

*Sui Generis:*  
**Aboriginal Title and the State of Exception**  
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“Sovereign is he who decides on the state of exception.”<sup>1</sup>

In a study of the “solidarity” between democracy and totalitarianism, Giorgio Agamben observes that there are two canonical approaches to the interpretation of power today. The “traditional approach” balances juridical models, which examine the legitimation of power, with institutional ones, which examine the organization of the state. The “biopolitical” approach assumes that power is exercised not at the level not of law, nor that of the state, but at the level of life itself. Biopolitical power—biopower—takes administrative charge of life by means of two technologies: the disciplines, which tend to grow the body’s forces, and regulatory controls, which tend to foster the life of “the species.”<sup>2</sup> Agamben seeks the “point of intersection” between the two approaches (6). What hinge joins the juridico-institutional apparatus with the proliferation and regulation of life? Agamben points out that the sovereign seizes hold of life by making an exception. Such is “the paradox” of sovereignty (15). The sovereign stands inside and outside the law simultaneously. He, or, in the present case, she defines the sphere of the law’s validity by deciding what can be lawfully cast beyond it, inscribing within the body of the law an “exteriority” that “animates it and gives it meaning” (18 and 26). This exteriority is life itself. It is what in the law undoes the law, for life itself—bare life—is what can be killed without therefore being murdered (28).

The state of exception, according to Agamben, is the fundamental political structure of “our age” (20). When he says “our” age, though, he assumes we know who “we” are. Hence to understand what age is ours we must first determine our genre. We have to decide what *kind* “we” are. There can be neither kind nor class, however, neither genus nor

genre, without the exception. A genre includes its exception in the form of an exclusion, a trait that belongs without belonging (18). Inclusive exclusion is therefore the very law of genre. Agamben says it is law in its “originary” state (26). “Law is made of nothing,” he explains, “but what it manages to capture inside itself through the inclusive exclusion of the *exceptio*” (27). To consolidate itself, the law suspends itself, addressing its performative violence to an “exteriority” that it includes. Hence the exceptional, *sui generis*, nature of the exception endows the law with its “particular,” *sui generis*, “force” (18). What it captures, and what sets it in action, is what it bans.

The space of exception is “unlocalizable,” but Agamben claims that “our age” nevertheless grants it “a permanent and visible location” in the concentration camp. The camp is a modern paradigm, not just a space of confinement, but “the absolute space of exception” (20). The exception, however, is what every paradigm excludes. It should hardly come as a surprise, then, that an exception inevitably emerges to the paradigmatic exception. The European powers used to project “a free and juridically empty space”—the phrase is Carl Schmitt’s—onto the surface of “the New World” (36). For centuries the Americas—and among them the Canadas—belonged without belonging to the European sovereigns. In Canada today the state of exception is distributed across “the land itself.” The crown enjoys paramount title, but the crown’s title includes, in the form of a “burden” that it simultaneously excludes, the prior title of aboriginal societies to the same land.

The title question first came before the Canadian courts in May, 1885. The province of Ontario asked the Chancery Division of the High Court of Ontario to stop the St. Catharine’s Milling and Lumber Company from cutting and removing timber from an area northwest of Lake Superior. The province argued that it had not granted the company permission to log (*R v. St. Catharine’s Milling and Lumber Company*, OR Vol. 10, at 196–7). The company responded that it had received permission from the government of Canada. The court had to decide whether the disputed lands fell under provincial or federal jurisdiction. The decision hinged on the question of aboriginal title. The company argued that the lands had “until recently” been claimed by bands of the Saulteaux First Nations.

A delegation of Saulteaux chiefs, however, had ceded aboriginal title to the Dominion of Canada in the Northwest Angle Treaty of 1873 (Treaty Three). The company argued that title now vested in the federal crown (198–9). The Attorney General for Ontario responded that aboriginal people had no title to cede. They had only a right to occupy the land. The treaty, moreover, had extinguished that right and did not transfer it (199). Aboriginal title—indeed aboriginality itself—emerged onto the surface of Canadian legal discourse in a conflict between two determinations—the dominion and the province—of one sovereign.

The case was appealed twice before it went before the Judicial Committee of the Privy Council of Great Britain. Lord Watson delivered the Committee's verdict in 1888. He found that the disputed area came under the Royal Proclamation of 1763, issued by George the Third shortly after the Treaty of Paris. The Proclamation, wrote Watson, grants aboriginal people "a personal and usufructuary right" to their traditional "hunting grounds" but makes that right dependent on the sovereign's "Will and Pleasure" (*St. Catharine's Milling and Luber Company v. The Queen* 14 AC, at 53–4; The Royal Proclamation, Act 7, 1763, 4–5). It is a "personal" right because lands reserved for aboriginal people can be surrendered only to the crown. It is "usufructuary" because it entitles aboriginal people to harvest the fruits of the lands and waters. It is the sovereign's to give, though, and the sovereign's to take away. According to the Proclamation, the lands set aside for aboriginal people are "parts of Our dominions and territories" (4–5). Watson took this to mean that the sovereign has "a substantial and paramount estate, underlying the Indian title." The sovereign's underlying title becomes a "plenum dominum," he added, as soon as "the Indian title" is "surrendered or otherwise extinguished." He declined to outline "the precise quality" of the "Indian right" (55), but he remarked three pages later that "the Indian title" is "a mere burden" on the sovereign's title (58). Indeed the law conceives of aboriginal title as a white man's burden in the classic sense: the sovereign has a chivalric duty to protect aboriginal societies from exploitation by third parties. It is a burden that survives to this day<sup>3</sup>

So in 1763, the crown, at its pleasure, created a state of exception. It gave aboriginal people a title that belongs without belonging to the

genre of “title,” a right that belongs without belonging to the genre of “right.” The inclusive exclusion of one title both inside and outside another is not an anomaly of Canadian law. Sovereign power, according to Agamben, “is this very impossibility of distinguishing between outside and inside” (*Homo Sacer* 37). The sovereign occupies the threshold between the rule and the exception and so can consolidate its own title only by inclusively excluding another, more original title.

Yet the Proclamation theory was to become the exception rather than the rule in Canadian law. By 1997 the courts had decided that aboriginal title has its source instead in the common law. In fact, as Kent McNeil points out, they had found not one common-law source, but two, and were cautiously “vacillating” between them.<sup>4</sup> McNeil surveys both sources in his 1989 book, *Common Law Aboriginal Title*. The first is occupation. The common law has long acknowledged that the occupation of land constitutes *prima facie* proof of possession (*Common Law Aboriginal Title* 73–4, 197). Occupation, moreover, is a matter of fact. You are assumed to be in occupation if you have exclusive control of a parcel of land and intend “to hold or use it” for some purpose (201). Nobody disputes that aboriginal societies have been on the land in Canada since time immemorial. Possession, however, is matter of law. Hence it can only be established within a legal system (197). Aboriginal societies could not have had possession of the land until the common law was extended to Canada. So here is the question: does an occupation that predates the law constitute proof of possession under the law?

The acquisition of territory is the concern of international law (the law between states). Historically, though, while English municipal law (the law within the state) conceded that it the crown’s right to acquire foreign territories, the English courts nevertheless reserved their right to decide exactly how a territory was acquired (131). By the end of the eighteenth century, they had recognized three modes of acquisition: conquest, cession and settlement. How did the sovereign acquire those territories that now comprise Canada? The Supreme Court of Canada ruled in 2004 that the First Nations were never conquered. Many, however, signed treaties with the crown, which is a form of cession.<sup>5</sup> Others, such as Nisa’a and Tsimshian First Nations, tried to negotiate treaties in

the nineteenth century, but until the end of the twentieth century the crown declined to negotiate treaties with them. What then is the legal status of an inhabited territory that was never conquered, nor ceded, but was settled nonetheless?

McNeil argues that English law applied to foreign territories as soon as the crown acquired them. The law assumed, moreover, that the people who were then in occupation had possession of the land (206). They enjoyed the legal status of “mere possessors,” and “a mere possessor whose possession is not known to be wrongful,” according to McNeil, “has a presumptive title which enables him [or presumably her] both to defend and recover possession” (207 and 75). He calls this the doctrine of common law aboriginal title. It is a genre that extends to all of the lands occupied by aboriginal people when the crown asserted sovereignty and includes the subsurface and whatever minerals it contains. Furthermore it entitles the possessors to fee simple estates. No member of an indigenous society, though, would have a “severable,” that is, “individual,” estate; title would instead vest in “all members” and would include not only reserve lands, but lands traditionally used for resource extraction (213).

The common law, however, is just one source of aboriginal title. The second is customary law. Today the courts acknowledge that when Europeans first arrived in Canada, aboriginal people were already here, using the land, living in organized societies, and following their own traditions, rules and customs. But were the rights they enjoyed under customary law carried forward into the common law post-contact? According to the doctrine of recognition, the residents of an acquired territory lose what rights they had under customary law unless the crown expressly acknowledges those rights, for example in legislation (166). According to the doctrine of continuity, the common law recognizes customary laws governing civil matters, such as property rights, provided there is nothing repugnant in those laws (181). McNeil argues that the courts have historically tended to favor continuity over recognition. In 1918, in *R v Southern Rhodesia*, Lord Sumner ruled that private property rights survive the act of conquest unless the crown explicitly states its intention to diminish or modify them.<sup>6</sup> In 1921, in *Amodu*

*Tijani v Secretary, Southern Nigeria*, Viscount Haldane found that communal private property rights survive the act of cession even though the underlying title to the land passes to the crown.<sup>7</sup>

The acquisition of territory does not replace one law with another, but rather opens up a place for one law within the other, establishing the sovereign's authority where the sovereign has no authority. Customary law belongs without belonging to the common law. It folds into it and flows out of it simultaneously. It is that which in the law suspends the law (Derrida "Force of Law" 991). Hence the state of exception conjures up the specter of a law that is both inside and outside the law: a law that both obeys and breaks the law. What kind of law does violence to the law in the form of the law? Walter Benjamin identifies two great genres of violence. There is a violence that makes and preserves the law, and there is a "hostile counterviolence" that destroys the law (241, 249, 251). Law-making violence is "mythic" and tends to preserve the law from the inside; law-destroying violence is "divine" and tends to undo the law from the "outside" (249, 251). There is, however, another genre of violence. Benjamin mentions it, but he does not name it, perhaps because it escapes the opposition between the mythic and the divine altogether. This other, nameless violence erupts inside and outside the law simultaneously. Benjamin finds its traces in the deeds of the criminal mastermind: "In the great criminal this violence confronts the law with the threat of declaring a new law" (241). The "public" is horrified by it. The state, in contrast, fears it, not because it breaks the law, but because it sets up "a new law" within the law. What is frightful is the "lawmaking character" of the lawbreaking act (241). Jacques Derrida, in his commentary on Benjamin, calls it "mystical" violence and observes that it is neither legal nor illegal in the moment when it sets into action ("Force of Law" 943). But it is no longer a criminal violence. It is instead fully legitimate "What the state fears," Derrida confirms, "is not so much crime or *brigandage*, even on the scale of the mafia or heavy drug traffic . . . The State is afraid of fundamental, founding violence, that is, violence able to justify, to legitimate (*begründen*, 'to found') or to transform relations of law. . . so to present itself as having a right to law . . . a violence that is not an ac-

cident arriving from outside the law” (989). What Canada fears today is not the drug lord, but the aboriginal fisher, for only the subject of aboriginal rights has the authority to set up a new law within the law. In May of 1984 Ronald Edward Sparrow was fined for fishing with a net that exceeded the maximum length allowed under the Musqueam band’s food fishing license. He responded that his aboriginal right to fish outweighed the sovereign’s right to regulate the fishery. He was neither convicted nor acquitted (*R v Sparrow* 1 SCR, at 1083 and 1121). Instead, the Supreme Court of Canada used his case to outline a test for deciding in what circumstances the sovereign can justifiably infringe an aboriginal right, a test for balancing the rule against the exception. Sparrow enjoyed the kind of right that falls both inside and outside the law.

McNeil agrees that “local law, whether customary or otherwise” might well prove to be “a good source of indigenous rights, including land rights,” (*Common Law* 193) but he warns that it is difficult to establish the principles of customary law in court, in part because “the past of indigenous groups,” as he puts it, is “obscured in legend and myth” (214). The Supreme Court of British Columbia shared his ethnocentrism and so, in 1991, it confirmed his fears. The hereditary chiefs of the Gitksan and Wet’suwet’en nations had filed suit in 1984 against the province of British Columbia, claiming ownership of, and the right to govern, traditional Gitksan territories bordering the Skeena, Nass and Babine Rivers, and traditional Wet’suwet’en territories bordering the Bulkley and Fraser-Nechako Rivers. The Gitksan proposed to recite oral histories called *adaakw* in order to establish their pre-contact occupation of the land; the Wet’suwet’en proposed to perform traditional songs called *kungax* for the same purpose (Culhane 120). The trial judge allowed the evidence to be heard under an exception to the hearsay rule but found in his final, 1991 decision that *adaakw* and *kungax* were of “dubious value” in proving the use and occupation of land (*Delgamuukw v. British Columbia* 79 DLR 4th at 260). The Supreme Court of Canada would later find that the problem lay not in the supposed “obscurity” of aboriginal legend and myth but in the trial judge’s treatment of evidence (*Delgamuukw v. British Columbia* 153 DLR 4th at 230).

McNeil remarks that the courts could relieve the plaintiffs of the burden of proof by displacing aboriginal title from customary law to the common law (304). Juridical utterances, he notes, have substantial performative force, but “judges” have so far declined to mobilize it in the defense of aboriginal rights: “the fact is that judges have not performed the law-making function which on this view should be assumed by them” (304). He nevertheless warns them to handle it with caution. The aim is not to overturn the law, but to preserve it from that nameless violence which threatens to declare a new law from inside the law. The result is a benevolent and scrupulously well-intentioned assimilationism.

The law-making function, however, is not without its dangers. The fact that judges have the power to make a law that goes against the law does not necessarily mean that they will deploy their power in favor of aboriginal people and interests. McNeil is aware of the danger. Indeed he finds an example of it in the United States Supreme Court’s 1823 decision in *Johnson v McIntosh*. English law says there are three ways of acquiring territory. Chief Justice Marshall, however, added a fourth: discovery. The First Nations of North America were the rightful occupants of the soil, he wrote, and occupation gave them a just claim to possession. Discovery nevertheless gave the discovering nation ultimate title and the “exclusive right” to acquire the land from its occupants. But its occupants were not prepared to give it up (*Johnson v McIntosh*, 8 Wheat. 543 at 572–3 and 587). The discovering nation therefore had two choices: it could either abandon the country altogether or enforce its claims by the sword (590). The British crown elected to conquer territories that already belonged to its dominions. It waged war on its own subjects (McNeil *Common law* 246). Marshall conceded that it is “extravagant” to convert a title won by discovery into a title won by conquest, but he observed that it had become “the law of the land” (591). McNeil accuses him of making a law that is doubly against the law: “what Marshall did was invent a body of law which was virtually without precedent” (301). The example indicates that there is no way to determine, in advance, what kind of law the law-making function will make. Hence there is no solid ground for asserting that common law is better suited than customary law to defend aboriginal title.



McNeil nevertheless goes on to conclude that Canadian courts have had “ample opportunity” to break with a tradition of law that breaks the law and to return instead to the “fundamental principles of the common law,” for if the land’s “indigenous occupiers” did have “a right to fee simple estates” when the British crown asserted sovereignty over its North American territories, he argues, then “(statutory bars aside) no one can contend that it is too late to declare the law, and enforce the right” (304). But the courts have chosen instead to create rights that belong without belonging to the genre of rights: “They have purported to accord land rights of some sort to indigenous people, but have not felt constrained to equate the interest held by them with any precise English law interest” (303). In Canada, these rights that are not quite rights have come to be known as *sui generis* aboriginal rights.

Ironically, the Supreme Court of Canada brought aboriginal title into the common law in the 1970s—but only to chase it out again. The Nisa’a tribal council asked the Supreme Court of British Columbia in 1967 to declare that the aboriginal title to the Nass River valley had never been extinguished. The trial judge found in 1969 that even if an aboriginal title had existed at common law, it had been “totally extinguished” prior to 1871, the year British Columbia entered confederation, by thirteen colonial acts of legislation, proclamation and ordinance—the so-called “Calder thirteen” (*Calder et al. v. Attorney-General of British Columbia*, 8 DLR 3rd at 82). The British Columbia Court of Appeal decided in 1970 that aboriginal title has no basis in customary law because the Nisa’a had no concept of private property until after they came into contact with settler society (*Calder et al. v. Attorney-General of British Columbia*, 13 DLR 3rd at 66). The Supreme Court of Canada dismissed the action on a technicality in 1973: the plaintiffs, it turned out, had neglected to ask the province for permission to sue it, as the law then required them to do. On the title question, though, the Court was evenly split.

Justice Judson wrote for the three judges who favored dismissing the appeal. He found that British Columbia is not included in the lands set aside for first nations in the Royal Proclamation. Hence the Nisa’a could not hold up the Proclamation as a source of aboriginal title. But they did not have to. For aboriginal title is a matter of common law: “the fact is,”

said Judson, “that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefather had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it [as Lord Watson had in *St Catherine’s Milling*] a ‘personal and usufructuary right’” (*Calder et al. v. Attorney-General of British Columbia* 34 DLR 3rd at 156). Since occupation is proof of possession, and since presumptive title comes with possession, Judson concluded that the Nisga’a did have title to their land “when the settlers came.” And then he took it away again: “this right was ‘dependent on the goodwill of the sovereign’” and could be extinguished at the sovereign’s will and pleasure.<sup>8</sup> Paradoxically, though Judson affirmed that the Nisga’a territory fell outside the scope of the Proclamation, he nevertheless decided, like Lord Watson before him, that Nisga’a title hinged on a phrase from the Proclamation—“Our Will and Pleasure.” Hence he argued in two directions at once: 1) aboriginal title exists at common law and is not the sovereign’s to grant; 2) aboriginal title depends on the sovereign’s will and can be extinguished at its pleasure. Nisga’a title belongs without belonging to the Proclamation; the Proclamation applies without applying to Nisga’a title. Judson concluded that the trial judge was correct when he ruled that aboriginal title, “if it ever existed,” had been extinguished by the performative violence of nine proclamations issued by the colonial governor and four ordinances passed by the colonial legislative council from 1858 to 1870: “All thirteen reveal a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to ‘aboriginal title, otherwise known as Indian title’.”<sup>9</sup> Aboriginal title was a burden on the crown’s title, and the crown had discharged that burden by setting aside reserves for the exclusive use of the colony’s first nations.

Justice Hall wrote for the three judges who favored allowing the appeal. He found that the trial judge was so preoccupied with the three conventional *indicia* of ownership—specific delineation, exclusive possession, and right of alienation—that he “overlooked” the fact “that possession is of itself proof of ownership” at common law (*Calder et al. v. Attorney-General of British Columbia* 34 DLR 3rd at 187). The Nisga’a had been

in possession since time immemorial. They did not have to prove their title. It was up to the crown to prove that their title had been extinguished. But Hall went further. He reviewed the evidence and concluded that aboriginal title has a second, parallel source in aboriginal customary law. The Nisa'a "are and were," he wrote, "a distinct cultural entity with concepts of ownership indigenous to their culture," and the Nisa'a law of property, he stressed, was fully "capable of articulation under the common law" (190). He set up "Nisa'a law" inside the common law even as he located its source outside the common law. "The aboriginal Indian title," he was careful to note, "does not depend on treaty, executive order or legislative enactment" (200), but is rather an independent legal right which, though recognized by the Royal Proclamation, nevertheless predates it.<sup>10</sup> Since it was not created by a sovereign performative, it does not depend on the sovereign's will and cannot be extinguished at the sovereign's pleasure. The only way to extinguish it is to pass legislation that clearly and plainly states the sovereign's intention to extinguish, and in Canada the crown has historically made that intention clear and plain by striking treaties with first nations, which means consulting them and securing their consent (199, 202–3). Hall's opinion draws Nisa'a customary law into the common law as a state of exception.

The Supreme Court of Canada consolidated the state of exception more than two decades later in *R v. Van der Peet*. Dorothy Marie Van der Peet was charged in 1987 with the crime of selling ten salmon. Her band, the Upper Sto:lo, had a license to catch fish for food, but not for sale. She argued, however, that in selling them she was exercising an aboriginal right (*R v. Van Der Peet* 23 BCLR 3rd at para 6). The Supreme Court found in 1996 that her right lay both inside and outside the law. Chief Justice Lamer cited the High Court of Australia's finding in *Mabo v. Queensland* that an aboriginal right has its origin in and acquires its content from the traditional laws acknowledged and traditional customs observed by the indigenous inhabitants of a given territory (para. 40). *Mabo* confirmed that the common law captures customary law within an internal-external space of exception, incorporating it without assimilating it. The challenge for the Supreme Court of Canada was to preserve the common law from customary law's legitimate, law-making force.

What the state feared in Van der Peet's case, as in Sparrow's, was neither the criminal nor the crime, but a performativity capable of founding a new law from within the law. Van der Peet argued that her right to sell the fish was protected by Part Two, Section Thirty-Five, paragraph one, of the *Constitution Act, 1982*, which states "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Lamer decided that the constitution includes aboriginal customs only insofar as it excludes them: "what s.35(1) does is provide the constitutional framework through which the fact that aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures is acknowledged and reconciled with the sovereignty of the Crown" (para. 31). The constitution seeks the "reconciliation" of two legal systems while affirming that one system has "sovereignty" over the other. Reconciliation requires judges to weigh "the aboriginal perspective" against "the perspective of the common law." True reconciliation "will equally, place weight on each" (para. 50). Lamer did not say that it will place *equal* weight on each. For the aboriginal perspective belongs to the common law perspective only in the mode of not belonging: "aboriginal rights exist within the general legal system of Canada," he reasoned, and have to be defined "in terms that are cognizable to the non-aboriginal legal system" (para. 49). He defined an "aboriginal right" as what remains today of a practice, custom, or tradition that used to be "integral" to the "distinctive culture" of a distinctively aboriginal group in the past: it *is* something that "truly *made*" a society what it "*was*" (paras. 46 and 55). Such a right is like a ghost: it is the living presence of an era that came an end the moment aboriginal people came into contact with European adventurers (para. 60). The rights that the law recognizes now protect only those practices that existed before the law arrived. Aboriginal traditions, customs, and practices are included in the law now on the condition that they were excluded from the law then. They are inside it and outside it at one and the same time, and that time, moreover, is the past present: "the rights recognized and affirmed by s. 35(1) must be temporally rooted in the historical presence—the ancestry—of aboriginal peoples in North America" (para 32): a presence that dates from "the period prior to contact" (para. 60). Aboriginal societies

have a right to whatever is “integral” to them, and integrality is a past that happens now only. The court found that Van der Peet had an aboriginal right to fish, but not to exchange fish for money, for commercial fishing was an incidental rather than an integral part of pre-contact Upper Sto:lo culture.

The Federal Court had already settled on a formula for inclusive exclusion in *Baker Lake v. Canada*. In 1979 a coalition of Inuit individuals and organizations asked for a declaration that they had an unextinguished aboriginal right to hunt and fish on lands adjacent to the Hamlet of Baker Lake (*Hamlet of Baker Lake v. The Minister of Indian Affairs*, 107 DLR 3rd at 513). Justice Mahoney noted that the Supreme Court had already found in *Calder* that aboriginal title exists at common law, so he devised a four-part test to decide whether the present plaintiffs had a title to the Baker lake area. He required them to prove:

1. That they and their ancestors were members of an organized society.
2. That the organized society occupied the specific territory over which they assert aboriginal title.
3. That the occupation was to the exclusion of other organized societies.
4. That the occupation was an established fact at the time sovereignty was asserted by England. (542)

The Baker Lake test affirms that aboriginal title is one part “organization” and three parts “occupation.” What determines whether a society is “organized” or not? (And is there such a thing as an *unorganized* society?) Mahoney decided that a society is organized if it observes the rules and customs of its ancestors (McNeil *Common Law* 284). Since being organized makes a society eligible for title, the existence of customary law is a necessary condition for recognition under common law. An aboriginal right is protected by the law only if, at one time, it fell outside the law. Such a right exists in the mode of inclusive exclusion.

Mahoney defined common law Inuit title as a right to hunt and fish: in the language of *St. Catherine's Milling*, he decided that it is a usufructuary right (560). Four years later, in *Guerin v. The Queen*, the Supreme Court of Canada proposed another definition, indeed a unique one.

The Musqueam band had agreed to surrender certain reserve lands to the Crown for lease to a Vancouver golf club. The members of the band approved the terms of surrender at a public meeting. But the Indian Affairs Branch afterwards changed the terms without notice, and, predictably, the new terms were less favorable than those the band had approved (*Guerin v. The Queen* 2 SCR at 335). The court found that the crown had a fiduciary obligation to deal with the land for the band's benefit and was thus liable for damages. Justices Wilson and Dickson located the source of the crown's obligation in the band's aboriginal title (McNeil *Common Law* 285). Dickson wrote that aboriginal title is "an independent legal right" based on aboriginal people's "historic occupation and possession" of the land (376, and 378). The fact that it is "independent" means it has a source in customary law. The fact that it is based on occupation and possession means it has a second, parallel source in common law. A pre-contact, customary "right" had been carried forward into the common law under the doctrine of continuity (McNeil *Common Law* 286). "The principle that a change in sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants," Dickson observed, "was approved by the [Judicial Committee of] the Privy Council in *Amodu Tijani v. Southern Nigeria (Secretary)*" in 1921 (378). But that is just what the state fears: the declaration of customary law within the borders of the common law. Dickson made it clear, however, that in his view this independent aboriginal right was nevertheless dependent on the sovereign's paramount right. "Indians have a legal right to occupy and possess certain lands," he explained, "the ultimate title to which is in the Crown" (382). But there is no term in general property law for a right that belongs without belonging to the genre of rights. Indeed Viscount Haldane had warned of the problem years earlier in *Amodu Tijani v. Secretary, Southern Nigeria*: "There is a tendency, operating at times unconsciously, to render [the native] title conceptually in terms of [legal] systems which have grown up under English law. But this tendency has to be held in check closely."<sup>11</sup> Scholars of rhetoric have long called this "tendency" catachresis. It is what happens when you borrow a term that already has a meaning in one context and graft it to a context where a term is needed but none

is available, for example when you say that a chair has legs. Dickson noted that in the past judges have considered giving bands “beneficial ownership” of reserve lands and have entertained the possibility that bands have “a beneficial interest” in their reserves (381). There is “a core of truth” in both catachreses, he conceded, but still neither was “quite accurate” (382). So he introduced a third term, which was no less catachrestic than the others. Aboriginal people, he wrote, have a “*sui generis*” interest in the land. A *sui generis* interest in one that belongs to a kind, a class—that is, a genus—of its own. What sets it apart from other interests? Dickson endowed it with two characteristic traits. First, it is personal, which means it can be surrendered only to the crown. Second, it burdens the crown with “a distinctive fiduciary obligation,” which binds the crown to manage the surrender of title for the benefit of aboriginal people, not golf courses. “Any description of Indian title which goes beyond these two features,” he warned, “is both unnecessary and potentially misleading” (382).

Dickson’s definition of this *sui generis* interest does nothing more than repeat the law of genre in general. The law requires every genre to be of its own kind: “genres,” it says, “are not to be mixed” (Derrida “The Law of Genre” 223). Every *genus* is therefore bound to be *sui generis*. “As soon the word *genre* is sounded,” according to Derrida, “as soon as it is heard, as soon as one attempts to conceive it, a limit is drawn. And when a limit is established,” he adds, “norms and interdictions are not far behind . . . one must not cross a line of demarcation, one must not risk impurity, anomaly, monstrosity” (224–5). When Dickson declared aboriginal title to be of its own kind, he inscribed this kind of line around it, and the line’s purpose, furthermore, is to protect it from contamination. He set aboriginal title apart to protect aboriginal people from being exploited by unscrupulous land purchasers and lessees. Its *sui generis* nature, he said, requires aboriginal people to surrender it only to the crown and obliges the crown to conduct the surrender in their best interest. The risk today, however, is not that aboriginal title might be treated like other property interests, but that other property interests might be compromised by a declaration of aboriginal title. And the doctrine of reconciliation is now the first line of defense.

The Supreme Court of Canada's put it work for the first time in late 2004 in *Haida Nation v. British Columbia (Minster of Forests)*. There is a "need," wrote Chief Justice McLachlin, "to reconcile prior Aboriginal occupation of the land with the reality of Crown sovereignty" (*Haida nation v. British Columbia Minister of Forests* 2004 SCC 73 at para 26). The term "reconciliation," however, is a catachresis for the state of exception. "This process of reconciliation," McLachlin explained, "flows from the Crown's duty of honorable dealing towards Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people" (para. 32). The fact that aboriginal societies used to "control" the land in the past obliges the crown to exercise self-control when dealing with aboriginal interests in the present. The crown controls itself because aboriginal people no longer control the "land and resources." The doctrine of reconciliation, like the law of genre, is performative and normative at once: it subordinates aboriginal law to Canadian law and at the same time binds the crown to honor what it subordinates. The sovereign is not subject to restraint, but is called to exercise self-restraint. It is not ruled; it rules itself.

But what happens to the law when the law of genre fails? What if it were impossible not to mix genres? This is the question that Derrida puts to the law: "What if there were, lodged within the heart of the law itself, a law of impurity or a principle of contamination" ("The Law of Genre" 225)? Every genus is defined by its difference from other genera. Every genus must therefore by definition have some characteristic trait that distinguishes it from all others: "if a genre exists," says Derrida, whether it is a genre of literature or genre of law, "then a code should provide an identifiable trait and one which is identical to itself, authorizing us to adjudicate whether a given text belongs to this genre or perhaps to that genre" (229). Every genre makes itself remarkable its own way. The "mark of belonging," however, belongs to genre in general without belonging to any genre in particular (230). It marks the limits between one genre and another, and yet it exceeds every limit that it marks. "This can occur," Derrida stresses, even "in texts that do not, at a given moment, assert themselves to be literary or poetic" (229).



Indeed there is a unique genre of case law that distinguishes itself by affirming the uniqueness of aboriginal title, and the mark that indicates whether or not a case belongs to this genre is the phrase “*sui generis*.” Yet as recently as 1997 Canadian courts had failed to specify what distinguishes a “*sui generis*” title from other property interests. It is true that Dickson had singled out two “features,” inalienability and fiduciary obligation, but according to McNeil, the mark of belonging, in order to be effective, has to grow out of the source, not the definition, of aboriginal title. Otherwise there is a risk of generic contamination. By 1989 judges agreed that first nations hold “some sort of communal legal title,” but they had “variously” located its source in “customary law, occupation and use of traditional lands, and the Royal Proclamation of 1763, as though these possible sources can be lumped together to arrive at a uniform result” (*McNeil Common Law* 289). How can a *sui generis* right arise from different genres? Aboriginal title was supposed to be of its own kind, but the only unique thing about it was that it lacked that mark of belonging which distinguishes one kind from another: “No wonder they have had so much difficulty in defining aboriginal title, and describing what the interest held thereby amounts to” (289).

The Supreme Court of Canada supplied the missing mark when it ruled on the appeal of *Delgamuukw v British Columbia* in 1997. The trial judge had answered the joint Gitksan and Wet’suwewt’en claim with an echo of Judson’s ruling in *Calder*. He identified two sources of title—the Royal Proclamation and prior occupation—and then he decided that the Proclamation did not extend to British Columbia and that any title that could be based on occupation had been extinguished by the performative violence of the *Calder* thirteen (*Delgamuukw v. British Columbia* 79 DLR 4th at 194 and 197). The plaintiffs had only the right to live in their villages and a non-exclusive right to use the surrounding lands for “sustenance” (462). The British Columbia Court of Appeal agreed in 1993 that the action should be dismissed but found that the *Calder* thirteen had not extinguished all of the plaintiffs’s aboriginal rights (*Delgamuukw v. British Columbia* 79 DLR 4th at 471). Justice Macfarlane concluded that the plaintiffs continued to have “unextinguished non-exclusive aboriginal rights” but stressed that these rights do

not amount to a right of ownership or a right of property. “Such rights,” he explained wrote, “are of *sui generis* nature” (547) because they have their source in aboriginality itself. “What the law protects is not bare presence or all activities,” he wrote, “but those which were an integral part of and recognized by an aboriginal society prior to the assertion of sovereignty,” (512, 543) which he dated at the signing of the Oregon Boundary Treaty in 1846 (McNeil “Meaning of Aboriginal Title” 138). What makes an aboriginal society distinctively, legibly aboriginal, moreover, is its pre-existing system of customary law: “I have said there is no question the Gitksan and Wet’suet’en people had an organized society. It is pointless,” he added, “to argue that such a society was without traditions, rules and regulations” (545). Customary law is an integral part of aboriginality, and aboriginality is a source of common law aboriginal rights. “But those traditions, rules, and regulations cannot operate,” he warned, “if they are in conflict with the laws of the province or of Canada” (545). Laws belonging to the customary law genre of aboriginality do not necessarily belong to the common law genre of aboriginal rights. Or rather they belong without belonging.

Justice Wallace warned that to set up an aboriginal legal system within the Canadian legal system would result in a kind of monstrosity. “The assertion of an all-encompassing aboriginal right to an exclusive social and legal system—under the so-called ‘doctrine of continuity’ [this is a dig at McNeil]—would result,” he predicted, “in the common law affording protection to a system which is both outside and independent of the common law” (569). Customary law and common law are two discrete legal genres, and genres, according to Wallace, are not to be mixed. Any effort to do so would result in contamination. Customary law would take root in common law from a position beyond the law. A parasite would work within the law to suspend the law. No longer would the sovereign have the power to decide on the state of exception; rather the exception would circumscribe the exercise of sovereign power. The only safe way to protect customary aboriginal practices, therefore, is to convert them into common law aboriginal rights: “customary practices,” according to Wallace, have “the protection of the common law” but “any system of aboriginal customary law” does not (577). Practices

are impurities: they bear traces of customary law, which threatens to contaminate the common law. Rights, however, are purified practices: they “take their force” not from customary law, but “from the common law” (570). Wallace’s judgment has the paradoxical effect of excluding aboriginal people from a genre that includes only them. Aboriginal customs must be distinctively aboriginal in order to receive the protection of the common law, but only aboriginal law has the authority to determine which customs are distinctively aboriginal and which are not: “the post-sovereignty creation or alteration of aboriginal customs do not, and cannot have the force of law,” but neither, according to Wallace, can pre-sovereignty customs (577). Practices can be converted into rights on the condition that aboriginal people cease to be aboriginal. Wallace invented a genre that is truly of its own kind: a *sui generis* interest that nobody can claim.<sup>12</sup>

Chief Justice Lamer opened the Supreme Court of Canada’s decision by recalling that he had already ruled, in *R v Côté*, that aboriginal title is “a distinct species of aboriginal right” (*Delgamuukw v. British Columbia* 153 DLR 4th at 201). By “species,” however, he meant “genus.” The court’s task in *Delgamuukw* was to define “the specific content” of this distinct kind of right. The genus was finally about to receive its unique mark of belonging. Lamer decided that aboriginal title is a *sui generis* interest in the land itself. One of the things that make this interest unique is that it participates, without full membership, in two genres of law. “Aboriginal title has been described as *sui generis* in order to distinguish it from ‘normal’ proprietary interests, such as fee simple. However,” he added, “it is also *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems” (241). The correct interpretation has to consider “both common law and aboriginal perspectives” while endorsing neither. Lamer could not *not* mix genres even though the law demanded that genres are not to be mixed.

He ruled, first, that this *sui generis* interest can be surrendered only to the crown. Second, he traced its source to the prior occupation of the land by aboriginal societies. That means that it belongs to the common

law precisely because it pre-dates it: “What makes aboriginal title *sui generis* is that it arises from possession *before* the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward” (242). Because it pre-dates it, moreover, it has a parallel source in “aboriginal systems of law” (246). The assertion of sovereignty simultaneously extended the jurisdiction of the common law and opened up a pocket inside it for the inclusive exclusion of customary law. Aboriginality is the sovereign’s outer limit, but it is traced within rather than around the sovereign’s domains. The outside of the law has from the outset of Canadian history resided on the inside of the law, in the form of a title that burdens the crown’s underlying title (254). Finally, Lamer reaffirmed that this burdensome title is a communal rather than individual right.

Since the courts had “never” defined “the *content* of aboriginal title,” he ventured a definition of his own (242). It consists of two propositions. First, aboriginal title is “the right to exclusive use and occupation of the land” for “purposes” that may or may not be “integral” to “distinctive aboriginal cultures” (243). Second, however, aboriginal title extends only to those uses that can be reconciled “with the nature of the group’s attachment to that land” (243). What the first proposition excludes, the second includes. The first annuls the genre of aboriginality: title-holders can use and occupy the land in “non-aboriginal” ways. The second reinstates it: there is an “inherent limit” on non-aboriginal uses of aboriginal lands (246). The law protects aboriginal title in order to protect the aboriginality of aboriginal people, and the characteristic trait of aboriginality, according to Lamer, is the aboriginal person’s “special bond”—indeed species bond—with the land itself. “That relationship,” he found, “should not be prevented from continuing into the future. As a result, uses of the lands that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title” (247). Formerly the courts protected aboriginal people from third parties; henceforth they will protect aboriginal people from themselves.

How can a court tell aboriginal from non-aboriginal uses? George Copway affirmed in 1850 that the only way to hunt in a distinctively aboriginal way is to obey the distinctively aboriginal laws of property. “The hunting grounds of the Indians were secured by right,” he recalls

in his autobiography, “a law and custom among themselves. No one was allowed to hunt on another’s land, without invitation or permission” (74). Aboriginal title is distinguished from other proprietary interest by its aboriginality, but what constitutes aboriginality can only be decided by aboriginal law. When Lamer affirmed that “aboriginality” must not be mixed with other genres, then, he acknowledged the principle of aboriginal self-government (McNeil “Defining Aboriginal Rights in the 90s” 13–14).

Yet he went on to assert that aboriginal title can be infringed whenever the infringement serves a “compelling and substantial” legislative objective, though he cautioned that any infringement has to honor the “fiduciary relationship” between settler governments and first nations (260–2). What genre of objective meets the infringement test? In *Haida Nation v B.C.*, McLachlin decided that the test can be applied in cases where aboriginal title has been claimed but not yet proven (paras. 6 and 10–11). Hence there can be infringement even before there is a title to infringe. Aboriginal title is the kind of right that can be excepted from the law before it has been included in the law. McLachlin found that the government of British Columbia had failed in its honorable duty “to consult with and reasonably accommodate” Haida interests when renewing a timber license in a traditional Haida territory (para. 27). In a simultaneous ruling, however, she found that the province had “thoroughly” fulfilled its duty to consult with the members of the Taku River Tlingit First Nation while planning the construction of a mining road on their territory. She accordingly let their title be infringed before it had been established either by negotiation or in court (*Taku River Tlingit First Nation v. British Columbia Project Assessment Director* 2004 SCC 74 at paras 41 and 44).

McNeil points out that the infringement test ignores that English law has protected property rights for more than eight hundred years and forgets that s.35 (1) was intended to defend aboriginal rights from government interference (“Defining Aboriginal Rights in the 90s” 26). What he forgets in turn is that the sovereign cannot abide a law that resides at once inside and outside the law. The common law takes hold of customary law by way of inclusive exclusion, for the capture forestalls that

performative violence which not only is not alien to the law, but is that which in the law suspends the law for legitimate ends: “a pure performative that would not have to answer to or before anyone” (Derrida “The Force of the Law” 992–3). Only by such a performative can an exception emerge within the state of exception.

Legal dictionaries typically put the phrase *sui generis* in a class of its own. *West’s Encyclopedia of American Law* is among the most concise: “SUI GENERIS” [*Latin, Of its own kind or class.*] That which is the only one of its kind.” Though it belongs to its own kind, though, it nevertheless includes more than one kind of right. *Black’s Law Dictionary* is among the most expansive: “*sui generis* (s[y]oo-I or soo-ee jen- -ris). [*Latin “of its own kind”*]. Of its own kind or class; unique or peculiar. The term is used in intellectual-property law to describe a regime designed to protect rights that fall outside the traditional patent, trademark, copyright, and trade-secret doctrines.” Still it is *The Dictionary of Canadian Law* that best captures the uniqueness of the unique interest that is aboriginal title: “SUI GENERIS. [L.] Of one’s own class or kind.” Whatever is *sui generis* is of “one’s” own kind. A *sui generis* right therefore amounts to the right of the one. Or is it one’s right to be included in a law that excludes one? For there is only one law, and it is closed to the possibility of a law that would undo it from inside its own limits. Aboriginal title: it is our kind of right.

## Notes

- 1 See Carl Schmitt in Giorgio Agamben. *Homo Sacer: Sovereign Power and Bare Life*, trans. Daniel Heller-Roazen (Stanford: Stanford UP, 1998) 11.
- 2 See Agamben, *Homo Sacer*, 3–5; Michel Foucault, *The History of Sexuality. Volume 1: An Introduction*, trans. Robert Hurley (New York: Vintage, 1978), 139.
- 3 In 1984 the Supreme Court of Canada reiterated that the crown has an obligation “to prevent the Indians from being exploited” by land purchasers and lessees; in November 2004 the Court reaffirmed that the crown has an honourable duty to protect aboriginal peoples’ rights and interests in the management of resources. See *Guerin v. The Queen* 2 SCR, at 336; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 20 and 27.
- 4 See McNeil “The Meaning of Aboriginal Title” *Aboriginal Treaty Rights in Canada*, ed. Michael Asch (Vancouver: UBC Press, 1997), 137; *Common Law Aboriginal Title* (Oxford: Clarendon P, 1989), 288–9.

- 5 This is currently the opinion of the Supreme Court of Canada. See *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, at para. 25.
- 6 See McNeil, *Common Law Aboriginal Title*, 171; *Re Southern Rhodesia* AC 211, at 233.
- 7 See McNeil, *Common Law Aboriginal Title*, 172; *Amodu Tijani v. Secretary, Southern Nigeria* 2 AC, at 407.
- 8 See *St. Catharine's Milling and Lumber Company v. The Queen*, 14 AC 1889, at 54; *Calder v. Attorney-General of British Columbia* 34 DLR 3rd at 156; *Delgamuukw v. British Columbia*, 79 DLR 4th at 197, 417, 453–4 and 478.
- 9 This is Judson citing the trial judge, Justice Gould. *Calder et al. v. Attorney General of British Columbia* 34 DLR 3rd at 81–2, and 34 DLR 3rd at 160.
- 10 This is Dickson's 1984 interpretation of "the assumption implicit in *Calder*"; *Guerin v. The Queen*, 2 SCR at 378.
- 11 *Amodu Tijani v. Secretary, Southern Nigeria* 2 AC at 403; see also *Calder v. Attorney-General of British Columbia* 34 DLR 3rd at 187.
- 12 McNeil tells us, in "The Meaning of Aboriginal Rights," that, "this places the Aboriginal peoples in an untenable position. To retain their aboriginal rights, they must maintain their societies in a precolonial state . . . If they try to adapt to meet the changes in circumstances caused by European colonization . . . their activities are no longer 'Aboriginal' and so are not encompassed by their Aboriginal rights" (152).

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