomi under the Compact as their protected “Hunting Grounds.”³⁷³ This applied to old Nova Scotia, including New Brunswick, Cape Breton and Prince Edward Island, Newfoundland and Quebec.³⁷⁴ The test to determine the application of the Proclamation was whether the Indian nations or tribes were “connected” with the Crown, or lived under the Crown’s “protection”.³⁷⁵ The terms of the Mikmaw Compact showed that the Mawiomi

370. S.N.S. 1772, c. 3.

371. *Ibid.*

372. See *supra* note 329.

373. See, in *Worcester*, *supra* note 5 at 552–53 (construing the fourth article of the Treaty of Hopewell that created a boundary line between United States “allotted” and the Indians “hunting-ground”). In the Treaty of Holson, July 1791, these terms were changed to “the boundary between the United States and Cherokee nation”, rather than allotments or hunting grounds.

374. Major General Gage sent the 1773 Proclamation to officers in command of the post of Halifax, Louisbourg, and Newfoundland 11 October 1773. C.E. Carter, ed., *The Correspondence of General Thomas Gage with the Secretaries of State* (New Haven: Yale University Press, 1931) vol. 2 at 1. On the 28 January 1774, Old Nova Scotia Governor Wilmot formally acknowledged receiving the Proclamation and promised the Board of Trade to give it the widest circulation (CO, 217/21, ff. 7–8). In Quebec, Lieutenant Governor Carleton issued a Proclamation dated 22 December 1776 and published in the *Quebec Gazette* (29 December 1776) ordering “if any of the said Inhabitants have made any Settlements on Indian Grounds, to abandon them without Delay” in B. Clark, *supra* note 194 at 99. On 9 February 1777, Governor Paliser of Newfoundland wrote Lord Shelburne, Secretary of State for the Southern Department, that the Quebec Governor allowed settlement along the Labrador seaboard “contrary to the Kings Proclamation of the 7th October” (CO, 194/18 and 27).

375. “And whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Ground” (CM, *supra* note 177 at 291).

were connected with the Crown and lived under its protection by their consent.³⁷⁶ Moreover, the Supreme Court of Canada has said that any silence in the 1773 Proclamation about existing Compacts and treaties cannot be interpreted as extinguishing them or their obligations.³⁷⁷

All lands in British North America that were not purchased by the Crown from the Aboriginal nations and tribes in 1773 were reserved as their Hunting Grounds. The reserved Mi'kmaq tenure was protected by this prerogative legislation and the constitutional law of Great Britain.³⁷⁸ The very wording of the 1773 Proclamation clearly shows that its objective, so far as the Indians were concerned, was to provide a solution to the problems created by fraud and greed which hitherto some of the English colonists had demonstrated in buying up Indian land at low prices.³⁷⁹ The Proclamation confers rights on the Indians without necessarily extinguishing any other right conferred on them by the British Crown under a treaty.³⁸⁰ These special constitutional rights have always existed and are now explicitly continued by the *Charter of Rights*.³⁸¹

There is no evidence that the Crown ever considered reserved Mi'kmaq tenure before the Compact was *res nullius* or *terra nullius* or was acquired by prescription, or effective control, or accretion or ceded or conquered territory. The terms of the Wabanaki and Mi'kmaq Compacts illustrate they were regarded as having the original title, which a colonist could purchase. To prevent conflict in purchases of Aboriginal tenure, these Compacts placed the aboriginal land and people under the protection of the Imperial Crown. The prerogative legislation conclusively affirms,

376. *Above* at part II B(3).

377. *Sioui*, *supra* note 245 at 152. The 1772 Instructions to the Governor explicitly stated Treaties and Compacts were protected by the Law (CM, *supra* note 177 at 285–86).

378. In the *Representation of the Lords of Trade on the State of Indian Affairs* (7 March 1778), it was confirmed that “the Proclamation of October 1773 . . . forbid, by the strongest prohibitions, all Settlement beyond the limits therein described as the Boundary of the Indian Hunting Ground, putting both their Commerce and Property under the protection of Officers here acting under your Majesty’s immediate authority, and making their Intervention necessary in every transaction with those Indians.” Clark, *supra* note 194 at 99 citing C.W. Alvord & A.C. Carter, *Trade and Politics 1777–1779* (Springfield: Trustees of the Illinois State Historical Library, 1921) vol. 3 at 184. The document received the King’s endorsement and was sent as a royal instruction of 1778 under the signet and sign-manual (*ibid.* at 245–47).

379. *Sioui*, *supra* note 245 at 152.

380. *Ibid.*

381. Section 25 of the *Constitution Act, 1982 (Charter)*, *supra* note 1. Lord Watson stated in *St. Catharines Milling*, “Whilst there have been changes in the *administrative authority*, there have [sic] been no changes since the year 1773 in the character of the interest which its Indian inhabitants held in the land surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the Royal Proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown” (*supra* note 5 at 54).

recognizes, and legally protects the territorial sovereignty of the Míkmaw Nation.³⁸² The Crown's future interest was a protective and derivative estate in the Law of Nations, with the 1773 Proclamation later establishing the procedures for its cession or purchase.³⁸³ Under the protection of the Treaties, the Santé Mawíomi's jurisdiction and tenure continued, as well as the Míkmaw family's management and uses of the land.

b. Foreign Jurisdictions

Treaties creating protective jurisdiction over territory outside of Great Britain came to be known in British constitutional law as a foreign jurisdiction under the Crown.³⁸⁴ Foreign jurisdictions are a separate legal category from dominions and colonies in British law.³⁸⁵ The *Foreign Jurisdiction Act, 1890*³⁸⁶ was a declaratory act about the distribution of power between Parliament and the royal prerogatives in foreign colonies over indigenous peoples. It affirmed the continuing exercise of Her Majesty's prerogative jurisdiction consistent with the terms of the treaties of protection with indigenous nations.³⁸⁷ These protectorates or protected states created by prerogative acts were considered a "foreign county".³⁸⁸

382. Royal Instructions of December 9, 1771, Governor Belcher 1772 Proclamation, 1773 Proclamation, *supra* note 202 at 285–89. See *supra* notes 260 and 262. *New South Wales v. Commonwealth of Australia* (1975), 135 C.A.R. 337 at 388 and 490; *R. v. Kent Justices*, [1967] 1 All ER 560 at 564.

383. For the English law of future interest at the time of the treaties, see Bacon, *Maximus*, reg. 14.

384. "Constitutional Law" 8 *Halsbury's Law*, *supra* note 352 at paras. 889–1082; 6 *Halsbury's Law*, *ibid.* paras. 806 and 981.

385. 6 *Halsbury's Laws*, *ibid.* describes a foreign jurisdiction as "a territory, outside Her Majesty's dominions, for whose international relations Her Majesty's government is responsible is styled a 'protectorate' or protected state." In a protectorate the Crown acquires jurisdiction exercisable by virtue of the *Foreign Jurisdiction Act*. The preamble of the Act provides that acquisition of legislative jurisdiction in a protectorate is by treaty, grant or other lawful means. In the sense of section 16 of the this Act, a protectorate or protected state was a "foreign county".

386. *Foreign Jurisdiction Act, 1890* (U.K.) 53 & 54 Vict., c. 37, original enactment 6 & 7 Vict. c. 94 (1843); In a protectorate the Crown acquires jurisdiction exercisable, by virtue of the *Foreign Jurisdiction Act*. The preamble of the Act provides that acquisition of legislative jurisdiction in a protectorate is by treaty, grant or other lawful means. In the sense of section 16 of this Act, a protectorate or protected state was a "foreign county". See also *Calvin's Case*, *supra* note 18; sections 132 and 129 of *Constitution Act, 1867*; Thompson and Story JJ.'s dissenting opinion in *Cherokee Nation*, *supra* note 249 at 49ff that the Cherokees composed a foreign state in the Law of Nations and within the sense and meaning of the constitution.

387. *Foreign Jurisdiction Act*, *ibid.* at s. 1. The exercise of prerogative power within foreign jurisdictions was limited by the doctrine of continuity of law and property. *Supra* note 173.

388. *Ibid.* at s. 16.

The Act instructed the British judiciary to interpret every prerogative action performed pursuant to this unique jurisdiction as valid, thus limiting the supremacy of the Parliament to pass inconsistent legislation.³⁸⁹ This Act affirms the Mi'kmaq Compact and prerogative legislation within British constitutional law. As distinct legal categories from the republican and colonial tradition of parliamentary or responsible government, the Act also immunizes the Mi'kmaq Nation from all authority derived from the Imperial Parliament's usual competency in the dominions and colonies or over subjects.

The prerogative Legislation reserving and protecting Mi'kmaq lands, liberties, and properties cannot be interpreted as annexing the territory to either the Crown or any colonial province or the dominion of Canada. This establishes a crucial constitutional fact. Together the 1771 Instruction and 1773 Proclamation establish Mi'kmaq lands as an acknowledged and protected 'dominium' or territorial sovereign in its own right. In 1910, in *The King v. Earl of Crewe. Ex parte Sikgome*,³⁹⁰ the King's Bench held that until Her Majesty and the Imperial Parliament and the local chiefs agreed to a consensual annexation of a territory protected by a prerogative Treaty, the territory remained a foreign country to the surrounding dominions even though it was administered solely by servants of Her Majesty. In analyzing the existing relations to the Crown's authority in a dominion and a foreign jurisdiction, Kennedy L.J. stated:

what the idea of a protectorate excludes, and the idea of annexation on the other hand includes is the absolute ownership [in the Crown] which was signified by the word 'dominium' in Roman law, and which, though perhaps not quite satisfactory, is sometimes described as a territorial sovereignty.³⁹¹

389. *Ibid.* at s. 3. This is a special law, parallel to *An Act to Remove Doubts as to the Validity of Colonial Law*, 28 & 29 Vict., c. 63 (1865).

390. [1910] 2 K.B. 576.

391. *Ibid.* at 619. Later, Lord Chancellor Shelborne reached the same conclusion. He stated: "Annexation is the direct assumption of territorial sovereignty. Protectorate is the recognition of the rights of the aboriginal or actual inhabitants of their own country, with no further assumption of territorial right than is necessary to maintain the paramount authority and discharge the duties of protecting power. In such a case, the measure of the protectorate, if assumed or asserted in general terms, would probably be the extent of territory occupied or inhabited by the races or tribes whom we have taken into our possession, for the coastline inland until some natural or tribal boundary was reached." A.D. McNair, *International Law Opinions, selected and annotated* (Cambridge: University Press, 1956) at 289–90; Memorandum of Lord Chancellor Shelborne, Secretary of State (30 January 1885). See 1883 draft of Proclamation of protectorate and Annexation (McNair, *ibid.* 293–94).

Central to an understanding of the distinct process of protectorates and annexation is the issue of a juridical state and a territorial sovereign. A foreign state or jurisdiction, judicially considered, consists in its being under a different jurisdiction or government, without any reference to its geographical position.³⁹² The Mawiomi's delegation of authority to the British Sovereign in the Compact vastly limited the nature and scope of British authority in Míkmáki. Together the Georgian Compacts and prerogative legislation established firm constitutional limitations on the competence of the Legislative Assembly outside the settlements. When the colonies are spoken of as provinces, reference is to their political or administrative capacity, and not to any proprietary capacity.³⁹³ Thus, to the Crown it was not perceived as inconsistent to have the reserved Hunting Grounds of Míkmáki within the political jurisdiction of one or many colonies.

Until the *Constitution Act, 1982*,³⁹⁴ no prerogative legislation formally incorporated the reserved tenures with the domestic realm of England or the colonies or dominions of British North America. From this perspective, it becomes clearer why the Supreme Court of Canada characterized Aboriginal title as *sui generis*. The reserved Míkmaw tenure in the treaties was of its own kind of class in English land law. By the *Constitution Act, 1982*, the Compact and its liberties were recognized and protected by Canadian law. The Compact was affirmed as limiting to other Imperial acts establishing the conventions of responsible government under the supremacy of law provisions.

3. English Domestic Land Law

Separate from prerogative legislation, the classic theory of the common law would affirm aboriginal tenure as an allodial tenure. At the time of the Míkmaw Compact, the classic theory of English common law held that law was an expression of a deeper reality found in custom remembered and observed or ancient collections of unwritten maxims and customs, which were merely discovered and publicly declared by judges.³⁹⁵ Blackstone's *Commentaries*³⁹⁶ and Hale's *History*³⁹⁷ did not trace English

392. See *Cherokee Nation*, *supra* note 249 at 54–58.

393. *Ibid.* at 54–55. For example, there are still no clearly established prerogative boundaries between Nova Scotia and New Brunswick in the written Constitution of Canada.

394. *Supra* note 1.

395. Blackstone, *supra* note 19, vol. 1 at 17, 64 and 68; Sir M. Hale, *A History of the Common Law*, 3d ed. by C.M. Gray (Chicago: University of Chicago Press, 1971) at 17.

396. *Ibid.*

397. *Supra* note 395.

law back to *a priori* first principles, but rather they located it within the living body of law and traced its historical development. Common law rested ultimately on general use and acceptance, the only way to show that a given rule is a rule of common law was by showing how it figures regularly in standard legal argument or tradition, use, and experience.³⁹⁸ The authority of any rules existed only insofar as they were used or relied upon. This theory was consistent with the respect the treaties with the Mi'kmaq accorded Aboriginal tenure and rights.³⁹⁹

The common law of England, derived from feudalism, acknowledged descent or inherited authority over land as the domestic model of land tenure. In contrast, personal effort by the Imperial Crown was the international model for acquisitions of foreign jurisdictions or territories.⁴⁰⁰ Personal effort comprised both purchase and conquest. Either method gave extensive prerogatives to the Crown with respect to acquired foreign jurisdictions or territories. In either method the title acquired by personal effort was a derivative title, not an original title.⁴⁰¹

Since the King could not acquire title to America through inheritance, acquisition of Aboriginal title had to be through personal effort. The translation of personal effort into purchase or conquest has created some perplexity. In the fifteenth century, Littleton defined "purchase" as the possession a man has, not by descent but . . . "*per son fait, ou per agreement.*"⁴⁰² In the seventeenth century Sir Edward Coke in his *Commentary on Littleton* translated "purchase" to mean by deed or agreement. Coke stated expressly what Littleton had not: that a gift was also a purchase. Blackstone in his *Commentaries* rounded out the rationalization of Littleton by explaining that one who receives a gift "comes to the estate by his own agreement, that is, he consents to the gift."⁴⁰³ In addition, Blackstone asserts that title by conquest was one method of purchase.⁴⁰⁴ He noted the Celtic word for "purchase" in Scottish law⁴⁰⁵,

398. *Ibid.* at 17 and 68.

399. NeNeil, *supra* note 24. "*Qui prior est Tempore potior est jure*" ("he [sic] has the better title who was first in point of time"), Coke, *supra* note 93 at 14a.

400. *Calvin's Case*, *supra* note 18 at 17a and 18a.

401. *Western Sahara*, *supra* note 274.

402. Sir T. Littleton, *Tenures*, trans. in Coke, *supra* note 93.

403. Coke, *ibid.* at 4a. With gift included, the special sense of law 'French purchase' is divorced alike from ancient etymology ("personal effort") and from the layman's understanding of purchase ("pay something").

404. Blackstone, *supra* note 19, vol. 2 at 243; L.C. Warmington, ed., *Stephen's Commentaries on the Laws of England*, 21st ed. (London: Butterworths, 1950) vol. 1 at 355; E.A. Freeman, *The History of the Norman Conquest of England* (Toronto: J. Campbell & Son, 1877) vol. 2 at 626; W.M. Spelman, *Glossarium Archaiologicum* (1687) under "conquest".

405. Blackstone, *ibid.* There is some controversy about this position. See *Oxford English Dictionary*, under "conquest".

as well as the French root of “conquest”, and rejects the idea of military “conquest” for the legal idea of “purchase.” As for English law, “purchase” and “conquest” were blended terms. Conquest was not an issue of brute force.⁴⁰⁶

From the legal concept of personal effort came the concept of treaties of cession as a third method for acquiring territory.⁴⁰⁷ Later, a fourth method of acquiring foreign territory was by peaceful settlement and birthright, if the territory was waste or desert or unoccupied.⁴⁰⁸ The particular nature of each acquisition determined the scope of protection of the law of existing land rights, but in any of these situations there were legal constraints on the Crown’s actions.

An example of the common law’s classic quandary about customary land rights in foreign jurisdictions in relation to changes in sovereignty in Great Britain is *Calvin’s Case*.⁴⁰⁹ The English court asserted that if the Crown inherited in a territory, the local law (*lex loci*) survived the change in sovereignty, thereby protecting pre-existing rights of the inhabitants.⁴¹⁰ The effect of this rule was that since a King (such as James VI of Scotland becoming James I of England) succeeded to the new kingdom by operation of law, the King could not alter the existing law of the inherited Kingdom to suit himself or to be inconsistent with the laws of the old kingdom.⁴¹¹ Thus after the accession of James I, Englishmen retained their own laws and Scottish laws were not imposed on them and vice versa. A new King had no greater prerogatives than his predecessor, and was bound by the rule of law.

The same principles applied to land acquired by conquest, the pre-existing rights of the inhabitants continued through a presumption of the rule of law. The King, as military conqueror, was not bound to respect those rights under the local law, unless they had been recognized in the articles of capitulation or prerogative legislation. Still the Crown’s authority in making laws for the conquered territories was curtailed by principles of natural justice and equity in making laws for the acquired territories.⁴¹² Moreover, in the absence of treaties, articles of capitulation

406. Sir Edward Coke conceptualized “conquest” of infidels in *Calvin’s Case* by stating that there need be no wars of fire and sword (*supra* note 93 at 17a).

407. McNeil, *supra* note 24 at 108; Barsh, *supra* note 163.

408. McNeil, *supra* note 24 at 134.

409. *Supra* note 18.

410. *Ibid.*

411. *Ibid.* at 18a.

412. *Ibid.* at 17a–18a. In *Campbell*, *supra* note 168 at 848, Lord Mansfield rejected the distinction between Christians and infidels and held that in any conquest, the laws of that kingdom continued in force until altered by the King. Any alteration of the existing law would have to be consistent with the principles in the British Constitution.

or prerogative legislation, the Crown never had absolute discretion to disrupt the customary traditions, whether or not it introduced the domestic common law in the foreign jurisdiction or colony.⁴¹³ The doctrine of continuity of existing law, derived from the element of custom as law in the common law, became the constitutional law of English colonization in “dominions not parcels of the realm”.⁴¹⁴

By the terms of Compact and treaties with the Mi'kmaq, the Crown did not have any authority to unilaterally seize the lands contrary to law. This principle was adopted in the leading British case on colonization in 1774, *Campbell v. Hall*, where Lord Mansfield held “the 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 meanings.”⁴¹⁵ In 1820, Chitty in his treatises of the law of the prerogatives could state: “Nor can the King legally disregard or violate the articles in which the country is surrendered or ceded; but such articles are sacred and inviolable, according to their true intent and meaning.”⁴¹⁶ The existence of Compact and treaties established the first principles of the foreign jurisdictions.

Under the classic principles of the common law and prerogatives of the King, on the acquisition of territorial jurisdiction in North America under the discovery theory of treaties, the Aboriginal peoples and their immemorial customs remain the controlling law of the land if an “alien friend that is in league”. Mi'kmaw customs as expressions or manifestations of commonly shared values and continuity with past experience were protected by the Crown as distinct jurisdictions of tenures and laws. By the Compact, these customary laws became vested rights as a matter of English law.⁴¹⁷ These existing Aboriginal rights did not need to be recognized by the Crown,⁴¹⁸ but when they were recognized in a Treaty or Act they became authentic instructions to the colonial authorities and vested rights in British and Mi'kmaw laws.

In the Mi'kmaw context, the Compact and prerogative legislation prevented the application of the notion of conquest and English domestic land law to the reserved Mi'kmaw tenure. The Compact established an “alien friend in league” or nation to nation relationship between the Sante

413. *Campbell, ibid.* See Smith, *supra* note 192 at 467–69.

414. Smith, *ibid.* note 191 at 468.

415. *Supra* note 168 at 208.

416. *Supra* note 173 at 29.

417. *Ibid.* at 17a; *Campbell, supra* note 168; *Worcester, supra* note 5. See also the liberties of the subjects 8 *Halsbury's Laws, supra* note 352 at para. 828.

418. *Calder, supra* note 5.

Mawíomi and the Sovereign which reserved all Míkmaw territory to the Mawíomi and placed that territory under its foreign jurisdictions as a protected nation. Since the King did not receive any derivative title from the Santé Mawíomi in the Compact, neither the Crown nor its agents could transfer any interest to the English settlers. Without a treaty cession from the Mawíomi, neither the King nor his Governor could grant any valid royal estates or interest to British immigrants to reserved allodial tenure of the Míkmaq.⁴¹⁹ Prerogative Legislation affirms the same conclusions.

Conclusion

Although our law is prisoner of its history, it is not now bound by decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies. . . . If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor seen to be frozen in an age of racial discrimination.

Justice Brennan⁴²⁰

Decolonizing Canadian law requires a new analysis of property law and Aboriginal title precedents.⁴²¹ It requires an understanding of the false superiority of colonial legal thought that is built into existing precedents. It requires a legal theory that is not comprised of racist assumptions. It cannot be assumed that British law automatically applies to North America because the Indian had no law or property systems. Such an assumption is built on supremacist colonial theory. A decolonizing legal system requires a departure from law as an artifact of Eurocentric society, to take into account the legal history of the actual dialogue and agreements between the nations and discovering the obvious.

Under section 35(1) of the *Constitution Act, 1982*, the field of Indian law has been refocused to Aboriginal rights and prerogative Treaties. All

419. See Royal Commission of 1749, *supra* notes 171–72.

420. *Mabo*, *supra* note 64, A.L.R. at 18–19.

421. J.R. Ponting, *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland and Stewart, 1986); P. Moynihan, “The Decolonization of Modern Law: Dismantling the Relations between Race and Law” (1993) 8 Can. J.L. & Soc. 191; J.R. Ponting, “The Native American Struggle: Conquering the Rule of Law. A Colloquium” (1993) 20 N.Y.U. Rev. L. & Soc. Change 199; R.N. Clinton, “Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law” (1993) 46 Ark. L. Rev. 77. J. Fish, “Law as a Means and as an End: Some Remarks on the Function of European and Non-European Law in the Process of European Expansion” in W.J. Mommsen & J.A. De Moor, *European Expansion and Law: The Encounter of European and Indigenous Law in the 19th and 20th Century* (New York: Berg, 1992) at 15; R.A. Williams, “Columbus’s Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples’ Right of Self-Determination” (1991) 9 Ariz. J. Int’l & Comp. L. 51.

legislation is to be constitutionally measured by these old rights. To understand whether legislation is compatible or inconsistent with Aboriginal or Treaty rights, it is essential to reach back to contexts of Aboriginal dominion, worldview, and language.

In the post-colonial era, we can give constitutional force to these old laws. The Supreme Court of Canada has resurrected aboriginal tenures and rights, and reaffirmed treaty rights. Moreover, it has established that the Crown is under an equitable duty, enforceable in courts, to determine whether a prerogative power has been exercised in good faith in accordance with its fiduciary duties. It has reversed the colonial precedent and pronouncement that the Crown's duty was only political or moral.⁴²²

Prior to 1982, Aboriginal and Treaty rights were compromised or ignored by the courts. The courts had no authority to challenge the federal Parliament's action. Now in the post-colonial order of Canada, these rights have been recognized as having full constitutional authority as well as being an integral part of unwritten federal common law operating in the constitution of Canada.⁴²³ Thus, they are actionable against the Crown and generate judicial remedies and damages.⁴²⁴

The Aboriginal nations, as illustrated by the Mi'kmaq Compact with the Crown, are the source of title to their unsold territory in Atlantic Canada. All the land is held allodially by the Mawíomi under Aboriginal dominion. Justice Lamer has clearly stated in *Sioui*:

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 era as little as possible.⁴²⁵

The Wabanaki and Mi'kmaq Compacts describe and affirm this general principle. The reservation of their Aboriginal territories and lands in these

422. *St. Catharines Milling*, *supra* note 5 at 649 cited to S.C.R. Justice Taschereau stated "The Indians must in the future . . . be treated with the same considerations for their just claims and demands that they have received in the past, but as in the past, it will not be because of any legal obligation to do so, but as a sacred political obligation in the execution of which the State must be free from judicial control." See also *Ontario (A.G.) v. Canada (A.G.)* (1895), 25 S.C.R. 434, aff'd (1897), A.C. 199 (H.L.); *Cayuga Indian Case* (1926), 6 R. Int'l Arb. Awards 173. These cases arose at the height of colonial thought.

423. Wilson J. in *Roberts v. Canada* (1989), 1 S.C.R. 322 at 340. The Supreme Court of Canada had previously established that common laws of Canada that fall within the jurisdiction of federal Parliaments are paramount to provincial law (*Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at 108). This judicial decision creates greater autonomy for Aboriginal and Treaty rights than section 88 of the *Indian Act*, R.S.C. 1985, c. I-5.

424. *Sparrow*, *supra* note 20.

425. *Supra* note 245, C.N.L.R. at 1055. The Court followed *Worcester* precedents that Great Britain established the policy of considering the Indians as protected nations under obligations of treaties that inhabited a territory from which all others were excluded (at 1054–55).

Compacts established the basis for retaining Aboriginal rights and served as the guardian of their liberties against Crown intrusion.

It is difficult to conceive of the Santé Mawíomi or any Míkmaq ever silently surrendering, to the Imperial Crown or settlers, the context in which they lived. The Mawíomi assign seven generations of responsibilities for the use of the land or space and thus define a long-term relationship with the land. Their relationship with land is the worldview that has always defined their identity, their langscape, their spiritual ecology, and their reality. The cession or purchase of the land, the rights of future generations, was never contemplated in the Compact. The sale of their land of friendships never became an issue in the Compact, because the protection and reservation of the land for the future generation was the elusive and operational context of the Santé Mawíomi.

Although the British Crown may have an international and ultimate preemptive interest in Aboriginal territory against other European nations and people, this future interest has no effect on Aboriginal dominion. The power of Aboriginal nations to enter into international Compacts and Treaties does not by itself affect its territorial sovereignty. All legitimate British authority in North America is derived from the Compact and Treaties with the Aboriginal nations. Thus, any Crown authority over the Aboriginal nations is limited to the actual scope of their treaty delegations. If no authority or power has been delegated to the Crown, this power must be interpreted as reserved to the Aboriginal nations. If the Treaties have recognized and affirmed an Aboriginal tenure or right of the Míkmaw nation, this right has become vested in the constitutional law of Great Britain and Canada. Tenure became the birthright of each generation of Míkmaq.

Míkmaw tenure is more than an expectation interest which the Crown acquired from the Mawíomi. Through the prerogative Compact, treaties and legislation, Míkmaq tenure became a vested constitutional, legal and equitable right to the present and future enjoyment of their land.

The Míkmaw Nation 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 the Compact to assert their dominion over their 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 Crown intends that the right of property of the inhabitants of any newly ceded territory will be fully respected.⁴²⁶

426. *Oyekan v. Adele*, [1957] 2 All E.R. 785 at 788 (P.C.), see *supra* note 173.

Consequently, colonial administration or regulation of these protected tenures or rights, either provincially or federally, cannot legally extinguish this distinct legal realm or the reserved tenure, since such action would be violative of the fundamental constitutional regime of Great Britain and *ultra vires*.⁴²⁷ An Act which is inconsistent with the Constitution of Canada cannot become law, since its radical invalidity remains with the act until it is either repealed or struck down.⁴²⁸

Furthermore, the passage of time cannot validate an unconstitutional statute.⁴²⁹ To make the contrary suggestion of implied extinguishment of vested Mi'kmaq tenure because of unauthorized colonial settlements is to attempt to enshrine the perverse notion that vested rights are not to be legally protected in precisely those situations when protection is essential. Aboriginal and Treaty rights do not cease to exist because the Crown's servants fail to secure them. It is now essential to turn our minds to the issue of remedies for those who have been victimized by centuries of illegal and colonialist conduct.

427. See *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 744 (discussion of the relationship between section 52(1) of the *Constitution Act, 1982* and section 2 of the *Colonial Law Validity Act*, *supra* note 389).

428. *Manitoba (A.G.) v. Metro Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 at 132; *P.A.T.A. v. Canada (A.G.)*, [1931] A.C. 310 at 313.

429. *Supra* note 356.