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"The Honour of the Crown is at Stake": Aboriginal Land Claims Litigation and the Epistemology of Sovereignty

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# “The Honour of the Crown is at Stake”: Aboriginal Land Claims Litigation and the Epistemology of Sovereignty

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Recent Canadian litigation on the collective rights of aboriginal nations has been examined mainly from the vantage point of Canada’s colonial/postcolonial politics. Who is winning and who is losing; how the scope of aboriginal rights is broadening, and with what effects; whether private corporations and provinces (rather than only the federal government) have a “duty to consult” and accommodate aboriginal interests; whether political negotiations, including but not limited to those resulting in “modern” treaties, are superseding litigation: these are the questions that, for good historical reasons, preoccupy most of the numerous commentators and stakeholders.

It is also possible, however, to look at these cases—and the related political controversies—from other perspectives, using the rich materials generated by this litigation and the surrounding discussions to address questions that are neither strictly legal nor strictly political. Sociolegal studies can illuminate legal issues not only by providing empirical evidence of how law has come to be what it is or how law works in practice, but also by opening up legal black boxes.

Thus, in keeping with methods and approaches developed in earlier work on the workings of legal knowledges in other areas of law,<sup>1</sup> in this Article I show that

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1. See MARIANA VALVERDE, *LAW’S DREAM OF A COMMON KNOWLEDGE* (2003); Ron Levi & Mariana Valverde, *Studying Law by Association: Bruno Latour Goes to the Conseil d’État*, 33 *LAW & SOC. INQUIRY* 3, 805–25 (2008).

this litigation has become not only an arena for renegotiating the status of the knowledges that aboriginal nations have of themselves but also, and less visibly, a venue in which the very essence of sovereignty in Canada is being quietly redefined. In other words: the key question regarding legal knowledges in this area of law used to be the admissibility and weight of aboriginal knowledges presented in non-European formats; but in recent years, a line of key cases (on “the duty to consult”) revealed that courts have decided to resort to medieval knowledges of “the Crown” to lay the basis for a jurisprudence in which the Crown’s inherent goodness—rather than any rights claims—becomes the source of aboriginal legal gains. In doing so courts are engaged, whether knowingly or not, in an exercise that I call “refurbishing the Crown for a multicultural age.”

The literature on postcoloniality, most famously Edward Said’s *Orientalism*,<sup>2</sup> has shown that as European authorities came to “know,” classify, govern, and manage colonial Others, they simultaneously redescribed and revised themselves. It is no longer controversial to state that Europe became what it is now in large part because it defined itself as against a variety of colonial and/or savage Others. Scholarship on Canadian law and politics has thus far remained relatively untouched by this postcolonial turn, however. Aboriginal issues are certainly more central, and treated more seriously, than they were a decade or two ago. But by and large Canadians are engaged in discussions about remedial justice or about special provisions for aboriginal offenders or for aboriginal spaces. Few are asking the more fundamental question of whether acknowledging Canada’s colonial rule over aboriginal peoples necessitates putting in question our (white Canadian) knowledge of ourselves, our institutions, and our rules. This Article is in part a response to John Borrows’s challenge to take a serious postcolonial look at Canadian legal traditions, with a view to properly “provincializing”<sup>3</sup> them, to use Dipesh Chakrabarty’s influential wording.

This radical rethinking of Canadian politics, law, and culture can be furthered by considering that the most important cases affecting the collective rights of aboriginal peoples (especially the nontreaty nations of Western Canada), which are those developing the new doctrine of the “duty to consult,”<sup>4</sup> do not turn on either

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2. EDWARD W. SAID, *ORIENTALISM* (1979).

3. See JOHN BORROWS, *CANADA’S INDIGENOUS CONSTITUTION* (2010). The author uses the Canadian legal pluralism tradition to suggest how aboriginal legal traditions can be integrated into the overall system, rather than being treated merely as a kind of personal law for aboriginal peoples. However, it stops short of questioning the colonial foundations of taken-for-granted legal tools (such as the law of evidence). On the nonaboriginal side, eminent left-liberal political theorist James Tully has also contributed to thinking about Canada postcolonially in his work *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* (1995), although, like Borrows, he tends to assume, a priori, that “reconciliation” rather than struggle is an appropriate paradigm. On provincialization, see DIPESH CHAKRABARTY, *PROVINCIALIZING EUROPE* 3–6 (2000).

4. My thanks to Dwight Newman for clarifying the “duty to consult.” See LEONARD ROTMAN, *PARALLEL PATHS: FIDUCIARY DOCTRINE AND THE CROWN-NATIVE RELATIONSHIP IN CANADA* (1996); Brian Slattery, *Aboriginal Rights and the Honour of the Crown*, 20 SUP. CT. L. REV. 433,

the substance or the format of the evidence about aboriginal peoples presented by aboriginal nations, unlike earlier cases—*Delgamuukw*<sup>5</sup> in particular. Instead, these cases present, without any fanfare or any footnotes, certain truths about the powerful if elusive entity that is “the Crown”—semimystical phrases that do the work that might otherwise have been done through rights claims.

The courts’ recourse to the premodern notions of the Crown as inherently honourable is particularly paradoxical in the context of aboriginal litigation. Aboriginal oral narratives had long been dismissed by Euro-Canadians, judges included, as myths or legends. This changed over the course of the 1990s, especially through the *Delgamuukw* decision, as the rules governing evidence in aboriginal formats loosened up. By contrast, the story that the “duty to consult” jurisprudence tells about “the Crown” is not a story made up of any facts, or even of law, in the black-letter sense: it is rather a wholly magical invocation of the Crown’s inherent virtues. Noted legal scholar and aboriginal leader John Borrows remarked, concerning *Delgamuukw*, that despite the cheers of victory with which aboriginal leaders greeted the decision, the key political-legal effect of the decision is to perform an “alchemy” that consists of “conjuring sovereignty.”<sup>6</sup> This is certainly accurate. But the more recent cases on the “duty to consult” feature white judges playing a shaman-like role with even greater vigour, since any justice effects resulting from those decisions have not arisen from any rights claims at all, and hence require no knowledge of aboriginality, self-generated or anthropological. The “duty to consult” cases produce “grace” more than justice. The efficacy of these cases, which has been regarded quite positively by many aboriginal commentators, is said by courts to be “grounded” in the doctrine that the Crown is always already honourable, with this honour then seeping into the crown’s “mystical body”—the Canadian state, in this instance—just as Christ’s virtues are deemed to seep into the mystical corporation that is the Christian church.<sup>7</sup>

We will now turn to a brief consideration of the change in the rules concerning evidence of collective rights in aboriginal formats, then turn to the “duty to consult” cases, and, finally, consider why it may be that aboriginal legal scholars have been less critical of the paternalist, premodern, crypto-Christian logic of “the honour of the Crown” doctrine than one might have thought.

#### I. KNOWLEDGE FORMATS AND THE PERFORMATIVITY OF NARRATIVES

The key cases that changed the rules regarding the admissibility and weight

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445 (2005).

5. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (Can.).

6. John Borrows, *Sovereignty’s Alchemy: An Analysis of Delgamuukw v. British Columbia*, 37 OSGOODE HALL L.J. 537, 558 (1999).

7. ERNST H. KANTOROWICZ, *THE KING’S TWO BODIES: A STUDY IN MEDIAEVAL POLITICAL THEOLOGY* (1957).

of aboriginal knowledge formats are the Supreme Court of Canada's decisions in *Delgamuukw* and in *Van der Peet*,<sup>8</sup> and two more recent lower court decisions arising from the Tsilhqot'in nation's aboriginal title claim (*William v BC*<sup>9</sup> and *Tsilhqot'in v BC*<sup>10</sup>).

Let us begin with the most important of these cases, namely, *Delgamuukw*, which noted political scientist Peter Russell sees as the most important and innovative decision on aboriginal common law title in the world.<sup>11</sup> I will here use John Borrows's summary of the link between the claims about aboriginal title and the character of the aboriginal people's knowledges:

In *Delgamuukw v. British Columbia*, the Supreme Court of Canada considered the Gitksan and Wet'suwet'en people's claim to aboriginal title and self-government over approximately 58,000 square kilometres of land in (what is now called) northwest British Columbia. Both nations have lived in this area as "distinct people" for a "long long time prior to [British assertions of] sovereignty." For millenia, their histories have recorded their organization into Houses and Clans in which hereditary chiefs have been responsible for the allocation, administration, and control of traditional lands. Within these Houses, chiefs pass on important histories, songs, crests, lands, ranks, and properties from one generation to the next. The passage of these legal, political, social and economic entitlements is *performed* and witnessed through Feasts. These Feasts substantiate the territories' relationships.<sup>12</sup>

The trial judge decided that many (though not all) of the ritual narratives of the House chiefs of both nations were admissible. But he then proceeded to deprive them of weight because they did not purport to set out "hard facts" but were rather a mix of "myth" and reality.<sup>13</sup> And he also refused to admit oral

8. R. v. Van der Peet, [1996] 2 S.C.R. 507 (Can.).

9. William v. British Columbia, (2004) 24 B.C.L.R. 4th 296 (Can. B.C. S.C.), [2004] 2 C.N.L.R. 380.

10. Tsilhqot'in Nation v. British Columbia, 2007 BCSC 1700 (Can. B.C.), [2008] 1 C.N.L.R. 112 (Can.).

11. PETER H. RUSSELL, RECOGNIZING ABORIGINAL TITLE 343 (2005). The classic work on aboriginal title in the British Empire and Commonwealth is KENT MCNEIL, COMMON LAW ABORIGINAL TITLE (1989). This work valiantly tried to scour the common law of real property, and particularly the feudal doctrine of tenures, in order to discern possession rights for aboriginal peoples that did not have to depend on either treaties or the recognition of customary law. McNeil's work has been quite influential within the courts, but this book is now superseded since recent cases (including to some extent the Australian *Mabo* decision) give some recognition to customary law, and hence recognize aboriginal title under the doctrine of continuity, thus making the legal fictions of Crown paramount lordship and aboriginal tenant rights unnecessary.

12. Borrows, *supra* note 6, at 538–39 (emphasis added).

13. The *Delgamuukw* case was complicated by the fact that the pleadings were substantially changed between the trial and the appeal. The original claims were for "ownership" of the lands in question and "jurisdiction." These far-reaching radical claims were abandoned in favor of the more achievable pursuit of "title." Title, of course, is a legal burden on the land, but is not full property. And even full property would not establish jurisdiction.

evidence in the form of "territorial affidavits."<sup>14</sup> In addition, a crucial fact that many commentaries on the decision neglect to discuss is that even those narratives that were said to be admissible were allowed in as exceptions to the hearsay rule—a classification that has the effect of making aboriginal representations of aboriginal history structurally inferior to the expert affidavits presented by historians and anthropologists.<sup>15</sup>

Mindful of the loud accusations of racism that had greeted the trial judge's ethnocentric dismissal of the aboriginal narratives,<sup>16</sup> the Supreme Court's judgement employed the discursive and textual conventions that are commonly used to perform Canadian multiculturalism to explain to the Canadian public the Gitksan term *adaawk* (a particular narrative performed at feasts by chiefs, with performative effects) and the Wet'suwet'en term *kungax* (a song with similar ritual and performative qualities).

Having acknowledged these (and then other) nontraditionally formatted evidence, in prose that, significantly, refuses to translate *adaawk* and *kungax* into English or French equivalents, Chief Justice Antonio Lamer chastised the trial judge as follows: "The implication of the trial judge's reasoning is that oral histories should never be given any independent weight and are only useful as confirmatory evidence in aboriginal rights litigation. I fear that if this reasoning were followed, the oral histories of aboriginal peoples would be consistently and systematically undervalued by the Canadian legal system."<sup>17</sup>

Lamer allowed the trial judge to save face, however, by pointing out that he did not have the benefit of his (Lamer's) previous decision in *Van der Peet*, a British Columbia aboriginal fishing rights case which had laid down more generous rules regarding aboriginal knowledge formats.<sup>18</sup>

In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and

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14. See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, paras. 102–04 (Can.).

15. An excellent analysis of some of the myriad problems caused by having aboriginal elders testify about their history and their law in courts using European structures and procedures is provided in Val Napoleon, *Delgamuukw: A Legal Straitjacket for Oral Histories*, 20 CAN. J.L. & SOC'Y 123, 123–55 (2005).

16. See, e.g., DARA CULHANE, *THE PLEASURE OF THE CROWN: ANTHROPOLOGY, LAW, AND FIRST NATIONS* (1998). A detailed account of the way in which evidence was gathered and presented by the First Nations at trial is found in RICHARD DALY, *OUR BOX WAS FULL: AN ETHNOGRAPHY FOR THE DELGAMUUKW PLAINTIFFS* (2005). Daly was one of the numerous anthropologists who testified as expert witnesses at trial supporting the aboriginal claim for title.

17. *Delgamuukw*, [1997] 3 S.C.R. 1010, para. 98.

18. See *id.* at paras. 99–105.

traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.<sup>19</sup>

This passage (the only one concerning the format of evidence in a very long judgement) is remarkably vague. It tells judges that they must be nice to aboriginal elders who are providing evidence in unusual formats, but it signally fails to specify how exactly evidence that is legally classified as hearsay, no matter how beautifully performed by elders in traditional dress, or how respectfully heard by judges, is supposed to serve to counter the weight of legal arguments made by government lawyers—as well as the long-established weight of European written records, such as the journals of Hudson's Bay Company officials.<sup>20</sup> To give one example: the *Delgamuukw* decision spent quite some time considering the issue of the temporality of the Crown's sovereignty, and finally decided on 1846, the date of the Oregon treaty establishing the forty-ninth parallel as the boundary between the United States and British Columbia, then still a British colony.<sup>21</sup> Other possible dates were the late eighteenth-century "discovery" journeys of Captain John Vancouver, and 1871, the year when British Columbia joined the Dominion of Canada, established in 1867. Aboriginal peoples' histories and periodizations were not deemed relevant to the establishment of the legally important date of (colonial) sovereignty.<sup>22</sup>

The *Delgamuukw* decision built on *Van der Peet's* vague multiculturalist exhortation by providing some slightly, but only slightly, firmer wording on the question of aboriginal performative narratives and songs. Justice Lamer said that "the ordinary rules of evidence must be approached and adapted in the light of the evidentiary difficulties inherent in adjudicating aboriginal claims,"<sup>23</sup> and chastised

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19. *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 68 (Can.).

20. Luis Campos, an SJD student at the University of Toronto, is writing a dissertation that critically analyzes the formats and the built-in assumptions of the Hudson's Bay Company records that have played such a key role in aboriginal title litigation in Western Canada.

21. See *Delgamuukw*, [1997] 3 S.C.R. 1010, para. 145.

22. Kantorowicz, would remark that inquiring into the "when" of the Crown's sovereignty deconstructs the key "sempiternal" ontological fiction of "the Crown"—which, unlike, say, the French or the American Republic, is not said to have a clear empirical beginning. See KANTOROWICZ, *supra* note 7. But be that as it may, establishing an agreed upon date of "sovereignty," that is colonial sovereignty, is important for land claims cases because the common law of aboriginal title has long held that hunting and fishing and other rights that flow from aboriginal title are only protected in the present (in the absence of treaties) if one can trace them back to the date at which sovereignty was effectively claimed. See MCNEIL, *supra* note 11. The ethnocentric assumption that aboriginal practices are protected only to the extent to which they are "frozen" have recently come under judicial self-criticism. See, e.g., *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 240 (Can.) (McLachlin, J., dissenting). At present, the rights being claimed have to still be traceable to precontact times, but it is admitted, for example, that using a snowmobile to trap fur-bearing animals is a valid continuation of precontact traditional practices. See, e.g., JOHN BORROWS, *RECOVERING CANADA: THE RESURGENCE OF INDIGENOUS LAW* (2002) for a very moderate critique of this form of judicial reasoning.

23. *Delgamuukw*, [1997] 3 S.C.R. 1010, para. 105.

the trial judge for dismissing "territorial affidavits" on the grounds that they had been actively discussed in communities for many years, rather than lying statically in archives: "The net effect [of applying the standards used for historical documents to oral narratives ritually performed by chiefs] may be that a society with such an oral tradition would never be able to establish a historical claim through the use of oral history in court."<sup>24</sup>

Just how the Chief Justice would have weighed evidence in the form of *adaawk* and *kungax* is a question that was never answered, however. In the end, the Court ordered a new trial—but also urged the parties to negotiate politically rather than relitigate (which is what indeed happened).<sup>25</sup> Subsequent court rulings, however, do not consistently follow Lamer's exhortation to not treat oral evidence as if it were composed of documents.

In the 2001 decision in the *Mitchell*<sup>26</sup> case, launched by the Mohawks at Akwesasne, newly appointed Chief Justice Beverly McLachlin repeated Lamer's multiculturalist incantation ("judges must resist facile assumptions based on Eurocentric traditions of gathering and passing on historical facts"). But she followed this by a qualification that amounted to a negation, warning ominously that "there is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence." The phrase "*the* rules of evidence" is quite telling: Chief Justice McLachlin admits that evidence previously considered "mythical" can now be given weight, but she cannot imagine that the rules of evidence could themselves be critiqued for their colonial assumptions. She thus concludes that evidence of aboriginal title does not have to look like evidence in a private torts case;<sup>27</sup> but "neither should it be artificially strained to carry more weight than it can reasonably support."<sup>28</sup> And in sharp contrast to the 1997

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24. There were concurring judgments by other justices but none took issue with Justice Lamer's discussion of aboriginal oral narratives. *Id.* para. 106.

25. While the *Delgamukw* case was winding its way to the Supreme Court, the political situation in British Columbia changed significantly. To make a very long story short, in 1998 the first treaty of the contemporary era was signed—the Nisga'a treaty. For the current state of treaty negotiations, see THE FIRST NATIONS SUMMIT, <http://www.fns.bc.ca> (last visited Nov. 16, 2011). See also ANDREW WOOLFORD, BETWEEN JUSTICE AND CERTAINTY: TREATY MAKING IN BRITISH COLUMBIA (2005); NATIONAL CENTRE FOR FIRST NATIONS GOVERNANCE, <http://www.fngovernance.org> (last visited Nov. 16, 2011); MINISTRY OF ABORIGINAL RELATIONS AND RECONCILIATION, <http://www.gov.bc.ca/arr> (last visited Nov. 16, 2011). See also COUNCIL OF THE HAIDA NATION, <http://www.haidanation.ca> (last visited Nov. 16, 2011).

26. *Mitchell v. Minister of National Revenue*, [2001] 1 S.C.R. 911 (Can.).

27. See LEONARD IAN ROTMAN, PARALLEL PATHS: FIDUCIARY DOCTRINE AND THE CROWN–NATIVE RELATIONSHIP IN CANADA (1996). One might well ask why a private tort came to the judge's mind here, rather than some area of public law; the reason for this lies in the continuing strength of the paternalist idea that the federal government has a fiduciary responsibility to protect hapless Indians from being exploited by white settlers and resource-exploiting provincial governments.

28. *Mitchell*, [2001] 1 S.C.R. 911, para. 39; see Stephanie Lysyk, *Evidentiary Issues: Oral Tradition Evidence*, THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA, <http://www.cle.bc.ca/PracticePoints/ABOR/Evidentiary.html> (last visited Nov. 16, 2011).



critique of the trial judge's ethnocentrism, in this case McLachlin criticized the trial judge for "an unreasonably generous weighing of dubious evidence."<sup>29</sup>

Further undermining the promise of *Delgamuukw*, in one notable case, the use of wampum belts<sup>30</sup> as legal objects providing evidence of the economic and political activities of the Mi'kmaq people (in what is now Nova Scotia) backfired rather badly. Chief Stephen Augustine and his people believed that a wampum belt that was an important legal document was made in the seventeenth century, and took the trouble to make an exact replica to bring to court—the original being unavailable, having been stored in the Vatican archives. However, an anthropologist hired by the government went to the Vatican and had the original belt scrutinized by Western experts. He then testified that the belt was made in the nineteenth century, not the seventeenth, and that it had been given by aboriginals in Quebec, not Nova Scotia, to the Pope. This was taken as undermining not only the evidentiary value of the belt but also the credibility of Chief Augustine: the court concluded that in regard to the belt, while the chief was "thoroughly truthful," his evidence was "in error."<sup>31</sup>

Even if the wampum belt's authenticity had been verified by experts, however, it is doubtful the judge would have been very favourably impressed by the Mi'kmaq legal argument. The judge's comments are worth citing at some length, since they clearly show the epistemological double bind faced by aboriginal witnesses testifying about aboriginal history and law. On the one hand, the judge takes it for granted that written records of colonial explorers and officials are more authoritative because they are written.<sup>32</sup> But on the other hand, the oral evidence of this Mi'kmaq chief is said to be unreliable because he is an insufficiently authentic specimen or exhibit of tradition given that he and his forebears are literate in English:

Chief Augustine knows a great deal about Mi'kmaq culture and history. He is a man of great dignity. . . . [But] the written record proves otherwise. . . . In the present case we have evidence of oral traditions provided by a single witness. We don't know whether the traditions he relates were influenced by his own literacy or that of his forebears. We don't know whether there are other Mi'kmaq tradition bearers or other traditions about the same topics. On the other hand, we do have a mass

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29. *Mitchell*, [2001] 1 S.C.R. 911, para. 51.

30. In Eastern Canada wampum belts were made to mark or perform treaties, both amongst aboriginal nations (e.g. the Haudeshone and the Anishnabek, in 1701) and between aboriginal nations and "the Crown." The two-row wampum belt, in particular, has been interpreted as a symbol or harbinger of a future postcolonial Canada by the eminent political theorist James Tully. TULLY, *supra* note 3, at 127–30.

31. *R. v. Marshall*, (2001) 191 N.S.R. 2d 323, para. 63 (Can. N.S. Provincial Ct.). John Borrows makes the point that it might have been better for Canadian law as well as for aboriginal interests if Chief Augustine had been treated as providing evidence about Mi'kmaq law, rather than as a quasi-historian. BORROWS, *supra* note 2, at 69.

32. See JACK GOODY, *THE POWER OF THE WRITTEN TRADITION* (2000).

of 18th century documents, both French and British, containing no evidence of seven districts and a Grand Council. The massive written record is far more convincing than the minimal oral evidence.<sup>33</sup>

## II. AUTHENTIC ABORIGINAL PEOPLES AND AUTHORITATIVE JUDICIAL ANTHROPOLOGY

The epistemological double bind in which the court placed Chief Augustine is not unique to aboriginal peoples. "Ethnic" Canadians too are sometimes regarded as less than authoritative sources of knowledge about minority cultures if they are well integrated into "mainstream" Canadian society, even though ethnic Canadians who speak excellent English and have been here many years could arguably be regarded as better placed to explain the kinds of things that white Canadians need to know. If Chief Augustine was regarded as lacking in authenticity, truly "authentic" spokespeople for a minority group suffer from a different problem, namely, too much authenticity, which generates a need for translation and cultural brokering.

To examine some of the dynamics of cultural brokering in legal contexts, it will be useful to turn to the Tsilhqot'in witnesses in a recent British Columbia land claims case, analyzing the unusual textual practices deployed by British Columbia trial court judge Vickers, who heard over three hundred days of testimony concerning the land claims of Tsilhqot'in Nation.

A significant portion of the trial took place in the schoolhouse of a remote northern community that relied on a generator for electricity, a community in which, unlike in many other aboriginal communities in Canada, many of the witnesses required translators to testify. Obviously moved by what he had seen and heard, the judge chose to begin his formal judgement with a long preface acknowledging the essential work performed by "word spellers" and interpreters.<sup>34</sup>

After this unusual preface (which appears as part of the text of the judgement), the judge, instead of recounting the facts of the case, chose to make a proclamation through which the changing legal status of aboriginal claims and aboriginal knowledge formats are directly linked to Canada's official policy of multiculturalism. The decision begins as follows: "Canada's multicultural society did not begin when various European nations colonized North America. Rather, multiculturalism on this continent had its genesis thousands of years ago . . . . Today's modern, multi-cultural communities seldom, if ever, look back at the Aboriginal roots of Canadian diversity."<sup>35</sup>

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33. *Marshall*, (2001) 191 N.S.R. 2d 323, paras 63, 65.

34. *Tsilhqot'in Nation v. British Columbia*, 2007 BCSC 1700, [2008] 1 C.N.L.R. 112. There is a separate decision by the same judge establishing rules for the leading of evidence in aboriginal knowledge formats. *William v. British Columbia*, (2004) 24 B.C.L.R. 4th 296 (Can. B.C. S.C.), [2004] 2 C.N.L.R. 380 (Roger William is the English name of the Tsilhqot'in hereditary chief).

35. *Tsilhqot'in Nation*, 2007 BCSC 1700, para. 1.

The diversity of aboriginal languages, customary laws, and cultures is thus read by Judge Vickers as multiculturalism *avant la lettre*—a reading which aboriginal people may find demeaningly Eurocentric, but which is not unique. Richard Day's careful archeology of multicultural federal policy cites a 1987 Secretary of State document proclaiming that "cultural diversity characterized the earliest societies to be seen through the mists of our history. Aboriginal peoples speaking a diversity of Algonkian tongues were spread across the breadth of North America."<sup>36</sup>

The implicit and/or thoughtless slippage from multicultural policy to aboriginal policy affects not only the content of judicial and other state pronouncements but also the formats used in official documents. This can be seen in the Tsilhqot'in decision just cited. Following the usual Canadian knowledge practices in regard to multiculturalism, which treat each "ethnic" group as clearly and statically bounded and as internally homogeneous, Judge Vickers takes a great deal of time to explain to less informed readers of the judgement how the Tsilhqot'in people (not aboriginals in general) think about temporalization:

It may be helpful to explain some common Tsilhqot'in words and concepts that are used in the evidence I am about to describe. Tsilhqot'in people traditionally used a lunar calendar . . . . The Tsilhqot'in calendar also identifies the seasons: xi (winter), ?eghulhts'en (spring), dan (summer) and dan ch'iz (fall). Tsilhqot'in history is not known in terms of calendar years. The depth of Tsilhqot'in oral history and oral traditions is measured in terms of generations and historical events.

Tsilhqot'in people identify sadanx as a legendary period of time which took place long ago. This was a time when legends began and when the ancestors, land and animals were transforming according to supernatural powers.

Yedanx denilin is a long time ago and includes the period of time prior to contact and the time period that is pre- and post-sovereignty. Witnesses described their grandparents and great grandparents as living in yedanx. Theophile Ubill Lulua testified that the Tsilhqot'in [Chilcotin] War occurred in the yedanx period.

?Undidanx is a period of time that one might characterize as recent history.

As I understood the evidence, Tsilhqot'in people, whether living in sadanx or yedanx, are all ?Esggidam (ancestors). A person living in ?unidanx . . . is not an ?Esggidam. Witnesses described the seasonal rounds and the activities undertaken on those rounds as activities carried

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36. See RICHARD J.F. DAY, MULTICULTURALISM AND THE HISTORY OF CANADIAN DIVERSITY 6 (2000). That many aboriginal nations within Canada are not Algonkian, incidentally, would be a well-known fact in the Indian Affairs department, but apparently unknown to the multiculturalism bureaucrats. On multicultural policy, see also EVA MACKEY, THE HOUSE OF DIFFERENCE (1999).

out by the ?Esggidam in yedanx and as far back as sadanx.<sup>37</sup>

Vickers's text refuses to estrange Tsilhqot'in words by underlining or italicizing, as is usually done with foreign words inserted in English texts. The absence of typographical markers of otherness—probably an unintended effect of the software used to post legal decisions online—brings Vickers's text very close to the textual practices of anthropologists, who carefully respect, and explain, their informants' classification systems. Vickers's move away from law and into anthropology<sup>38</sup> is compounded by the fact that his text uses "foreign" concepts cumulatively, rather than simply being quickly mentioned one at a time as is normal judicial practice<sup>39</sup>—as well as by the unusual sight of question marks placed at the beginning of words. Vickers clearly made a major effort to understand, and to convey to nonaboriginal Canadians, many important features of Tsilhqot'in life and thought, in a welcome change from the demeaning judicial attitudes of the past—but whether constructing the Tsilhqot'in people as yet another multicultural group makes sense either empirically or normatively is a more fundamental question, and one that Vickers's own judgement forecloses.

Leaving the multicultural-aboriginal slippages aside for a moment, let us now turn to the "duty to consult" jurisprudence, since only after understanding this very new but very old doctrine will we be able to ask some concluding questions about the way in which courts are redefining sovereignty for a multicultural—but not postcolonial or postmonarchical—Canada.

### III. REFURBISHING THE CROWN

A recent line of cases concerning aboriginal peoples has established a government "duty to consult" (in regard to natural resource development, mainly) that may have more significant and beneficial practical implications for aboriginal peoples than the epistemologically and legally laborious establishment of aboriginal title and other aboriginal rights, especially for those aboriginal nations whose traditional territories hold mineral or other resources valuable to corporations.

The judges who have discovered or created this "duty to consult" consistently state that the "foundation" of this duty lies in "the honour of the Crown." The Supreme Court decision in *Haida Nation v. British Columbia (Minister of*

37. *Tsilhqot'in Nation*, 2007 BCSC 1700, paras. 350–55.

38. In the end, despite the great respect shown by Vickers to aboriginal witnesses and their narratives, he did not find that title had been proven. The quality of his anthropological inquiry, therefore, does not correlate with practical legal benefits. *See id.*

39. Apart from the black-letter question of the role of appellate versus trial courts, it is important to also note, from an empirical sociolegal perspective, that the syntax and the semantics of Supreme Court judgments on aboriginal issues are shaped by the fact that those judges do not travel to remote aboriginal communities, do not see the litigants (except perhaps as silent, distant figures on the seating provided at the Supreme Court), and do not have to wait for evidence to be translated into French or English.

*Forests*)<sup>40</sup> puts the matter in a phrase that is oddly at odds with the principles of democracy and the supremacy of parliament that Canadians believe are the “grounds” of Canadian law: “The government’s duty to consult with Aboriginal peoples and accommodate their interests is *grounded in* the honour of the Crown.”<sup>41</sup>

The view that it is the “honour of the Crown,” not the acknowledgement of past injustice or the requirements of modern rights doctrines, that is responsible for greatly expanding the opportunities for aboriginal peoples not only to earn royalties but also to take a role in establishing rules for the management of natural resources and wilderness areas<sup>42</sup> is consistently presented without chapter or verse, as if it were self-evident. A typical text, from *Van der Peet*, reads as follows:

The Crown has a fiduciary obligation to aboriginal peoples with the result that in dealings between the government and aboriginals the honour of the Crown is at stake. Because of this fiduciary relationship, and its implications for the honour of the Crown, treatise, section 35(1) [the aboriginal rights section of the 1982 Constitution] . . . and other provisions . . . must be given a generous and liberal interpretation.<sup>43</sup>

This is not strictly speaking new. It has long been held, throughout the Commonwealth, that “the honour of the Crown is at stake in dealings with aboriginal peoples.”<sup>44</sup> However, in the past this had been narrowly construed as applying only to official “status” Indians living in reserves, who had a ward-like legal and political status. (The duty also applied only to the federal government, as will be discussed later.) But the recent cases declare the “honour of the Crown” and the fiduciary or quasi-fiduciary duties associated with it apply to all aboriginal peoples, “status” or not, living on reserves or not, and also apply to situations involving land interests that are not (yet) subject to land claims litigation. Since most of the territory of resource-rich British Columbia either is or could be subject to aboriginal title claims, as are vast swaths of the Far North, the major expansion of the “duty to consult” has very important practical effects.

The leading Supreme Court cases on this are *Guerin*<sup>45</sup> and *Haida Nation*. In *Guerin*, the Musqueam nation had wanted (in the 1950s) to lease a good part of its valuable reserve, located within Greater Vancouver, to a golf course. Since interest

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40. *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 (Can.).

41. *Id.* at para 16 (emphasis added).

42. See, e.g., *Gwaii Haanas Agreement*, PARKS CANADA (Jan. 30, 1993), <http://www.pc.gc.ca/eng/pn-np/bc/gwaiihaanas/plan/plan2.aspx>, a fascinating political document between the Government of Canada and the Council of the Haida Nation establishing rules for the nature reserve that the Haida call Haida Gwaans and whites call South Moresby Island. The Agreement states that the Haida Nation claims sovereignty, not title, over the territory; that Parks Canada disagrees, since they consider the Crown has sovereignty; but that the two joint authorities agree on rules for the management of the space.

43. *R. v. Van der Peet*, [1996] 2 S.C.R. 507, para. 24 (Can.).

44. *R. v. Sparrow* [1990] 1 S.C.R. 1075, para. 75 (Can.).

45. *Guerin v. The Queen*, [1984] 2 S.C.R. 335 (Can.).

in Indian lands, most particularly reserves, cannot be alienated except to the Crown,<sup>46</sup> the band had asked the Department of Indian Affairs to lease the land on its behalf, as is routinely done in such cases. The government ended up signing a lease whose terms were far less favourable to the Musqueam than those originally agreed, and compounded the breach of fiduciary duty by refusing—for fifteen years at a stretch—to show the actual lease to the band leaders. By the time the Musqueam saw the lease, the political climate had changed, and the high-handed actions of 1950s Indian Affairs officials were not so likely to go unquestioned. Just as importantly, by the 1970s, the provision of the Indian Act that prohibited the collection of funds to sue the government regarding aboriginal land claims had been repealed.<sup>47</sup>

The British Columbia court of appeal followed the old Judicial Committee of the Privy Council jurisprudence and decided that "once the surrender documents were signed the Crown could lease to anyone on whatever terms it saw fit."<sup>48</sup> But the Supreme Court found that there was a fiduciary obligation and that this had been breached. The court's text constructs the (federal) Crown as the benevolent patriarch that assumed the role of protecting Indians against greedy settlers and racist provincial governments previously performed, in theory, by the British Crown. Just what kind of fiduciary obligation the federal government has, however, was left unspecified. The fiduciary obligation is not a trust, Chief Justice Dickson warned: it is "sui generis."<sup>49</sup> In another case, the Supreme Court continued to fudge the issue of just what kind of fiduciary duty is involved by stating that while the Crown is not really a trustee, it has "trustee-like" obligations. In that later case the court relied mainly on a statute regarding oil and gas royalties to come to its conclusion, in a text in which one can almost hear the judges' audible sigh of relief at being able to simply interpret an ordinary statute, rather than be forced to create new law by defining the "sui generis" fiduciary obligation to aboriginal peoples.<sup>50</sup>

In the *Guerin* decision, the fact that the Indian Affairs officials were themselves "the Crown," for purposes of receiving the interest in land that the Musqueam had to surrender in order for it to be leased, is, not surprisingly, not

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46. This is true generally within the common law, but it was also a key clause in the 1763 Royal Proclamation. See KING GEORGE, A PROCLAMATION (Oct. 7, 1763), reprinted in A COLLECTION OF THE ACTS PASSED IN THE PARLIAMENT OF GREAT BRITAIN AND OF OTHER PUBLIC ACTS RELATIVE TO CANADA 26, 32, 34 (1824). The Royal Proclamation, however, is not usually taken as applying to nonreserve Indians in Western Canada, who make up the vast majority of Canadian aboriginal peoples, or to any of the aboriginal peoples of the far North (e.g. Nunavut).

47. See Hamar Foster, *Letting Go of the Bone: The Idea of Indian Title in British Columbia, 1849–1927*, in ESSAYS IN THE HISTORY OF CANADIAN LAW 28 (Hamar Foster & J. McLaren, eds., 1995).

48. *Guerin*, [1984] 2 S.C.R. 335.

49. See John Borrows & Leonard Rotman, *The Sui Generis Nature of Aboriginal Rights: Does It Make a Difference?*, 36 ALBERTA L. REV. 9, 10–13 (1997) (describing an obligation as "sui generis" can work to limit it).

50. *Ermineskin Indian Band and Nation v. Canada*, [2009] 1 S.C.R. 222 (Can.).

mentioned. A handy distinction is drawn between the (unfaithful) servants of the crown and the crown itself, with “the honour of the Crown” being attributed wholly to the latter. Servants of the Crown might be dishonourable, but “it is always assumed that the Crown intends to fulfil its promises.”<sup>51</sup> Just where the servants of the Crown end and the Crown or sovereign itself begins is a question left unasked, however, much less answered. But the fact that the lines between the Crown itself and its servants are extremely fluid (unlike in most private law situations) is not an invention of Canadian judges. As Ernst Kantorowicz pointed out long ago, English theories of the Crown’s supernatural qualities have since the Middle Ages enabled interested parties to create a separation between the (always honourable) Crown and not only its lower servants, such as Indian Affairs department bureaucrats, but even the monarch. Since Edward II and Richard II were forced out of power, even the monarch can, in English discourses of the Crown, be regarded as a threat to the Crown.<sup>52</sup>

A later decision, one that uncharacteristically admits that in the end it is the Crown, in one personification, that acts dishonourably, without this being any threat to the belief in eternal, essential honour, shows the applicability of Kantorowicz’s famous analysis of English medieval theories of sovereignty to today’s Canada: “Once a reserve is created the Crown’s fiduciary duty expands. . . . The Crown must use diligence to protect a band’s legal interest from exploitative bargaining by third parties or from exploitation by the Crown itself.”<sup>53</sup>

This admission that the name of the game is using one instantiation of the Crown against another is a one-off slip, however. The most important “duty to consult” decision, a 2004 case involving the highly politicized Haida Nation (a northern British Columbia people who have never signed treaties or lived in reserves), does not mention the possibility that the Crown might itself constitute a threat to the very people who are under its protection. In that case and most others out of British Columbia, the Queen in Right of British Columbia was, arguably, guilty of the very injustices that were supposed to be remedied by invoking the honour of the non-British Columbia crown. Instead, in *Haida Nation* the Supreme Court writes as if “the Crown” were a singular entity, rather than the complex bundle of “personae” in perpetual motion that it is, especially in a state whose monarch is actually in another country:<sup>54</sup>

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51. *Haida Nation v. British Columbia*, [2004] 3 S.C.R. 511, para. 20 (Can.).

52. See KANTOROWICZ, *supra* note 7, at 23 (in France, executing the king brought about a republic: in England, by contrast, the king’s “body natural” can be removed from power or even executed while the king’s body politic and the closely related “Crown” can remain, and indeed act as that for the sake of which the king has to be removed). See also *id.* at 341–57 (analyzing coronation oaths in which the king promises not to alienate Crown estates).

53. *Wewaykum Indian Band v. Canada*, [2002] 4 S.C.R. 245 (Can.).

54. “It is insufficient to state, as the Supreme Court of Canada did in *Bear Island*, that the Crown ‘breached its fiduciary duty to the Indians’ without revealing which personification of the Crown are bound by those obligations. In a juridical context, the phrase ‘the Crown’ has a multitude

The government’s duty to consult with aboriginal peoples and accommodate their interests is grounded in the honour of the Crown.<sup>55</sup>

....

It is always assumed that the Crown intends to fulfil its promises.<sup>56</sup>

....

The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require to consult . . . Aboriginal interests.<sup>57</sup>

....

The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests . . .<sup>58</sup>

And depriving aboriginal people of the resource (timber, in this case) is not permissible because “that is not honourable.”<sup>59</sup>

The hypnotic repetition of what Kantorowicz’s analysis suggests is a crypto-Christian term, namely “the honour of the Crown”—whose epistemology relies on the Christian notion that Christ had a natural body that died on the cross but has a mystical body that lives forever in the corporation-like communion of saints, just as the Crown lives on whatever happens to Queen Elizabeth or Prince Charles—has the effect of taking attention away from the curious absence of any reference to authoritative common law sources. Significantly, there is no footnote after the term “the historical roots of the principle of the honour of the Crown”;<sup>60</sup> here and elsewhere, the Court only cites its own recent cases.<sup>61</sup>

The internal logic of the doctrines and texts within which “the honour of the Crown” appears is unpacked in unusual detail in an interesting text authored by the Treaty Commissioner for the government of Saskatchewan, David M. Arnot. In a lecture entitled “The Honour of the Crown,” Mr. Arnot suggests that rather than be embarrassed by the antique notion of the Crown’s honour, we (Canadians) should embrace our mystical legal tradition without embarrassment,

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of meanings which refer to a variety of personae.” ROTMAN, *supra* note 4, at 16.

55. *Haida Nation*, [2004] 3 S.C.R. 511, para. 16.

56. *Id.* at para. 20.

57. *Id.* at para. 25.

58. *Id.* at para. 27.

59. *Id.*

60. *Id.* at para. 17.

61. Even the official government summary of current law on the Crown’s fiduciary duties that is available on the Parliamentary Library website, alongside other summaries characterized by their uncritical stance, complains that “the standards for government conduct that will uphold ‘the honour of the Crown’ in various situations require clarification.” *The Crown’s Fiduciary Relationship with Aboriginal Peoples*, PRB 00-09E, LIBRARY OF PARLIAMENT, <http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/BP/prb0009-e.htm> (last visited May 22, 2011).



since “the honour of the Crown” “reflects the deepest and oldest layer of our traditions of human rights in Canada.”<sup>62</sup> Judges have tended to treat the doctrine as a mere “principle of statutory construction”<sup>63</sup> or as a principle to interpret treaties, but the phrase, Arnot believes, is more than that. It is actually “the conscience of the country.”<sup>64</sup>

Is it any wonder that American colonists, during the 18th century agitations that preceded their revolution . . . appealed to “the honour of the Crown” to protect them from men they described as “the King’s evil ministers”? In doing this, they distinguished between the Crown per se, which traditionally stood for what is just and honourable, and the government of the day, which was susceptible to corruption and misconduct. Appealing to the honour of the Crown was an appeal not merely to the sovereign as a person, but to a traditional bedrock of principles of fundamental justice that lay beyond persons and beyond politics. It is precisely this distinction between principles and persons that rests at the heart of our ideals of human rights today.<sup>65</sup>

One of the most curious things about this text—and there are many—is that Arnot seems to have forgotten that the American colonists actually rejected the Crown itself, and not just the King’s misguided ministers.

But Arnot is not alone in his refusal to contemplate even for a minute the possibility of a postmonarchical regime for Canada. In a recent article, noted aboriginal legal scholar Sakej Henderson also provides a rather positive, almost rosy view of the Crown in his discussion of the government’s newly expanded “duty to consult.”<sup>66</sup> Along similar lines, John Borrows’s magisterial work, *Canada’s Indigenous Constitution*, does not use terms such as “the Canadian state” or “the federal government” except on rare occasions. While stating in the introductory chapter that the most crucial brainwashing he underwent in law school consisted of acquiring “the belief that the Crown is all-powerful,”<sup>67</sup> when later in the book he speculates about how Canadian law might integrate aboriginal legal traditions, he adds that aboriginal nations might also decide to give “the Crown” and “Crown law” some role in their own territories.<sup>68</sup>

Perhaps one of the reasons why leading aboriginal legal scholars are much more positive about the “honour of the Crown” than one would expect is that, historically, the Crown signed treaties with aboriginal nations, at least in parts of Canada, whereas most federal and provincial governments gave very little if any

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62. David M. Arnot, *The Honour of the Crown*, 60 SASKATCHEWAN L. REV. 339, 339 (1996).

63. *See id.* at 342.

64. *See id.* at 345.

65. *Id.* at 340.

66. James [Sakej] Youngblood Henderson, *Dialogical Governance: A Mechanism for Constitutional Governance*, 72 SASKATCHEWAN L. REV. 29, 29 (2009).

67. BORROWS, *supra* note 3, at 28.

68. *Id.* at 182.

political recognition to aboriginal nations. In addition, for aboriginal nations the supremacy of Parliament is not a particularly useful doctrine; and other democratic mechanisms that empower majorities and disempower minorities also have the potential to perpetuate grave injustices.<sup>69</sup>

At the more practical level, declaring that the "honour of the Crown" (not treaties or rights documents) is the foundation of the "duty to consult" means that aboriginal peoples do not have to engage in the always somewhat demeaning work of proving a legal right by establishing title or rights according to the rules of white courts. Indeed, in regard to the "duty to consult," proving or even formulating title claims, through oral narratives or other evidence, is somewhat beside the point. It is highly significant that courts have held that the "duty to consult" applies even in the case of peoples (such as the Haida) who have not even initiated litigation for aboriginal title. Despite the symbolically important declarations that evidence in aboriginal knowledge formats is admissible and has weight, actually deploying the evidence and making it count in court has proven to be legally difficult, as well as extremely expensive and sometimes downright humiliating, as documented above. The clearly paternalist epistemological and political effects of the "honour of the Crown" doctrine may be the lesser of two evils, given this reality.

A related point with great practical significance is that the only crown that was thought to have fiduciary responsibilities, for many years, was the federal crown (and then only in respect to treaty Indians). In *Haida*, by contrast, the Supreme Court found that the provincial crown also has a "duty to consult" and if possible accommodate aboriginal interests. Given the importance of timber, water, minerals, and other natural resources formally designated as under provincial jurisdiction in the Canadian economy, particularly in the North and the West, including provincial governments under the "duty to consult" may have huge implications.

The result of these cases is quite paradoxical. As courts proceed to partially disavow some of the more racist moments in Canadian law and politics, it may be that radically changing what counts as evidence of legal possession by admitting and giving weight to knowledges of history in aboriginal formats may matter less than peering into medieval mists to redescribe the Crown in terms that make the feudal history of "the Crown" converge with Canadian multiculturalism and diversity politics.

#### IV. CONCLUSION: MULTICULTURALISM, RECONCILIATION, AND THE REFURBISHED CROWN

As in Australia, the ambiguous notion of "reconciliation" can be discerned hovering over all of the litigation and all the political negotiations discussed thus

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69. I would like to thank Amar Bhatia for useful comments and sources on this point.

far. In Canada, reconciliation is often said to be rooted in, or even required by, the aboriginal rights section of the 1982 Constitution, 35 (1): “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” In interpreting and applying this constitutional provision courts have decided that the purpose of the section is to effect the “reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty.”<sup>70</sup>

The assertion of the very question that one would think is at stake is not unique to judges. For example, the Manitoba department of Aboriginal and Northern Affairs’s document on “Crown consultations with aboriginal peoples” states as a noncontroversial matter that “One of the main goals of the Crown-aboriginal relationship is to further the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”<sup>71</sup>

There is a vast literature on section 35(1), which we cannot here even begin to canvass. For our purposes, it suffices to point out that even though some negotiations that have taken place or are in progress may well end up granting certain rights to aboriginal Nations, the “reconciliation” process which such contemporary treaties and agreements seek to implement explicitly leaves untouched not only the fact of Canadian government sovereignty but also the underlying question of the justice and legitimacy of the Crown’s sovereignty.

The underlying normative question, of course, is whether any instantiation of the crown—the French crown in New France, the British Crown in colonial Canada, the post-1867 government of Canada, etc.—had any right whatsoever to simply declare itself the sovereign of territories that have been acknowledged even by the most racist courts to have been occupied for many centuries by a variety of aboriginal peoples, peoples who (unlike in other parts of the former British Empire) have never been held to have been defeated in war.

Some might say that questioning the ultimate normative ground of the sovereignty of “the Crown” is simply unthinkable, at least to judges.<sup>72</sup> However, the sovereignty of the Canadian federal state is not quite as unshakeable as the discourse about the Crown’s honour might suggest. First of all, the original pleadings in *Delgamuukw* were for “ownership and jurisdiction.” Although at the Supreme Court stage the pleadings had been changed to the more practical and achievable claim of aboriginal title, the term “jurisdiction” is there for all to see, in

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70. See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, paras. 81, 141 (Can.); see also *R v. Van der Peet*, [1996] 2 S.C.R. 507, para. 31 (Can.).

71. *Crown Consultations with Aboriginal Peoples*, PROVINCE OF MANITOBA, [www.gov.mb.ca/ana/crown\\_consultations](http://www.gov.mb.ca/ana/crown_consultations) (last visited May 13, 2011).

72. Brian Slattery points out that a careful reading of some of Chief Justice McLachlin’s decisions suggests that sovereignty, at least white Canadian sovereignty in British Columbia, is being subtly redefined as “de facto.” See Slattery, *supra* note 4, at 445. But that is perhaps an overly optimistic/progressive reading. As Borrows and others show, the “alchemy of sovereignty” continues to be performed in courtrooms across the country with little if any serious disruption.

the *Delgamuukn*'s decision recounting of the lower-court proceedings. But perhaps most significantly: as the Supreme Court was deciding *Delgamuukn*, the government of Quebec and the government of Canada were sharpening their respective legal knives in preparation for the all-out fight over sovereignty that was the "*Quebec Secession Reference*," decided in 1998.<sup>73</sup> Nevertheless, the continuing visibility of the Quebec sovereigntist movement does not seem to have had much effect on either Quebecois or Anglo-Canadian perceptions of what is "at stake" in the struggle over aboriginal rights.

In Canadian popular discourse as well as within law, aboriginal rights litigation is not regarded as significantly affecting other dimensions of state policy (e.g., multiculturalism, or the Quebec question). And one reason for this fragmented view of state action (even just federal state action) is that "the Crown" is the key interlocutor only for purposes of aboriginal rights litigation and discussions. Ethnic Canadians organizing to have diversity affirmed and valued rarely, if ever, think or speak about the Crown.<sup>74</sup> They think about and try to intervene in state policy, not Crown deeds.

But in the context of aboriginal politics and aboriginal collective rights, the Crown seems to have become more meaningful and powerful in recent years, rather than less. This is a historically peculiar event that the great authorities on the English constitution could not have predicted. After all, as is well known, after canvassing some of the unwritten doctrines about the Crown in English law, Frederick Maitland ended the matter by stating, "As a matter of fact we know that the crown does nothing but lie in the Tower of London to be gazed at by sight-seers."<sup>75</sup>

But as Maitland documented, and as one sees in recent aboriginal rights litigation, one of the curious things about the Crown is that it has the divine power of being in many places at once. So it can be in the Tower of London, in the hand of Queen Elizabeth as she signs laws, in the mind of the Canadian Governor-General as she opens, or prorogues, Parliament—and at the same time, in "The Queen in Right of Canada," "The Queen in Right of British Columbia," and so on. Kantorowicz famously documented the workings of the political fiction about the "king's two bodies"; but even someone with the erudition of a Kantorowicz, or a Maitland, would be hard pressed to carry out a full inventory of the numerous instantiations of the mystical entity that is "the Crown." But one thing we can say is that one of its most effective incarnations is that which can be

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73. See Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Can.).

74. As an ethnic Canadian myself, the only time I had to think about "the Crown" prior to researching this paper was when I took my oath of Canadian citizenship. That the oath was not to the flag or the constitution of Canada but rather to "the Queen, her heirs and successors" came as quite a surprise. And only when reading Kantorowicz did I learn the interesting fact that "successors," in this context, refers to the corporation sole that is the Crown, which never dies, whereas "heirs" are the descendants who succeed the current monarch after her natural body dies.

75. F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 418 (1961).

discerned somewhere in the robing rooms of the Supreme Court of Canada—where the crown is being quietly refurbished so that it goes better with the new multicultural decor of the nation-state but in such a way as legitimates the (English) monarchy.