

THE ONUS OF PROOF OF ABORIGINAL TITLE[©]

BY KENT McNEIL*

In the *Delgamuukw* decision, the Supreme Court of Canada clearly placed the onus on the Aboriginal nations to prove their title by showing occupation of lands at the time the Crown asserted sovereignty. In this article, it is argued that the common law could assist them in this respect. They should be able to rely on present or past possession to raise a presumption of Aboriginal title, and so shift the burden onto the Crown to prove its own title. Moreover, Aboriginal nations may be more successful if they bring an action for trespass or for recovery of possession of land, rather than for declaration of Aboriginal title.

Dans l'arrêt *Delgamuukw*, la Cour Suprême du Canada a clairement établi que le fardeau de démontrer le titre appartenait aux peuples autochtones, et que pour décharger ce fardeau ils devaient montrer qu'il y avait une occupation des terres au moment où la couronne a fait valoir sa souveraineté. Dans cet article, l'auteur soutient que la common law pourrait aider les peuples autochtones. Les autochtones devraient être capables de se fier sur la possession effective ou antérieure pour établir une présomption du titre autochtone, renversant ainsi le fardeau à la couronne qui devra alors démontrer son propre titre. De plus, les peuples autochtones pourraient mieux réussir s'ils intentaient une action pour intrusion ou pour le recouvrement de la possession des terres, plutôt que de demander une déclaration d'un titre autochtone.

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I. INTRODUCTION

In *Delgamuukw v. British Columbia*¹ the Supreme Court of Canada decided that, absent valid extinguishment or surrender,² the Aboriginal peoples have Aboriginal title to the lands they exclusively occupied at the time of assertion of Crown sovereignty.³ The Court placed the onus of proving the requisite occupation on the Aboriginal peoples. Chief Justice Lamer, delivering the principal judgment,⁴ said that “[i]n order to establish a claim to aboriginal title, the aboriginal group asserting the claim must establish that it occupied the lands in question at the *time at which the Crown asserted sovereignty over the land*

¹ [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*].

² Extinguishment of Aboriginal title without the consent of the Aboriginal titleholders could only have been accomplished after Confederation by or pursuant to clear and plain federal legislation, as the provinces do not have the constitutional authority to extinguish Aboriginal title: *ibid.* at 1115-23, Lamer C.J.C. Moreover, since the enactment of section 35(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, even Parliament does not have the authority to extinguish Aboriginal rights: *R. v. Van der Peet* [1996] 2 S.C.R. 507 at 538, Lamer C.J.C. [hereinafter *Van der Pee*]. As Aboriginal title is “one manifestation of the doctrine of Aboriginal rights” (*R. v. Adams*, [1996] 3 S.C.R. 101 at 119, Lamer C.J.C. [hereinafter *Adams*]), Aboriginal title is protected from extinguishment by section 35(1).

Surrender of Aboriginal title can occur by treaty or modern land claims agreement, but once again it must be clear that the Aboriginal people in question intended to give up their title, as their understanding must be taken into account and ambiguities resolved in their favour: see *Nowegijick v. R.*, [1983] 1 S.C.R. 29 at 36; *Simon v. R.*, [1985] 2 S.C.R. 387 at 402; *R. v. Sioui*, [1990] 1 S.C.R. 1025 at 1035-36; *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85 at 142-43 (La Forest J.), 98-100 (Dickson C.J.C.); *R. v. Badger*, [1996] 1 S.C.R. 771 at 793-94, Cory J. [hereinafter *Badger*]; *R. v. Marshall*, [1999] 3 S.C.R. 456 at 472-74; and *R. v. Sundown*, [1999] 1 S.C.R. 393 at 406-07. Compare *Eastmain Band v. Canada (Federal Administrator)* [1993] 1 F.C. 501 (C.A.), leave to appeal to S.C.C. refused [1993] 3 S.C.R. vi; and *R. v. Howard*, [1994] 2 S.C.R. 299. For discussion, see K. McNeil, “The High Cost of Accepting Benefits from the Crown: A Comment on the Temagami Indian Land Case” [1992] 1 C.N.L.R. 40 at 62-69.

³ Although Lamer C.J.C. spoke of “assertion” of sovereignty, in my view he must have meant “acquisition,” as only upon acquisition of sovereignty would the Crown have obtained underlying title to lands occupied by the Aboriginal peoples. However, as this is my interpretation, I will respect Lamer C.J.C.’s terminology by using the word “assertion” in this article. Also, whether this includes French as well as British sovereignty is unclear. For discussion, see K. McNeil, “Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty” (1998) 5 *Tulsa J. Comp. & Int’l L.* 253 at 273-76 [hereinafter “Aboriginal Rights in Canada”].

⁴ In *Delgamuukw*, *supra* note 1, Lamer C.J.C. gave judgment for himself, Cory and Major JJ. Justice La Forest delivered a separate judgment for himself and L’Heureux-Dubé J., concurring in result but differing to some extent in his reasons (though not with respect to the onus of proof, which La Forest J. clearly placed on the Aboriginal peoples). At 1135, McLachlin J. simply said: “I concur with the Chief Justice. I add that I am also in substantial agreement with the comments of Justice La Forest.”

subject to the title”⁵

Chief Justice Lamer went on to say that present occupation can be relied on as proof of pre-sovereignty occupation; however, in that situation, continuity between present and pre-sovereignty occupation is required. He elaborated as follows:

Conclusive evidence of pre-sovereignty occupation may be difficult to come by. Instead, an aboriginal community may provide evidence of present occupation as proof of pre-sovereignty occupation in support of a claim to aboriginal title. What is required, in addition, is a *continuity* between present and pre-sovereignty occupation, because the relevant time for the determination of aboriginal title is at the time before sovereignty.⁶

Chief Justice Lamer was careful, nonetheless, to avoid placing an impossible burden of proof on Aboriginal claimants in this respect. He said:

Needless to say, there is no need to establish “an unbroken chain of continuity” (*Van der Peet*, at para. 65) between present and prior occupation. The occupation and use of lands may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognize aboriginal title. To impose the requirement of continuity too strictly would risk “undermining the very purposes of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect” aboriginal rights to land (*Côté*, ... at para. 53). In *Mabo*, ... the High Court of Australia set down the requirement that there must be “substantial maintenance of the connection” between the people and the land. In my view, this test should be equally applicable to proof of title in Canada.⁷

This article examines this issue of onus of proof of Aboriginal title. Part II discusses possible explanations for placing the onus on Aboriginal peoples. Part III explains how the onus can be met by relying on present or past possession of land, thereby forcing the Crown to prove its own title. Part IV suggests alternative ways of protecting Aboriginal title to lands that are presently in Aboriginal possession.

II. EXPLANATIONS FOR PLACING THE ONUS ON THE ABORIGINAL PEOPLES

Why, one might ask, is the onus of proving Aboriginal title on the Aboriginal peoples, and not on the Crown, when we all know that the Aboriginal peoples were here first? In *Calder v. British Columbia*

⁵ *Ibid.* at 1097 [emphasis in original].

⁶ *Ibid.* at 1102-03 [emphasis in original].

⁷ *Ibid.* at 1103.

(A.G.),⁸ the very first Canadian case involving a direct assertion of Aboriginal title, Judson J. acknowledged that this prior presence is the basis for Aboriginal title. In an oft-quoted passage, he said that “the fact is that when the settlers came, the Indians were there, organized in societies and *occupying the land* as their forefathers had done for centuries. This is what Indian title means”⁹ Given the undeniable fact of their pre-existing occupation of land, why do Aboriginal peoples have to prove their title? While to my knowledge Canadian courts have not answered this question directly, some possible explanations can be given, none of which are entirely satisfactory.

One explanation is that, in dominions of the Crown where the common law applies, the doctrine of tenures gives the Crown underlying or radical title to lands that are occupied or owned by others.¹⁰ But where lands are unoccupied and unowned by anyone else, as a general rule the Crown has title to the lands themselves as an incident to its territorial title over the whole of its dominions.¹¹ As occupation and ownership are primarily questions of fact, whereas the Crown’s title arises as a matter of law in this context, the onus is apparently on persons who allege occupation or ownership to rebut what amounts to a presumption of Crown title by proving their own occupation or

⁸ [1973] S.C.R. 313 [hereinafter *Calder*].

⁹ *Ibid.* at 328 [emphasis added]. The case involved a claim by the Nisga’a Nation (spelled “Nishga” in the judgments) of British Columbia that their Aboriginal title had never been extinguished. See also *Van der Peet* *supra* note 2 at 538, where Lamer C.J.C. referred to the “simple fact” that, “when Europeans arrived in North America, aboriginal peoples *were already here* living in communities on the land, and participating in distinctive cultures, as they had done for centuries” [emphasis in original].

¹⁰ In feudal terms, this underlying title is known as the Crown’s paramount lordship. See generally K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 79-107 [hereinafter *Common Law Aboriginal Title*]. Note, however, that even in Great Britain the Crown does not necessarily have underlying title to land in areas where the common law does not apply: see *Smith v. Lerwick Harbour Trustees* [1903] 5 F. 680 (Ct. Sess., Scot.); and *Lord Advocate v. Balfour*, [1907] Sess. Cas. 1360 (Ct. Sess., Scot.), holding that the Udal law applicable on the Orkney and Shetland Islands allows for allodial (*i.e.*, non-tenurial) ownership of land, thereby excluding the Crown’s underlying title. For an argument that Mikmaq law in Atlantic Canada provides for allodial ownership of land, see J. (Sákéj) Youngblood Henderson, “Micmaq Tenure in Atlantic Canada” (1995) 18 Dal. L.J. 196.

¹¹ See *A.G. v. Brown* (1847), 1 Legge 312 (N.S.W. S.C.) [hereinafter *Brown*]; *R. v. Symonds* (1847), [1840-1932] N.Z.P.C.C. 387 (N.Z. S.C.) at 388-90 (Chapman J.), 393 (Martin C.J.); *Falkland Islands Co. v. R.* (1864), 2 Moo. N.S. 266, 15 E.R. 902 at 904 (P.C.); and *Mabo v. Queensland [No. 2]* (1992), 175 C.L.R. 1 (H.C.A.) at 53 (Brennan J.), 88 (Deane and Gaudron JJ.), 180-82, 211-12 (Toohey J.) [hereinafter *Mabo*]. For discussion, see *Common Law Aboriginal Title* *supra* note 10 at 134-36.

ownership.¹² Hence, Aboriginal peoples who claim title due to their occupation of lands prior to Crown assertion of sovereignty have to prove the occupation.

In *Delgamuukw*, Lamer C.J.C. held that the requisite occupation can be proven either by establishing physical occupation, or by showing that the Aboriginal laws of the claimants demonstrate their occupation of the claimed lands. Physical occupation, he said,

may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources: see McNeil, *Common Law Aboriginal Title* at pp. 201-2. In considering whether occupation sufficient to ground title is established, “one must take into account the group’s size, manner of life, material resources, and technological abilities, and the character of the lands claimed”: Brian Slattery, “Understanding Aboriginal Rights,” at p. 758.¹³

Respecting Aboriginal law, Lamer C.J.C. said that

if, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.¹⁴

Given these criteria for occupation, the Aboriginal peoples probably occupied much, if not all, of what is now Canada at the time of Crown assertion of sovereignty.¹⁵ If so, is it appropriate to apply the presumption of Crown title in this context? Is not reliance on the feudal doctrine of tenures, which had already lost much of its importance in Britain by the time Canada was colonized,¹⁶ counter-intuitive and prejudicial where Aboriginal title is concerned? Why does the known fact of the Aboriginal presence not take precedence over a presumption based on this largely out-dated doctrine? And what of the Aboriginal

¹² See *Common Law Aboriginal Title* *supra* note 10 at 216.

¹³ *Delgamuukw*, *supra* note 1 at 1101. At 1089, Lamer C.J.C. reaffirmed that regular use of land for hunting amounts to occupation when he wrote, in reference to the “inherent limit” he placed on Aboriginal title, that “if occupation is established with reference to the *use of the land as a hunting ground* then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it)” [emphasis added].

¹⁴ *Ibid.* at 1100.

¹⁵ In *Adams*, *supra* note 2 at 118, Lamer C.J.C. intimated that some Aboriginal peoples might not have Aboriginal title because they were nomadic or varied the location of their settlements. However, it seems that Aboriginal peoples who did not have permanent settlements nevertheless had a special relationship and connection with definite territories, where they lived and obtained the resources to sustain their ways of life: see *Common Law Aboriginal Title* *supra* note 10 at 202-03.

¹⁶ See A.W.B. Simpson, *A History of the Land Law* 2d ed. (Oxford: Clarendon Press, 1986).

perspective on this matter? In *Van der Peet*, Lamer C.J.C. said that, “[i]n assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right while at the same time taking into account the perspective of the common law.”¹⁷ In placing the onus of proof of Aboriginal title on Aboriginal claimants in *Delgamuukw*, the chief justice does not appear to have taken account of the Aboriginal perspective at all.

One reason why the Supreme Court probably has not relied on the Aboriginal perspective and the historical record to presume that the Aboriginal peoples were in occupation of all of Canada, and so cast the burden on the Crown of rebutting that presumption by proving the opposite where particular lands are concerned, is that the Aboriginal peoples would then be presumed to have held all lands in Canada by Aboriginal title, and that might pose too great a threat to the economic, social, and political stability of the country.¹⁸ But there are legal rationalizations for the position the Court has taken on this matter as well. Aboriginal title is not a single title to all of Canada that is vested in the Aboriginal peoples as a whole. Rather, it relates to particular tracts of land, and is held by discrete Aboriginal nations or groups¹⁹ who occupied those tracts at the time of Crown sovereignty. This is evident

¹⁷ *Van der Peet* *supra* note 2 at 550-51. See also *Delgamuukw*, *supra* note 1 at 1066, Lamer C.J.C.

¹⁸ Courts in other common law jurisdictions have resorted, both explicitly and implicitly, to equivalent pragmatic considerations where the land rights of indigenous peoples are concerned. For example, in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 at 591 (1823), Chief Justice Marshall said in reference to the doctrinally questionable (see *Common Law Aboriginal Title* *supra* note 10 at 245-49) conversion of the European “discovery” of America into “conquest,” by which the lands of the Indian Nations were taken:

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.

Without the same frankness, the High Court of Australia in *Mabo*, *supra* note 11; in *Wik Peoples v. Queensland* (1996), 187 C.L.R. 1 (H.C.A.); and in *Fejo v. Northern Territory* (1998), 195 C.L.R. 96 (H.C.A.) has held that native title can be extinguished by Crown grant, despite the inconsistency of this holding with fundamental common law principles: see K. McNeil, “Racial Discrimination and Unilateral Extinguishment of Native Title” (1996) 1 A.I.L.R. 181 [hereinafter “Racial Discrimination”]; and K. McNeil, “Extinguishment of Native Title: The High Court and American Law” (1997) 2 A.I.L.R. 365 [hereinafter “Extinguishment of Native Title”]. But as my commentary on these cases shows, I do not agree with the courts taking what is essentially a *political* approach to these *legal* issues at the expense of Indigenous peoples.

¹⁹ The Aboriginal community holding Aboriginal title might be an Aboriginal nation, a subgroup thereof, or other entity. For simplicity, however, in the remainder of this article the designation “Aboriginal nation” will be used when referring to Aboriginal titleholders.

not only from judicial decisions like *Delgamuukw*,²⁰ but also from the fact that there are many instances where the land claims of Aboriginal nations overlap and conflict with one another.²¹ Consequently, even if the Aboriginal peoples occupied all of Canada, it would still be necessary to prove which nations occupied what parts in order to identify the actual Aboriginal titleholders. One could not presume that every nation occupied the lands they claim when so many claims overlap.

A second legal justification for placing the onus of proof on the Aboriginal peoples arises from the fact that they are typically the plaintiffs in actions for a declaration of Aboriginal title.²² As a general rule, in legal actions the plaintiffs bear the onus of proving the facts on which their claims depend.²³ As the validity of an Aboriginal title claim depends on occupation of the claimed land at the time the Crown asserted sovereignty over the territory where the land is located, and occupation is a question of fact,²⁴ it is not surprising that the courts have placed the onus of proving occupation of that specific land on the Aboriginal nation making the claim. But if the tables were turned and Aboriginal nations were the defendants rather than the plaintiffs, the onus should be the other way around. Moreover, if an Aboriginal nation brought an action, not for a declaration of Aboriginal title, but for

²⁰ *Supra* note 1. See also *Calder*, *supra* note 8; *Baker Lake (Hamlet of) v. Canada (Minister of Indian Affairs & Northern Development)* [1980] 1 F.C. 518 (T.D.) [hereinafter *Baker Lake*]; and *Guerin v. R.*, [1984] 2 S.C.R. 335.

²¹ For discussion of one such instance, see N. Sterritt, "The Nisga'a Treaty: Competing Claims Ignored!" (1998-1999) 120 B.C. Studies 73. See also *Gitanyow First Nation v. Canada*, [1998] 4 C.N.L.R. 47 (B.C. S.C.).

²² See *Calder*, *supra* note 8; *Baker Lake*, *supra* note 20; and *Delgamuukw*, *supra* note 1.

²³ See C. Tapper, ed., *Cross and Tapper on Evidence* 8th ed. (London: Butterworths, 1995) at 133:

[A] fundamental requirement of any judicial system is that the person who desires the court to take action must prove his case to its satisfaction. This means that, as a matter of common sense, the persuasive burden of proving all facts essential to their claims normally rests upon the plaintiff in a civil suit or the prosecutor in criminal proceedings. [footnote omitted].

See also *Halsbury's Laws of England* 4th ed. (London: Butterworths, 1973) vol. 17 at paras. 13-14; and J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada* (Markham, Ont.: Butterworths, 1992) at 141.

²⁴ "Occupation" is synonymous with "actual possession" or "possession in fact." When proven by evidence, it gives rise to a presumption of "possession in law," a legal concept. See F. Pollock & R.S. Wright, *An Essay on Possession in the Common Law* (Oxford: Clarendon Press, 1888) at 11-20. For discussion and further references, see *Common Law Aboriginal Title* *supra* note 10 at 6-7, 73, 197-206. In *Delgamuukw*, *supra* note 1 at 1101, Lamer C.J.C. accepted the distinction between factual occupation and legal possession, and affirmed the rule that "physical occupation is proof of possession at law."

trespass on their Aboriginal title lands, the evidentiary requirements would be different as well, because in that situation they would only have to prove their present possession, not their title. So the identity of the party initiating the legal proceedings, and the form of action, affect both the onus of proof and what has to be proven. I will return to these matters later in this article.

Despite the evident unfairness of presuming the title of the Crown and placing the onus of proof of Aboriginal title on the Aboriginal peoples, for the pragmatic and legal reasons referred to above I think it very unlikely that the Supreme Court will reconsider this matter, and place the initial onus on the Crown to prove its own title. However, a closer look does need to be taken at what the onus of proof really involves in this context. In particular, attention should be directed to two well-established common law rules that operate in favour of Aboriginal nations rather than against them. It is to these rules that I now turn.

III. MEETING THE ONUS BY PROVING PRESENT OR PAST ABORIGINAL POSSESSION

At common law, every person who is in possession of land is presumed to have a valid title.²⁵ So once present possession has been established by proof of physical occupation,²⁶ the burden of rebutting this presumption shifts to whoever disputes the title of the possessor. Moreover, the person challenging the rightfulness of the possession cannot rely on the fact that the possessor does not have a valid title because the land is owned by a third party. To succeed in an action to acquire possession, the challenger generally has to prove that he or she personally has a better title than the current possessor,²⁷ for as Bracton

²⁵ See *Whale v. Hitchcock* (1876), 34 L.T.R. 136 (Div. C.A.) [hereinafter *Whale*]; *Emmerson v. Maddison*, [1906] A.C. 569 at 575 (P.C.) [hereinafter *Emmerson*]; *Wheeler v. Baldwin* (1934), 52 C.L.R. 609 (H.C.A.), especially at 621-22; and *Allen v. Roughley* (1955), 94 C.L.R. 98 at 136-41 (H.C.A.).

²⁶ On the distinction between occupation and possession see note 24, *supra*.

²⁷ See *Ro v. Harvey* (1769), 4 Burr. 2484, 98 E.R. 302 at 304-05 (K.B.); *Goodtitle d. Park v. Baldwin* (1809), 11 East 488, 103 E.R. 1092 at 1095 (K.B.); *Ash v. Whitlock* (1865), L.R. 1 Q.B. 1 [hereinafter *Ash*]; *Danford v. McNulty* (1883), 8 App. Cas. 456 at 460-61, 462, 464-65 (H.L.); *Perry v. Clissold*, [1907] A.C. 73 at 79-80 (P.C.) [hereinafter *Clissold*]; *City of Vancouver v. Vancouver Lumber Company*, [1911] A.C. 711 at 720 (P.C.); *McAllister v. Defoe* (1915), 8 O.W.N. 175 (Div. Ct.), *aff'd* (1915), 8 O.W.N. 405 (C.A.) [hereinafter *McAllister*]; *Swale v. Zurdayk*, [1924] 2 W.W.R. 555 (Sask. C.A.) [hereinafter *Swale*]; *Pinder Lumber and Milling Co. v. Munro*, [1928] S.C.R. 177 [hereinafter *Pinder Lumber and Milling Co.*]; and *Oxford Meat v. McDonald*, [1963] N.S.W.S.R. 423

wrote as far back as the thirteenth century, “everyone who is in possession, though he has no right, has a greater right [than] one who is out of possession and has no right.”²⁸ These rules are fundamental to the common law of property.²⁹ They have been affirmed in so many cases that they could be said to have produced two legal maxims: first, that *title is presumed from possession* and second, that *possession is title as against a challenger who cannot prove that he or she has a better title*.

Significantly, Lamer C.J.C. acknowledged the existence of these common law rules in *Delgamuukw* when he stated that “the fact of physical occupation is proof of possession at law, which in turn will ground title to the land.”³¹ However, while he correctly applied these rules to conclude that Aboriginal peoples would have title to the lands they occupied at the time the Crown asserted sovereignty, with all due respect I think he failed to appreciate the relevance of these rules to

at 425, 427 (S.C.). An exception to this is where the challenger is acting as agent for, or on the authority of, the third-party titleholder.

²⁸ H. de Bracton, *On the Laws and Customs of England* vol. 3, ed. and trans. by S.E. Thorne (Cambridge, Mass.: Harvard University Press, 1968) at 134. See also *ibid.* at 27, 30, 70, 98, 122.

²⁹ They apply to personal property as well as to real property: see *Armory v. Delamirie* (1722), 1 Str. 505, 93 E.R. 664 (K.B.); *Jeffries v. Great Western Railway Co* (1856), 5 El. & Bl. 802, 119 E.R. 680 at 681 (Q.B.); *Glenwood Lumber Co. v. Phillips*, [1904] A.C. 405 at 410-11 (P.C.) [hereinafter *Glenwood Lumber*]; *The Winkfield* [1902] P. 42 (C.A.); *Dutton v. Canadian Northern Railway Co.* (1916), 10 W.W.R. 1006 (Man. C.A.), *aff'd* [1917] 2 W.W.R. 948 (S.C.C.); *Gottschalk v. Hutton* (1921), 66 D.L.R. 499 (Alta. C.A.); *Hibbert v. McKiernan*, [1948] 2 K.B. 142; *Bird v. Fort Frances (Town of)*, [1949] O.R. 292 (H.C.J.); and *Parkerv. British Airways Board* [1982] Q.B. 1004 (C.A.).

³⁰ For confirmation of these rules in leading texts, see E. Coke, *The First Part of the Institutes of the Laws of England; or a Commentary upon Littleton* 9th ed. by C. Butler (London: J. & W.T. Clarke, 1832) at 239a, n. 1; W. Blackstone, *Commentaries on the Laws of England* vol. 2, 16th ed. (London: T. Cadell & J. Butterworth and Son, 1825) at 196, *ibid.*, vol. 3 at 177, 180; Pollock & Wright, *supra* note 24 at 22-25, 91-100; J.M. Lightwood, *A Treatise on Possession of Land* (London: Stevens & Sons, 1894) at 125, 146-47, 294-95; R.E. Megarry & H.W.R. Wade, *The Law of Real Property* 5th ed. (London: Stevens & Sons, 1984) at 102-09, 1158-59; E.H. Burn, ed., *Cheshire and Burn's Modern Law of Real Property* 15th ed. (London: Butterworths, 1994) at 25-29; and *Halsbury's Laws of England*, *supra* note 23, vol. 39(2) at para. 267. For discussion and further references, see *Common Law Aboriginal Title* *supra* note 10 at 42-43, 46-49, 56-58.

³¹ *Supra* note 1 at 1101. See also *ibid.* at 1082. Chief Justice Lamer relied on two leading English textbooks (see Burn, ed., *supra* note 30; and Megarry & Wade, *supra* note 30), as well as on my own work (*Common Law Aboriginal Title*, *supra* note 10), for this statement. Also relevant is the observation of Hall J. (dissenting on other grounds) in *Calder*, *supra* note 8 at 368: “Possession is of itself at common law proof of ownership Unchallenged possession [since time immemorial by the Nishga (or Nisga'a) Nation in British Columbia] is admitted here.” Justice Hall relied on the same English textbooks as Lamer C.J.C. in making this observation. He continued at 375:

In enumerating the *indicia* of ownership, the trial judge overlooked that possession is of itself proof of ownership. *Prima facie*, therefore, the Nishgas are the owners of the lands that have been in their possession from time immemorial and, therefore, the burden of establishing that their right has been extinguished rests squarely on the respondent [*i.e.*, the Crown] [emphasis in original].

present-day Aboriginal possession. In a situation where an Aboriginal nation is presently in possession of lands, the first common law rule—that title is presumed from possession—should apply to accord the Aboriginal people a presumptive title, irrespective of whether they have established continuity of occupation from the time of Crown assertion of sovereignty. However, because this title would be presumptive, it could be rebutted by proof that the nation in question does not have a valid title, possibly because they were not in occupation at the time of assertion of sovereignty,³² or because their Aboriginal title has been validly extinguished or surrendered.³³ But it is essential to realize that *the onus of rebutting the presumption would be on whoever alleges that the Aboriginal nation does not have a valid title*. Moreover, rebutting the presumption by proving that the Aboriginal nation does not have a valid Aboriginal title would not in itself be sufficient for the person challenging that title to claim the land. Due to the second common law rule that possession is title as against anyone who does not have a better title, the Aboriginal nation, like any other possessor, would still be able to rely on their present possession as against a challenger who could not establish his or her own title.³⁴

A hypothetical example may help to clarify this. Let us suppose

³² However, proof that another Aboriginal nation had been in occupation of the lands at the time of Crown assertion of sovereignty would not of itself establish the Crown's title: see *infra* note 44. On one possible scenario, the title of the Aboriginal nation in occupation at that time might have been validly transferred to or acquired by the present possessors. In his judgment in *Delgamuukw*, *supra* note 1 at 1130-31, La Forest J. suggested that this could happen:

Also, on the view I take of continuity, I agree with the Chief Justice that it is not necessary for courts to have conclusive evidence of pre-sovereignty occupation. Rather, aboriginal peoples claiming a right of possession may provide evidence of present occupation as proof of prior occupation. Further, I agree that there is no need to establish an unbroken chain of continuity and that interruptions in occupancy or use do not necessarily preclude a finding of "title." I would go further, however, and suggest that the presence of two or more aboriginal groups in a territory may also have an impact on continuity of use. For instance, one aboriginal group may have ceded its possession to subsequent occupants or merged its territory with that of another aboriginal society. As well, the occupancy of one aboriginal society may be connected to the occupancy of another society by conquest or exchange. In these circumstances, continuity of use and occupation, extending back to the relevant time, may very well be established; see Brian Slattey, "Understanding Aboriginal Rights" (1987), 66 Can. Bar Rev. 727, at p. 759.

³³ See note 2, *supra*.

³⁴ See authorities cited in notes 25, 27, and 30, *supra*. For a case where an Aboriginal person—the son of an Indian chief—successfully relied on possession as against a claimant who could not show a better title, see *McAllister*, *supra* note 27. However, the interest in question does not appear to have been communal Aboriginal title, but rather a several common law interest, presumably a fee simple.

that an Aboriginal nation is presently in possession of land.³⁵ That possession should give rise to a presumption that they have Aboriginal title to the land. The provincial Crown then issues a patent granting the same land to a corporation in fee simple.³⁶ Can the corporation rely on this grant to rebut the presumptive title of the Aboriginal possessors, and successfully claim the land? The answer to this question clearly depends on whether the Crown had sufficient title to the land to issue a valid grant of a fee simple interest.³⁷ If the Aboriginal possessors have a valid Aboriginal title, then the only title the Crown could have would be its underlying title,³⁸ which would not support a grant of a fee simple in possession.³⁹ On the other hand, we have seen that the Crown's title to the land itself can be presumed, but only if the land is unoccupied or unowned by anyone else.⁴⁰ Given that the Aboriginal nation is in occupation and has possession, the presumption of Crown title does not apply. As the grantee cannot rely on the Crown's presumptive title in this context, it would have to prove that the Crown had an actual title to

³⁵ On what would be necessary to establish possession, see notes 13-15, *supra*, and accompanying text; and notes 100, 109-14, *infra*, and accompanying text.

³⁶ I have chosen the example of a fee simple grant for simplicity. In practice, these kinds of conflicts more often involve Crown grants of lesser interests, such as mineral leases and permits or licences to harvest timber.

³⁷ For the purposes of this article, I am disregarding the possibility that the Crown might have the power to validly infringe an existing Aboriginal title by grant. However, for reasons given in "Racial Discrimination," *supra* note 18, "Extinguishment of Native Title," *supra* note 18, and in K. McNeil, *Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got It Right?* (Toronto: Robarts Centre for Canadian Studies, 1998) at 16-25, I do not think the Crown could do this without clear and plain statutory authority. Moreover, as Aboriginal title is within the core of federal jurisdiction over "Indians, and Lands reserved for the Indians" (*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 91(24): see *Delgamuukw*, *supra* note 1 at 1116-18, Lamer C.J.C.), provincial jurisdiction to infringe it is questionable: see K. McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" (1998) 61 Sask. L. Rev. 431; N. Bankes, "Delgamuukw, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights" (1998) 32 U.B.C. L. Rev. 317; and K. Wilkins, "Of Provinces and Section 35 Rights" (1999) 22 Dal. L.J. 185. Also, provincial legislatures have clearly lacked the authority to *extinguish* Aboriginal title ever since Confederation: *Delgamuukw*, *supra* note 1 at 1115-23, Lamer C.J.C. If grant of a fee simple would extinguish Aboriginal title, it would be *ultra vires* the province.

³⁸ See note 10, *supra*, and accompanying text.

³⁹ See *Chippewas of Sarnia Band v. Canada (A.G.)*, [1999] O.J. No. 1406 at paras. 397-432, especially para. 419, online: QL (OJ) [hereinafter *Chippewas of Sarnia*], motion to quash appeal dismissed, [2000] O.J. No. 138, online: QL (OJ). It might, however, support a fee simple in reversion or remainder (given that Aboriginal title is not itself a fee simple interest: see *Delgamuukw*, *supra* note 1 at 1080-81, Lamer C.J.C.), which is generally the approach taken by the United States Supreme Court: see "Extinguishment of Native Title," *supra* note 18.

⁴⁰ See notes 11-12, *supra*, and accompanying text.

the land itself when the patent was issued. The reason for this is that the Crown, like anyone else, cannot give what it does not have.⁴¹ In other words, given that the Aboriginal nation is in possession, the grantee will have to prove the Crown's title because it is on that title that the grantee's own title depends. The grantee could probably accomplish this in these circumstances either by proving that the land was unoccupied when the Crown asserted sovereignty,⁴² or if occupied, by showing that the Aboriginal title to the land had been lost by valid extinguishment or surrender.⁴³ However, proving that the land was occupied by some other Aboriginal nation at the time of Crown assertion of sovereignty would not establish the Crown's title and hence that of the grantee, unless it could also be shown that the Crown had validly acquired title to the land in the meantime.⁴⁴

These conclusions are well supported by authority.⁴⁵ The leading decision on the requirement that the Crown's title be proven in an equivalent situation is *Bristow v. Cormican*,⁴⁶ decided by the House of Lords in 1878. That case involved an action of trespass brought by appellants who, though not in actual possession of the land where the alleged trespass took place, claimed a title derived from a Crown grant

⁴¹ This rule is usually expressed by the latin maxim *nemo dat quod non habet*. There are, of course, exceptions to the rule: for example, where the person has a power, or statutory authority, to transfer title to property that he or she does not own. However, the burden would be on that person to establish the power or indicate the authority.

⁴² The reason for this is that the Crown would have acquired title to any unoccupied lands at the time it asserted sovereignty: see note 11, *supra*, and accompanying text.

⁴³ It is well established that the onus of proving that Aboriginal rights (which include Aboriginal title: see note 2, *supra*) have been extinguished is on the party so alleging, and that the legislative intention to extinguish must be clear and plain: see *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at 1098-99 [hereinafter *Sparrow*]; *Badger*, *supra* note 2 at 794, Cory J.; and *Delgamuukw*, *supra* note 1 at 1120, Lamer C.J.C. Similar principles would seem to apply to an allegation that Aboriginal title has been surrendered by treaty, given the rules respecting interpretation of treaties referred to in note 2, *supra*: see *Chippewas of Sarnia*, *supra* note 39.

⁴⁴ The reason for this is that occupation of the land by *any* Aboriginal nation at the time of assertion of sovereignty would preclude the Crown's presumptive title because that title depends on the lands being unoccupied and unowned at that time: see notes 11-12, *supra*, and accompanying text. So, to successfully claim the land, the grantee would have to establish some other basis for the Crown's title: for example, extinguishment or surrender, on which the validity of its own title would depend. For this reason, it would not be necessary for the Aboriginal nation presently in possession to show that it had validly acquired the Aboriginal title of those in occupation at the time of assertion of sovereignty (though that may have happened: see note 32, *supra*).

⁴⁵ On the relevant rules respecting possession of land generally, see the cases and texts cited *supra* notes 25, 27, 30.

⁴⁶ (1878), 3 App. Cas. 641 (H.L.) [hereinafter *Bristow*]. See also *Johnston v. O'Neill*, [1911] A.C. 552 (H.L.).

of a fee simple reversion after a 99-year lease.⁴⁷ The House of Lords decided that the validity of the appellant's title depended on the validity of the Crown grant, which was a question of fact dependent in turn on whether the Crown had title to the land at the time of the grant. Their Lordships refused to accept the grant itself as sufficient evidence of the Crown's title.⁴⁸ Lord Chancellor Cairns said that it was "incumbent on the Appellants, in order to make available their documentary title, to give some evidence of the ownership or possession of the Crown at the beginning of that title."⁴⁹ Lord Blackburn likewise refused to presume the Crown's title, either from the grant or on the basis of the royal prerogative. Respecting the grant, he accepted the trial judge's opinion that it had to be dealt with "in the same way as if the grantor was a private individual."⁵⁰ As for the prerogative, Lord Blackburn expressly rejected the contention that the Crown has a prerogative right to lands to which no one else can show a title.⁵¹ He observed that the Crown could have title by forfeiture, escheat, or otherwise, but this would have

⁴⁷ The lease and reversion were of the bed of Lough Neagh in Ireland and of the fishery in that body of water. They had been granted by Charles II in 1660 and 1661, respectively. The appellants claimed through the grantee of the reversion.

⁴⁸ On reflection, the reason for this is obvious, as otherwise the Crown could fabricate a title to any lands in its dominions simply by issuing a grant. This would be contrary to fundamental principles of English law, which at least since *Magna Charta* (U.K.), 17 John (as re-enacted in 9 Henry III) has been solicitous in its protection of real property against Crown taking. As Lord Parmoor stated in *A.G. v. De Keyser's Royal Hotel* [1920] A.C. 508 at 569 (H.L.), "[s]ince *Magna Carta* the estate of a subject in lands or buildings has been protected against the prerogative of the Crown." For affirmation of the fundamental nature of property rights in English law, see Blackstone, *supra* note 30, vol. 1 at 127-29, 138-40; H. Broom, *Constitutional Law Viewed in Relation to Common Law*, 2d ed. by G.L. Denman (London: W. Maxwell & Son, 1885) at 225-45; *Halsbury's Laws of England*, *supra* note 23, vol. 8 at para. 833; and J.W. Ely Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* 2d ed. (New York: Oxford University Press, 1998) at 13-14, 54-55.

⁴⁹ *Bristow*, *supra* note 46 at 655.

⁵⁰ *Ibid.* at 667, quoting *Bristow v. Cormican* (1874), I.R. 10 C.L. 398 at 422 (Ex.). Obviously a grant by a private individual would be worthless if the grantee had neither title nor possession at the time of the grant. Compare *Farmer v. Livingstone* (1880), 5 S.C.R. 221, and *Farmer v. Livingstone* (1883), 8 S.C.R. 141, where the Court held a Crown grant to be effective as against a person in possession who could prove no title apart from the title that possession gave him. However, in that case the possessor did not question the validity of the Crown's title; on the contrary, by his own evidence he admitted that the land had been Crown land prior to the grant. He based his case instead on a claim to statutory homestead rights, which the Court denied him.

⁵¹ See *Bristow*, *supra* note 46 at 667. See also *ibid.* at 658, Lord Hatherley: "Clearly no one has a right to say that it [the lough bed] became vested in the Crown because it belonged to nobody else."

to be proven.⁵²

It has been held as well in the context of expropriation of land for public purposes that the Crown cannot avoid paying compensation to the person in possession on the grounds that he or she does not have a good title. In *Perry v. Clissold*,⁵³ the Governor of New South Wales exercised his statutory authority to compulsorily acquire certain land in 1891 for a public school. It appeared that Clissold, who was in possession of the land at the time, was an adverse possessor, having entered wrongfully in 1881. As he did not yet have a good title by statutory limitation, the Crown refused to pay compensation to him, even though the true owner of the land was unknown. The Privy Council decided that the Crown had to pay compensation to Clissold, as by virtue of his possession he had “a perfectly good title against all the world but the rightful owner.”⁵⁴ His title by possession was thus good against the Crown, and no presumption of Crown title operated against him. To claim the land without paying compensation to the possessor, the Crown would have had to prove its own title.⁵⁵ The *Clissold* decision therefore shows that the Crown is bound by the rule that a person claiming land from the person in possession cannot rely on the weakness of the possessor’s title or on the title of a third party—like any other claimant, the Crown must prove that it has a better title than that arising from the possession itself.⁵⁶

⁵² *Ibid.* at 667. Lord Blackburn pointed out that, generally speaking, the title of the Crown must be found by inquest of office, which was defined by Blackstone, *supra* note 30, vol. 3 at 258, as “an inquiry made by the king’s officer, his sheriff, coroner, or escheator, *virtute officij* or by writ sent to them for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels.” The inquiry would take place before a jury, who would find a title for the Crown if the evidence was sufficient to do so. In other words, the title of the Crown would have to be proven to the satisfaction of the jury. See *Common Law Aboriginal Title* *supra* note 10 at 95-98. It should be noted that the decision in *Bristow*, *supra* note 46, actually goes beyond holding that the Crown’s title cannot be presumed when someone else is in possession, as the House of Lords was unwilling to accept that the Crown had title without proof, even though *no one* was shown to be in possession of the lands (the respondents had been fishing in the lough, but in the circumstances did not have possession of it).

⁵³ *Supra* note 27.

⁵⁴ *Ibid.* at 79.

⁵⁵ In *Emmerson*, *supra* note 25 at 575, it was held that the “presumption of title which arises from simple occupation or possession” can be rebutted by proof that the lands are owned by the Crown.

⁵⁶ See notes 25-30, *supra*, and accompanying text. Note that the title held by a possessor whose possession is known to be wrongful is not a presumptive title. Rather, it is a title that every possessor has, and can be described as the “title that goes with possession”: see *Common Law Aboriginal Title* *supra* note 10 at 15-16, 31-77. As the Privy Council held in *Clissold*, *supra* note 27, it is valid against anyone who cannot prove a better title in herself or himself.

The *Bristow* and *Clissold* decisions both involved lands in territories that had been colonized by the Crown,⁵⁷ not lands in England, so they cannot be disregarded in Canada on the grounds that the usual common law rules respecting proof of Crown title do not apply in the Crown's overseas dominions.⁵⁸ Nor can they be limited in their application to lands not held by Aboriginal title. This is clear from two Privy Council appeals from New Zealand that not only affirmed the fundamental rule that the Crown must prove its title when it claims lands in the possession of others, but also applied the rule in the context of the indigenous land claims of the Maori.

In the first of these appeals, *Nireaha Tamaki v. Baker*,⁵⁹ the appellant alleged that he and the other members of the Rangitane Tribe had title to a triangular block of land by virtue of their native title under their customs and usages, either by virtue of an 1871 order of the Native Land Court or otherwise. The appellant sought a declaration of this title, and an injunction to restrain the Crown from selling the block of land. The respondent, the Commissioner of Crown Lands, claimed the land for the Crown by virtue of surrenders of two adjacent blocks by their Maori proprietors to the Crown. The disputed question of fact between the parties was whether the triangular block was part of the Rangitane lands, or part of the surrendered lands. But the appeal to the Privy Council did not involve resolution of this question, as the trial court had dismissed the action on the preliminary ground that it had no jurisdiction. The New Zealand Court of Appeal affirmed this judgment, holding that "the mere assertion of the claim of the Crown is in itself sufficient to oust the jurisdiction of this or any other Court in the

⁵⁷ Ireland had been acquired by conquest—see *Campbell v. Hall* (1774), 1 Cowp. 204, 98 E.R. 1045 at 1048 (K.B.)—whereas New South Wales had been acquired by settlement: see *Cooper v. Stuart* (1889), 14 App. Cas. 286 (P.C.); and *Coe v. Commonwealth of Australia* (1979), 24 A.L.R. 118 (H.C.A.).

⁵⁸ For an Australian decision where such a distinction was made, see *Doe d. Wilson v. Terry* (1849), 1 Legge 505 at 508-09 (N.S.W. S.C.) [hereinafter *Terry*], where Stephen C.J. stated:

In England, as we observed in the case of the *Attorney-Generak. Brown* ... the title of the Sovereign to land is a fiction; or, where the Crown really owns land, the property is enjoyed as that of the subject is, and by a title which admits of proof by documentary and other evidence. Here, the title of the Crown as universal occupant is a reality, and there is no proof of it required, or admissible.

As discussed in K. McNeil, "A Question of Title: Has the Common Law Been Misapplied to Dispossess the Aboriginals?" (1990) 16 Monash U. L. Rev. 91, the *Brown* and *Terry* decisions totally disregarded the presence of the Indigenous peoples of Australia. In this respect, they have no doubt been overruled by *Mabo*, *supra* note 11.

⁵⁹ [1901] A.C. 561 (P.C.) [hereinafter *Nireaha Tamaki*]. For commentary, see P.G. McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (Auckland: Oxford University Press, 1991) at 117-19.

Colony.”⁶⁰

Lord Davey, for the Privy Council, said that the Court of Appeal had misunderstood the action, which was really based on an allegation that the respondent would exceed his statutory authority if he sold lands on behalf of the Crown that included the triangular block. “Their Lordships,” he said, “hold that an aggrieved person may sue an officer of the Crown to restrain a threatened act purporting to be done in supposed pursuance of an Act of Parliament, but really outside the statutory authority.”⁶¹ His Lordship found it “unnecessary to multiply authorities for so plain a proposition, and one so necessary to the protection of the subject.”⁶² He then said, in obvious reference to the astonishing holding of the Court of Appeal that the courts have no jurisdiction to question an assertion of title by the Crown: “In a constitutional country the assertion of title by the Attorney-General in a Court of Justice can be treated as pleading only, and requires to be supported by evidence.”⁶³ But apparently the appellant still had to prove that “he and the members of his tribe are in possession and occupation of the lands in dispute under a native title which has not been lawfully extinguished”⁶⁴ If the appellant could do so, Lord Davey said “he [could] maintain this action to restrain an unauthorized invasion of his title.”⁶⁵ From this, it appears that the initial onus was on the appellant to establish his tribe’s *prima facie* title by proving present occupation under a native title.⁶⁶ It would not be a sufficient answer to this for the Crown simply to assert a title of its own. Instead, it had to prove its title, which

⁶⁰ *Nireaha Tamaki*, *supra* note 59 at 575, quoting from the Court of Appeal’s judgment.

⁶¹ *Ibid.* at 576.

⁶² *Ibid.* The two authorities he did cite were *Tobin v. R.* (1864), 16 C.B. (N.S.) 310, 143 E.R. 1148 (P.C.); and *Musgrave v. Pulido* (1879), 5 App. Cas. 102 (P.C.).

⁶³ *Nireaha Tamaki*, *supra* note 59 at 576 [emphasis added].

⁶⁴ *Ibid.* at 578 [emphasis added]. Note that the requirement that the possession and occupation be “under a native title” apparently stemmed from the fact that Maori title in New Zealand, as acknowledged by the statutes referred to in *Nireaha Tamaki*, is based on Maori customs and usages (unlike in Canada, where Aboriginal title is based on occupation, though Aboriginal customs, usages, and laws are relevant to the proof of occupation: see *Delgamuukw*, *supra* note 1 at 1099-1102, Lamer C.J.C.; and notes 13-14, *supra*, and accompanying text).

⁶⁵ *Nireaha Tamaki*, *supra* note 59 at 578.

⁶⁶ This follows from the fact that the appellant was the plaintiff, and was asking for a declaration of title: see notes 22-23, *supra*, and accompanying text. That this burden of proof could be met by proving present possession appears from Lord Davey’s use of the present-tense “are” when referring to the possession and occupation required for proof of title in the quotation accompanying note 64, *supra*. See also the quotation below from *Wallis v. Solicitor-General for New Zealand*, [1903] A.C. 173 (P.C.) [hereinafter *Wallis*], accompanying note 73.

no doubt could be done by showing that the triangular block in dispute had in fact belonged to the neighbouring Maori proprietors, and had been included in the surrender of their two adjacent blocks of land to the Crown.

The Privy Council returned to this issue of the necessity for the Crown to prove its title to lands occupied by Maori tribes in *Wallis v. Solicitor-General for New Zealand*.⁶⁷ The case involved an 1848 transfer by certain Maori chiefs of lands in their possession to Bishop Selwyn for the purpose of founding a Christian college. The Crown waived its right of pre-emption of these Maori lands by sanctioning the gift, and confirmed the transaction by issuing a Crown grant to Bishop Selwyn and his successors to hold the land in trust for the purposes of the college.⁶⁸ However, the college was not built, and by the end of the nineteenth century was no longer needed, as the Maori population in the area had declined. The trustees therefore applied to the New Zealand Supreme Court for directions on the administration of this charitable trust, which was how the *Wallis* case originated. They also gave notice of the action to the solicitor-general, who was subsequently made a party. He took a position that Lord Macnaghten, for the Privy Council, described as “somewhat strange,” given “the duty of the law officers of the Crown to intervene for the purpose of *protecting* charities and affording advice and assistance to the Court in the administration of charitable trusts.”⁶⁹ Instead of doing that, the solicitor-general “seems to have thought it not inconsistent with the traditions of his high office to *attack* a charity which it was *prima facie* his duty to protect. He suggested that the Crown was or might be entitled to the property.”⁷⁰ The New Zealand Court of Appeal, hearing an appeal from the Supreme Court, nonetheless accepted that the Crown was entitled, in part because of an allegation by the solicitor-general that the Crown had been deceived in its grant. Lord Macnaghten was obviously unimpressed by this decision, as he could find no evidence to support it.⁷¹ Moreover,

⁶⁷ *Supra* note 66. For commentary, see McHugh, *supra* note 59 at 119-20.

⁶⁸ The Privy Council pointed out that the grant was issued simply for conveyancing purposes to put on record that the Crown had waived its right of pre-emption, as “the Crown had *no beneficial interest to pass*.” *Wallis*, *supra* note 66 at 180 [emphasis added].

⁶⁹ *Ibid.* at 181-82 [emphasis added].

⁷⁰ *Ibid.* at 182 [emphasis added].

⁷¹ In reference to the Court of Appeal’s decision on this issue, Lord Macnaghten asked, *ibid.* at 185: “Why should the Court attribute to a Government of the past more than childlike simplicity in order that the Government of to-day may confiscate and appropriate property which never belonged to the Crown, and which the Crown encouraged the rightful possessors [the Maori] to

he strongly disapproved of the process by which the solicitor-general had been allowed to challenge the validity of the charitable gift, and twist an action for direction respecting administration of the trust into a Crown claim to the trust property itself, especially when this was done without any evidence being led to support the Crown's claim.⁷² If the Crown thought it had a valid claim to the land, Lord Macnaghten held, the proper procedure would be for it to come forward as plaintiff and prove its claim. On the necessity for such proof, he said this:

There is not in the evidence the slightest trace of any cession to the Crown, or of any bargain between the Crown and the native donors. Of course, if the Crown comes forward as plaintiff, the transaction may assume a very different complexion. There may be in existence evidence which has not yet been disclosed. *But if the Crown seeks to recover property and to oust the present possessors, it must make out its case just like any other litigant.* All material allegations must be proved or admitted. Allegations unsupported go for nothing.⁷³

The *Nireaha Tamaki* and *Wallis* decisions reveal clearly that the fundamental rule that the Crown generally must prove its title by evidence just like anyone else when challenging the title of persons in possession applies in the context of Indigenous land rights. The Privy Council was scornful of the argument made in both cases on behalf of the Crown that, where Maori lands are concerned, the Crown can ignore the usual rules and simply assert a title without proving it. As Lord Davey pointed out in *Nireaha Tamaki*, in a *constitutional* country, that is simply not acceptable. He obviously had in mind the principle that the executive is bound by the rule of law, and as such cannot rely on unsubstantiated allegations, or dictate to the courts, whether in relation to Maori title to land or anything else.⁷⁴

dedicate to charity?"

⁷² In reference to the solicitor-general's proposition (which the Court of Appeal apparently accepted) that the Court should not question the executive government's position that the *cy-près* doctrine was inapplicable to the trust without the assent of the New Zealand Parliament, Lord Macnaghten was unsparing in his criticism of the solicitor-general and his disapproval of the Court's deference. He gave them both a lesson on the independence of the judiciary, *ibid.* at 188:

The proposition advanced on behalf of the Crown is certainly not flattering to the dignity or the independence of the highest Court in New Zealand, or even to the intelligence of the Parliament. What has the Court to do with the executive? Where there is a suit properly constituted and ripe for decision, why should justice be denied or delayed at the bidding of the executive? Why should the executive Government take upon itself to instruct the Court in the discharge of its proper functions? Surely it is for the Court, not for the executive, to determine what is a breach of trust.

⁷³ *Ibid.* [emphasis added].

⁷⁴ The leading case on the executive's duty to respect the rule of law is *Entick v. Carrington* (1765), 2 Wils. K.B. 275, 95 E.R. 807 (C.P.). See also *Roncarelliv. Duplessis* [1959] S.C.R. 121. As stated in Broom, *supra* note 48 at 245, "[t]he enjoyment of personal liberty and private property

To sum up our discussion to this point, it is a fundamental common law rule that title is presumed from possession. Moreover, anyone—and this includes the Crown—who challenges the title of a person in possession of land generally has to prove that he or she has a better title. The challenger cannot rely on the weakness of the possessor's title, or on the title of a third party (unless acting on that person's behalf), as it is incumbent on the challenger to establish that he or she has a title superior to that of the possessor. Failing that, the person in possession will prevail because, as against an untitled challenger, possession is title. These rules apply in the Crown's overseas dominions as well as in England, and in the context of Indigenous land rights as well as in relation to other real property. They therefore should permit Aboriginal nations in Canada who are presently in possession of land to rely on that possession to discharge the initial onus of proof of their title. The evidentiary burden should then be on the Crown, or whoever else challenges the validity of their title, to prove its own title.

If this analysis is correct, with all due respect to Lamer C.J.C., Aboriginal claimants who are currently in possession should not have to prove continuity with occupation pre-dating the Crown's assertion of sovereignty.⁷⁵ Their possession should be sufficient in and of itself to establish a presumption of Aboriginal title. But if continuity is required, it should also be presumed from present possession, just like occupation of the lands at the time that the Crown asserted sovereignty should be presumed.⁷⁶

without interference by the Crown is guaranteed by this fundamental doctrine of our constitution, that the sovereign cannot alter the existing laws—can neither add to nor dispense with them.”

⁷⁵ While Lamer C.J.C. did not say explicitly that the onus is on the Aboriginal claimants to prove continuity, this is clearly implicit in his judgment: see *Delgamuukw*, *supra* note 1 at 1102-03, quoted in part in the text accompanying notes 6-7, *supra*.

⁷⁶ In his discussion of continuity, Lamer C.J.C. said it is needed where present occupation is relied upon “because the relevant time for the determination of aboriginal title is at the time before sovereignty”: *Delgamuukw*, *supra* note 1 at 1102-03. However, in his discussion of what amounts to continuity, we have seen that he also adopted the *Mabo* requirement that “there must be ‘substantial maintenance of the connection’ between the people and the land,” rather than “an unbroken chain of continuity”: *ibid.* at 1103 (see text accompanying note 7, *supra*, for the context of this quotation). This is problematic, as in *Mabo* this issue of continuity arose in the context of loss of native (Aboriginal) title in a hypothetical situation where an Indigenous group failed to adequately maintain a connection *that they had once had* I therefore fail to understand how the *Mabo* standard for continuity can apply in the context in which Lamer C.J.C. purported to apply it, namely *to show continuity of occupation from the present back in time to the date of Crown assertion of sovereignty*. Was he saying that continuity has to be shown all the way back to assertion of sovereignty, by establishing “substantial maintenance of the connection” throughout that period? If so, it would seem that the Aboriginal claimants would still have to prove their occupation at the time the Crown asserted sovereignty, making it unnecessary to rely on present occupation. As this makes little sense, he must have meant instead that proof of a substantial connection for some unspecified period from

Up to this point, the discussion has been limited to situations where Aboriginal nations are presently in possession of lands. However, many Aboriginal nations have involuntarily lost possession of at least some of their lands, often because they were dispossessed by the Crown or its grantees.⁷⁷ Does the presumption of title arising from possession apply in this context as well? The answer must be “yes,” as every possession of land, whether past or present, raises a rebuttable presumption that the possession was or is rightful.⁷⁸ Moreover, the dispossession itself would give rise to a right to recover the land,⁷⁹ unless

the present back (though not as far back as the date of assertion of sovereignty) would suffice to prove Aboriginal title. If he had looked at American law in this context, he would have found support for this approach in *Cariño v. Insular Government of the Philippine Islands* 212 U.S. 449 (1909), a successful land claim based on Igorot custom and long occupation, where Holmes J., for a unanimous Supreme Court, said at 460:

[E]very presumption is and ought to be against the government in a case like the present. It might, perhaps, be proper and sufficient to say that when, as far back as testimony or memory goes, the land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the same way from before the Spanish conquest, and never to have been public land.

However, even in the absence of proof of possession “as far back as testimony or memory goes,” the presumption of title from present possession should operate to cast the burden on the Crown to prove its own title: see notes 25-74, *supra*, and accompanying text.

⁷⁷ In *Delgamuukw*, *supra* note 1 at 1103, in the context of his discussion of continuity (see note 76, *supra*), Lamer C.J.C. acknowledged that Aboriginal “occupation and use of lands may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognize aboriginal title.” He continued: “To impose the requirement of continuity too strictly would risk ‘undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect’ aboriginal rights to land (*Côté*, ... at para. 53).” More commonly, however, this injustice is not just historical, as the dispossession of Aboriginal nations has not been just “for a time,” but has continued to the present day.

⁷⁸ In addition to the authorities cited in notes 25, 27, and 30, *supra*, see *Catteris v. Cowper* (1812), 4 Taunt. 547, 128 E.R. 444 (C.P.) [hereinafter *Catteris*]; *Doe d. Osborne v. M'Dougall* (1848), 6 U.C.R. (Q.B.) 135; *Lessee of Smith v. McKenzie* (1854), 2 N.S.R. 228 (S.C.); *Doe d. Eaton v. Thomson* (1860), 9 N.B.R. 461 (S.C.); and *Wogama Pty. v. Harris* (1968), 89 N.S.W.W.N. (Pt. 2) 62 (C.A.), especially at 64. For discussion, see *Common Law Aboriginal Title* *supra* note 10 at 39-63, especially 42-43. Where there are two or more presumptive titles arising from two or more possessions, in the absence of other evidence the earliest possession will prevail: see *Freeman v. Allen* (1866), 6 N.S.R. 293 (C.A.); *Donnelly v. Ames* (1896), 27 O.R. 271 (Q.B.); *Poulin v. Eberle* (1911), 20 O.W.N. 301 (Div. Ct.). In *Whale*, *supra* note 25, Field J. wrote at 137: “The plaintiff proved possession previous to that of defendant. The defendant has present possession, but from the evidence does he show a better title? I think the presumption is in favour of the earlier possession, but at all events, it is a matter for a jury.” See also *Doe d. Harding v. Cooke* (1831), 7 Bing. 346, 131 E.R. 134, especially Park J.

⁷⁹ In the early common law, the action that was generally used to recover possession of land was the assize of novel disseisin, in which the plaintiff alleged that he or she had been seised of the land (in possession for a freehold estate), and the defendant had disseised (dispossessed) him or her. The plaintiff did not have to prove any title, as prior seisin and disseisin sufficed. To successfully defend against the action, the defendant had to show a right of entry (*i.e.*, a right to disseise the plaintiff); it was no answer to prove that the plaintiff did not have a valid title to the

the Crown or its grantees could establish a right to take possession of the lands at the time of the dispossession.⁸⁰ So if an Aboriginal nation proved, for example, that lands presently in the *alleged* possession of the Crown⁸¹ were in the possession of that nation at any time in the past, that past possession should give rise to both a presumptive title and a presumptive right to recover possession of the lands. This right to recover possession could be exercised either by peacefully taking possession, if that were possible, or by initiating legal proceedings. The legal action could be for a declaration of Aboriginal title, but an action of ejectment or for recovery of the lands might be more appropriate,⁸² and more likely to succeed, as it would not be prejudicial to the interests of persons who were not party to the action.⁸³ The burden in either case would be on the Crown to show that it had taken possession of the lands as of right, either because the lands had been unoccupied and so became Crown lands when it asserted sovereignty,⁸⁴ or because Aboriginal title to them had been validly extinguished or surrendered.⁸⁵ As grantees of the Crown would be in no better position than the Crown itself, they would bear the same burden of proving the Crown's title at the time the

land. Similarly, the action of ejectment, which eventually replaced the assize of novel disseisin as the preferred action for recovering possession of land, was based on possession and ejection (dispossession), rather than on title. For detailed discussion, see *Common Law Aboriginal Title* *supra* note 10 at 17-20, 38-63.

⁸⁰ See note 2, *supra*.

⁸¹ It is important to be aware that, at common law, the dignity of the Crown prevents it from acquiring possession, whether rightfully or wrongfully, by physically occupying land. Unless possession is cast upon it by law, for the Crown to have possession it generally must have a title that is of record, *i.e.* a title recorded as a memorial of a court or legislative body. This rule complemented the provision in chapter 29 of *Magna Charta*, *supra* note 48, that the Crown cannot disseise (*i.e.* dispossess) freeholders (this is now subject to statutes of limitation). It protected landholders against arbitrary exercise of power by a sovereign that enjoyed immunity in its own courts prior to the enactment of modern Crown liability statutes. See *Common Law Aboriginal Title* *supra* note 10 at 93-95.

⁸² In England and some common law provinces, an action for recovery of land has replaced ejectment as the main action for recovering lost possession: see *Common Law Aboriginal Title* *supra* note 10 at 38, n. 147; and *Canadian Encyclopedic Digest* Ontario 3d ed. (Toronto: Carswell, 1973) vol. 28, "Real Property," § 561.

⁸³ See notes 92-93, *infra*, and accompanying text.

⁸⁴ See note 11, *supra*, and accompanying text.

⁸⁵ See note 2, *supra*. The burden on the Crown, at least where it alleges extinguishment, is onerous, as "the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right": *Sparrow*, *supra* note 43 at 1099. See also *R. v. Gladstone*, [1996] 2 S.C.R. 723 at 759-60 (Lamer C.J.C.), 790-91 (La Forest J.), 809 (L'Heureux-Dubé J.); *Adams*, *supra* note 2 at 129-30, Lamer C.J.C.; and note 43, *supra*.

grants had been made.⁸⁶

As mentioned earlier, when an Aboriginal nation commences an action for a declaration of their Aboriginal title, the onus of proving their title is on them because they are the plaintiffs.⁸⁷ Similarly, if they bring an action to recover lost possession, they will have to demonstrate a right to possession. What I have attempted to show so far is that this onus can be met in either action by proving that the claimants are or were in possession, thereby casting the burden on the Crown (or its grantees) to prove its own title. But if the Aboriginal nation is presently in possession, an action for recovery of the land obviously would not make any sense. In that context, an action for declaration of title might be a possibility,⁸⁸ but in most situations I doubt whether it would be the best option. I will now consider other alternatives.

IV. PROTECTING PRESENT ABORIGINAL POSSESSION

If an Aboriginal nation is presently in possession of land, there does not seem to be much reason for them to bring an action for declaration of their title to it. They can generally act as any landholders do, and use the lands for their own purposes, in accordance with the collective needs of their community.⁸⁹ If anyone, such as the Crown in right of a province or a grantee of the Crown, challenges their right to possession in court, as plaintiff the challenger would generally have the onus of proving its own title.⁹⁰ The Aboriginal nation should not have to prove their title because, as defendants in possession, they should be able to rely on the two fundamental common law rules discussed above,

⁸⁶ See notes 35-52, *supra*, and accompanying text.

⁸⁷ See notes 22-24, *supra*, and accompanying text.

⁸⁸ See, however, *Cheslatta Carrier Nation v. British Columbia*, [1999] B.C.J. No. 2639 (S.C.), online: QL (BCJ), where Lysyk J. granted an application to strike a statement of claim asking for a declaration of an Aboriginal fishing right on the grounds that a declaration could not be sought in the absence of an allegation that the right had been infringed.

⁸⁹ Unlike other real property interests in Canada, Aboriginal title is held communally, and so decisions respecting the land are made by the Aboriginal nation holding the title: see *Delgamuukw*, *supra* note 1 at 1082-83, Lamer C.J.C. On the implications of this for self-government, see "Aboriginal Rights in Canada," *supra* note 3 at 285-91. Note, however, that Aboriginal title is also subject to an inherent limit that forbids uses that are irreconcilable with the attachment to the land upon which the title is based: see *Delgamuukw*, *supra* note 1 at 1088-91, Lamer C.J.C.

⁹⁰ See note 23, *supra*, and accompanying text. As our discussion of the *Bristow* decision, *supra* note 46, has shown, a grantee of the Crown would not be able to rely on the grant without proof that the Crown had sufficient title to support the grant at the time it was made: see notes 45-52, *supra*, and accompanying text.

namely that title is presumed from possession, and that possession is title as against anyone who does not have a better title.⁹¹ So by maintaining their possession and waiting for others to challenge it, they should be able to effectively reverse the onus of proof.

But what if the Crown or its grantee does not respect the possession of the Aboriginal nation, and comes onto their land without initiating legal action against them? What if a lumbering company, for example, starts cutting timber on lands that are in the possession of an Aboriginal nation, and relies on the fact that authority to do so has been granted to it by the Crown in right of the province? Should the Aboriginal nation then initiate an Aboriginal title claim in order to protect its possession against this encroachment? That would be one option, but in my opinion it would be simpler and more effective to bring an action for trespass. As a general rule, a court is reluctant to issue a declaration of title because it is virtually impossible to be sure that no other person has a valid claim to the disputed property.⁹² In fact, Lamer C.J.C. expressed just this kind of concern at the end of his judgment in *Delgamuukw*, where he observed that

many aboriginal nations with territorial claims that overlap with those of the appellants did not intervene in this appeal, and do not appear to have done so at trial. This is unfortunate, because determinations of aboriginal title for the Gitksan and Wet'suwet'en will undoubtedly affect their claims as well. This is particularly so because aboriginal title encompasses an *exclusive* right to the use and occupation of land, i.e., to the *exclusion* of both non-aboriginals and members of other aboriginal nations. It may, therefore, be advisable if those aboriginal nations intervened in any new litigation.⁹³

Unlike an action for declaration of title, an action for trespass to land cannot prejudice persons who are not party to it because the basis for trespass is wrongful interference with the plaintiff's possession, which

⁹¹ See notes 25-30, *supra*, and accompanying text.

⁹² Even the expiry of limitation periods is no guarantee that third-party rights do not exist, as disability, concealed fraud, or other impediment may have prevented time from running, or an unknown reversion or remainder may not yet have fallen into possession: see *Common Law Aboriginal Title* *supra* note 10 at 60. For this reason, apart from Torrens system legislation or other statutory provisions, common law title to land is relative. In a dispute between A and B over title to Blackacre, for example, all that can safely be said is that A has a better title than B (or vice versa), for, unknown to the court, C may have a better title than either of them. See A.D. Hargreaves, "Terminology and Title in Ejectment" (1940) 56 L.Q. Rev. 376, especially at 377; W.S. Holdsworth, "Terminology and Title in Ejectment—A Reply" (1940) 56 L.Q. Rev. 479; Megarry & Wade, *supra* note 30 at 106-09, 1158; and Burn, ed., *supra* note 30 at 26-27.

⁹³ *Delgamuukw*, *supra* note 1 at 1123 [emphasis in original].

does not have to be supported by a valid title.⁹⁴ The issues in trespass are generally simple and primarily factual.⁹⁵ Was the plaintiff in occupation, and hence in possession,⁹⁶ of the land when the alleged trespass occurred? Did the defendant physically intrude on the land or otherwise interfere with the plaintiff's possession? Did the defendant have lawful justification for the intrusion or interference? The burden of proving justification rests on the defendant, and can be met by showing he or she had a right of possession or entry, based on his or her own title, statutory authority, or other source.⁹⁷ Proof of a third party right of possession or entry is, however, only a defence if the defendant acted on that party's authority,⁹⁸ as without such authorization the defendant would still have no right to intrude on, or interfere with the plaintiff's possession, even if it could be shown that the possession was wrongful.⁹⁹

Let us assume that an Aboriginal nation were to bring an action of trespass against a corporation whose employees entered land in possession of that nation, and began to fell and remove trees. The Aboriginal nation would, of course, have to prove their possession of the

⁹⁴ See for example *Wuta-Ofeiv. Danquah*, [1961] 1 W.L.R. 1238 (P.C.), where the plaintiff succeeded in an action for trespass by establishing her possession, mainly by marking boundaries and protesting the defendant's intrusion on the land, even though the West African Court of Appeal had dismissed her additional claim for a declaration of title (this aspect of the Court of Appeal's decision was not appealed to the Privy Council). It is also clear from the case law that a plaintiff who establishes his or her possession, even though that possession is wrongful, will succeed in trespass against a defendant who cannot prove a right to enter upon the land or to do the acts of trespass: see *Graham v. Peat* (1801), 1 East 244, 102 E.R. 95 (K.B.); *Catteris* *supra* note 78; *Asher*, *supra* note 27; *Glenwood Lumber*, *supra* note 29; *Swaile*, *supra* note 27; *Pinder Lumber and Milling Co*, *supra* note 27; and *Nicholls v. Ely Beet Sugar Factory* [1931] 2 Ch. 84. Note, however, that a plaintiff in trespass who does not have actual possession, but who does have a valid title, can rely on that title in appropriate circumstances, but of course the onus is then on the plaintiff to prove that title: see *Bristow*, *supra* note 46. See also R.F.V. Heuston & R.A. Buckley, eds., *Salmond and Heuston on the Law of Torts*, 21st ed. (London: Sweet & Maxwell, 1996) at 47.

⁹⁵ See *Halsbury's Laws of England* *supra* note 23, vol. 45 at paras. 1384-1408; and *Canadian Encyclopedic Digest* *supra* note 82, vol. 32, "Trespass," § 30-162.

⁹⁶ On the distinction between occupation and possession, see note 24, *supra*.

⁹⁷ See *Halsbury's Laws of England* *supra* note 23, vol. 45 at paras. 1405-08; and *Canadian Encyclopedic Digest* *supra* note 82, vol. 32, "Trespass," § 117-44. Apart from a right to possession or statutory authority, an entry would be lawful if with the leave or licence of the person in possession, for the lawful execution of legal process, to preserve life or property, or to lawfully take possession of chattels, either by way of distress or recaption.

⁹⁸ See *Jones v. Chapman* (1849), 2 Ex. 803, 154 E.R. 717 (Ex. Ch.); and *Gray v. Harding* (1861), 21 U.C.Q.B. 241 (C.A.).

⁹⁹ See *Halsbury's Laws of England* *supra* note 23, vol. 45 at para. 1405; *Canadian Encyclopedic Digest* *supra* note 82, vol. 32, "Trespass," § 135; and the cases cited in note 94, *supra*.

land, and the acts of trespass.¹⁰⁰ There would, however, be no need for them to prove Aboriginal title. If possession and acts of trespass were established, it would then be up to the defendant to show lawful justification. Assume the defendant were to produce a Crown patent, granting the land to it in fee simple the day before the alleged trespass occurred. Would that suffice to meet the burden of proving lawful justification? Clearly not. On the basis of the authorities discussed above, the defendant would have to go further and prove that the Crown actually had title to the land itself at the time of the grant.¹⁰¹ That could probably be done by proving that no Aboriginal nation had been in occupation of the land when the Crown asserted sovereignty. If another Aboriginal nation occupied the land at that time, the Crown's title could be shown by proving that nation's title had been validly extinguished or surrendered. Failing proof of the Crown's title, the trespass action would succeed and result in an award of damages, and probably an injunction if the defendant did not discontinue the trespass.¹⁰² Thus by bringing an action of trespass, an Aboriginal nation that is in possession of land can cast the burden on the alleged trespasser to prove either its own title, or some other lawful justification for the interference with the nation's possession. Moreover, simple production of a Crown grant will not be an adequate defence.¹⁰³

As mentioned above, because an action for trespass does not involve a declaration of title, it cannot prejudice claims by others, including Aboriginal nations, who are not parties to it. As a result, courts may be more willing to grant judgment to Aboriginal plaintiffs in a trespass action than in an action for declaration of Aboriginal title. On the other hand, a successful trespass action would not bar others from claiming the land if they could prove a better title than the Aboriginal nation currently in possession. Moreover, unlike a declaration of title, a trespass action is not concerned with the nature of the interest held by

¹⁰⁰ On what amounts to possession for the purposes of trespass actions generally, and what constitutes trespass, see *Halsbury's Laws of England supra* note 23, vol. 45 at paras. 1384-95; and *Canadian Encyclopedic Digest supra* note 82, vol. 32, "Trespass," § 31-72. Where an Aboriginal nation brings a trespass action, no doubt their own land uses and perspectives on possession would be taken into account as well: see *Cadija Umma v. S. Don Manis Appu* [1939] A.C. 136 (P.C.), especially at 141-42; and *Delgamuukw, supra* note 1 at 1099-1101, Lamer C.J.C.

¹⁰¹ See notes 45-74, *supra*, and accompanying text. Recall that, for the purposes of this article, I am disregarding the possibility that the patent could take effect as a valid infringement of Aboriginal title: see note 37, *supra*.

¹⁰² On remedies in trespass actions, see *Halsbury's Laws of England supra* note 23, vol. 45 at paras. 1400-04; and *Canadian Encyclopedic Digest supra* note 82, vol. 32, "Trespass," § 145-62.

¹⁰³ See notes 46-52, *supra*, and accompanying text.

the plaintiffs. It would protect their possession against interference, but beyond that it would not specify the nature of their interest in the land.

One may ask why an Aboriginal nation that believes it has a valid Aboriginal title claim would be satisfied with an award of damages and/or an injunction in a trespass action, rather than a declaration of title. Canadians generally do not have or need a court declaration of their title to validate their landholdings. Leaving aside the impact of registry and Torrens system legislation,¹⁰⁴ as long as they are in possession, and no one else can show a better title, their landholdings are secure.¹⁰⁵ Beyond this, for reasons related to Aboriginal autonomy some Aboriginal nations might regard recognition of their Aboriginal title by the judicial branch of the Canadian state as superfluous, and possibly even as inconsistent with their sovereign status as nations. Taking an example from the United States, certain chiefs and other members of the Hopi Nation, in a letter to President Harry Truman dated 28 March 1949, wrote: "We will not ask a white man, who came to us recently, for a piece of land that is already ours."¹⁰⁶ So some Aboriginal nations might in fact be satisfied with having Canadian courts protect their possession from outside interference, without requiring or even desiring an affirmation of the title that they know they have.

V. CONCLUSIONS

Despite the apparent unfairness of placing the onus of proving their title on the Aboriginal nations, it is unlikely that the Supreme Court will re-examine this issue and require the Crown to initially prove its own title when an Aboriginal title claim is brought to court. Nonetheless, Aboriginal nations should be able to rely on two fundamental common law rules to meet the onus the Court has placed on them: (1) title is presumed from possession; and (2) possession is title

¹⁰⁴ The impact of this legislation in the various provinces would have to be taken into account where Aboriginal nations rely simply on their present possession. As this legislation is provincial, and Aboriginal title is under exclusive federal jurisdiction (see *Delgamuukw*, *supra* note 1 at 1115-23, Lamer C.J.C.), this raises complex constitutional issues that cannot be dealt with in this article. For general discussion, see the articles cited in note 37, *supra*.

¹⁰⁵ This is because, in the common law system of landholding, possession is the basic root of title: see Megarry & Wade, *supra* note 30 at 105, 108-09; and Burn, ed., *supra* note 30 at 26-27. For detailed discussion, see *Common Law Aboriginal Title* *supra* note 10 at 6-78. Note, however, that where the Crown is concerned this is generally reversed—possession depends on title, not the other way around: see note 81, *supra*.

¹⁰⁶ Reproduced in F. Waters, *Book of the Hopi* (New York: Viking Press, 1963) at 393.

as against anyone who cannot prove that he or she has a better title. So in situations where they can establish either present or past possession of lands at any time *after* Crown assertion of sovereignty,¹⁰⁷ Aboriginal nations should be presumed to have a valid Aboriginal title to those lands,¹⁰⁸ and the burden of proving a better title should be cast on the Crown or its grantees.

Where past possession and the presumption of title arising from it are relied on, an action for recovery of land might be more appropriate and more likely to succeed than an action for declaration of Aboriginal title, as judgment in an action for recovery of land would not prejudice possible claims of persons not party to the action. For the same reason, where an Aboriginal nation seeks to protect *present* possession from interference, the preferable action would probably be an action for trespass rather than an action for declaration of title. If it resulted in a positive judgment, an action for recovery of land or for trespass would restore or secure the possession of the Aboriginal nation against the defendant who had wrongfully taken possession of or trespassed on the nation's lands. Such a judgment would presumably act as a deterrent to discourage others from wrongfully interfering with the nation's possession.

From the discussion in this article, it is apparent that possession is of vital importance to Aboriginal nations who want to either recover their lands or protect them from outside interference.¹⁰⁹ While a detailed discussion of the kinds of evidence necessary to establish possession is beyond the scope of this article, basically any uses of, and activities on or in relation to, land that show an intention to possess it

¹⁰⁷ If they can prove occupation *at the time* of assertion of Crown sovereignty, of course they will have established their title in accordance with the *Delgamuukw* requirements for proof without having to rely on either of these common law rules.

¹⁰⁸ The presumption should result in an Aboriginal title rather than some other interest because the possession would be that of the Aboriginal nation as a whole, which could only result in the communal title that is unique to Aboriginal peoples: see note 89, *supra*.

¹⁰⁹ This is the result of what has been described as the "crude empiricism" of the common law, which is "preoccupied with what happens on the ground": K. Gray & S. Francis Gray, "The Idea of Property in Land," in S. Bright & J. Dewar, eds., *Land Law: Themes and Perspectives* (Oxford: Oxford University Press, 1998) 15 at 18-19. The authors go on to observe, at 19, that this leaves the recognition of property to rest upon essentially intuitive perceptions of the degree to which a claimant successfully asserts *de facto* possessory control over land. On this view property in land is more about fact than about right; it derives ultimately not from "words upon parchment," but from *the elemental primacy of sustained possession* [footnotes omitted; emphasis added].

and to hold it against the rest of the world, will serve this purpose.¹¹⁰ The more the uses and activities, and the longer their duration, the more likely it is that a court will find possession. In situations of dispossession where an Aboriginal nation has to rely on their past possession, sources of requisite evidence would include oral histories, the nation's customs and laws in relation to that land, historical documents, archaeological and anthropological studies, linguistic analysis, geographical information (such as place names), and so on.

An Aboriginal nation that is in a position to rely on present possession of some or all of their lands could also support that possession with continuing uses and activities on and in relation to the land that would make their possession apparent to the world. Using the land in accordance with their traditional lifestyles, which might include fishing, hunting, gathering, horticulture, cutting trees for building houses, maintaining trails, visiting and conducting ceremonies at sacred sites, and so on, would all be means of supporting their possession. But any other uses of the land, whether "traditional" or not,¹¹¹ would serve the same purpose. Examples might be constructing roads, controlling water flow, utilizing natural resources, erecting buildings and other structures, pasturing livestock, and putting up fences. Given that Lamer C.J.C. said in *Delgamuukw* that Aboriginal laws are also relevant to proving Aboriginal occupation,¹¹² affirming or establishing laws in relation to the land would be another way for the nation to support their possession, while exercising their right of self-government.¹¹³ It would also be advisable to mark boundaries and put up signs or other indicators that the land belongs to the Aboriginal nation. Informing outsiders who intrude on the land that they are trespassing, and either asking them to leave or giving them limited permission to stay,¹¹⁴ would be another important way to make the nation's possession known to the world. In short, the Aboriginal nation could engage in as many uses and

¹¹⁰ For judicial authority and discussion, see *Common Law Aboriginal Title* *supra* note 10 at 197-204.

¹¹¹ On some of the problems with trying to classify Aboriginal activities as either "traditional" or "non-traditional," see G. Christie, "Aboriginal Rights, Aboriginal Culture, and Protection" (1998) 36 *Osgoode Hall L.J.* 447.

¹¹² See note 14, *supra*, and accompanying text.

¹¹³ For further discussion of the connection between self-government and Aboriginal title to land, see "Aboriginal Rights in Canada," *supra* note 3 at 278-91.

¹¹⁴ If they do not leave when asked, it would be appropriate to bring a trespass action against them, but the more that can be done to establish possession before having to initiate legal action, the better.

peaceful activities on and in relation to the land as practicable, and sustain those activities over time so that their possession would be maintained. This would require community organization and coordination, fostering a common enterprise that virtually every member of the nation could participate in. By means of this direct participation on the ground, they would be contributing to their community by helping to establish the factual basis for their nation's possession, on which the nation's right to the land may well depend.