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Chapter One

Context

Introduction

Cases from overseas jurisdictions arise in political and legal contexts quite different to our own. Often decisions are reliant on a particular facet of that legal or political system which renders them inapplicable to Australia. However, in some circumstances, with an appropriate understanding of the context in which they arose, decisions can be argued effectively in Australia. In each chapter of this manual we provide both an outline of the relevant case law from the United States, Canada and New Zealand, and an explanation as to the applicability of that law to Australia. In addition, it is important to have some understanding of the key features of those legal systems as they apply to Indigenous peoples. For that reason, we have included this chapter. Obviously it is impossible in a work of this nature to provide a detailed explanation of the United States, Canadian and New Zealand legal systems. However, we have included the key features we believe are necessary to understanding the chapters that follow. In addition, at the end of each jurisdiction we have included some further readings, which provide detailed analysis of all the features discussed in this chapter. We strongly recommend that you read this chapter before considering any of the later ones.

The United States

Demographics

The 1990 U.S. Census showed that there was 1.959 million self-identified Native Americans in the United States. This represents approximately 1% of the total population of the United States. This figure includes 57 000 Eskimos and 24 000 Aleuts. There are 555 federally recognised Indian tribes and 287 reservations. These 287 reservations are comprised of 22.68 million hectares, which are held in trust by the United States for Native Americans. The United States has concluded almost all land settlements, although there is no statute of limitations to file land claims.[1]

Terminology

Like many Indigenous peoples, Native Americans are moving away from the terms or labels given to them by the white settlers. The term ‘Indian’ has largely been replaced by ‘Native American’ or ‘First Peoples’. Indian lands are still

[1] Figures taken from ‘Indians in Canada and the United States’ prepared by the Communications Branch, Department of Indian Affairs and Northern Development, Ottawa, Canada: http://www.inac.gc.ca

usually known as reservations and different groups of Native Americans are known as tribes. However, much case law used, and continues to use, the term 'Indian'. Wherever possible we have used the terms Native Americans. However, when discussing cases, we use the terminology employed by the courts in order to avoid confusion.

Historical Overview

Pre-Independence policy (1533-1789)

Prior to Independence, the Administrators of British and Spanish colonies negotiated treaties with Indian tribes. These treaties were considered to be agreements between sovereign nations and accorded tribes an equivalent status to that of the colonial governments.

Further, in many cases the British Imperial Government instructed colonial administrators that land could only be acquired by purchase from the Indians. This policy was formalised, and applied uniformly to all the North American colonies in the *Royal Proclamation of 1763*. The *Royal Proclamation* prohibited all private purchases of lands covered by the *Proclamation*. This gave the Crown the sole right to purchase Indian lands.

The formative years (1789-1871)

After independence, the United States government assumed the role of the British and Spanish governments and continued the earlier British policy of treating with the Indians as members of sovereign nations. These treaties were made under the authority of the federal treaty making power. United States Constitution, Art. II(2) provides, *inter alia*, that the President: '. . . shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur'. Treaties provided not only guarantees that the government would protect traditional lands, but also for the provision of specific services to the Indian nations, which can be analogised today to provision of social welfare services.

During this period, the famous 'Marshall Trilogy' of cases were decided by the United States Supreme Court: *Johnson and Graham's Lessee v. M'Intosh*, 8 Wheat. 543, 21 U.S. 543 (1823), *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832) and *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831). These early decisions determined both the relationship of the United States Government to the Indian Nations, and the parameters of subsequent judicial developments. These cases are considered in some detail both later in this chapter, and in subsequent chapters. Suffice to note, *Johnson v. M'Intosh* determined that by virtue of the doctrine of discovery, the United States government had the sole right to acquire land from the Indian nations. The two latter cases established

the status of the Indian Nations as domestic dependent nations and the resulting Federal-Indian trust relationship.

The twin policies of this period, paradoxically, were non-interference and forced removals. At the end of the eighteenth century, the reserve system became a leading feature of United States policy. The justification for the creation of reserves was similar to that for the creation of reserves in Australia: to regulate the contact of the Indigenous inhabitants with settlers in order to avoid the bloodshed characteristic of earlier encounters. Indian reservations have been described as 'the concrete manifestation of a guarantee of measured separatism.'[2] In pursuance of the policy of separatism, Congress enacted the *Trade and Intercourse Act* in 1790.[3] Of particular importance is §177, which is still in force today, and provides, *inter alia*, that:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

This Act, of course, did not represent new law, but merely codified the surrender requirement in the *Royal Proclamation of 1763*.

However, this policy of non-intercourse was complemented by one of forced removal of Indians from traditional lands where those lands were pressed by settlers. The policy was designed to force the Indians off the land and thereby also reduce conflict with non-Indians. In 1829, Andrew Jackson took office as President of the United States, and in his first address to Congress, recommended that that all Indians be removed westward beyond the Mississippi River. This recommendation was enacted into law by the *Act to Regulate Trade and Intercourse with the Indian Tribes and to Preserve Peace on the Frontiers*,[4] and was designed to both guarantee lands to settlers, and to provide a permanent homeland where Indian tribes would be protected from the ravages of white settlement.

The era of allotment and assimilation (1871-1928)

By the mid 1800s, policy shifted from one of 'measured separatism' to one of assimilation. In 1871, treaty making with the Indian tribes was discontinued as

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2 C.F. Wilkinson, *American Indians, Time, and the Law: Native Societies in a Modern Constitutional Democracy*, Yale University Press, New Haven, 1987, at 4.

3 *Trade and Intercourse Act* of July 22, 1790, Ch. 33, 1 Stat 137 (codified as amended at 25 U.S.C. §177 (1976)).

4 *Act to Regulate Trade and Intercourse with the Indian Tribes and to Preserve Peace on the Frontiers* of June 30, 1834, 12 Stat. 352 (1834), now repealed.

it was seen as an impediment to the assimilation of Indians into white society. Interestingly, this occurred at the same time as in Australia the reserve system was established in order to ensure separatism.

The linchpin of assimilation was the *General Allotment Act* of 1887,[5] known as the *Dawes Act*. The Act attempted to guarantee assimilation of the Indian tribes by breaking up the reserve system. The Act authorised the Bureau of Indian Affairs to allot 160 acres of tribal land to each head of a household, and forty acres to each minor. These allotments were to be held in trust for 25 years, and could not be sold. At the end of the trust period these allotments could be transferred to individual Indians in fee simple:

> Upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance (*sic*) whatsoever."(§148)

The 'surplus' was sold to white settlers. The *Burke Act* of 1906[6] amended this procedure by allowing the transfer of a fee patent to 'competent' Indians prior to the expiration of the trust period. It also allowed the opening of 'surplus' reservation lands for non-Indian homesteading. The result of this policy was that Indian tribal lands were reduced from 138 million acres in 1887 to 52 million acres in 1934.

Reorganisation era (1928-1945)

The *Indian Citizenship Act* was passed in 1924. This granted Indians United States citizenship for the first time. In 1928, allotment was declared to be a complete disaster. Poverty and administrative abuse on reservations were rife. Congress recognised the need to protect remaining tribal lands. The *Indian Reorganisation Act* of 1934[7] halted the issuance of any new allotments and

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5 *General Allotment Act* of Feb. 8, 1887, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-31, 339, 341-2, 348-9, 354, 381 (1983)). This Act is commonly known as the *Dawes Severalty Act*.

6 *Burke Act* of May 8, 1906, Ch. 2348, 34 Stat. 182 (1906) (codified 25 U.S.C. (1983)).

7 *Indian Reorgansiation Act* of 1943, 25 U.S.C. §§ 461-78.

provided for the extension of the trust status of existing allotments. The Act set up Reservation Business Councils to govern tribes, and provided for the adoption of constitutions and the granting of federal charters.

Termination era (1945-1961)

In this period, legislation was passed that called for a reversal of the tribal self-government movement previously endorsed and called for an end to the trust relationship between federal and tribal governments. This resulted in the termination of more than 50 tribal governments. The federal government simply no longer recognised them as Indian nations. *Public Law 280* passed in 1953, gave six states mandatory and substantial criminal and civil jurisdiction over Indian country. Ten other states also opted to accept some degree of P.L. 280 jurisdiction.

Self-determination era (1961-)

The abuses of the termination era led to reforms. This period has been characterised by expanded recognition of the powers of tribal self-government. Important legislation includes: *Indian Civil Rights Act* of 1968, *Indian Self-Determination and Education Assistance Act* of 1975, *Indian Child Welfare Act* of 1978, *American Indian Religious Freedoms Act* of 1978 and *Native American Graves Protection and Repatriation Act* of 1990.

Treaties

From first settlement, the administrators of British colonies treated with Indian Nations in North America as equal sovereigns. On Confederation, power to make treaties with the Indian Nations was given to the Federal Government. Dealing with the Indian Nations as political entities was, of course, a matter of political expediency. Other European powers, notably France and Spain, were contesting sovereignty of North America, and the Indian Nations were valuable allies. Later, pressure from white settlers on the frontiers and from traders led to a need to make treaties of peace in order to encourage settlement. The practice of making treaties continued until 1871. In that year, in a rider to the *Appropriations Act*, Congress declared that no more treaties could be made with the Indian nations:

> § 71. Future treaties with Indian tribes
>
> No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired. (25 U.S.C. §71(1976))

Thereafter, 'agreements' rather than 'treaties' were made with the Indians. Between 1911 and the 1970s, Congressional practice was to obtain some kind of consent from the Indians for any action it was considering which might affect them. Current practice is to use negotiated settlements as a means of dealing with complex issues. An example of this is the *Alaska Native Claims Settlement Act.*(43 U.S.C. 1601-1629) Other subjects of negotiated settlements include child welfare and gaming on Indian reservations.

Many Indian treaties were concerned with the transfer of land, where Indian Nations were forced to surrender their lands. This is particularly so in the removal period, when the federal government attempted to persuade the Indian Nations to voluntarily move west, allowing the east to be further opened for white settlers. Examples of these treaties include the *Treaty with the Cherokee* of 1817,[8] in which the federal government accepted a surrender of land from the leaders of the lower Cherokee towns so that the Indians could be removed westward of the Mississippi River to public lands on the Arkansas River. Others included the *Treaty with the Creeks* of 1826,[9] and the *Treaty with the Delawares* of 1829.[10] These are only a few of numerous examples. The practice of removing Indians to beyond state boundaries, and securing their removal with treaties, continued until 1861. The expansion of settlers beyond the state borders, into Indian country, forced a change in policy from removal to reservations. Between 1861 and 1887, many treaties were signed with the Indian Nations by which land was explicitly reserved for the permanent occupation of the tribe. An example of such a treaty is the *Treaty with the Winnebago* of 1859.[11] Many of the Indian wars of the latter part of the 19th Century were caused by the efforts of the federal government to force Indians onto reservations. In addition to provision of land, these treaties usually provided that hunting and fishing rights were to be reserved to the Indians.

8 *Treaty with the Cherokee*, July 8, 1817, 7 Stat. 156.

9 *Treaty with the Creeks*, January 24, 1826, 7 Stat. 286.

10 *Treaty with the Delawares*, August 3, 1929, and September 24, 1829, 7 Stat. 326, 327.

11 *Treaty with the Winnebago*, April 15, 1859, 12 Stat. 1101.

Legislative Power and the Plenary Power Doctrine

> *United States v. Kagama* 118 U.S. 375 (1886).
> *Lone-Wolf v. Hitchcock*. 187 U.S. 553 (1903).
> *Choate v. Trapp* 224 U.S. 665 (1912).
> *Hodel v. Irving* 481 U.S. 704 (1987).

In contrast to Australia and Canada, there is no general power over Indian affairs in the United States Constitution. There are, however, a number of powers which give some legislative competence over Indian affairs. The two clauses are the Commerce Clause, Art. 1, §8, cl 3, and the Treaty-making Clause, Art. II, §2, cl. 2.2. The Commerce Clause states that:

> The Congress shall have the power to . . . regulate Commerce with foreign nations and among the several states, and with the Indian tribes.

The Treaty making Clause states that the President:

> . . . shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur . . .

As it was assumed that the Indian Nations would soon become extinct the federal government's powers were considered adequate to deal with them.

In addition, however, the Supreme Court has held that the guardian status of the federal government towards the Indian Nations gives rise to a distinct source of extra-constitutional congressional power, which is plenary in nature, over the Indian nations. This is known as the 'plenary power doctrine'. The plenary power doctrine can be traced to the Supreme Court decisions in *United States v. Kagama* and *Lone-Wolf v. Hitchcock*. This 'extra-constitutional' source of power is unlimited, subject only to relevant constitutional limitations. These cases are discussed in Chapter Six. The plenary power doctrine has been the subject of considerable criticism because of the fact that there is no textual basis for the doctrine in the Constitution. Moreover, because of its extraordinary breadth, with two minor exceptions, no act of Congress concerning Indian Affairs has ever been set aside or ruled unconstitutional. These both concerned takings without just compensation. See *Choate v. Trapp* and *Hodel v. Irving.*

Tribal Sovereignty and Tribal Courts

Inherent tribal sovereignty

> *Cherokee Nation v. Georgia* 30 U.S. (5 Pet) 1 (1831).
> *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).
> *United States v. Rogers,* 45 U.S. (4 How.) 567 (1846).
> *Oliphant v. Suquamish Indian Tribe* 435 U.S. 191 (1978).
> *McClanahan v. Arizona State Tax Commissioner* 411 U.S. 164 (1973).
> *United States v. Wheeler*, 435 U.S. 313 (1978).

Tribal sovereignty is a somewhat elusive concept. The doctrine of inherent tribal sovereignty has waxed and waned over the 200 years since Independence. Although it is clear that tribes do have sovereignty, this sovereignty can only be such as is compatible with their dependent status, and will always be subject to the plenary power of Congress. Legally (rather than historically or factually) tribal sovereignty can be traced to the seminal decisions of Marshall CJ in *Cherokee Nation v. Georgia* and *Worchester v. Georgia*.

Neither the decision in *Cherokee Nation*, nor that in *Worchester v. Georgia*, directly concerned Indian rights. Rather, the decision in *Cherokee Nation v. Georgia* considered the scope of the Supreme Court's original jurisdiction under Art. III § 2, of the United States Constitution. At issue was the applicability of Georgian statutes to persons residing on Cherokee Indian lands within that state. The Cherokee sought to restrain the enforcement of state statutes against them, and filed their claim under the original jurisdiction of the Supreme Court. In order to decide whether they had jurisdiction in this matter, it was necessary for the Court to determine the nature of the relationship between the Indian Nations and the United States. [12]

Marshall CJ held that the Court lacked jurisdiction to hear the matter, as the Cherokee Nation was not a 'foreign state' within Article III of the Constitution. Marshall characterised the Cherokee as: '. . . a distinct political society . . .

[12] Art. III, §2 of the Constitution grants the Supreme Court original jurisdiction in all 'controversies' 'between a state or citizens thereof, and foreign states, citizens or subjects.' In order for the Supreme Court to have had jurisdiction in *Cherokee Nation*, it would have been necessary to characterise the Indian Nations as 'foreign'.

capable of managing its own affairs and governing itself.'(at 16) In addition, he held that Indian tribes:

> . . . may more correctly, perhaps, be denominated domestic dependent nations. . . [Indians] are in a state of pupillage; their relation to the United States resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief of their wants . . . (at 17)

He therefore characterised the federal-Indian relationship as 'marked by peculiar and cardinal distinctions which exist nowhere else,' and held that Indian Nations are self-governing entities, with a form of inherent domestic sovereignty, despite their geographic location within the jurisdiction of the United States. (at 16)

Marshall CJ reiterated his analysis of the federal-Indian relationship in *Worcester v. Georgia*, decided one year after *Cherokee Nation*. This decision confirmed the supremacy of federal over state power, an issue that divided the nation at the time. The case concerned an appeal by two non-Indians who resided on Indian lands from a conviction under some of the same statutes challenged in *Cherokee Nation*. Marshall CJ held those state statutes at issue to be unlawful under the supremacy clause and held that the Constitution assigned exclusive power to deal with Indians to the federal government. He premised the supremacy of federal power on his view of the Indians' status as distinct political communities, 'having territorial boundaries, within which their authority is exclusive'. (at 557)

Only a few years after these decisions, however, the Supreme Court began to repudiate the earlier approach of the Marshall Court to the status of Indian Nations. In 1946, the Supreme Court determined not only that the Indian Nations should no longer be categorised as independent, but also that they had never had inherent sovereignty. In *United States v. Rogers*, the Court stated that:

> The native tribes who were found on this continent at the time of its discovery have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupied. (at 572)

This view was to prevail for well over one hundred years. As late as 1973, the Supreme Court noted that the doctrine of tribal sovereignty had 'undergone considerable evolution' since *Worcester v. Georgia*, and that:

> . . . the trend has been away from the idea of inherent tribal sovereignty as a bar to state jurisdiction and towards reliance on federal preemption. The modern cases thus tend to avoid reliance

> on platonic notions of Indian sovereignty and instead look to the applicable treaties and statutes which define the limits of state power. The Indian sovereignty doctrine is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it provides a backdrop against which the applicable treaties and federal statutes must be read. (*McClanahan*, at 172)

Similarly, in 1978, in *Oliphant v. Suquamish Indian Tribe*, the Supreme Court held that Indian Nations did not possess inherent criminal jurisdiction over non-Indians. Rather, 'as a result of ceding their lands to the United States and announcing their dependence on the Federal Government', the tribes retain only 'elements of "quasi-sovereign" authority' (at 209). These two decisions represent the low ebb of the doctrine of tribal sovereignty. However, a mere sixteen days after the decision in *Oliphant*, which appeared to signal the demise of inherent sovereignty, the Supreme Court handed down its decision in *United States v. Wheeler*, which firmly established tribal sovereignty as part of the United States' constitutional framework. In that decision the Court held that: '[t]he powers of Indian tribes are, in general, *inherent powers of a limited sovereignty which has never been extinguished.'* (at 322, original emphasis)

In stating this conclusion, however, the Court was careful to note that while tribal powers were inherent, they are nevertheless subject to the overriding power of Congress:

> But our cases recognise that Indian tribes have not given up their full sovereignty. . . The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status. (at 323)

Although the actual *ratio decidendi* of the two cases are reconcilable, the tenor of the two is clearly quite different.

Today, tribal sovereignty is broadly divided into two areas:

- self-government over tribal members and tribal lands within reservations; and
- self-government over non-tribal members and their lands within reservations.

Most sovereignty issues involve the latter, particularly state-tribal disputes about civil jurisdiction as concerns non-Indians and their property on reservations in diverse areas such as taxation, regulation of hunting and fishing, and zoning. A summary of the interaction between tribal sovereignty and state

regulation is given in Chapter Five.

Tribal courts

Tribal Courts do not exist because of any specific statutory authorisation, but rather in the early administrative practices of the Bureau of Indian Affairs and the implicit authorisation suggested by the *Indian Reorganisation Act*.[13] They are based in the administrative assessment that some kind of formal device was necessary on the reservations to maintain law and order. The *Indian Reorganisation Act* authorised tribes to draft their own constitutions, adopt laws and set up tribal court systems. However, most tribal constitutions were in fact drafted by the Bureau of Indian Affairs, rather than the tribes themselves.[14] According to Pommersheim, most current tribal codes, which include a framework for tribal courts, are a combination of tribal law and adapted state and federal law. Newer codes include a commitment to increase the recognition of customary law.[15]

Crimes committed by Indians on tribal lands fall under the jurisdiction of tribal justice systems. In 1883, the Supreme Court held in *Ex Parte Crow Dog*, 109 US. 556 (1883) that tribes had exclusive jurisdiction over crimes among Indians: i.e., where both parties (offender and victim) are Native Americans. However, Congress has gradually eroded tribal jurisdiction under the *Major Crimes Act*,[16] by instituting compulsory federal jurisdiction over certain major crimes. The *Major Crimes Act* applies where the offender of any crime enumerated in the Act is a Native American. In addition, the *Indian Country Crimes Act*[17] provides for federal, rather than state, jurisdiction in relation to crimes committed in Indian Country which involve Indians and non-Indians.

Tribal courts also have civil jurisdiction in Indian Country. However, the scope of this jurisdiction remains uncertain.

There are approximately 38 Courts of Indian Offenses and 254 tribal courts operating in the U.S. The majority of these courts were established after 1970. There are 181 Tribal Courts, which receive operating funds from the Bureau of Indian Affairs. For the larger tribes, about 75 percent receive funding from the BIA, whereas smaller tribes receive 100 percent of their funding from the

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13 F. Pommersheim, *Braid of Feathers: American Indian Law and Contemporary Tribal Life*, University of California Press, Berkley, 1995 at 61.

14 *Ibid*, at 65.

15 *Ibid*, at 66.

16 *Major Crimes Act* 18 U.S.C. §1153 (1984), as amended.

17 *Indian Country Crimes Act* 18 U.S.C. § 1152 (1984), supplemented by the *Assimilative Crimes Act* 18 U.S.C. §13 (1984).

BIA.[18]

Court of Claims

Congress created the Court of Claims for any person with claims for money damages, including compensation for property seized by the government.[19] In 1863, Congress amended the Act that created the Court so as to except from the Court's jurisdiction any claims based on treaties with Indian tribes and foreign nations.[20] This meant that tribes were effectively barred from turning to the Court in most cases, and could only look to Congress for relief. Until the end of World War II, tribes with the resources for lobbying obtained what were called 'special jurisdictional acts', which permitted them to bring claims in the Court of Claims seeking compensation for a variety of wrongs, including seizures of land. The Court of Claims interpreted these special acts so narrowly that few claims prevailed. In addition, the special statutes often permitted the court to offset against the damages awarded any gratuities the federal government had given the tribe. Since gratuities included everything given – whether it was requested or not – and the cost of administering federal programs, the final net judgment was considerably reduced.[21]

In 1946, Congress enacted the Indian Claims Commission Act (ICCA), which was intended to settle Indian claims for all time. This Act granted tribes access to the Court of Claims for any future claims, including property claims.[22] The Act also created a commission to investigate and settle any and all claims arising before 1946 that tribes wished to bring forward.[23] In addition to existing claims, including property claims, the law included a catch-all provision for claims that did not fit neatly into existing formal legal pigeonholes: 'claims based upon fair and honourable dealings that are not recognized by any existing rule of law or equity.'[24] In 1992, the United States Court of Claims was renamed the United States Court of Federal Claims.

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18 Figures taken from 'Indians in Canada and the United States' prepared by the Communications Branch, Department of Indian Affairs and Northern Development, Ottawa, Canada: http://www.inac.gc.ca

19 Act of Feb. 24, 1855, ch. 122, 10 Stat. 612, 612.

20 Act of Mar. 3, 1863, ch. 92, @ 9, 12 Stat. 765, 767.

21 See generally Newton, N.J., "Compensation, Reparations, & Restitution: Indian Property Claims in the United States" (1994) 28 *Ga. L. Rev.* 453, at 467.

22 Indian Claims Commission Act of 1946, Pub. L. No. 726, ch. 959, @ 2(5) 60 Stat. 1049 (codified at 28 U.S.C. 1505.)

23 *Ibid* at 1050.

24 *Ibid.*

Title 25

Title 25 of the United States Code is devoted entirely to 'Indians'. This title consolidates all federal laws respecting Indians and Indian lands. Title 25 contains 42 chapters, which are devoted to subjects such as:

- Agreements with Indians (chapter 3);
- Protection of Indians (chapter 5);
- Education of Indians (chapter 7);
- Allotment of Indian Lands (chapter 9);
- Constitutional Rights of Indians (chapter 15);
- Financing Economic Development of Indians and Indian Organizations (chapter 17);
- Indian Health Care (chapter 18);
- Indian Law Enforcement Reform (chapter 30)
- Native American Languages (chapter 31);
- National Indian Forest Resources Management (chapter 31);
- Indian Employment, Training and Related Services (chapter 36); and
- American Indian Agricultural Resource Management (chapter 39).

The entire United States Code, including Title 25, can be found on the Internet via the Legal Information Institute at Cornell University: http://www.law.cornell.edu/uscode/

Bureau of Indian Affairs

The Bureau of Indian Affairs (BIA) is the principal bureau, within the federal government, responsible for the administration of federal programs for federally recognised Indian tribes, and for promoting Indian self-determination. The BIA is located within the Department of the Interior. The BIA currently provides federal services to approximately 1.2 million American Indians and Alaskan Natives who are members of more than 557 federally recognised Indian tribes in the 48 contiguous states of the United States and in Alaska. The Bureau administers tribally-owned land, individually-owned land, and federally-owned land which is held in trust status.

The Bureau of Indian Affairs can be found on the internet at: http://www.doi.gov/bia/

Further Reading:

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Canada

Demographics

According to 1991 Census figures, the self-identified Aboriginal population is 1 002 675. This represents 3.6 percent of the total Canadian population. There are nearly 602 700 Registered Indians, of which 346 291 live on reserve and 256 400 live off reserve. There are 608 First Nations Councils. First Nations Councils were formally known as Indian bands. The term 'Indian bands' will be encountered in many judicial decisions.

In Canada, there are 2 370 reserves encompassing approximately 3 million hectares (30 000 square kilometres) held in trust (1995 figures). Ten comprehensive land claims settlements have been reached to date, and over 57.8 million hectares (or 578 000 square kilometres) have been identified for the exclusive use of Aboriginal peoples.[25]

Terminology

In Canada, Indigenous peoples were formally known as 'Indians. The majority

[25] Figures taken from 'Indians in Canada and the United States' prepared by the Communications Branch, Department of Indian Affairs and Northern Development, Ottawa, Canada: http://www.inac.gc.ca

now prefer to be called First Nations peoples. Similarly, those formally known as Eskimos prefer the term 'Inuit. Band councils are now known as First Nations Councils, while reserves are known as First Nations Communities. The term 'Aboriginal peoples' is often used to describe the Indian, Inuit and Métis as a collective group in Canada. However, the *Indian Act* 1985 R.S.C. c. I-5 still uses the terms 'Indian', 'band council' and 'reserves'. Wherever possible we use the term First Nations peoples. However, legislation and many decisions refer still to 'Indians'. When commenting on a case, to avoid confusion, we use the same terminology as the court.

Historical Overview

> *Guerin v. R.* (1984) 13 D.L.R. (4th) 321.
> *Calder v. Attorney-General of British Columbia* (1973) 34 D.L.R. (3d) 145.

Prior to 1830

Prior to 1830, the British primarily viewed the Aboriginal peoples of Canada in two lights: as allies; and as trading partners. They saw the Aboriginal peoples of Canada as allies in their various wars against the French and later against the newly formed United States. The British realised that Indian support was vital to the preservation of their North American colonies. This is reflected in the fact that Indian policy was largely under the auspices of the military. The Imperial government employed similar policies with respect to Aboriginal peoples in all its colonies in North America. During this period, a number of treaties were signed with First Nations peoples as they were with Native Americans. However, these treaties have subsequently been given different legally interpretations by courts in Canada and the United States.

As in the those colonies that became the United States, the foundation document of British Imperial policy with respect to the Aboriginal peoples is the *Royal Proclamation of 1763*.[26] It should be noted, however, that the *Royal Proclamation* did not apply to all of the territory that is now Canada. The area that now forms British Columbia, for example, was not included. The *Royal Proclamation of 1763*, *inter alia*, proscribed all private purchases of lands covered by the *Proclamation*. Any Aboriginal peoples who wished to dispose of their lands situated in those areas were obliged to surrender or sell to the Crown. As far as reserves are concerned, the surrender requirements were codified in the various versions of the *Indian Act*. These provisions remain essentially

[26] The *Royal Proclamation* can be found on the internet at: http://www.miredespa.com/wmaton/Other/Legal/Constitutions/Canada/English/PreConfederation/rp_1763.html

unaltered. Sections 37 and 38 of the present Act state that:

> 37. (1) Lands in a reserve shall not be sold nor title to them conveyed until they have been absolutely surrendered to Her Majesty pursuant to subsection 38(1) by the band for whose use and benefit in common the reserve was set apart.
>
> . . .
>
> 38. (1) A band may absolutely surrender to Her Majesty, conditionally or unconditionally, all of the rights and interests of the band and its members in all or part of a reserve.[27]

The policy of setting aside reserves began after the *Royal Proclamation*, largely as a result of the influx of loyalist settlers from the United States after the War of Independence. This influx made it difficult for the Imperial government to control the trespass of white settlers onto Indian lands.

1830-1867

Indian policy was transferred to the civil arm of the British Indian Branch. During this time, the Branch's main interest was in acquisition of land. However, curbing settlement was difficult. As an attempt to stop trespass on Indian lands the *Crown Lands Protection Act* was passed in 1839. This Act declared all Indian lands to be Crown lands. In 1839, acquisition of Indian land was transferred to the Crown Lands Department. At this early stage, Indian policy was still administered, at least in theory, by the Imperial Government. In practice, however, colonial legislatures had considerable autonomy. Full control of Indian affairs was not transferred to Canada until 1860.

During this time, the reserve system was dramatically expanded. The reserve system was intended to further the protective policy of the *Royal Proclamation of 1763*, as well as to enable the Christianisation of the Indians. Reserves were set aside in Canada on a wider scale than in Australia. Many First Nations people still reside on these reserves, now known as First Nations communities, whereas few survive in Australia. The reserve system was expanded as a result of the 1844 Bagot Commission into Indian Affairs, which stressed the need for the protection of reserve lands:

> the settled and partially civilized Indians, when left to themselves, become exposed to a new class of evils. They hold large blocks of land . . . which they can neither occupy not protect against the encroachment of white squatters, with whom, in a vain attempt to guard their lands they are brought into a state of constant hostility and collision.[28]

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27 *Indian Act*, R.S.C. 1985, c.I-5.

28 'Report on the Affairs of the Indians in Canada' Provincial Canadian Legislative Assembly,

These reserves were described as consisting of:

> [an] allotment of lands to the Indians, to be set aside as reserves for them for homes and agricultural purposes, and which cannot be sold or alienated without their consent, and then only for their benefit.[29]

Unlike the majority of reserves established in Australia, many of the reserves in Canada were created out of traditional tribal territory. In *Guerin*, Dickson J noted with respect to the reserve land surrendered by the Musqueam:

> . . . that the reserve in question here was created out of the ancient tribal territory of the Musqueam band by the unilateral action of the colony of British Columbia, prior to Confederation. (at 337)

In general, these reserves were created by treaty or agreement for surrender with the particular tribe involved. The treaties initially provided payment of monies for the surrender of lands. However, as settlers encroached on Indian lands express provision was made for the creation of reserves. Later, land was set aside for by Order in Council under the authority of general lands legislation.

The continuing pressure of settlement from the United States led to a need for further reserves. A number of Acts were passed at this time to set aside lands. These included: *An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada*[30] and *An Act for the Protection of the Indians in Upper Canada from Imposition, and the Property Occupied by them from Trespass and Injury*,[31] *An Act to Authorize the Setting Apart of Lands for the use of Indian Tribes in Lower Canada*[32] and *An Act for the Gradual Civilization of the Indian Tribes in the Canadas*.[33] During this period, the forms of protection given to Indian lands varied across the colonies.

1867 - 1951

In 1867 the Eastern Provinces united as the Dominion of Canada and the central and eastern provinces soon joined the union. Responsibility for Indian affairs

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Journals of the Legislative Assembly of Canada, 11 Vic, 24 June 1847, s. III, pt. I, General Recommendations, General Recommendation No. 1.

29 A. Morris, *Treaties of Canada with the Indians*, Coles Publishing Co., Toronto, 1971, at 287-88.

30 *An Act for the Better Protection of the Lands and Property of the Indians in Lower Canada* SC 1850, 13 & 14 Vic. c.42.

31 *An Act for the Protection of the Indians in Upper Canada from Imposition, and the Property Occupied by them from Trespass and Injury* SC 1850, 13 & 14 Vic. c.74.

32 *Act to Authorize the Setting Apart of Lands for the use of Indian Tribes in Lower Canada* SC 1851, 14 & 15 Vic, c.106.

33 *Act for the Gradual Civilization of the Indian Tribes in the Canadas* 20 Vic. C.6.

was placed with the new federal government and all laws respecting Indians were consolidated in the 1876 *Indian Act.* It was confirmed that '. . . the legal status of the Indians is that of minors, with the Government as their guardians,'[34] just as the Australian Aboriginal peoples had been spoken of as children. The goal was assimilation. Like the protectorate legislation, the *Indian Act* controlled most aspects of the lives of First Nations peoples. The Superintendent General was empowered to determine who was allotted land. He provided for government control of sale of lands, and could licence timber, hay, stone and gravel to be removed. The proceeds of the sale of land or resources were paid to the Receiver General to hold for the band. His general powers of control and management were wide. The Act also provided that on surrender the lands were to be managed, leased and sold as directed by the Governor in Council subject to conditions on the surrender.[35]

Unlike the Australian legislation, however, the *Indian Act* provided that the land had to be surrendered before it could be disposed of, that Indian lands would be exempt from taxes, and that Bands would have limited local self-government, albeit on a limited range of issues. The Act also provided for the possibility of enfranchisement and ownership of land.[36] When compared with the Australian protectorate legislation, the same paternalistic control is evident.

In addition, by this time treaties had become the federal government's primary device for the extinguishment of aboriginal title.

The centralising control over the lives of aboriginal peoples continued throughout the latter part of the 19th century, and for the first half of the 20th century.

1951-1973

As in the United States, the Second World War ushered in changes in attitude. In both the United States and Canada, Aboriginal peoples enlisted in proportionally higher numbers than any other group within society. In Canada, on their return, veterans' organisations and church groups mounted campaigns on their behalf, which resulted in the establishment of a Joint Senate and House of Commons Committee on the Indian Act, which held hearings from 1946-1948. A revised *Indian Act* was passed in 1951. Under the new Act, the Minister's role was reduced to a supervisory role and the self-control of bands

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34 J. Leslie, and R. Maguire (eds), *The Historical Development of the Indian Act*, 2nd ed., Department of Indian and Northern Affairs, Canada, 1978, at 61.

35 See generally R.H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland*, University of Saskatchewan Native Law Centre, Saskatoon, 1990, at 136.

36 First Nations peoples living in British Columbia, Manitoba and the North West Territories were originally exempt from the enfranchisement provisions.

was increased in the areas of the management of surrendered and reserve lands, band funds and the administration of by-laws. Also, women were granted the vote in band council elections.

1973-

In 1973, the Supreme Court of Canada handed down its decision in *Calder*. That case determined for the first time that aboriginal title existed. This case was the impetus for the federal government to open negotiations with aboriginal peoples over land rights. This led to the comprehensive and specific claims processes still in existence. The decision in *Calder* is dealt with in Chapter 2, while the claims process is considered later in this chapter. In 1982, at the time of patriation of the Canadian Constitution, s 35(1) was inserted into the Constitution, thus protecting aboriginal rights existing in 1982. This consitutional protection is also considered later in this chapter. Other recent developments are also considered later in this chapter.

Legislative Power

> *Kruger v. R.* (1978) 75 D.L.R. (3d) 434.
> *Re Stony Plain Indian Reserve No 135* (1982) 130 D.L.R. (3d) 636.

In Canada, the Federal Government has exclusive power over 'Indians, and Lands reserved for Indians' under s 91(24) of the *Constitution Act*, 1867. This contrasts with Australia, where the State and Federal Governments have concurrent jurisdiction over Aboriginal peoples.

The provinces have no head of legislative power under the Constitution that allows them to legislate for Indians. However, by virtue of s 88 of the *Indian Act*, provincial laws can still apply to Indians in two circumstances.

First, if a provincial law is of general application and not a law specifically relating to Indians it will apply to them: See *Kruger*. An example of such a law may be traffic regulations or child welfare laws. Second, if an Act applies to Indians because it regulates them as Indians that law is incorporated into federal law by s 88. Note that s 88 relates only to Indians covered by the *Indian Act*, not to other Indians or Indian lands: *Re Stony Plain Indian Reserve No 135*.

Section 88 provides that:

> subject to the terms of any treaty and any other Act of parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians

> in the Province, except to the extent that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws make provision for any matter for which provision is made by or under the Act.

Indian Act

A considerable number of Acts exist in Canada which regulate different aspects of the lives of Aboriginal peoples or affect aboriginal rights.[37] Of all of these, however, the *Indian Act* R.S.C. 1985 c.I-5 is the most important. The *Indian Act* was first enacted in 1876 under the authority of s 92(24) of the *Constitution Act*, 1867. While the Act has been frequently amended since, the core provisions of the Act have not changed. The Act is the principle piece of legislation through which the federal government manages reserve lands and particular aspects of the lives of those residing on reserve lands. Areas covered by the Act include:

- registration of all persons entitled to be registered as an Indian under the Act;
- creation and maintenance of bands, band lists and membership;
- reserves, surrender of reserve lands and management of those lands;
- wills and distribution of property;
- mental incompetency;
- management of Indian moneys;
- elections of chiefs and band councils;
- powers of band councils;
- taxation; and
- schools.

Under the Act, the Minister for Indian Affairs and Northern Development has wide, discretionary powers of control over Indian lands, assets and moneys. The Act also requires the Minister to supervise band elections and approve or disallow council by-laws. The Act has been widely criticised for failing to reflect the modern economic and political development of First Nations peoples. Both First Nations peoples and the Government have recognised that the Act requires substantial amendment. It may, however, be some time before this process is completed. In July, 1996, the First Nations Chiefs rejected proposed uni-lateral government amendments to the *Indian Act*, which included transfer of federal responsibilities to the provincial governments.

For the purposes of this manual, two of the key provisions of the *Indian Act* are sections 4 and 18(1). These provide that:

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[37] For a list of these see: http://www.inac.gc.ca/legisl/legisl.html

> 4. The Minister of the Interior, or the head of any department appointed for that purpose by the Governor-in-Council, shall have the control and management of the lands and property of the Indians in Canada.
>
> . . .
>
> 18(1). Subject to the provisions of this Act, reserves shall be held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the *use and benefit* of the band.

Section 18(1) has formed the basis of the Supreme Court of Canada's decisions on the fiduciary obligation, which can be found in Chapter Six.

Department of Indian and Northern Affairs Canada

The federal government department with primary responsibility for Aboriginal and Inuit affairs is the Department of Indian and Northern Affairs Canada (INAC). INAC is responsible for the funding of the delivery of services to Aboriginal and Inuit communities. The broad areas of delivery funded are for:

- operation of band and tribal councils;
- child and family services;
- social assistance;
- education;
- housing and other infrastructure;
- Indian oil and gas management;
- community economic development; and
- management of Indian lands.

INAC also has a broad responsibility for the residents and resources of the Northwest Territories and the Yukon.

INAC can be found on the internet at: http://www.inac.gc.ca/

Treaties

Prior to Confederation, almost 40 treaties were entered into between Aboriginal peoples and the British Crown (1693-1862). These treaties differ from those made in the United States. In the United States, it is considered that treaties were made between two sovereign nations: the United States and the relevant Indian Nation. Both the treaties with Indian Nations and international treaties

were made under the authority of Art. II, §2 of the Constitution of the United States. In Canada, by contrast, the Government did not consider that Indians were sovereign powers. *R. v. Bob and White* (1964) 50 D.L.R. (2d) 613, Davey JA held that an Indian Treaty is not an Executive act establishing relationships between two or more independent states acting in sovereign capacities.[38] The majority of early treaties were essentially treaties of peace.[39] Later treaties tended to follow a pattern of surrender of lands in return for particular rights, for example continued hunting and fishing rights, supplies or monetary payments.

After Confederation, the new Canadian Federal Government continued the practice of entering treaties. Treaties entered into post-Confederation are known as the 'numbered treaties' as they are consecutively numbered Treaty 1 (1871) to Treaty 11 (1921). All of the numbered treaties contain the same core provisions, and are based on the pre-confederation Robinson Treaties of 1850.[40] In all of the numbered treaties, in exchange for surrendering 'all their right and title' to their lands, the Indian peoples were to receive monetary annuities in perpetuity and reserves. Treaties 1 to 7 also included the provision of tools, livestock and seed grain to any Indian people who took up farming, as they were designed to open the West up to agricultural settlement. Treaties 3 to 11 also included a guarantee of hunting and fishing rights.

According to the Supreme Court, these treaties are *sui generis* in nature: *R. v. Simon* (1982) 130 D.L.R. (3^{d}) 636. They are not the same as a treaty created in accordance with international law. However, they do create enforceable obligations. Generally, these treaties do not create new rights, for example hunting and fishing rights, but recognise pre-existing rights. Treaty rights are supreme in relation to provincial laws by virtue of s 88 of the *Indian Act.* However, treaties do not have primacy over federal laws. As was stated by Martland J in *R. v. George* (1966) 55 D.L.R. (2^{d}) 386:

> [section] 88 was not intended to be a declaration of the paramountcy of treaties over federal legislation. The reference to treaties was incorporated into a section the purpose of which was to make provincial laws applicable to Indians, so as to preclude any interference with rights under treaties resulting from the impact of provincial legislation. (at 398)

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38 Compare this position with that in the United States, discussed earlier in this Chapter.

39 See, for example, the *Treaty or Articles Peace and Friendship Renewed*, 1752, between Governor Hopson of Nova Scotia and the Micmac, reproduced in P. Cumming, & N. Mickenberg, *Native Rights in Canada*, 2nd ed., General Publishing Co. Ltd., Toronto, 1972, at 307.

40 These consisted of the Robinson Superior Treaty of 1850, entered into between Robinson on behalf of the Crown and the Ojibewa Indians of Lake Superior, and the Robinson Huron Treaty of 1850 entered into between Robinson and the Ojibewa of Lake Huron.

An extensive discussion of the nature of treaties can be found in the decisions of *R. v. Simon* (1985) 23 C.C.C. (3d) 238 and *R. v. Sioui* (1990) 70 D.L.R. (4th) 427. The texts of most of the numbered treaties can be found on the Internet at: http://www.inac.gc.ca/treatdoc/index.html

Constitution Act, 1982 s 25 and 35(1) and Natural Resources Transfer Agreements

> *R. v. Sparrow* (1990), 70 D.L.R. (4th) 385.

Section 35 was inserted into the *Constitution Act* in 1982 at the time of the patriation of the Constitution. The section stands outside the *Canadian Charter of Rights and Freedoms* and provides that:

> 35.(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.
>
> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired. (added by *Constitutional Amendment Proclamation, 1983*.)
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons. (added by *Constitutional Amendment Proclamation, 1983*.)

In addition, s 25 provides that:

> 25 The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:
>
> (a) any rights or freedoms that have been recognised by the Royal Proclamation of October 7, 1763; and
>
> (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

Section 35 is designed to protect those aboriginal rights and treaty rights that had not been extinguished in 1982 at the time of the section's insertion into the Constitution. Thus, aboriginal rights can no longer be extinguished without consent and legislation may only infringe aboriginal rights if it passes the justification test laid down in 1990 by the Supreme Court in *Sparrow*. Section

35(3) specifically includes treaty rights embodied within land claim agreements post-1982 within the scope of the section's protection.

In *Sparrow* the appellant, a member of the Musqueam Nation in British Columbia, was charged, under the *Fisheries Act*, with fishing with a drift net longer than that permitted by the terms of his Band's Indian food fishing licence. He admitted that the facts as alleged constitute an offence, but defended the charge on the basis that he was exercising an existing aboriginal right to fish, and that the net length restriction contained in the Band's licence was invalid in that it was inconsistent with s 35(1) of the *Constitution Act, 1982*.

The Court unanimously held that s 35 provides constitutional protection to those aboriginal rights which were not extinguished prior to the coming into force of the *Constitution Act, 1982*. It was further held, however, that the Parliament still has the power to infringe these rights by regulation, provided that the legislation which so infringes meets a justification test laid down by the Court. In order for a piece of legislation which infringes Aboriginal rights to be valid, it must pass a two fold test, which can be summarised as follows:

1. Does the federal law interfere with an activity that is within the scope of the Aboriginal right?
2. If there is an interference, the federal government must show that:
   (a) there was valid reason for making the law, such as conserving and managing the resource, or preventing the exercise of a right in a way which would cause harm to the general populace or Aboriginal peoples, or other objectives which are 'compelling and substantial';
   (b) the law upholds the honour of the Crown, and is in keeping with the unique contemporary relationship grounded in history and policy, between the Crown and Canada's Aboriginal peoples. In the case of fishing, this means giving priority fishing to Aboriginal peoples, with any excess to non-Aboriginal people;
   (c) the government has addressed other factors, such as infringing the aboriginal right as little as possible, providing fair compensation to Aboriginal peoples affected, and consulting with the Aboriginal people concerned. (at 411)

Unlike s 35, s 25 is contained within the Charter of Rights and Freedoms. The Charter is designed to protect individuals against the actions of governments. Section 25 of the Charter attempts to ensure that protection of individual rights does not take away from the protection of 'aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples'. Thus, s 25 is designed to ensure that the Charter is interpreted in a manner that respects aboriginal and treaty rights. The individual freedoms protected by the Charter must be balanced with

aboriginal traditions and values.

On Alberta being admitted to the Dominion, the Alberta Natural Resources Transfer Agreements transferred all ungranted Crown lands to the Province, the title previously held by the Crown in right of Canada. Similar agreements were also signed with British Columbia, Saskatchewan, and Manitoba. These agreements include provisions relating to Indian hunting and fishing rights. An example is paragraph 12 of the Alberta Natural Resources Transfer Agreement, which provides that:

> 12. In order to secure the Indians of the Province the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them, of hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.

It was held in *Frank v. The Queen,* (1977) 75 D.L.R. (3^d) 481 that:

> It would appear that the overall purpose of s. 12 of the Natural Resources Transfer Agreement was to effect a merger and consolidation of the treaty rights theretofore enjoyed by the Indians but of equal importance was the desire to re-state and reassure to the treaty Indians the continued enjoyment of the right to hunt and fish for food. (at 484-5).

To this effect, see also *R. v. Horseman*.

Land Claims Agreements

Following the Supreme Court of Canada's decision in *Calder v. Attorney-General of British Columbia* (1973) 34 D.L.R. (3^d) 145, in which two judges held that aboriginal title was recognised by Canadian law, the Federal Government instituted a land claims process. Two types of claims process exist: comprehensive claims, and specific claims.

Comprehensive claims

Comprehensive land claims are based on the assertion of continuing Aboriginal title to lands and natural resources. The Canadian Federal Government policy stipulates that land claims may be negotiated with Aboriginal peoples in areas where claims to Aboriginal title have not been addressed by treaty or through other legal means.

According to the Government, the purpose of a comprehensive claims settlement is to clarify the rights of Aboriginal peoples to lands and resources, in a manner that will facilitate their economic growth and self-sufficiency. In order to achieve these objectives, settlement agreements define a wide range of rights and benefits to be exercised and enjoyed by claimant groups. These rights and benefits usually include full ownership of certain lands in the area covered by the settlement; guaranteed wildlife harvesting rights; guaranteed participation in land, water, wildlife and environmental management throughout the settlement area; financial compensation; resource revenue-sharing; specific measures to stimulate economic development; and a role in the management of heritage resources and parks in the settlement area. In some cases, comprehensive land claims settlements are accompanied by self-government agreements.

Since 1973, 12 Comprehensive Claims have been finalised:

- The James Bay and Northern Quebec Agreement (1975);
- The Northeastern Quebec Agreement (1978);
- The Inuvialuit Final Agreement (1984);
- The Gwich'in Agreement (1992);
- The Nunavut Land Claims Agreement (1993);
- The Sahtu Dene and Metis Agreement (1994);
- Six Yukon First Nation Final Agreements (1994) based on the Council for Yukon Indians Umbrella Final Agreement (1993) and corresponding Self-Government Agreements for:

- The Vuntut Gwich'in First Nation (1995);
- The First Nation of Nacho Nyak Dun (1995);
- The Teslin Tlingit Council (1995);
- The Champagne and Aishihik First Nations (1995);
- The Little Salmon/Carmacks First Nation (1997); and
- The Selkirk First Nation (1997).

Perhaps the best known of these is the Nunavut Land Claims Agreement, which was reached in 1993 with the Tungavik Federation of Nunavut. This is the largest comprehensive claim in Canada. The agreement will provide some 17 500 Inuit of the eastern Arctic with 350 000 square kilometres of land, financial compensation of $1.17 billion over 14 years, the right to share in resource royalties, hunting rights, and a greater role in the management of land and the environment. The final agreement committed the federal government to a process which divides the Northwest Territories and creates the new territory of Nunavut by 1999.

Descriptions of these agreements, and some of the texts of agreements can be found on the internet at: http://www.inac.gc.ca/subject/claims/comp/index.html

Specific claims and treaty land entitlement claims

Specific land claims are those arising from alleged non-fulfilment of Indian treaties and other lawful obligations, or from the alleged improper administration of lands and other assets under the *Indian Act* or other formal agreements. Those specific claims related to land generally involve either the loss of reserve lands without lawful surrender by the band concerned or the government's failure to pay compensation where lands were taken with legal authority. In addition, there are also Treaty Land Entitlement (TLE) claims. These are handled separately from other specific claims and involve claims for outstanding treaty entitlements to lands promised under a group of treaties that were signed with Indian bands, mainly in the prairie provinces. Since 1983, a total of 151 specific claims have been settled, with a total value of approximately $368 939 294.

In 1991, the Canadian Federal Government released the latest version of its Specific Claims Policy. Under this policy, claims are accepted for negotiation if it can be demonstrated the claim represents a lawful obligation of the federal government. Under the policy, the government will not refuse to negotiate claims on the grounds that they are submitted too late.

Indian Claims Commission

The Indian Claims Commission (ICC) was established in July 1991 as an independent body to inquire into and report on disputes between First Nations and the Government of Canada involving claims based on treaties, agreements or administrative actions. The ICC focuses on specific, rather than comprehensive claims.

The purposes of the Commission are to:

- review disputes between claimant bands and the government concerning the assessment of claims that have not been accepted under the policy and criteria for compensation;
- submit formal recommendations; and
- assist the government and claimant bands in arranging mediation when negotiations break down.

The Indian Claims Commission and its reports can be found on the internet at: http://www.indianclaims.ca/english/english.htm

Legal status of claims

Land claim agreements have several legal aspects. First, they are a contract between all parties: Federal, Provincial or Territorial governments, and the Aboriginal claimants. Second, comprehensive land claims and Treaty Land Entitlements are legislatively enacted. An example of this is the *Gwich'in Land Claim Settlement Act*,[41] which legislatively enacts the Gwich'in Agreement (1992). The Acts themselves are short and 'approve, give effect and declare valid' the Agreement.[42] The Agreement is generally appended as a schedule. Other specific claims may be enacted, but have not been in all cases. In some cases they are appended to Treaty Land Entitlements. Third, treaty rights are recognised and affirmed by s 35(1) of the *Constitution Act, 1982*. It is unclear exactly what scope of protection is afforded by this section. However, it appears that it is not the agreement itself that is protected. Section 35(3) expands on s 35(1) and provides that the treaty rights that are recognised and affirmed are those 'treaty rights' which now exist by way of land claims agreements. As a comprehensive land claim agreement may be hundreds of pages in length, this leaves considerable scope for disagreement as to which parts of the document embody 'rights'.

Aboriginal Self-government

In *Creating Opportunity*, the 1994 policy document of the Liberal Party of Canada, the federal government pledged to 'act on the premise that the inherent right of self-government is an existing Aboriginal and treaty right'. According to the Canadian government, self-government agreements must be negotiated with the government according to the following principles:

- the right to self-government is an existing Aboriginal right which is recognized and affirmed under the Canadian Constitution;
- self-government will be exercised within the existing Canadian Constitution. Canada's recognition of the inherent right of self-government does not mean sovereignty in the international sense. Aboriginal peoples will continue to be citizens of Canada and the province or territory where they live, but may exercise varying degrees of authority in areas of federal and provincial jurisdiction;
- due to federal fiscal constraints, all federal funding for self-government will be achieved through the reallocation of existing resources;
- federal, provincial, territorial and Aboriginal laws must work in harmony. Certain laws of overriding federal and provincial importance, such as the Criminal Code, will prevail;

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41 *Gwitch'in Land Claim Settlement Act*, R.S.C. (1992) c. G-11.8.

42 *Ibid*, s 4(1).

- the interests of all Canadians will be taken into account as agreements are negotiated;
- where all parties agree, rights in self-government agreements may be protected in new treaties under section 35 of the *Constitution Act, 1982*, in addition to existing treaties, or as part of comprehensive land claims agreements.[43]

Six self-government agreements have been negotiated as part of the comprehensive land claims settlement process. Agreements have been concluded with:

- The Vuntut Gwich'in First Nation (1995);
- The First Nation of Nacho Nyak Dun (1995);
- The Teslin Tlingit Council (1995);
- The Champagne and Aishihik First Nations (1995);
- The Little Salmon/Carmacks First Nation (1997); and
- The Selkirk First Nation (1997).

In addition, there is also self-government legislation. The *Cree Naskapi (of Quebec) Act* 1984 applies to a number of First Nations Communities in Quebec and resulted from the first two land claims agreements: the *James Bay and Northern Quebec Agreement* (1975) and the *Northeastern Quebec Agreement* (1978). The Act largely replaces the operation of the *Indian Act* in relation to the First Nations Communities who are parties to the agreements. The Act can be found on the internet at: http://www.inac.gc.ca/legisl/legisl.html

Despite these agreements and legislation, the Federal Government continues to oppose self-government claims by Aboriginal communities in the courts.

Royal Commission on Aboriginal Peoples

After five years of research and hearings, the Royal Commission on Aboriginal Peoples released its final report in November, 1996. First Nations Chiefs across Canada have adopted the RCAP Report 'in-principle', subject to further review. The Government of Canada has not adopted the Report. The RCAP Report sets out a 20 year blueprint to restructure the First Nations-Canada relationship to be on a Nation-to-Nation People-to-People basis, and to improve social and economic conditions. The Report has five volumes, and covers a wide range of contemporary issues, as well as providing historical information. The Commission recommended that a renewed relationship between Aboriginal and

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[43] See 'Aboriginal Self-Government' prepared by the Communications Branch, Department of Indian Affairs and Northern Development, Ottawa, Canada, 1995: http://www.inac.gc.ca

non-Aboriginal people in Canada be established on the basis of justice and fairness. Specifically, the five chapters are entitled:

1. Looking Forward, Looking Back;
2. Restructuring the Relationship;
3. Gathering Strength;
4. Perspectives and Realities;
5. Renewal: A Twenty-Year Commitment.

There is also a summary of recommendations.

The entire text can be accessed via the internet at:
http://www.libraxus.com/rcap/rcap_entry.htm

Further Reading:

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New Zealand (Aotearoa)

Terminology

In the following discussion English language terminology is adopted although reference is made to Maori language equivalent terms and concepts. It is acknowledged that often there is some discrepancy in meaning between the two languages when discussing matters such as the Treaty of Waitangi, resources, and other areas affecting Maori rights.[44]

[44] See D. Awatere Huata, 'Indigenous Peoples' Rights', *The Law and Politics, 1993 New Zealand*

Demographics

The latest New Zealand census, conducted in 1996, indicates that of a total population of 3 970 722, there were 523 374 people who identify as Maori. This number has increased from 1991 when there was a Maori population of only 321 396. The Maori population has a greater proportion of young people when compared with non-Maori and consequently this sector of the population is increasing comparatively faster. Further details about the Maori population, including a breakdown of Iwi numbers and composition, can be found on the New Zealand Government census location on the internet and from the Ministry of Maori Development.[45]

Government and Constitution

New Zealand was colonised by the British and it is a common law jurisdiction similar to Australia. Unlike Australia it has a unitary rather than federal structure of government. It is a constitutional monarchy but does not have a written constitution. The government's power to deal with Maori affairs derives not from a nominated head of power as under the Australian Commonwealth Constitution, but from the inherent plenary power arising from sovereignty.

With the signing of the Treaty of Waitangi in 1840, according to the English text version, sovereignty passed to the British Crown and then subsequently to the New Zealand government.[46] However the Maori text speaks of granting a right of governance rather than sovereignty. Under the principles of international law operative at that time, the British Crown acquired sovereignty over New Zealand by way of cession.[47]

The Treaty of Waitangi is recognised as the founding document of New Zealand and 'resides in the consititutional field' of the New Zealand system of government. However, the Treaty can only give rise to legally enforceable rights when incorporated into domestic New Zealand law. Many Maori want to see the Treaty incorporated into law as a fundamental constitutional document to strengthen claims to greater control over their own affairs, and to obtain

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Law Conference, 2-5 March, 1993 Conference Papers Vol 2, 84.

45 Located at http:// www.stats.govt. nz/statsweb, Te Puni Kokiri Ministry of Maori Development located at http://www.tpk.govt.nz/publish/tpkpeb/10-Social(1).htm#MaoriPopulation.

46 Note that this view is dependent on the English text version of the Treaty wherein Article 1 provides the cession of sovereignty by Maori. By contrast, the Maori text version gave the British a right of 'governance'.

47 Acquisition of sovereignty by way of cession was only one of the recognised methods of gaining sovereignty at international law. Where land was deemed *terra nullius*, the doctrine of sovereignty by occupation could apply (as in Australia). But where the land was held to be inhabited then sovereignty had to be derived from the prior sovereign: either through conquest (war) or by cession (treaty or purchase). See *Oyekan v. Adele* [1957] 2 All ER 785 at 788.

protection of Maori culture and compensation for Treaty breaches.[48]

The Treaty of Waitangi provided that the British Crown would have the right to govern but this right was dependent upon the Crown meeting its obligations to Maori people under Articles of the Treaty.[49] Recently the Treaty has been has been considered in a number of land mark cases dealing with Maori rights.[50]

In a similar manner to Australia, English common law was 'received' in New Zealand upon colonisation although the proviso exists that only such law as was applicable to the situation existing in the colony was received upon colonisation. Currently there are debates about the extent to which various aspects of English common law were received in New Zealand, and its effect upon customary rights. As Whata and Wharepouri suggest, Maori claims to customary rights such as fishing are based on the principle that:

> . . . [first,] the introduction of British law to New Zealand did not destroy pre-existing rights belonging to the original inhabitants: and second a citizen's rights will be respected unless Parliament expressly takes those rights away.[51]

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48 Te Puni Kokiri Ministry of Maori Development, Post election Brief 1996 at http://www.tpk.govt.nz/publish/tpkpeb/13-compliance.htm#ConstitutionalIssues

49 For a more complete discussion of this relationship between the Crown and Maori people (a fiduciary duty) see Chapter 5. Further discussion of the treaty is given below.

50 *New Zealand Maori Council v Attorney General* [1987] 1 N.Z.L.R. 641.

51 C. Whata & M. Wharepouri, 'Customary Rights and the Law', Casenote, *Australian Environmental Law News* No. 2, 1997, p.12.

Treaty of Waitangi

Hoani Te Heu Heu v. Aotea District Maori Land Board [1941] A.C. 308.
New Zealand Maori Council v. Attorney-General [1987] 1 N.Z.L.R. 641.
New Zealand Maori Council v. Attorney-General, [1992] 2 N.Z.L.R. 576.
New Zealand Maori Council v. Attorney-General, [1994] 1N.Z.L.R. 513 (Maori Language case).

Under the terms of the Treaty of Waitangi, the Crown was given the right to govern in New Zealand and peaceful settlement was allowed to take place. In exchange Maori rights to their lands, resources and taonga were affirmed and Maori were granted the rights and privileges of 'British citizenship'. As New Zealand became constitutionally independent from Britain the Treaty obligations of the British Crown were transferred to the Crown in New Zealand.[52]

As noted by the Maori Ministry of Development:

> Maori and Crown have had different conceptions of the meaning and legal status of the Treaty of Waitangi throughout their history. In 1877 the treaty was found by the Courts to be a "simple nullity", and this general attitude was pervasive for the next century. In contrast, the Treaty has remained for Maori a document of the utmost symbolic and moral importance which gives formal recognition to their pre-existing rights as tanata whenua.[53]

Accordingly, the two official versions of the treaty; the Maori and English texts, differ in meaning. Moreover, as discussed in recent case law considering the Treaty, 'With the passage of time, "the principles" which underlie the Treaty have become much more important than its precise terms.'[54] The idea of a partnership between Maori and the Crown based on the Treaty principles has become prominent. In this regard note Chapter Five which deals with fiduciary relationships. To fully appreciate the difference in meaning between the two

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52 Te Puni Kokiri, (Ministry of Maori development) 'Post Election Brief' 1996 located on the web at http://www.tpk.govt.nz/publish/tpkpeb/7-Treaty.htm on 10/2/98.

53 *Ibid.*

54 *New Zealand Maori Council v. Attorney-General,* [1994] 1 N.Z.L.R. 513 (Maori Language case) per Lord Woolf at 517.

texts of the Treaty it is suggested that Maori and English texts of the treaty be consulted. Copies are located on the Te Puni Kokiri (Maori Ministry of Development) site on the internet and in 'Te Roopu Whakamana I te Tiriti O Waitangi', A guide to the Waitangi Tribunal, available from the Information section of the Waitangi Tribunal.

Legal effect of the treaty

In interpreting the Treaty of Waitangi, the courts historically have consistently held the Treaty to be of no legal force, in itself, without incorporation into domestic New Zealand law.[55] A passage frequently cited on this subject in the case *of Hoani Te Heu Heu v. Aotea District Maori Land Board*:

> It is well settled that any rights purporting to be conferred by such a "treaty of cession" (sc. The Treaty of Waitangi) "cannot be enforced in the Courts, except insofar as they have been incorporated in the municipal law". . .(at 324).

Further, while Maori occupation and possession of land and maritime areas was recognised under the Treaty there is some debate as to the exact nature of what was agreed or ceded by Maori under the Treaty.[56] Thus to be legally effective in protecting Maori rights, the treaty must find expression in either the common law (i.e., judge made law) or legislation.

However, as noted in the Waitangi Tribunal Report, 'Kaitunua River Claim (WAI 4)':

> The Treaty of Waitangi has always assumed great importance in the eyes of the Maori. He believes that by the solemn agreement made with the Queen of England the peaceful colonisation of New Zealand became possible. He believes also that the Land Wars that occurred later in New Zealand's history were not the result of the Treaty but the result of failure to abide by it . . .
>
> The European on the other hand generally regarded the Treaty as an historical event which does not have much impact on modern New Zealand. This view springs largely from the judicial decisions in cases when the legal consequences of the Treaty have been in question and which have led to the conclusion that it has no place in New Zealand law. Since the passing of the *Treaty of Waitangi Act* 1975, that conclusion may require

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55 In a similar manner to Australia, international law in legal instruments such as treaties does not have effect in domestic law until it has been incorporated by means of legislation or in case law. For a statement of this rule see *Hoani Te Heu Heu v. Aotea District Maori Land Board* [1941] A.C. 308, noted in the text.

56 Article 2, Treaty of Waitangi 1840 (English text).

> reconsideration. (at 5.1 - 5.2)

From the 1860s, when the New Zealand government assumed control over Maori affairs from the British Crown,[57] the New Zealand Parliament has never ratified the full Treaty of Waitangi. However various statutes have contained provisions directing the government to have regard to principles of the Treaty in certain decision-making realms. For example, the Court stressed in the *Maori Land Council Case* that its capacity to look at the principles of the Treaty derived from s 9 of the *State-Owned Enterprises Act* 1986. Importantly, though, the court held that the Act does not permit the Crown to act in a manner which is inconsistent with the principles of the Treaty of Waitangi.

Over the last ten years there has developed a significant body of case law which has clarified the treaty obligations of the Crown. Of particular importance in marking a change in the attitude of the Court was the above mentioned *Maori Land Council Case* where the Court found that the Treaty should be interpreted in a broad manner and as an evolving instrument taking account of international human rights norms. A number of treaty principles were elucidated in the course of that decision including:

- Sovereignty was exchanged for the protection to Rangatiratanga,
- The treaty established a partnership imposing on the partners a duty to act reasonably and in good faith, and
- Maori are to retain Rangatiratanga over their resources and taonga.[58]

For a more detailed discussion of the case law interpreting the Treaty see Chapter Two ‘Recognition’ and Chapter Six ‘Fiduciary Duties’.

Future directions in the interpretation of the Treaty are perhaps encapsulated by the Waitangi Tribunal in Ngai Tahu Sea Fisheries Report (WAI 27)

> The High Court has ruled that the Treaty ‘is part of the fabric of New Zealand society’ and in certain circumstances regard may be had to its provisions in interpreting legislation. But in the absence of express legislative provision, Treaty rights cannot be enforced in the courts. Nevertheless this tribunal senses that the central importance of the Treaty in our constitutional arrangements is likely to receive growing recognition by the courts, the legislature and the executive in the foreseeable future. (at 11.4).

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57 *Constitution Act* 1852.

58 K. Connolly-Stone, (Policy Analyst, Treaty Analysis Unit, Te Puni Kokiri, Ministry of Maori Development), ‘History and Recognition of Native Title In New Zealand’ Paper delivered to Presentation to Australian Indigenous Delegation, 11 December 1997, at 5.

The Waitangi Tribunal can be found on the internet at: http://www.knowledge-basket.co.nz/topic4/waitr_db/text/wai004/toc.html.

Settlement of treaty claims

In concert with the legal decisions about the interpretation and application of the Treaty of Waitangi, a general consensus has emerged at the level of government policy of the need to settle Maori grievances arising from breaches of the Treaty. Significant steps include the legislation establishing the Waitangi Tribunal and later legislation which enlarged its jurisdiction to cover grievances dating from 1840. The introduction of a process of direct negotiation with Maori to settle claims and the subsequent conclusion of Deeds of Settlement such as those with the Ngai Tahu have also been important.

Historical Overview

Pre-1840

Maori people first reached Aotearoa, as the group of islands comprising New Zealand is known by Maori, over a millennium ago. Polynesian people departed from the present-day Cook or possibly the Society Islands, in the South Pacific and sailed south and west across more than a thousand miles of open ocean to discover and eventually settle the largest of the islands of the Pacific. The continual condensation around them, lead to the islands being known as Aotearoa: 'the land of the long white cloud.'

Maori society is structured communally with this structure revealed most clearly in the cultural association with land and waters**.** The hapu is the main basis of division in Maori society. Iwi (tribes) are broken down into hapu or kinship groups and these are comprised of whanau or extended family groups. Under the Maori system of land tenure, rights of occupation and use were divided among the whanau but the right of alienation belonged to the hapu. The hapu based its claim to territory upon a series of *take*, or rights. Rights of use and occupation covered specific resources, garden areas, and fishing areas. The rights of individuals and sub groups were always subject to greater rights in the hapu, and the hapu retained control over uncultivated lands. The take or rights could be derived from descent lines, as a result of conquest, or from a gift.

It was some 800 years after Maori settlement in Aotearoa, before the first European navigators came across the islands.[59] After this there was a period of sporadic contact between Maori and Europeans with the advent of sealing and the provisioning of passing ships, but in the early nineteenth century there were stronger moves by the British to establish more permanent settlements on the

[59] R. Walker, *Ka Whawhai Tonu Matou: Struggle Without End*, Penguin Books, Ringwood Victoria, (1990), at 78.

islands of New Zealand having recently colonised several areas of Australia[60]. This colonisation was part of a wider colonial movement by European powers into the Pacific region during the eighteenth and nineteenth centuries.[61] In a similar manner to other Indigenous peoples around the Pacific Rim, contact with Europeans lead to epidemics of disease.[62] Further, the introduction of European firearms upset the balance of power between iwi and escalated deaths in tribal wars. These two factors lead to a decimation of the Maori population.

1840-1860

At this time, it was a settled principle of British colonial law that the land rights of Indigenous people were protected by the Crown. British Colonial policy also sought to prevent private purchases of that land by settlers.[63] Under the doctrine of Crown pre-emption, the Crown had the sole right to acquire land from the Indigenous inhabitants of a new colony. This doctrine found expression in New Zealand in the *Native Land Purchase Ordinance* 1846. Once land was acquired by the Crown from Maori people, it was to be considered 'waste land' of the Crown[64], and unless required for public purpose, was available for distribution to settlers by way of Crown Grant.[65]

However while Colonial policy may have favoured the recognition of Indigenous possession of land, the reality of colonial settlement was often that such policy was ignored by settlers in the rush to occupy land.[66] Australia was colonised only shortly before New Zealand.[67] It is argued that in the light of the frontier violence which had occurred in Australia, there was support at the level of official British Colonial policy for a more peaceful settlement of New Zealand. This position, together with a range of other factors[68] favoured a policy

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60 *Ibid*.

61 R. Howitt, J. Connell, & R. Hirsch, *Resources, Nations and Indigenous Peoples*, Oxford University Press, Melbourne, (1996).

62 Walker, *supra* note 59, at 59, estimates that by 1840 the Maori Population had been reduced by 40 percent.

63 Waitangi Tribunal Report - Kaituna River Claim at 5.6.7. http://www.knowledge-basket.co.nz/topic4/waitr_db/text/wai004/doc008.html.

64 Walker *supra* note 59, at 99 argues that the issue of the Royal Charter in November 1840 breached the Treaty of Waitangi in that Governor Hobson was instructed to make grants of 'waste land' to private persons or corporate bodies. Since according to Maori custom there was no waste land in the tribal areas then such waste land was actually Maori land.

65 Letters Patent of 1840, 15 and 16 Vict. LXXII. See further, M. Litchfield, 'Confiscation of Maori Land', (1985) 15 *V.U.W.L.R.* 335. However, Governor Grey rejected the waste lands policy developed in Britain and his position was adopted in New Zealand.

66 H. Reynolds, *The Law of the Land*, 2nd ed. Penguin Books, Ringwood Australia, (1992) at 1.

67 *Ibid* at chapter 3.

68 For a discussion of this argument see K. Connolly-Stone, *supra* note 58.

of obtaining native lands by treaty or other agreement, [69] and culminated in the Treaty of Waitangi. This outcome was also influenced by the fact that Britain had earlier recognised New Zealand as a entity outside British Dominion,[70] in the light of the Maori Declaration of Independence in 1835.[71]

Lord Normanby's Instructions to Hobson, who took part in the negotiation of the Treaty of Waitangi, included the following:

> . . . (the Maori) title to their soil and to the sovereignty of New Zealand is indisputable and has been solemnly recognised by the British Government . . . [72]

The Treaty was originally negotiated between British government representatives and the leadership of some of the North Island iwi and hapu[73] and was signed at Waitangi in the Bay of Islands on 6 February 1840 by Captain William Hobson, several English residents and approximately forty-five Maori chiefs. To extend Crown authority, further copies of the Waitangi document were sent around the country for signing.[74] More information on the historical circumstances surrounding the Treaty of Waitangi is available in many of the reports of the Waitangi Tribunal.[75]

Despite the solemn promises contained in the Treaty it did little to help Maori people to retain possession of much of their land during the later part of the nineteenth century. Between 1846 and 1864 when the Crown had the sole right to acquire lands, the dealings between Maori and the government were largely confined to those of land acquisition through purchase. The *Constitution Act* of 1852 did not significantly alter this position[76] but there was an increasing

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69 Waitangi Tribunal Report - Kaituna River Claim at 5.6.7. http://www.knowledge-basket.co.nz/topic4/waitr_db/text/wai004/doc008.html

70 Walker argues that a Maori flag signifying recognition of Maori sovereignty was recognised by James Busby as the 'British Resident' in 1834. See R. Walker, *supra* note 59, at 88.

71 In 1835, 34 Maori chiefs had convened a meeting and issued a declaration that New Zealand was to be an independent state under the name of the United Tribes of New Zealand. However the strongly tribal nature of Maori society meant that a centralised authority structure of this nature was largely ineffectual.

72 Information from the Treaty of Waitangi site at http://www.archives.dia.govt.nz/holdings/treaty_small.html

73 C. Orange, *The Treaty Of Waitangi*, Bridgett Williams Books Ltd., 1987, at 46-66.

74 Information from the Treaty of Waitangi site at http://www.archives.dia.govt.nz/holdings/treaty_small.html

75 The reports are located on the Waitangi Tribunal site on the Internet and are available from the Tribunal in hard copy. Location - http://www.knowledge-basket.co.nz/waitangi/ See also R. Walker, *supra* note 59, at 90-99.

76 While the right to purchase land remained with the Crown as Huata suggested quoting A. Simpson, 'The effect of the 1852 Act was to hand power over the land to precisely those who

pressure, following the move to self-government, for more land to be made available for white settlers. A significant consequence of the move to self-government was that settlers now had effective control over land legislation.[77] An aggressive land acquisition policy resulted in 32 million acres being bought for $62,000 over 7 years.[78] While some efforts were made to protect Maori rights during this time, effective representation of Maori interests through democratic processes was largely precluded through the voting structure based on individual rather than collective ownership of property.[79]

Maori people, while at first not adverse to sales of land, found that increasingly they were forced to sell against their wishes. As Huata noted,

> By this time, however, Maori leaders had grown troubled at both the methods and speed with which their land was being bought by the settlers. Awareness amongst many tribes of the creeping alienation of their economic base provoked feelings of anxiety and hostility. They could see the miserable state that some tribes had been reduced to subsequent to selling their lands and as a consequence, became increasingly reluctant to sell.[80]

In some instances, in the light of the aggressive demands by settlers for land, open conflict developed, especially when Governor Browne adopted a policy enabling individual Maori to sell land without the consensus of tribal leaders.[81]

1860s

Early incidents escalated during the fifties until in the early 1860's the 'Maori Land Wars' erupted. As Litchfield noted,

> There was no Maori Land War as such but rather a series of battles in various parts of the North island. The Maori hapus involved did not resist as a combined force. . . There was no national uprising against the Government."[82]

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had a vested interest in dispossessing the people who owned it and at the same time to disenfranchise those who stood at risk of being disenfranchised.' D. Awatere Huata,'Indigenous Peoples' Rights', *The Law and Politics, 1993 New Zealand Law Conference*, 2-5 March, 1993 Conference Papers Vol 2,at 89.

77 *Ibid*, at 88.

78 *Ibid.*

79 *Ibid.*

80 *Ibid.*

81 For a discussion of the moves by Governor Grey to advance British settlement at the expense of Maori lands is given by R. Walker, *supra* note 59, at 105-110.

82 M. Litchfield, 'Confiscation of Maori Land', (1985) 15 *V.U.W.L.R.* 335, at 340.

Nonetheless, Imperial troops were used to quell the Maori opposition and were supported by white settlers clamouring for greater access to Maori lands.[83]

During the Land Wars and following the passage of the *New Zealand Settlements Act* 1863, in the period 1864 - 1867 approximately three and a quarter million acres of Maori land was confiscated on the ground that the owners of the land were in rebellion against the sovereignty of the Crown.[84] The *Settlements Act* was in direct conflict with the Treaty of Waitangi. The British Imperial Government reluctantly agreed to the passage of the Act, imposing but never enforcing conditions, through an Instruction in 1864. A series of amendments to the main act were passed during the next decade which reinforced the validity of the confiscation process.

In 1864 the Maori King Movement, in an effort to curb land confiscations and death rates, appealed to the Queen (Victoria), although to no avail:

> [t]o grant a government to your Maaori subjects, to those who are living on their own lands, that they may have the power to make laws regarding their own lands and race, lest they perish by the ills which have come upon them.[85]

The New Zealand Crown (executive government) generally confiscated all land within 'Districts' proclaimed under the *New Zealand Settlements Act.* Subsequently some land was returned to loyal and rebel Maori. Land required for settlement was not returned and if the original owners had not been in 'rebellion' they were paid compensation. But in many instances there was not sufficient funds to provide compensation or support for dispossessed Maori people.

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83 Walker argues that Governor Grey's plan was to invade the Waikato District on the pretext of an imminent Maori invasion of Auckland. Further, the ground was prepared for the oppressive New Zealand Settlement Acts soon after the occupation of the Waikato and justified on the basis that The tribes of the Waikato were seeking to drive out Europeans to establish a native kingdom. See R Walker, *supra* note 59, at 120-121.

84 M. Litchfield, *supra* note 82, at 335.

85 D. Awatere Huata, *supra* note 76, at 89.

Post 1860's

Maori people received some redress for grievances arising from the confiscations of their land and the devastation of Maori customary tenure in two later Royal Commissions. However the fragmentation of Maori land continued to be a concern well into the twentieth century.[86] More recently various attempts have been made to increase Maori control over land and to prevent further fragmentation of Maori customary lands through the *Te Ture Whenua Act 1993*. Some earlier measures include Maori Incorporations and Maori trusts.[87] However much of this earlier legislation was paternalistic, and largely unsuited to the range of commercial enterprises and claimant activities now undertaken by many trust boards.[88]

The Native Land Court

The Native Land Court was constituted in 1865, in part as a reaction to the Maori Land Wars. As Walker noted:

> The primary objective for which the war had been waged was the assertion of sovereignty and the acquisition of land. A more successful instrument for the achievement of both of these aims, over the 6.4 million hectares still in Maori possession was devised in the institution of the Native Land Court.[89]

The main functions of the Court were to:

1. ascertain the owners of Maori land according to Maori custom,
2. to translate Maori title lands into a title recognised by English law, and
3. to facilitate dealings in Maori land and the settlement of the colony.[90]

Once Maori had their customary title investigated by the Land Court, a freehold title was issued, generally to individuals, and then the land was freely alienable, not only to the Crown, but to private purchasers; in effect the court replaced Crown pre-emption by free trade. This process lead to the fragmentation of Maori customary (or aboriginal) title as noted above. Further losses of Maori control over their lands occurred with the introduction of the *Native Reserves Act* in 1864.

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86 Connolly-Stone, K., *supra* note 58, at 2 . Stone argues that the laws of succession compounded the problem of fragmentation of Maori customary title.

87 These are discussed by McHugh, P., in *The Fragmentation of Maori Land*, Legal Research Foundation Inc. Publication No.18, 1980.

88 Te Puni Kokiri, *supra* note 52, at 15.

89 Walker, R., *supra* note 59, at 135.

90 See Connolly-Stone, K., *supra* note 58, at 41.

A further consequence of the establishment of the Native Land Court was the effect it had on Maori communities. As long as Maori land remained in customary title it could not be alienated but when one member of a hapu applied to the Court for a grant of individual ownership, there was nothing the rest of the hapu could do to stave off the Court through assertion of mana whenua (tribal power to control land).[91] Moreover, Maori people became burdened with high costs associated with the Court process and often found themselves in debt to white settlers. As many debts were secured against Maori land, it further escalated loss of Maori lands.

The Maori Affairs Act 1953 and its Predecessors

Another factor significant in the decline of the extent of customary title was a statutory bar on asserting such title against the Crown. The most recent manifestation of the prohibition is contained in section 155 of the *Maori Affairs Act* of 1953, but this section repeated a long line of similar enactments. For example s 84 of the *Native Lands Act* 1909 provided that:

> Except so far as may be expressly provided in any other Act, the Maori customary title to land shall not be available or enforceable by proceedings in any Court or in any other manner as against Her Majesty the Queen or against any Minister of the Crown or any person employed in any Department of State acting in the execution of his office.

Significantly though, the Act did not mention customary title to resources.[92] Further, s 157 of the 1953 Act provided that customary title for all purposes shall be deemed to have been extinguished over all land which was in the possession and had continued in the possession of the Crown in a period dating from ten years before the commencement of the *Native Lands Act* 1909.

At a more general level, Walker argued that the *Maori Affairs Act* of 1953 was designed to 'mop up' the last of Maori land into Pakeha control, in that 'uneconomic' land, i.e., land deemed by European standards not to be utilised effectively, could be purchased by the Department of Maori Affairs.[93]

The statutory bar against asserting aboriginal title was removed by later legislation. Common law actions asserting aboriginal customary title were then possible. But prior to its repeal it had significant consequences for Maori customary title in not allowing the possibility of making a legal claim. Given this situation, the absence of claims seeking recognition of, and compensation

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91 R. Walker, s*upra* note 59, at 136.

92 K. Connolly Stone, *supra* note 58, at 3.

93 R. Walker, *supra* note 59, at 137.

for aboriginal title until very recently is not surprising. Also significant in this context are reforms introduced by *Te Ture Whenua Maori Act* 1993.

Te Kooti Whenua Maori - Maori Land Court

Historical overview

The Maori Land Court is the main legal forum in relation to customary Maori land. Its predecessor was the Native Land Court.[94] Information about the Maori Land Court and records of decisions since 1993 are located at the Maori Law Review internet site and hard copy of the records is available.

The Maori Land Court administers land which remains under customary title; about 4.5% of New Zealand's land area. Despite the early functioning of the Native Land Court, which effectively dispossessed many Maori, more recently the Court has become a forum for asserting collective title to disputed lands. Probably the single most significant change in the court's role occurred with the 1993 *Te Ture Whenua Maori Act*. The objects of this legislation are to 'promote and assist the return of Maori-owned land in continued Maori ownership; and [to encourage] . . . the effective use and management of Maori-owned land.'

Current structure and function of Maori Land Court and Maori Appellate Court

Established under the *Te Ture Whenua Maori Act* 1993, these courts have jurisdiction (power) to hear matters relating to Maori land. Three or more Judges of the Maori Land Court have power to act as the Maori Appellate Court. Maori Land Court rulings are legally binding on questions of property title but are also subject to appeal. The Maori Land Court and the Maori Appellate Court may state a case for the opinion of the High Court on any point of law arising in proceedings before it. The decision of the High Court is subject to an appeal to the Court of Appeal.

The function of the Maori Land Court is to contribute to:

- the administration of Maori land;
- the preservation of taonga Maori;
- the promotion of the management of Maori land by its owners, by maintaining the records of title and ownership information of Maori land;
- servicing the Maori Land Courts and related Tribunals; and
- providing land information from the Maori Land Court and Crown Agencies.[95]

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94 Maori Law Review home page located on the internet at http://www.kennett.co.nz/maorilaw/

95 This information appears on the Maori Land Court Home page on the internet. This can be

The Court also has a significant record keeping and registry function. Further information about the court can be obtained on the internet at: http://www.govt.nz/courts/

The Waitangi Tribunal (Te Roopu Whakamana I Te Tiriti o Waitangi)

The New Zealand Parliament created the Tribunal in the 1975 *Treaty of Waitangi Act* as a legislative response to Maori protests over violations of the Treaty's principles, during a period of heightened national consciousness over questions of human rights. The Tribunal was later reconstituted and the period for which it could hear claims was considerably extended by the 1985 *Treaty of Waitangi Amendment Act*.

The function of the Waitangi Tribunal is to inquire into and make recommendations upon claims made under the *Treaty of Waitangi Act* (1975), and to examine and report upon proposed legislation in light of that Act. The Tribunal hears and reports on claims by Maori that they have been or may be 'prejudicially affected' by any Crown action or petition past (since 6 February 1840), present or future.[96] The Tribunal may have up to 17 members who sit in divisions as small as 3, of whom one member must be Maori. Sittings are usually headed by a member with legal training or a judge of the Maori Land Court.

The Waitangi Tribunal has no statutory authority to make findings on questions of law. However judges in New Zealand courts can and do take Waitangi Tribunal reports into consideration in evidentiary proceedings and accord them an appropriate weight, but the New Zealand High Court and Court of Appeal have both ruled that such reports are not binding on the New Zealand courts, (*Te Runanga o Muriwhenua Inc. v. A-G* [1990] 2 N.Z.L.R. 641). Thus, in contrast to the position of the Maori Land Court, the determinations of the Waitangi Tribunal are not legally definitive but are recommendatory in nature with some exceptions.

If the Tribunal finds that the principles of the treaty have been breached, it can recommend a wide range of actions with no restrictions except that it cannot recommend the return of land held by private individuals. For small claims, affecting a hapu or extended family group (whanua), recommendations are usually specific, e.g., the return of particular lands, or payment of compensation. For larger claims affecting entire hapu or iwi, there will also usually be a recommendation for the Crown to undertake negotiations in light of

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accessed via the Te Tari Kooti/ Department of Courts home page at http://www.govt.nz/courts/

96 This information appears on the Treaty of Waitangi internet site at http://www.knowledge-basket.co.nz/waitangi/info1.htm

the Tribunal findings.

The tribunal may not now hear claims concerning commercial fisheries. These claims are regarded as settled by an agreement signed with Maori hapu in 1992 giving them a substantial interest in New Zealand commercial fisheries by way of cash, rights to fisheries quota and shares in the country's largest fishing company. This agreement is colloquially known as the 'Sealords Deal'.[97]

The reports issued by the Tribunal are extremely comprehensive, and very valuable sources of information, about Maori customary rights and contain extensive historical material. The reports are located on the internet at: http://www.knowledge-basket.co.nz/waitangi/welcome.html.

Maori Governance

The Government department with responsibility for Maori affairs generally is Te Puni Kokiri (Department of Maori Development). The Ministry is the Government's principal adviser on the Crown's relationship with iwi, hapu and Maori, and on key Government policies as they affect Maori.[98]

Maori Participation in Resource Allocation and Management

Resource Management Act (1991) 32 R.S.N.Z. [RMA].

One of the emerging issues in respect of Maori aboriginal title/rights is the extent of Maori involvement in resource management and environmental protection. In common with the United States and Canada, environmental and resource regulation has the potential to greatly impact upon the exercise of traditional rights such as hunting and fishing, and more broadly upon the extent to which traditional territories can be managed by Indigenous peoples. New Zealand has begun the process of involving Maori people in environmental and resource management at various levels and with various degrees of effectiveness.

Perhaps the most important piece of legislation in this regard is the *Resource Management Act* 1991. When this legislation was enacted there were many resource related claims pending in the courts. Contemporaneously, the Waitangi Tribunal was investigating resource related claims and had made a number of reports, recommending greater Maori involvement in resource management.

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97 For a more complete discussion see Chapter Three.

98 Information from the Te Puni Kokiri/ Ministry of Maori Affairs site on the internet at http://www.tpk.govt.nz/

Significant appellate court decisions drew attention to difficulties in the relationship between the New Zealand government and the Maori peoples regarding ultimate title to, and management of, all natural resources.

In drafting the RMA, there was provision for an accounting of Maori interests in the environment. The statute directs authorities responsible for administering the Act to 'recognise and provide' for recognition of the Maori's traditional relationship to ancestral lands, water, sacred sites, and other taonga. It also calls upon government decision-makers to have 'particular regard' to the principle of kaitiakitanga, (cultural guardianship of resources). The RMA directs authorities administering the Act to 'take into account' the 'principles of the Treaty of Waitangi.'[99] While these policy directions are more inclusive of Maori interests, the RMA largely sidesteps the conflicts over resource ownership by simply focussing upon management of resources.

Further, despite the statutory direction in the RMA to regard the principles of the Treaty of Waitangi, there are many unresolved issues. One of the central problems is the different cultural understanding of Treaty principles. As noted, there is a significant divergence in views on the meaning of the Treaty. Maori conflicts with the New Zealand government over environmental matters have continued to reflect this different understanding of the treaty as it affects ownership of resources and management influence over them.[100] To the extent that such issues remain unresolved they will continue to impact upon aboriginal title/rights questions.

As noted in the section on the interpretation of treaty principles, Maori are to retain Rangatiratanga over their resources and taonga.[101] In giving effect to this principle the question of the ownership of resources has been of crucial importance. Much of the focus of the claims settlement process has been directed to this question. One of the more important steps in this direction was the settlement deed giving Maori a share in the commercial fisheries operations.

Sealords Deal

The 'Sealord's Deal' was signed on 23 September 1993, and purports to be a final settlement of Maori fishing claims under the *Treaty of Waitangi*. As a result of the Waitangi Tribunal reports, and the decision in *Te Weehi*, the *Treaty of Waitangi (Fisheries Claims) Settlement Act* 1992 was enacted. This settlement takes the form of the allocation of monetary resources and access to

99 L. Burton & C. Cocklin, 'Resource Management and Environmental Policy Reform In New Zealand: Regionalism, Allocation, and Indigenous Relations', (1996) 7 *Col J of Int'l Law and Policy* 75 at 94.

100 *Ibid*, at 96.

101 K. Connolly Stone *supra* note 58, at 5.

commercial fisheries in return for the extinguishment of any commercial offshore rights that Maori might have.

Clause 5.1 of the Deed of Settlement provides that:

> Maori agree that this Settlement Deed, and the settlement it evidences, shall satisfy all claims, current and future, in respect of, and shall discharge and extinguish, all commercial fishing rights and interests of Maori whether in respect of sea, coastal or inland fisheries (including any commercial aspect of traditional fishing rights and interests), whether arising by statute, common law (including customary title and aboriginal title), the Treaty of Waitangi, or otherwise, and whether or not such rights have been the subject of recommendation or adjudication by Courts or the Waitangi Tribunal.

In essence, Maori were advanced $NZ 150 million in order to enable them to enter into a joint venture with Brierly Investments Limited to purchase a 100% interest in Sealord's Products Limited, a company holding 26% of total fisheries quotas. Fisheries legislation was amended to authorise the allocation to Maori of 20% of any new quota issued under the quota management system. Maori are given rights of participation and representation on bodies such as the Fisheries Management Advisory Committee, the various Conservation Authorities and Boards, and the Maori Fisheries Commission was reconstituted as the Treaty of Waitangi Fisheries Commission. Under the Deed, Maori also acknowledged that the Quota Management Scheme was both lawful and appropriate for the sustainable management of commercial fishing in New Zealand waters.

The Sealord's deal only relates to commercial fisheries. Subsistence or ceremonial fishing activities were not extinguished: See *Ngai Tahu Maori Trust Board v. Director-General of Conservation* [1995] 3 N.Z.L.R. 553. The Deed of Settlement is appended as a schedule to the decision of the New Zealand Court of Appeal in *Te Runanga o Wharekauri Rekohu v. Attorney-General* [1993] 2 N.Z.L.R. 301. As a result of the Sealord's Deal there has been considerable litigation. This has centred around the issues of:

- whether all iwi are bound by the Sealord's Deal;
- how the distribution of pre-settlement assets of the Treaty of Waitangi Fisheries Commission are to be allocated; and
- on what basis the allocation of Maori quota to the iwi is to be determined.

Further Reading and References

Treaty Hapus Coalition, Te Runanga o Ngati Poru and Tainui Maori Trust Board v. Urban Maori Authorities [1997] 1 N.Z.L.R. 513 (P.C.) - distribution

of Waitangi Tribunal Fisheries Commission's pre-settlement assets to the iwi; meaning of 'iwi'; does 'iwi' include urban Maori.

Te Runanga o Muriwhenua v. Te Runanganui o Te Upoko o Te Ika Association Inc [1996] 3 N.Z.L.R. 10 (C.A.) distribution of Waitangi Tribunal Fisheries Commission's pre-settlement assets to the iwi; meaning of 'iwi'; does 'iwi' include urban Maori.

Hauraki Maori Trust Board v Treaty of Waitangi Fisheries Commission [1995] 2 NZLR 702 - allocation of individual transferable quota to Maori iwi.

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In addition useful information can be obtained by application to the Information section of the Treaty of Waitangi. The Maori Law Review provides an overview of Maori rights issues and is published on a monthly basis.

Chapter Two

Recognition of Aboriginal Title

Introduction

The first stage to any native title claim is that of recognition. In other words, does the native title right exist? This inquiry is quite separate from that of whether the right has subsequently been extinguished, or whether the exercise of that right is impaired by valid regulation.

The existence of aboriginal, or Indian, title in the United States has been acknowledged since 1823. However, the doctrine of Indian title was settled early, and has not changed much since the end of last century. Because of the particular history of federal-Indian affairs in the United States, far more cases concern treaty rights and tribal self-regulation, than concern aboriginal title. In Canada, the decision in 1973 in *Calder v. Attorney-General of British Columbia* (1973) 34 D.L.R. (3d) 145, although arguably not conclusive, prompted the government to undertake negotiations with Aboriginal peoples. It is largely because of the reluctance of British Columbia to negotiate that in the late 1980s claims for aboriginal title again came before the Courts. In fact, there was no decisive decision of the Supreme Court of Canada on aboriginal title until 1997. In that jurisdiction, the focus of most litigation throughout the 1990s has been on aboriginal rights and s 35(1) of the *Constitution Act, 1982*.

With some exceptions, most cases in this chapter are relevant to Australia. The similarities and distinguishing factors with Australian law are discussed throughout the text. As will be seen, the doctrine of native title is arguably as broad and encompassing as that of aboriginal title in Canada and the United States.

United States

Aboriginal (or Indian) title in the United States can be described as the possessory right of Native Americans to land which they have continuously and exclusively occupied since time immemorial. Although aboriginal title is somewhat different in the United States from the doctrine of native title laid down in *Mabo v. State of Queensland (No. 2)* (1992) 175 C.L.R. 1, it is important to understand cases from the United States as they lay the foundations for subsequent developments in Canada and Australia. There are a number of cases on aboriginal title, and most cases set out the same general principles. However, compared to the law on treaty entitlements, that relating to aboriginal title is comparatively underdeveloped. The difficult issue is generally not the recognition of aboriginal title, nor even whether or not it has been extinguished, but the interaction of aboriginal and treaty rights with state law, as will be

evident from the section on hunting and fishing rights.

Recognised and Unrecognised Title

> *Lac Courte Oreilles Band Of Lake Superior Chippewa Indians v. Voight* 700 F.2d 341 (1983).

Prior to examining any cases on aboriginal title, it is necessary to make a distinction between two types of title:

1. what is known variously as aboriginal, Indian or *unrecognised* title; and
2. *recognised* title, also known as treaty-reserved rights.

The first of these refers to rights that exist by virtue of exclusive occupation and use over a long period. Although the doctrine of aboriginal title in the United States has numerous differences to our native title, it is this form of title which most closely corresponds with native title. It is recognised by the federal common law and does not depend on governmental recognition for its existence.

Recognised title refers to the situation where there has been Congressional recognition of a tribe's right to permanently occupy land either by way of statute, executive order or, more usually, by way of treaty. The treaty or statute formally recognises aboriginal title to land, and generally sets aside land as reservations. Treaty-reserved rights are rights reserved to the Indians in treaties of cession. In other words, when aboriginal title is extinguished in return for treaty rights, some aboriginal rights (generally hunting and fishing) are exempted from extinguishment. Treaty-reserved rights can only be exercised if there are aboriginal rights upon which they can be based: *United States v. Michigan* 471 F Supp 192 (1979).

In *Lac Courte Oreilles Band*, the Court of Appeal for the Seventh Circuit outlined the difference between recognised and unrecognised title. The Court stated that:

> A. Aboriginal Title Versus Treaty-Recognized Title
> Although "title" is not at issue on this appeal, an understanding of the legal distinction between aboriginal and treaty-recognized title provides a foundation for the discussion that follows.
> Aboriginal title is the right of native people in the new world to occupy and use their native area. The United States' sovereign rights to the land within its borders was subject to the aboriginal title of the various Indian tribes. The United States could, however, extinguish aboriginal title at any time and by any means. The United States did not need to compensate the Indians for the taking of such title. Essentially, aboriginal title was title good against all but the United States. E.g., Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 288-89, 99 L. Ed. 314, 75 S. Ct. 313 (1955).

> "Treaty-recognized title" is a term that refers to Congressional recognition of a tribe's right permanently to occupy land. It constitutes a legal interest in the land and, therefore, could be extinguished only upon the payment of compensation. E.g., United States v. Sioux Nation, 448 U.S. 371, 415 n. 29, 65 L. Ed. 2d 844, 100 S. Ct. 2716 (1980). The Supreme Court has made clear that abrogation of treaty-recognized title requires an explicit statement by Congress or, at least, it must be clear from the circumstances and legislative history surrounding a Congressional act. Mattz v. Arnett, 412 U.S. 481, 505, 37 L. Ed. 2d 92, 93 S. Ct. 2245 (1973). **[at 351-352]**

As indicated in the above extract, it is necessary to understand the difference between recognised title and aboriginal title as it is of considerable importance to the issue of compensation payable for extinguishment. Compensation is discussed in some detail in Chapter 7. It may also impact on the test for extinguishment. Extinguishment is considered in detail in Chapter 5. In this chapter we concentrate on unrecognised/Indian/aboriginal title, as that is the form of title which most closely corresponds to native title.

Origins of the Doctrine of Indian Title

> *Johnson and Graham's Lessee v. M'Intosh*, 8 Wheat. 543, 21 U.S. 543 (1823).
> *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

Cases on aboriginal title can be traced back to Marshall CJ's decision in *Johnson v. M'Intosh*. In *Johnson v. M'Intosh*, certain chiefs of the Illinois and Piankeshaw tribes conveyed land to the plaintiffs, who were private individuals. The question before the court was whether the conveyance to the plaintiffs was valid, and, if so, what kind of interest was acquired by the plaintiff.

Marshall CJ held that:

- that discovery gives title to the government by whose subjects the discovery was made. That title might then be completed by possession;
- the European powers gained ultimate dominion and the power to grant land, but the right of occupancy by the Indigenous inhabitants was to be respected;
- discovery gave the discoverer the exclusive right to extinguish the Indian title;
- the United States could convey good title to a third party, but that title would be subject to the Indian right of occupancy.

The following is an extract from *Johnson v. M'Intosh:*

> On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character

> and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were all in pursuit of nearly the same object, it was necessary in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.
> The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.
> Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.
> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.
> While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy. **[at 572-74]**

Marshall CJ elaborated on this in *Worchester v. Georgia*. The issue in that case was whether the state of Georgia had jurisdiction over the territory of the Cherokee Nation. Georgia had enacted laws in 1830 requiring any person living within the Cherokee Nation to have a licence from the Governor. Worchester was prosecuted for violating this law.

Marshall CJ held that:

- the Cherokee Nation was a distinct, independent political community;
- the Cherokee Nation retained their original natural rights, as the undisputed possessors of the soil, from time immemorial, subject to the limitations placed on this by the doctrine of discovery. Hence only the discoverer could deal with them; and

- the laws of Georgia had no force in Cherokee territory.

The following is an extract from *Worchester v. Georgia*.

> America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.
> After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting, and fishing.
> Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers?
> But power, war, conquest, give rights, which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions.
> The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discover of the coast of the particular region claimed. . . **[at 542-43 and 559]**

These cases are of particular significance as they are considered the foundation cases of the doctrine of aboriginal title, and have been relied on in Canada, Australia and New Zealand. In summary, these cases hold that:

- discovery gave title, against all other European governments, to the government by whose subjects discovery was made;
- that title might be completed by possession;
- the nation making the discovery had the sole right of acquiring the soil from the original inhabitants;
- the rights of the original inhabitants were not entirely disregarded; but were considerably impaired;
- they remained the rightful occupants and possessors of the land but their sovereignty was diminished;
- the original inhabitants had no right to dispose of the land; and

- if lands were transferred to a third party, those lands carried with them the continued Indian right to occupy the land (unless extinguished by Congress).

From this summary two major differences between aboriginal title in the United States and native title in Australia are clear. They are:

- that the Indian Nations retained some sovereignty, although that sovereignty had been considerably diminished. This contrasts with the Australian situation, where, according to the High Court in *Coe v. Commonwealth* (1993) 68 A.L.J.R. 110, on acquisition of the continent by Great Britain all Indigenous sovereignty was extinguished; and
- that on the transfer of lands burdened with Indian title to third parties, that Indian title continues to burden the title of the new owner, unless it has been extinguished by Congress. This is because in the United States the federal government has the exclusive right to extinguish Indian title. Thus, the grant of a fee simple interest by a State cannot extinguish Indian title. This contrasts with Australia, where both the States and the Commonwealth have the power to extinguish native title, and the acquisition of a fee simple title by a third party will extinguish native title: *Mabo v. State of Queensland (No. 2)* (1992) 175 C.L.R. 1; *Fourmile v. Selpam*, as yet unreported decision of the Federal Court of Australia (1998) 67 FCA.[1]

Nature of Indian Title

> *Oneida Indian Nation v. County of Oneida* 414 U.S. 661 (1974) (*Oneida I*).
>
> *Tee-Hit-Ton v. United States* 348 U.S. 272 (1954).
>
> *Beecher v. Wetherby* 95 U.S. 517 (1877).
>
> *Sac & Fox Tribe of Indians v United States* 383 F 2d 991 (1967).
>
> *The Prairie Band of Potawatomi Indians v. The United States* 165 F. Supp 139 (1958).
>
> *United States v. Dann* 873 F 2d 1189 (1989).

In *Oneida I*, the Oneida Indian Nations brought an action against Oneida and Madison Counties for fair rental for lands allegedly owned since time immemorial and ceded in the late 1700s to the State of New York. The Oneida Indian Nations argued that either the cession was ineffective as it had been without the consent of the federal government, or that an unconscionably low price had been paid and therefore damages in the form of fair rental should be

[1] See further, Chapter Five “Extinguishment”.

awarded.

The United States Supreme Court considered the nature of Indian title. According to the Court:

- the Indian's possessory right is only a right of occupation;
- it is not a property right and merely constitutes a permission to occupy land which is revokable by Congress;
- Indian title operates as an encumbrance on the fee simple title of the United States.(at 667)

The following is an extract from *Oneida I*:

> It very early became accepted doctrine in this Court that although fee title to the lands occupied by Indians when the colonists arrived became vested in the sovereign -- first the discovering European nation and later the original States and the United States -- a right of occupancy in the Indian tribes was nevertheless recognized. That right, sometimes called Indian title and good against all but the sovereign, could be terminated only by sovereign act. Once the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, was extinguishable only by the United States. The Federal Government took early steps to deal with the Indians through treaty, the principal purpose often being to recognize and guarantee the rights of Indians to specified areas of land. This the United States did with respect to the various New York Indian tribes, including the Oneidas. The United States also asserted the primacy of federal law in the first Nonintercourse Act passed in 1790, 1 Stat. 137, 138, which provided that "no sale of lands made by any Indians . . . within the United States, shall be valid to any person . . . or to any state . . . unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." This has remained the policy of the United States to this day. See 25 U. S. C. @ 177.
>
> In United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 345 (1941), a unanimous Court succinctly summarized the essence of past cases in relevant respects:
>
> > "Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States.' Cramer v. United States, 261 U.S. 219, 227. This policy was first recognized in Johnson v. M'Intosh, 8 Wheat. 543, and has been repeatedly reaffirmed. Worcester v. Georgia, 6 Pet. 515; Mitchel v. United States, 9 Pet. 711; Chouteau v. Molony, 16 How. 203; Holden v. Joy, 17 Wall. 211; Buttz v. Northern Pacific Railroad[, 119 U.S. 55]; United States v. Shoshone Tribe, 304 U.S. 111. As stated in Mitchel v. United States, supra, p. 746, Indian 'right of occupancy is considered as sacred as the fee simple of the whites."
>
> The Santa Fe case also reaffirmed prior decisions to the effect that a tribal right of occupancy, to be protected, need not be "based upon a treaty, statute, or other formal government action." Id., at 347. Tribal rights were nevertheless entitled to the

> protection of federal law, and with respect to Indian title based on aboriginal possession, the "power of Congress . . . is supreme." Ibid. **[at 667-669, footnotes omitted]**

In *Tee-Hit-Ton*, a group of American Indians residing in Alaska claimed compensation for the taking by the United States of timber which was on land that allegedly belonged to the tribe. The Supreme Court considered the nature of the appellant's interest in the land as a prerequisite to determining whether there had been a compensable taking. The appellants claimed 'full proprietary ownership' of the land, or at least a recognisable right to unrestricted occupation and use. The appellants claimed that they had continuously occupied and used the land from time immemorial and that they had a well-developed social order, which included a concept of property ownership.

The Supreme Court held that:

- Indian title is not a property right, but a right of possession or occupancy;
- the sovereign protects that right against intrusion by third parties but may terminate it without any legally enforceable obligation to compensate the Indians.

The following is an extract from *Tee-Hit-Ton:*

> The nature of aboriginal Indian interest in land and the various rights as between the Indians and the United States dependent on such interest are far from novel as concerns our Indian inhabitants. It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised "sovereignty," as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.
> This position of the Indian has long been rationalized by the legal theory that discovery and conquest gave the conquerors sovereignty over and ownership of the lands thus obtained. 1 Wheaton's International Law, c. V. The great case of *Johnson v. McIntosh*, 8 Wheat. 543, denied the power of an Indian tribe to pass their right of occupancy to another. It confirmed the practice of two hundred years of American history "that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest." P. 587.**[at 279-280]**

In *Beecher v. Wetherby*, a tract of land which Indians were expressly permitted by the United States to occupy, was granted to Wisconsin. In a controversy over timber, the question arose as to the validity of Wisconsin's title to the land. The Court held Wisconsin's title to the land was good, with the following

qualification: if Indian land is taken by a third party, for example, under a state grant, the grantee takes only a 'naked' fee simple, and the Indian right of occupancy continues. Therefore, a defining characteristic of Indian title is that it is inalienable except to the Federal government.

The following is an extract from *Beecher v. Whetherby*:

> The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians: that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians. The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the government."**[at 525, quoted with approval in *Tee-Hit-Ton*, at 281.]**

Indian title is generally communal. The Court held in *Sac & Fox Tribe of Indians* that right of occupancy is vested in the tribe, even though the lands are held by the tribe for the common use and equal benefit of all the members. Any individual right depends on tribal law or custom. (*Sac* at 997) In *The Prairie Band of Potawatomi Indians,* the Court stated that:

> The unbroken rule of law from Johnson v. M'Intosh, 8 Wheat. 543, to date is that Indian title, unrecognized by the United States by treaty or patent, covers the right to use only, a right that may be withdrawn by the Government at any time without liability for compensation. This right to use the land is, however, the property of the band, tribe, or nation of Indians that occupies the land, either by Indian title or a right of occupancy that is recognized by the United States by treaty. The individual's right to use depends upon tribal law or custom. The tribal right to use is communal. No instance is known of individual ownership of tribal lands. Mr. Wallace testified without contradiction in this case that communal use of lands and annuities was a custom of the Potawatomies of all bands. **[at 147]**

See also *United States v. Jim* 409 U.S. 80 (1972).

However, individual aboriginal title may be established where that individual can show that his or her lineal ancestors held and occupied, as individuals, a particular tract of land, to the exclusion of all others, from time immemorial and that that title has never been extinguished.

In *United States v. Dann,* the issue arose whether individual aboriginal title could be established by the Danns, who had been grazing cattle and horses for many years on Western Shoshone ancestral land. Although the Court held that

there was no theoretical reason why individual aboriginal title could not be established, they made no factual determination of the issue, as the Danns had asserted only tribal, rather than individual, interests. The Court did find, however, that the Shoshone Tribe communal title had been extinguished, with the result that no remnant of that tribal title could survive thereafter in individuals. It must be assumed that as Congress had extinguished the tribal title it had intended to finally determine that tribal land claim. (at 1196)[2]

There would seem no reason why an individual aboriginal right could not be established in Australia. The High Court has held that although native title rights are generally communal, native title could encompass individual rights if such a right could be established according to tradition and custom: *Mabo v. State of Queensland (No. 2)* (1992) 175 C.L.R. 1, at 86, per Deane and Gaudron JJ.

In summary:

- Indian title is a right of occupation;
- Indian title is not a property right;
- Indian title is inalienable except to the federal government;
- Indian title can only be extinguished by the federal government;
- Indian title is communal; and
- Indian title can be individual.

From the above, it can be seen that Indian title in the United States has many of the same characteristics of native title. The three main differences are that:

- in Australia native title can be extinguished by both federal and state governments;
- in Australia the status of native title as either a 'property' or 'personal' interest has not been determined. The High Court in *Mabo (No. 2)* warned against imposing western notions of property interests on native title. The better view is that native title is *sui generis*; and
- to establish Indian title, occupation must be exclusive. There is no necessary requirement of exclusivity in Australia. The content of native title depends on the customs and traditions of the claimant groups. If, for example, according to custom and tradition, non-exclusive hunting and fishing rights can be established, then that would form the content of the native title right.

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[2] The Court did find that the Danns could establish an individual right based on a narrower form of individual aboriginal title based in policy and occupation, rather than aboriginal title based on occupation over a long duration. However, this second form of title is not relevant to Australian circumstances. This determination was based on the decision of the United States Supreme Court in *Cramer v. United States* 261 U.S. 219 (1923).

Proving Indian Title and Date of Establishment of Occupation

> *United States v. Santa Fe Pacific R. Co*., 314 U.S. 339 (1941).
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> *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp*. 418 F.Supp. 798 (1976).
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> *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp*. 418 F. Supp. 798 (1976).

In *United States v. Santa Fe*, an action was brought by the United States, on behalf of the Hualpai Tribe in Arizona, to stop the Santa Fe Railway Company from disturbing the tribe's possession and occupancy of lands in northwest Arizona. The tribe argued that the Railway's title to the lands was subject to the tribe's right of occupation and possession.

The Supreme Court held that:

- aboriginal title is based on actual, exclusive and continuous occupancy for a long time; and
- whether the requisite occupation and use had been shown is a question of fact:

> Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from lands wandered over by many tribes), then the Walapais had "Indian title" which, unless extinguished, survived the railroad grant of 1866. (at 345)

Narragansett Tribe of Indians concerned two actions brought by Narragansett Tribe of Indians to establish its right to possession of certain parcels of land which it contended were unlawfully held by the State of Rhode Island and some private individuals and businesses. The tribe asserted that it had aboriginal title to the land and that alienation of that land had occurred in violation of the Indian Nonintercourse Act. With respect to establishing aboriginal title, the Court of Claims held the following:

> [The] Plaintiff has alleged that it is "an Indian tribe which has resided in the State of Rhode Island since time immemorial," and that "since time immemorial the plaintiff Tribe has exclusively owned, used, and occupied" the claimed land, until the acts

complained of in these actions. These allegations, if established at trial, are sufficient to prove Indian title or "right of occupancy."
Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact. If it were established as a fact that the lands in question were, or were included in, the ancestral home of the Walapais in the sense that they constituted definable territory occupied exclusively by the Walapais (as distinguished from land wandered over by many tribes), then the Walapais had "Indian title".
Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action. As stated in the Cramer [v. United States, 261 U.S. 219, [43 S. Ct. 342, 67 L. Ed. 622] (1923)] case, "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive." 261 U.S. at page 229, 43 S. Ct. at page 344, 67 L. Ed. 622.
Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme." United States v. Santa Fe Pacific R. Co., 314 U.S. 339, 345, 347, 86 L. Ed. 260, 62 S. Ct. 248 (1941). **[at 807]**

In *Sac & Fox Tribe of Indians*, the United States Court of Claims considered whether the Sac and Fox Nation had aboriginal title to an area of land in Louisiana. The following is an extract of the facts examined by the Court of Claims in order to determine whether or not they had established title:

Originally the Sac and Fox Nation consisted of two separate and identifiable tribes of Indians belonging to the Algonquin stock. Around 1735, due to their mutual hostility and conflict with the French, they formed a close and intimate alliance, politically and socially, so that from thence forward they have been dealt with and referred to as a single nation both in their relationship with the other Indian tribes and in treaty negotiations and other matters with the United States.
It was shortly after this merger that the members of the Sac and Fox Nation began to establish themselves in Iowa. They maintained for many years and on into the 1800's several separate but permanent villages constructed along and on both sides of the Mississippi River, from as far up as the Prairie du Chien and Turkey River area, to as far down as the mouth of the Missouri River. For the most part the Fox Indians occupied the upper villages and the Sac Indians the lower villages, including the small village near the mouth of the Des Moines River. The principal Sac and Fox village sites prior to 1800, were located on the Rock River which is considerably north of the lands in controversy. Auguste Chouteau places the establishment of the Rock River location as 1764, while first references to the Sac village on the Des Moines River occur around 1780. All of these village sites are confirmed in subsequent reports, and in 1810, Zebulon Pike sets them out specifically in a report on his 1805 Mississippi River expedition.
During the War of 1812 with Great Britain, those members of the Sac and Fox Nation, who claimed allegiance to the cause of the United States departed their Mississippi River villages, and began to move down into Cession 69. There, during the years that followed, they were located at various places, and at times in the company of the

Iowas. Reports have placed them on the Salt, Missouri, Osage, Grand and Chariton Rivers.

Having established their villages on the Mississippi around 1760, the Sac and Fox began to hunt the adjacent area on both sides of the river from as far north as Prairie du Chien to as far south as the mouth of the Illinois River. The principal hunting grounds of the Sac Indians west of the Mississippi River stretched southward below the Des Moines River to the Missouri River, and includes generally the northeastern part of Cession 69 and all of Cession 50. Cession 50 lies immediately east of Cession 69 and west of the Mississippi, and embraces all those lands which were ceded to the United States by the Sac and Fox Treaty of 1804. The evidence contains many references to the Sac and Fox hunting in this vicinity which show consistent use from about 1780 to at least 1810.

During the period from 1795 to 1824, the Sac and Fox hunted extensively the area in the eastern and southern parts of Cession 69 from the Mississippi on the east to the Grand and Chariton Rivers on the west and from headwaters of such last-mentioned rivers on the north to the Missouri River on the south, and even beyond this area on the west and south. They were friendly with the Iowa and frequently hunted in the same area with them. The early explorers, traders, and military people supplied much of this evidence and information. For instance, in his 1806 Report to the Congress, Captain Lewis said that the Sac and Fox Nation sometimes hunted toward the Missouri and Lieutenant Pike in 1810, based on his explorations made in 1805, stated that the Sacs hunted on the Mississippi River and its tributaries from the Illinois River north to the River Iowa "and on the plains west of them which border the Missouri."

Captain Lewis in 1808 described the Fire Prairie, which is located near the southwest corner of Cession 69 as convenient to "the principal hunting grounds of the Ioways and Saucs."

. . .

Two years later, General Clark reported that members of the Sac and Fox Nation resided west to northwest of St. Louis on both sides of the Missouri River. In 1819, Major Long who had recently explored the Missouri River, stated that the Sac and Fox and Iowa Nations hunted on the plains towards the sources of the Grand River. Indian Agent Sibley in 1820, reported that the Sac and Fox and Iowa Indians regularly made a fall hunt on the Missouri River. Sac and Fox Agent Forsyth mentions the presence of Sac and Fox along and near the Missouri River and in the vicinity of the Grand River in the years 1817 to 1820. In an extensive report concerning the Sac and Fox Nation which Agent Forsyth originally wrote in 1822, and later revised in 1827, he says that the members of the Sac and Fox Nation would hunt "on the waters of the Missouri River and its tributaries" and sometimes further west.

From about 1812 to 1825, the Sac and Fox Nation had a village on the north side of the Missouri River between the Chariton and Grand Rivers and therefore on the west boundary of the lands claimed in this appeal. An early settler reported that the Sac and Fox had a village in 1818 east of the Chariton River in present Randolph County, Missouri, near the present town of Yates. In 1819, there was a Sac camp on the Missouri River below Fort Osage and also near the mouth of the Grand River. For a time (1815-1818) there was also a Sac village south of the Missouri River near Jefferson City, Missouri.

> During the period under consideration, it is estimated that the combined populations of the Sac and Fox tribes was between 4,400 and 6,500 persons.
> It appears from all the facts that there was some basis for the claim of the Sac and Fox Nation that it had actual exclusive and continuous use and possession of the east and south portions of Cession 69 for a long time prior to the Treaty of 1824. **[at 995-996]**

From the above, it can be seen that evidence of occupation need not be established from date of sovereignty. Rather, what is required is evidence of exclusive and continuous possession 'for a long time'. This allows for recognition that tribal lands moved, due to both hostilities from other tribes, and from dispossession by white man, as well as the fact that sovereignty to what is now the United States was acquired incrementally from other powers. The date of establishment is a fundamental point of distinction between Aboriginal title in the United States, and the doctrine of native title laid down in *Mabo v. State of Queensland (No. 2)* (1992) 175 C.L.R. 1. Although it would be open to the High Court to follow such a decision as the one above, it would be unlikely, given the holding in *Mabo (No. 2)* that native title is founded in custom and traditions existing at the date of acquisition of sovereignty.

Rights to Minerals and Timber

> *United States v. Shoshone Tribe of Indians* 304 U.S. 111 (1968).

In *Shoshone Tribe of Indians*, the question arose whether the Shoshone tribe's right to compensation for the taking of their lands included a right to compensation for timber and mineral resources.

The Court held that the Shoshone Tribe's aboriginal title was a right of occupancy, which is as 'sacred as the fee'. Minerals and timber are constituent elements of the land itself and for all practical purposes the tribe owned the land. Therefore they were entitled to compensation for the minerals and timber.

In Australia, any rights to timber and minerals would depend on establishing that customary use of timber and minerals occurred prior to sovereignty. Native title is not based on occupancy as in the United States. Rather, according to *Mabo v State of Queensland (No. 2)* (1992) 175 C.L.R. 1 it is necessary to look at the customs and traditions of the claimant group. Therefore, a right to occupy the land would not necessarily also result in a right to claim resources on that land.

Hunting and Fishing Rights

> *Spokane Tribe of Indians v. United States* 163 Ct. Cl. 58 (1963).
> *State v. Coffee* 556 P 2d. 1185 (1976).
> *United States v. Winans* 198 U.S. 371 (1905).

The importance of hunting and fishing rights has long been recognised by American courts. Hunting and fishing rights can arise from three sources: aboriginal/Indian title, treaties or executive orders. In general, United States federal law recognises and protects the aboriginal right to hunt and fish by treating lands on which Indian tribes customarily hunted or fished, as being subject to aboriginal title. As with any claim of aboriginal title, this requires the tribe to show exclusive use and occupancy of the land over a long period of time, although the seasonal and intermittent nature of hunting and fishing is acknowledged.

In *Spokane*, the Spokane Tribe of Indians challenged a determination of the Indian Claims Commission as to the extent of their aboriginal title. The Court of Claims found that the Commission had erred, as they had only included areas where there were permanent villages or habitations. However, fishing or hunting areas, even though intermittently or seasonally used, were capable of showing Indian title.(at 67) See also *Delaware Tribe of Indians v. United States*, 128 F. Supp. 391 (1955) and *Confederated Tribes v. United States* 177 Ct. Cl. 184 (1966).

In *State v. Coffee*, a member of the Kootenai Indian tribe was convicted of killing a deer out of season. She relied as a defence on her aboriginal right to hunt and fish. The Court held that aboriginal title to hunt and fish could be established:

> Aboriginal title was founded on the notion that Indian occupancy and use of the land prehistorically predated the present sovereign. Justice demanded that until some more compelling exigence was recognized, the Indian should be allowed to continue his way of life on his traditional tribal lands, Thus, the aboriginal title was more than just a right to remain camped on the land. It was a right to continue, at least temporarily, a way of life. To the extent that hunting or fishing was an integral part of the Indians way of life prior to the coming of the white man, it became a part of the way of life allowed to continue after establishment of the sovereign. Thus, hunting and fishing rights are part and parcel with aboriginal title. In *Pioneer packing Co. v. Winslow*, 159 Wash. 655, 294 P. 557 (1930), the court held that the Indians own reservation fish “by the same title and in the same right as they owned them prior to the time of the making of

the treaty". (at 980)

The Court found that the Kootenai aboriginal title had already been extinguished by treaty in 1859, a fact that was evidenced by previous action by the Kootenai before the Indian Claims Commission for that extinguishment. However, the treaty excepted from cession certain hunting and fishing rights 'upon open and unclaimed land.' The Court held that this saving did preserve hunting and fishing rights on vacant land, but that as the defendant had been on private land at the time of the offence, she could not rely on aboriginal rights as a defence.

As reservations of the right to hunt and fish are not grants of the right to hunt and fish by the Government, but are merely reservations of pre-existing aboriginal rights, an express provision for food gathering right in the treaty is not necessary to establish their existence: See *Menominee Tribe v United States* 391 U.S. 404. The scope of those rights to hunt and fish then needs to be determined. Like all aboriginal title, compensation is payable for the extinguishment of recognised hunting and fishing right, but not for rights based solely in aboriginal title.

Those cases based on pre-existing aboriginal rights to hunt and fish are clearly relevant to Australia. There is no doubt in Australia that hunting and fishing rights can found native title. However, it is not clear whether hunting and fishing rights can exist independently of the soil. The above cases are consistent with the approach of Williamson J in the New Zealand Case of *Te Weehi v. Regional Fisheries Officer* [1986] 1 N.Z.L.R. 682. That case is discussed later in this chapter. The issue of whether a connection with the land is required in order to recognise a customary fishing right came before the New South Wales Court of Appeal in *Mason v. Tritton* (1994) 34 N.S.W.L.R. 572. The Court, however, declined to squarely address the issue. That case is also discussed later in this chapter.

Further Cases and Readings

United States v Alcea Band of Tillamooks 329 US 40 (1946).

United States v. Seminole Indians of Florida 180 Ct Cl 375 (1967).

Turtle Mountain Band of Chippewa Indians v. United States 490 F.2d 935 (1974).

Ordon, K., 'Aboriginal title: The Trials of Aboriginal Indian Title and Rights - An Overview of Recent Case Law', (1985) 13 *American Indian Law Review* 59.

Canada

Aboriginal rights and aboriginal title

> *Delgamuukw v. British Columbia*, as yet unreported decision of the Supreme Court of Canada, December 11, 1997 (SCC).
> *R. v. Van der Peet* (1996) 137 D.L.R. (4th) 289.
> *R. v. Adams* (1996) 138 D.L.R. (4th) 657.
> s. 35(1), *Constitution Act, 1982.*
> *Mabo v. State of Queensland (No. 2)* (1992) 175 C.L.R. 1.

Prior to examining the case law on aboriginal rights and aboriginal title in Canada, it is necessary to briefly explore what is meant by the terms 'aboriginal rights' and 'aboriginal title', and the relationship between the two. Although it has been accepted in Canada since the 1973 decision in *Calder* that aboriginal title forms part of the law of Canada, until the 1997 decision in *Delgamuukw* there had been no authoritative statement by the Supreme Court as to the nature and content of aboriginal title. After *Calder*, the Canadian Government chose to enter into negotiations with First Nations Peoples. This led to the land claims process and hence minimal litigation. In 1982, s 35(1) was inserted into the Canadian Constitution. That section states that 'the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.'[3] In recent years, judicial decisions have focused on this section, and the broad notion of 'aboriginal rights'.

'Aboriginal rights' are all those rights protected by s 35(1). The section itself does not create rights. This is apparent from the use of the word 'existing'. Rather, the section is designed to accord constitutional protection to all aboriginal rights which existed in 1982, the date at which the section was enacted. In *Van der Peet*, the Court held that aboriginal rights existed and were recognised under the common law prior to the enactment of s 35(1). However, the question of what aboriginal rights actually are has been the subject of a number of decisions. It is clear that aboriginal rights include, but are not limited to, aboriginal title.

In *Van der Peet*, the Court considered the nature of aboriginal rights. This case is considered in some depth below. However, for present purposes, the Court

[3] Section 35(1) *Constitution Act, 1982* is reproduced in full and discussed in Chapter One 'Context'.

defined aboriginal rights as those practices, customs and traditions that are integral to the distinctive culture of a claimant group, for example, hunting and fishing, certain ceremonial practices etc. However, it is clear from the cases discussed below that aboriginal rights also means more than this. For example, what is the relationship between aboriginal rights generally, and aboriginal title specifically? In *Van der Peet*, L'Heureux-Dubé J described the meaning of 'aboriginal title' and 'aboriginal rights' in the following way:

> . . . it has become accepted in Canadian law that aboriginal title, and aboriginal rights in general, derive from *historic occupation and use of ancestral lands by the natives*. . .
>
> The traditional and main component of the doctrine of aboriginal rights relates to aboriginal title. . .
>
> The concept of aboriginal title, however, does not capture the entirety of the doctrine of aboriginal rights. Rather, as the name indicates, the doctrine refers to a broader notion of aboriginal rights arising out of the historic occupation and use of native ancestral lands, which relate not only to aboriginal title, but also to the component elements of this larger right - such as aboriginal rights to hunt, fish or trap, and their accompanying practices, traditions and customs. (at 331-332)

The matter was further clarified in *Adams* and *Delgamuukw*. In *Delgamuukw*, Lamer CJ said the following about the relationship between aboriginal rights and aboriginal title:

> The picture which emerges from *Adams* is that the aboriginal rights which are recognized and affirmed by s 35(1) fall along a spectrum with respect to their degree of connection with the land. At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. However, the "occupation and use of the land" where the activity is taking place is not "sufficient to support a claim of title to the land" (at para. 26 [of *Adams*]). Nevertheless, those activities receive constitutional protection. In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. . . At the other end of the spectrum, there is aboriginal title itself. As *Adams* makes clear, aboriginal title confers more that the right to engage in site specific activities which are aspects of the practices, customs and

> traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. What aboriginal title confers is the right to the land itself. (at para 138)

Thus, according to Lamer CJ in *Delgamuukw*, aboriginal rights can be loosely characterised as encompassing the following:

1. practices, customs and traditions integral to the distinctive culture of a group;
2. site-specific activities related to a particular piece of land, but not amounting to aboriginal title; and
3. aboriginal title.

However, in *Delgamuukw*, Lamer CJ did point out that although aboriginal title is a species of aboriginal right which is recognised and affirmed by s 35(1), it is also distinct from other aboriginal rights because it arises where the connection of a group with a piece of land 'was of central significance to their distinctive culture' (at para 137). He further stated that:

> Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive culture of aboriginal societies. These activities do not constitute the right *per se*; rather, they are parasitic on the underlying title. (at para 111)

In Australia, the doctrine of native title would comprehend most of the rights claimed as aboriginal rights in Canada. However, in Australia no difference is made between a right to land, and other analogous rights - all may amount to native title. The content of native title may be a right similar to (but not equal to) fee simple ownership, as, for example, in *Mabo (No. 2)*, or it may be a right to hunt or fish seasonally. In Canada, as will be seen below, two different tests are now posited for determining the existence of an aboriginal right such as the right to hunt and fish, or to conduct ceremonies, and for determining the existence of aboriginal title. In Australia, by contrast, as all of these activities are comprehended within the doctrine of native title, we have only one - that laid down by the High Court in *Mabo (No. 2)*.

In the rest of this section on Canada we discuss the case law relating to aboriginal rights and aboriginal title and its application in Australia.

Aboriginal Rights

R. v. Delgamuukw, as yet unreported decision of the Supreme Court of Canada, December 11, 1997 (SCC).

Delgamuukw v. R. (1993), 104 D.L.R.(4th) 470 (BCCA).

R. v. Gladstone (1996), 137 D.L.R. (4th) 648.

R. v. Van der Peet (1996), 137 D.L.R. (4th) 289.

R v. N.T.C. Smokehouse Ltd (1996), 137 D.L.R. (4th) 528.

The case law on aboriginal rights has been heavily influenced by s 35(1) of the *Constitution Act, 1982*. As noted above, s 35(1) does not create rights, but protects rights existing at the date of its enactment in 1982. However, in those cases concerning s 35(1), the Supreme Court has been concerned to identify those rights that are to be protected by s 35(1), not necessarily to identify aboriginal rights *per se*. This process of identification has in turn been influenced by the understanding of various members of the Court as to the purpose of s 35(1), which broadly speaking is the protection and reconciliation of the interests which arise from the prior occupation of aboriginal peoples with Canadian sovereignty. In *Van der Peet*, Lamer CJ stated that:

> . . . what s.35(1) does is provide the constitutional framework through which the fact that the 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. The substantive rights which fall within the provision must be defined in light of this purpose; the aboriginal rights recognised and affirmed by s.35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown. (at 303)

Thus, the aboriginal rights sought to be identified and protected are those that aid in the reconciliation of pre-existing rights with Canadian sovereignty. It is this view that determines the Court's test for the identification of aboriginal rights. Different members of the Supreme Court have slightly different visions of the purpose of s 35(1), and this influences their understanding of how aboriginal rights are to be identified.

In general, in order to identify aboriginal rights (other than aboriginal title), the Supreme Court has laid down the 'integral to the distinctive culture' test.

The 'integral to the distinctive culture' test

This test originates in the Supreme Court decision in *Sparrow*, where the Court noted that:

> The scope of the existing Musqueam right to fish must now be delineated. The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. . . (at 402)

In *Delgamuukw* (BCCA) both Macfarlane and Wallace JJA held that a practice was an aboriginal right if it is an integral part of their distinctive culture. However, they did not clarify how it was to be determined whether a practice was integral. It was left to the recent decisions of the Supreme Court in *Van der Peet, Gladstone* and *N.T.C. Smokehouse* to outline the 'integral to the distinctive culture test'.

Of the three cases, the most important is that of *Van der Peet*, which lays down the test to be applied in order to determine whether a particular practice is an aboriginal right. In order to determine those rights which are considered aboriginal rights, and thus protected under s 35(1), the majority held that the basic test is whether the particular activity at issue is an element of a practice, custom or tradition which is integral to the distinctive culture of the aboriginal group claiming the right.

The following is an extract from the majority judgment in *Van der Peet*:

> [44] In order to fulfil the purpose underlying s. 35(1) – i.e., the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America aboriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions – the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans.
> [45] In Sparrow, supra, this Court did not have to address the scope of the aboriginal rights protected by s. 35(1); however, in their judgment at p. 1099 Dickson C.J.C. and La Forest J. identified the Musqueam right to fish for food in the fact that
>
> > "The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an *integral part of their distinctive culture*. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their cultural and physical survival. [Emphasis added.]"
>
> The suggestion of this passage is that participation in the salmon fishery is an

aboriginal right because it is an integral part'' of the distinctive culture'' of the Musqueam. This suggestion is consistent with the position just adopted; identifying those traditions, customs and practices that are integral to distinctive aboriginal cultures will serve to identify the crucial elements of the distinctive aboriginal societies that occupied North America prior to the arrival of Europeans.
[46] In light of the suggestion of *Sparrow*, supra, and the purposes underlying s. 35(1), the following test should be used to identify whether an applicant has established an aboriginal right protected by s. 35(1): in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right. **[at 310. © Canada Law Book Company 1996]**

How then is an integral activity identified? What factors must be taken into account? The majority identified the following factors:

- In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right. However, it must also be recognised that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure; (at 311-312)
- In assessing a claim to an aboriginal right a court must first identify the nature of the right being claimed. In order to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right, the court must first correctly determine what it is that is being claimed; (at 312)
- The court must bear in mind that the activities may be the exercise in a modern form of a practice, tradition or custom that existed prior to contact, and should vary its characterisation of the claim accordingly; (at 313)
- The claimant must demonstrate that the practice, tradition or custom was a central and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, tradition or custom was one of the things which made the culture of the society distinctive - that it was one of the things that truly made the society what it was; (at 314)
- the court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question; (at 314)

McLachlin J's dissenting judgment and criticisms of the test

McLachlin J, in dissent, criticised the majority's formulation of the 'integral to the distinctive culture' test, although she did not reject the test itself. McLachlin J had three main objections to it. First, it was held that the test was too broad. According to her Honour, it may serve to identify aboriginal rights, but is too

broad to identify those aboriginal rights that should receive constitutional protection. Also the test was found to be indeterminate - different peoples may entertain different ideas of what is distinctive, specific or central to a people. This would allow the determination of rights to be coloured by subjective views rather than objective norms. Finally, Mc Lachlin J found the test too categorical, or too 'all or nothing': either something would be integral or it wouldn't.(at 375-376)

McLachlin J's first criticism, that the test is too broad, is obviously linked to a particular view as to the function of s 35(1), and what aboriginal rights deserve constitutional protection. However, although her Honour may be of the view that the test is too broad, in Australia the converse may be true. We have no equivalent of s 35(1) and therefore are not constrained to identify only aboriginal rights deserving constitutional protection. The 'integral to the distinctive culture' test is, in fact, potentially narrower than the principles for identifying native title laid down in *Mabo (No. 2)*. Not all aboriginal customs, practices and traditions will be judged to be integral. They will, therefore, not qualify as aboriginal rights for the purposes of s 35(1). McLachlin J, herself, acknowledged that the test is designed to identify a range of rights which are lesser than those that may exist at common law.

This point can best be illustrated by reference to the Supreme Court decision in *N.T.C. Smokehouse*. In that case the appellant was convicted of an offence against fisheries regulations, and pleaded an existing aboriginal right protected by s 35(1) of the *Constitution Act, 1982* as a defence. Essentially, the appellant argued that sale of herring spawn on kelp was the modern form of a traditional activity. The Court considered the evidence in order to determine whether the sale of herring spawn on kelp was integral to the distinctive culture of the Heiltsuk Band. The Court determined that while it was a feature of their culture, it was not central. Rather, it took place as an incident to the social and ceremonial activities of the community. Thus, in its modern form it was not an aboriginal right deserving of s 35(1) protection. As can be seen from this example, the 'distinctive to the integral culture' test can place considerable limitations on what rights will be recognised.

However, McLachlin J's second and third criticisms are equally applicable to Australia. As with all native title rights, rights that are integral must be established by appropriate oral, anthropological and historical evidence. The majority's test requires some evaluation to be made as to the centrality of the custom to the group at issue. Once a value judgment has been made that the custom is not central, then it is not recognised. The problem is with who is making the value judgment. Although oral evidence is of vital importance, courts rely to a large extent on (non-Indigenous) historical and (non-Indigenous) anthropological evidence, the result of which is value judgments by one culture

as to the centrality or otherwise of features of another's culture. In contrast, the High Court's approach in *Mabo (No. 2)* (and that of McLachlin J as will be seen) simply requires evidence of what practices occurred prior to contact, with no value judgments as to their central or peripheral natures.

McLachlin J suggested a simpler, alternative approach. Rather than attempting to define an aboriginal right, and thus a principle which controls all future cases, McLachlin J held that time honoured common law methodology should prevail. According to her Honour, the preferred approach is that when:

> [c]onfronted by a particular claim, we should ask, "Is this like the sort of thing which the law has recognized in the past?'' This is the time-honoured methodology of the common law. Faced with a new legal problem, the court looks to the past to see how the law has dealt with similar situations in the past. The court evaluates the new situation by reference to what has been held in the past and decides how it should be characterized. In this way, legal principles evolve on an incremental, pragmatic basis. (at 377)

McLachlin J goes on to discuss the same legal principles applied in *Mabo (No. 2)* and in fact refers to that case with approval. Her Honour begins by considering the common law's recognition of aboriginal rights which pre-existed the arrival of Europeans.

(viii) The Common Law Principle: Recognition of Pre-Existing Rights and Customs
[263] The history of the interface of Europeans and the common law with aboriginal peoples is a long one. As might be expected of such a long history, the principles by which the interface has been governed have not always been consistently applied. Yet running through this history, from its earliest beginnings to the present time is a golden thread – the recognition by the common law of the ancestral laws and customs the aboriginal peoples who occupied the land prior to European settlement.
[264] For centuries, it has been established that upon asserting sovereignty the British Crown accepted the existing property and customary rights of the territory's inhabitants. Illustrations abound. For example, after the conquest of Ireland, it was held in The Case of Tanistry (1608), Davis 28, 80 E.R. 516, that the Crown did not take actual possession of the land by reason of conquest and that pre-existing property rights continued. Similarly, Lord Sumner wrote in In re Southern Rhodesia, [1919] A.C. 211, at p. 233 that "it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected [pre-existing aboriginal rights] and forborne to diminish or modify them". Again, Lord Denning affirmed the same rule in Oyekan v. Adele, [1957] 2 All E.R. 785 (P.C.) at p. 788:

> "In inquiring . . . what rights are recognised, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can

> make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it: *and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law*. . . [Emphasis added.]"

[265] Most recently in Mabo, the Australian High Court, after a masterful review of Commonwealth and American jurisprudence on the subject, concluded that the Crown must be deemed to have taken the territories of Australia subject to existing aboriginal rights in the land, even in the absence of acknowledgment of those rights. As Brennan J. put it at p. 58: an inhabited territory which became a settled colony was no more a legal desert than it was "desert uninhabited". Once the "fictions'' of terra nullius are stripped away, "[t]he nature and incidents of native title must be ascertained as a matter of fact by reference to [the] laws and customs'' of the indigenous people.

[266] In Canada, the Courts have recognized the same principle. Thus in Calder, supra, at p. 328, Judson J. referred to the asserted right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished.'' In the same case, Hall J. (dissenting on another point) rejected at p. 416 as "wholly wrong'' "the proposition that upon conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer.'' Subsequent decisions in this Court are consistent with the view that the Crown took the land subject to pre-existing aboriginal rights and that such rights remain in the aboriginal people, absent extinguishment or surrender by treaty. [267] In Guerin, supra, this Court re-affirmed this principle, stating at pp. 377-78:

> "In recognizing that the Proclamation is not the sole source of Indian title the Calder decision went beyond the judgment of the Privy Council in *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46. In that case Lord Watson acknowledged the existence of aboriginal title but said it had its origin in the Royal Proclamation. In this respect Calder is consistent with the position of Chief Justice Marshall in the leading American cases of Johnson v. M'Intosh, 8 Wheaton 543 (1823), and Worcester v. State of Georgia, 6 Peters 515 (1832), cited by Judson and Hall J. in their respective judgments.
>
> In *Johnson v. M'Intosh* Marshall C.J., although he acknowledged the Proclamation of 1763 as one basis for recognition of Indian title, was nonetheless of opinion that *the rights of Indians in the lands they traditionally occupied prior to European colonization both predated and survived the claims to sovereignty made by various European nations in the territories of the North American continent*. The principle of discovery which justified these claims gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians' rights in the land were obviously diminished; but their rights of occupancy and possession remained unaffected. [Emphasis added.]"

> This Court's judgment in Sparrow, supra, re-affirmed that approach. **[at 378-379. © Canada Law Book Company 1996]**

McLachlin J then discussed the nature of the customs and interests recognised. She held, as was held in *Mabo (No. 2)*, that:

- on discovering a new territory the common law recognised the custom of the aboriginal societies and their rights to their traditional lands; (at 379)
- the common law recognises all kinds of aboriginal interests and whether they exist must be ascertained as a matter of fact; (at 380)
- aboriginal rights were group rights. A particular aboriginal group lived on or controlled a particular territory for the benefit of the group as a whole. The aboriginal rights of such a group accrue to the descendants of the group, so long as they maintain their connection with the territory or resource in question; (at 381-382)

In coming to these conclusions, McLachlin J relied heavily on the decision of Brennan J in *Mabo (No. 2).* Certainly her judgment is entirely consistent with that of Brennan J. In conclusion she noted that:

> [275] It thus emerges that the common law and those who regulated the British settlement of this country predicated dealings with aboriginals on two fundamental principles. The first was the general principle that the Crown took subject to existing aboriginal interests in the lands they traditionally occupied and their adjacent waters, even though those interests might not be of a type recognized by British law. The second, which may be viewed as an application of the first, is that the interests which aboriginal peoples had in using the land and adjacent waters for their sustenance were to be removed only by solemn treaty with due compensation to the people and its descendants. This right to use the land and adjacent waters as the people had traditionally done for its sustenance may be seen as a fundamental aboriginal right. It is supported by the common law and by the history of this country. It may safely be said to be enshrined in s. 35(1) of the Constitution Act, 1982. **[at 382. © Canada Law Book Company 1996]**

The 'integral to the distinctive culture' test was also applied in *Gladstone* and *N.T.C. Smokehouse*.

Date of establishment of custom

At what date must the custom sought to be established as an aboriginal right have been 'integral to the distinctive culture' of the claimant group? This issue was discussed in both *Van der Peet* and *Gladstone*. In *Van der Peet*, the majority of the Supreme Court noted that the origins of those customs relied upon as constituting an aboriginal right must have their roots in the pre-contact era. The court, citing with approval the judgment of Brennan J in *Mabo (No. 2)*,

held that those practices and customs which constitute aboriginal rights are those which have continuity with practices and traditions which existed prior to contact with European society. However, the practices and traditions may evolve over time as long as they have that continuity with pre-contact practices. (at 316)

'Prior to contact' is, of course, a more generous date than that of sovereignty. Quite obviously, sovereignty may have been claimed some time before any contact with the Indigenous inhabitants occurred. In *Van der Peet*, L'Heureux-Dubé J rejected the majority's test of 'prior to contact' and instead held that the practice need only have formed an integral part of the culture for a 'substantial period of time'. Her Honour held that this period should be assessed on:

(1) the type of aboriginal practices, customs and traditions;

(2) the particular aboriginal culture and society; and

(3) the reference period of twenty to fifty years.(at 349-350)

In the same case, McLachlin J steered a course between that of the majority and L'Heureux-Dubé J. McLachlin J held that what must be established is:

> . . . continuity between the modern practice at issue and a traditional law or custom of native people. Most often, that law will be traceable to time immemorial; otherwise it would not be an ancestral aboriginal law or custom. But date of contact is not the only moment to consider. What went before and after can be relevant.(at 372-3)

Since the decision of the Supreme Court in *Delgamuukw* it seems clear that the view of the majority in *Van der Peet* has prevailed. The relevant date for establishment of a custom which is 'integral to the distinctive culture' is that of European contact. However, in *Delgamuukw* the majority held that the date of establishment for aboriginal rights other than aboriginal title, and for aboriginal title, are different. Therefore, while the appropriate date for aboriginal rights other than aboriginal title is that of European contact, the appropriate date for aboriginal title is sovereignty. This is discussed further below in the section on Aboriginal Title.

Applying the 'integral to the distinctive culture' test in Australia

Although McLachlin J's view is simpler and accords well with that of the High Court in *Mabo (No. 2)*, it seems clear since the decision of the Supreme Court in *Delgamuukw* that the majority view has prevailed. The 'integral to the distinctive culture' test would seem to offer little to potential native title claimants in Australia. As noted above, the test is not designed to identify *all* aboriginal rights, but rather those that deserve the protection of s 35(1), keeping in mind the purpose of that section. As Australia has no equivalent to s 35(1)

there is no particular gain in utilising a test designed to identify a restricted class of rights. The test for native title set down in *Mabo (No. 2)* is broader than the 'integral to the distinctive culture' test.

Further, the test has the potential to compound already existing problems of presenting evidence of the customs and traditions of Indigenous societies. As well as expert evidence being required as to the kinds of traditional practices and customs that existed at sovereignty, evidence is also required as to the centrality of these customs to the claimant group's culture, leading to a kind of 'double filtering' of Indigenous culture into the western legal system.

Finally, we would simply suggest that the test is overly complex. The principles laid down in *Mabo (No. 2)* as to the recognition of native title rights are relatively simple compared to those pertaining to the recognition of aboriginal rights in Canada. This is particularly so given that it is necessary to apply the 'integral to the distinctive culture' test to identify aboriginal rights which are not accompanied by a claim of aboriginal title, but unnecessary in order to identify aboriginal rights which are part of a claim of aboriginal title, as they are subsumed into the larger claim. This is further explained below in the discussion of the Supreme Court's decision in *Delgamuukw*.

Aboriginal Title

St Catherine Milling and Lumber Co. v. The Queen (1889) 14 A.C. 46.

Calder v. Attorney-General of British Columbia (1973) 34 D.L.R. (3d) 145.

Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development (1979), 107 D.L.R. (3d) 513.

Guerin v. R (1984) 13 D.L.R. (4^{th}) 321.

R. v. Delgamuukw (1993) 104 D.L.R.(4^{th}) 470 (BCCA).

R. v. Van der Peet (1996) 137 D.L.R. (4^{th}) 289.

R. v. Adams (1996) 138 D.L.R. (4^{th}) 657.

Delgamuukw v. British Columbia, as yet unreported decision of the Supreme Court of Canada, 11 December 1997 (SCC).

Mabo v. State of Queensland (No. 2) (1992) 175 C.L.R. 1.

As noted above, until the 1997 Supreme Court decision in *Delgamuukw* there had been no definitive decision in Canada as to the nature and content of native title. In this section we review the decisions on aboriginal title in Canada, beginning with the 1889 decision in *St Catherine's Milling* and concluding with *Delgamuukw*.

St Catherine's Milling

This is the most significant early Canadian case on the question of the legal status of aboriginal title. In this case, the province of Ontario challenged the federal government's right to grant a timber licence to St Catherine's Milling and Lumber Co. The constitutional reasons for this were extremely complex. Suffice to say that Ontario could succeed in its challenge if the 'Indian interest', which had existed earlier on the land over which the licence was to be granted, was an interest less than a fee simple interest. This, of course, raised the question of the nature of Indian interests in land.

The Privy Council recognised the existence of an Indian interest in land. This interest was characterised as personal and usufructuary in nature,[4] dependent on the goodwill of the Crown. An Indian interest in land was held to be 'lesser' than a fee simple interest. Indian title was a mere burden on the Crown's proprietary estate. However, the Privy Council held that the interest arose solely because of the provisions of the *Royal Proclamation of 1763*,[5] rather than by virtue of the common law.

Calder

The foundation case on common law aboriginal title in Canada is *Calder*. In *Calder*, Hall J, with whom two other members of the Court agreed, found in favour of the doctrine of aboriginal title being part of Canadian law. Judson J, with whom two other members of the court agreed, found that whatever title the Nishga may have had, had been extinguished. The seventh judge, Pigeon J, dismissed the appeal of the Nishga people on a technicality. However, the Supreme Court has referred on numerous occasions with approval to the judgments of those who found in favour of aboriginal title.

The facts of *Calder* are as follows. The Nishga people of Northwestern British Columbia sought a declaration that they had aboriginal title to their land and that this title had not been terminated. The Nishga based their claim to the land on the fact that their ancestors had been occupying and using the land from time immemorial. The leading judgment is that of Hall J, who spoke for the three

4 'Usufruct' is a common law term, which refers to the right to hunt and fish, or undertake other such activities, on someone else's land.

5 See Chapter One 'Context' for an explanation of the *Royal Proclamation of 1763.*

members of the Court who found for the Nishga.

Hall J based his decision on the following:

- a lengthy discussion of precedent from other jurisdictions, including some of the same cases relied on in *Mabo (No. 2)*. The main cases were the decisions of the United States Supreme Court in *Johnson v. M'Intosh* and *Worchester v. Georgia*, the decisions of the Privy Council in *Re Southern Rhodesia* and *Amodu Tijani v. Secretary, Southern Nigeria* [1921] 2 A.C. 339 and the judgment of Lord Watson in *St Catherine's Milling*;
- the fact that aboriginal title does not derive from treaty, executive order or any enactment (including the *Royal Proclamation* of 1763);
- the doctrine of discovery, that on discovery or conquest the aboriginal peoples of newly founded lands were conceded to be the rightful occupants of the soil with a legal as well as a just claim to retain possession of it and to use it according to their own discretions. He also determined that aboriginal title is communal in nature.(at 190-201)

As you can see from the above, the general principles of Hall J's judgment are not contrary to the decision of the majority in *Mabo (No. 2)*.

Hamlet of Baker Lake

Hamlet of Baker Lake concerned an action by the Inuit of the Baker Lake area of the Northwest Territories for a declaration that they had aboriginal title to an area of approximately 78 000 km around the community of Baker Lake. The plaintiffs also sought to restrain the government from issuing land use permits, prospecting permits and granting mining leases in the Baker Lake area.

Mahoney J of the Federal Court, Trial Division, found the following facts:

- the Inuit, or their ancestors, had lived in the area since time immemorial;
- the Inuit were nomadic and lived in small bands. Neither individuals nor bands claimed or recognised exclusive rights over a particular territory. The exigencies of survival dictated the sparse and wide ranging nature of their occupation;
- no white settlement was established in the Baker Lake area until 1914;
- in the 1960s, government policy was to encourage Inuit to leave their traditional camps and relocate in government settlements. They did, however, continue to hunt and fish in their traditional lands; and
- that an overall decline in caribou in the Baker Lake area was not significantly caused by mining activities.

Having determined these facts, Mahoney J considered the law relating to aboriginal title. In summary, he concluded that:

- the common law of Canada recognises the existence of an aboriginal title, which exists independent of the *Royal Proclamation*, legislation or any prerogative act. In coming to this conclusion, Mahoney J followed the decision in *Calder*; (at 541)
- the elements which the plaintiffs must prove in order to establish an aboriginal title at common law are:
  - that they and their ancestors were members of an organised society;
  - that the organised society occupied the specific territory over which they assert the aboriginal title;
  - that the occupation was to the exclusion of other organised societies;
  - that the occupation was an established fact at the time sovereignty was acquired by England. (at 542)

  In order to establish these points, Mahoney J relied on *Calder, Johnson v. M'Intosh, Worchester v. Georgia, In Re Southern Rhodesia* [1919] A.C. 211 and *Amodu Tijani v. Secretary, Southern Nigeria* [1921] A.C. 399.
- the nature and extent of the aboriginal peoples' physical presence on the land they occupied is to be determined subjectively in each case:

  > To the extent that human beings were capable of surviving in the barren lands, the Inuit were there; to the extent the barren lands lent themselves to human occupation, the Inuit occupied them. (at 545)

  On the evidence, Mahoney J held that the entire Baker Lake area was not exclusively occupied by the Inuit. However, he did find that:

  > . . . on the balance of probabilities, on the evidence before me, that, at the time England asserted sovereignty over the barren lands west of Hudson Bay, the Inuit were the exclusive occupants of the portion of barren lands extending from the vicinity of Baker Lake north and east towards the Arctic and Hudson Bay to the boundaries of the Baker Lake R.C.M.P. detachment area as they were in 1954. . . An aboriginal title to that territory, carrying with it the right freely to move about and hunt and fish over it, vested at common law in the Inuit. (at 547)

- the aboriginal title of the Inuit was not paramount over the mining laws. (at 557)

It can be seen from the above case that 'occupation' sufficient to found aboriginal title need not mean settled occupation, but depends upon the customs and traditions of the claimant group. Mahoney J ordered that particular lands 'are subject to the aboriginal right and title of the Inuit to hunt and fish thereon'.

Guerin

Guerin concerned the surrender for lease of 162 acres of reserve lands by the Musqueam band in 1957, 'in trust, to lease the same to such person or persons, and upon such terms as the Government of Canada may determine most conducive to our welfare and the welfare of our people.' The Crown entered a 75 year lease in 1958 upon terms and conditions substantially less advantageous than those discussed with the band. Despite the band's requests, no copy of the lease was made available to them until 1970. The Chief of the Musqueam band, in a representative action on behalf of the band, sought a declaration that the Crown in right of Canada was in breach of its trust responsibility in respect of the leasing. The band also requested substantial damages.

Clearly, the case turns on the question of the Crown's duty to a band on surrender of reserve lands. However, the Court's comments on the nature of aboriginal title are authoritative. Dickson J held that the Court in *Calder* recognised aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands.(at 335) Such a judgment was consistent with the decisions of Marshall CJ in *Johnson v. M'Intosh*. The principle of discovery gave ultimate title to the Nation which had discovered and claimed it, leading to a diminution in the rights of the Indians, but leaving their rights of occupancy and possession unaffected.(at 336) His Honour held that:

> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true, as will presently appear, that the interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with land for the benefit of the surrendering Indians . . . The nature of the Indians' interest is therefore best characterised by its general inalienability. . . Any description of Indian title which goes beyond [this] is both unnecessary and potentially misleading.(at 339)

Leaving aside the comments relating to the Crown's fiduciary duty, it is clear from the above that the nature of aboriginal title in Canada and Australia is very similar. However, Canadian Courts chose to emphasise 'use and occupation' as the basis of aboriginal title, which does differ somewhat from the basis of native title in 'custom and tradition' as held by the High Court in *Mabo (No. 2)*.

As to the *sui generis* nature of aboriginal title/rights, see also *St. Mary's Indian Band and St. Mary's Indian Band Council v. The Corporation of the City of Cranbrook and The Attorney General of Canada* (1997) 147 D.L.R. (4th) 385, which is discussed in Chapter Seven.

Delgamuukw (BCCA)

In *Delgamuukw*, aboriginal peoples claimed ownership and jurisdiction over 22 000 square miles of British Columbia. Specifically, the claim was expressed as one for 'unextinguished aboriginal rights which include a right of ownership, or in the alternative a proprietary interest in the lands and resources.' While admitting that the radical title was vested in the Crown, the appellants claimed that they were absolutely entitled to occupy and possess the land, which for all purposes was the equivalent to ownership in fee simple. The decision of the British Columbia Court of Appeal is included here (in summarised form) for the sake of completeness. However, it must be noted that a number of elements in the judgments have been superseded by the decision of the Supreme Court, which is discussed below.

The following summary is taken from the judgment of Wallace JA.

- British Columbia (like New South Wales) was acquired as a settled colony; (at 566)
- As a settled colony, the common law was imported on acquisition of sovereignty by the Oregon Boundary Treaty, but that common law was introduced subject to local circumstances (*Mabo (No. 2)*); (at 567)
- Canadian courts have recognised that the acquisition of sovereignty did not extinguish the rights of the aboriginal people to continue their traditional customs, practices and use of the tribal land in a manner integral to that indigenous way of life. Rather it recognised the historical aboriginal presence and title and served to protect aboriginal customs and practices and the traditional relationship the aboriginal people had with the land (*Hamlet of Baker Lake*, *Guerin*)); (at 568)
- Aboriginal rights take their force from the common law. Despite the unfortunate wording, Wallace JA does not appear to mean that aboriginal rights are a creature of the common law. Rather, it appears he takes a similar position to *Mabo (No. 2)* that aboriginal rights are recognised and protected by the imported common law which has now been adjusted to meet the circumstances of the colony; (at 570)
- Aboriginal rights, including aboriginal title, have their basis in the historic use and occupation of land. (*Calder*, *Guerin*). It is the traditional practices and ways of the aboriginal people associated with this occupation which attract common law protection. In *Sparrow* the Court said that the protection of aboriginal rights extended to those practices which were 'an integral part

of their distinctive culture'; (at 571-572)

- Aboriginal rights import an historical dimension which requires that the practices be part of the pre-sovereignty aboriginal society; (at 572)
- Aboriginal rights are site and activity specific and their existence turns on the particular facts of each case; (at 572)
- Where there is a pre-sovereignty aboriginal occupation and use of tribal land in a manner which is distinctive and integral to the aboriginal culture and traditional use of that land then the activity is an aboriginal right; (at 573)
- Although aboriginal rights have an historic and traditional basis, they may be exercised in a modern manner.(at 573) Wallace JA held that it was important to distinguish between the evolution or modernisation of a right, and a modern manner of exercising a right. It is the manner of exercising the right which may assume a contemporary or modern form. The needs of the aboriginal society cannot be used to define the scope of their aboriginal rights. To hold otherwise would be to ignore the historical dimension of aboriginal rights; (at 574-5)
- By the common law, claimants of aboriginal rights are required to establish the following (taken from *Hamlet of Baker Lake*):
    - that they and their ancestors were members of an organised society;
    - this society occupied the territory over which they claim aboriginal rights;
    - the practices supporting the rights were integral to the claimant's distinctive and traditional society or culture;
    - the occupation and practices existed as a matter or fact at the time of soverignty;
    - if exclusive occupation and use is claimed then the traditional occupation must have been exclusive. (at 575 and 579)

Macfarlane JA's judgment, with which Taggart JA concurred, does not differ substantially. That judgment can be summarised as follows.

- Aboriginal rights in respect of land arise from the Indians' historic occupation and possession of their tribal lands; (at 492)
- The nature and content of an aboriginal right is determined by asking what the organised society regarded as 'an integral part of their distinctive culture'; (at 492)
- A use need not have been exercised, or occupation established, since time immemorial. All the evidence need show is that it had been in effect for a sufficient length of time to become integral to the aboriginal society; (at 492)
- The common law will give effect to those traditions regarded as integral to the distinctive culture of the society and existing at the date sovereignty was asserted; (at 492)

- At the date of assertion of sovereignty, the underlying title to the lands in the colony was vested in the Crown. The Crown title was burdened with aboriginal rights; (at 493)
- Aboriginal rights may be modernised forms of traditional practices. However, a practice which became prevalent as a result of European influences would not be protected as an aboriginal right; (at 494)
- Aboriginal rights are not absolute. They are subject to regulation. However, aboriginal rights in existence as of 1982 were recognised and affirmed by s 35(1) of the *Constitution Act, 1982*; (at 494)
- Aboriginal rights are *sui generis*; (at 494)
- The scope and content of aboriginal rights may vary from context to context in accordance with distinct patterns of historical occupancy and use of land; (at 496)
- aboriginal title does not have a single, generic form encompassing all activities. Its content is determined by traditional aboriginal enjoyment; (at 497)

Van der Peet

In *Van der Peet*, a number of judges made comments about the nature of aboriginal title, although strictly speaking the case involved hunting and fishing rights. The majority of the Supreme Court[6] held the following with respect to aboriginal title:

- aboriginal title is a legal right derived from the Indians' historic occupation and possession of the land; (at 340)
- aboriginal title is based in the pre-existing societies of aboriginal peoples; (at 308)

Notably, the majority noted with approval those parts of Brennan J's judgment in *Mabo (No. 2)* which base native title in traditional laws and customs.

The following is an extract from the majority judgment in *Van der Peet:*

> The basis of aboriginal title articulated in *Calder*, supra was affirmed in *Guerin v. The Queen,* [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321(S.C.C.). The decision in *Guerin* turned on the question of the nature and extent of the Crown's fiduciary obligation to aboriginal peoples; because, however, Dickson J. based that fiduciary relationship, at p. 376, in the "concept of aboriginal, native or Indian title'', he had occasion to consider the question of the existence of aboriginal title. In holding that such title existed, he relied on Calder, supra for the proposition that "aboriginal title as a legal right *derived from the Indians' historic occupation and possession of their tribal lands''* (emphasis added). **[at 304]**

6 The majority in *Van der Peet* was Lamer CJ, with whom La Forest, Sopinka, Gonthier, Cory, Iacobucci and Major JJ concurred.

After referring to the United States Supreme Court decisions of *Johnson v. McIntosh* and *Worchester v. Georgia*, the majority referred to the decision of the Australian High Court in *Mabo (No. 2)*:

> [38] The High Court of Australia has also considered the question of the basis and nature of aboriginal rights. Like that of the United States, Australia's aboriginal law differs in significant respects from that of Canada. In particular, in Australia the courts have not as yet determined whether aboriginal fishing rights exist, although such rights are recognized by statute: Halsbury's Laws of Australia, Vol. 1, paras. 5-2250, 5-2255, 5-2260 and 5-2265. Despite these relevant differences, the analysis of the basis of aboriginal title in the landmark decision of the High Court in Mabo v. State of Queensland (No. 2) (1992), 175 C.L.R. 1, is persuasive in the Canadian context.
>
> [39] The Mabo judgment resolved the dispute between the Meriam people and the Crown regarding who had title to the Murray Islands. The islands had been annexed to Queensland in 1879 but were reserved for the native inhabitants (the Meriam) in 1882. The Crown argued that this annexation was sufficient to vest absolute ownership of the lands in the Crown. The High Court disagreed, holding that while the annexation did vest radical title in the Crown, it was insufficient to eliminate a claim for native title; the court held at pp. 50-51 that native title can exist as a burden on the radical title of the Crown: "there is no reason why land within the Crown's territory should not continue to be subject to native title. It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty".
>
> [40] From this premise, Brennan J., writing for a majority of the Court, went on at p. 58 to consider the nature and basis of aboriginal title:
>
> > "Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. The ascertainment may present a problem of considerable difficulty, as Moynihan J. perceived in the present case. It is a problem that did not arise in the case of a settled colony so long as the fictions were maintained that customary rights could not be reconciled with the institutions or the legal ideas of civilized society'', In re Southern Rhodesia, [1919] A.C., at p. 233, that there was no law before the arrival of the British colonists in a settled colony and that there was no sovereign law-maker in the territory of a settled colony before sovereignty was acquired by the Crown. These fictions denied the possibility of native title recognized by our laws. But once it is acknowledged that an inhabited territory which became a settled colony was no more a legal desert than it was "desert uninhabited'' in fact, it is necessary to ascertain by evidence the nature and incidents of native title. [Emphasis added.]"
>
> This position is the same as that being adopted here. "[T]raditional laws'' and "traditional customs'' are those things passed down, and arising, from the pre-existing culture and customs of aboriginal peoples. The very meaning of the word "tradition''

– "that which is handed down from ancestors to posterity'', Concise Oxford Dictionary, 9th ed. (Oxford: Clarendon Press, 1995) – implies these origins for the customs and laws that the Australian High Court in *Mabo* is asserting to be relevant for the determination of the existence of aboriginal title. To base aboriginal title in traditional laws and customs, as was done in Mabo, is, therefore, to base that title in the pre-existing societies of aboriginal peoples. This is the same basis as that asserted here for aboriginal rights. **[at 307-308. © Canada Law Book Company 1996]**

R. v. Adams

In *Adams*, the accused, a Mohawk, was charged with fishing without a licence contrary to the Quebec Fishery Regulations. The accused argued as a defence that he was exercising an existing aboriginal right to fish protected under s 35(1) of the *Constitution Act, 1982*.

Although the existence of aboriginal title was not directly at issue in the case, the Court made some comments concerning the nature of aboriginal title. This decision was released simultaneously with that in *R. v. Cote* (1996) 138 D.L.R. (4^{th}) 385, and should be read together with that judgment.

The Court determined that in order to resolve the appeal it was necessary to determine whether aboriginal rights were necessarily based in aboriginal title to land, or whether aboriginal title is a sub-set of the larger category of aboriginal rights, so that fishing and other aboriginal rights can exist independently of a claim to aboriginal title. As noted above, in the introduction to the Canadian section of this chapter, the Court determined that aboriginal rights exist independently of a claim of aboriginal title. In the following extract, the Court explains why the two are not necessarily linked:

[27] To understand why aboriginal rights cannot be inexorably linked to aboriginal title it is only necessary to recall that some aboriginal peoples were nomadic, varying the location of their settlements with the season and changing circumstances. That this was the case does not alter the fact that nomadic peoples survived through reliance on the land prior to contact with Europeans and, further, that many of the customs, practices and traditions of nomadic peoples that took place on the land were integral to their distinctive cultures. The aboriginal rights recognized and affirmed by s. 35(1) should not be understood or defined in a manner which excludes some of those the provision was intended to protect.

[28] Moreover, some aboriginal peoples varied the location of their settlements both before and after contact. The Mohawks are one such people; the facts accepted by the trial judge in this case demonstrate that the Mohawks did not settle exclusively in one location either before or after contact with Europeans. That this is the case may (although I take no position on this point) preclude the establishment of aboriginal title to the lands on which they settled; however, it in no way subtracts from the fact that, wherever they were settled before or after contact, *prior to contact the Mohawks engaged in practices, traditions or customs on the land which were integral to their*

distinctive culture.

[29] Finally, I would note that the Court in Van der Peet did address itself to this question, holding at para. 74 that:

> "Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land. In considering whether a claim to an aboriginal right has been made out, courts must look at both the relationship of an aboriginal claimant to the land *and* at the traditions, customs and traditions arising from the claimant's distinctive culture and society. Courts must not focus so entirely on the relationship of aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of aboriginal rights. [Emphasis in original.]"

This analysis supports the position adopted here.

[30] The recognition that aboriginal title is simply one manifestation of the doctrine of aboriginal rights should not, however, create the impression that the fact that some aboriginal rights are linked to land use or occupation is unimportant. Even where an aboriginal right exists on a tract of land to which the aboriginal people in question do not have title, that right may well be site specific, with the result that it can be exercised only upon that specific tract of land. For example, if an aboriginal people demonstrates that hunting on a specific tract of land was an integral part of their distinctive culture then, even if the right exists apart from title to that tract of land, the aboriginal right to hunt is nonetheless defined as, and limited to, the right to hunt on the specific tract of land. A site-specific hunting or fishing right does not, simply because it is independent of aboriginal title to the land on which it took place, become an abstract fishing or hunting right exercisable anywhere; it continues to be a right to hunt or fish *on the tract of land in question*.**[at 667-8. © Canada Law Book Company 1996]**

R v. Adams laid the foundations for the Supreme Court's decision in *Delgamuukw*.

Delgamuukw (SCC)

The decision of the Supreme Court of Canada in *Delgamuukw* represents the first time since *Calder* that the Court has directly considered the nature and content of aboriginal title. There are two main judgments: that of Lamer CJ, with whom Cory, McLachlin and Major JJ agreed, and that of La Forest J, with whom L'Heureux-Dubé J agreed. McLachlin J also was in substantial agreement with La Forest J's judgment and Sopinka J took no part in the judgment. The facts of *Delgamuukw* are outlined above, in the discussion of the decision of the British Columbia Court of Appeal. The appeal concerned five issues:

1. whether the pleadings were properly before the Court (the trial judge had

allowed an informal amendment and the respondents did not appeal this amendment);
2. the ability of the Supreme Court to interfere with factual findings made by the trial judge;
3. the content of aboriginal title, what is required for its proof, and how it is protected by s.35(1);
4. whether the appellants had made out a claim to self-government; and
5. whether the province had constitutional power to extinguish aboriginal rights.

For the purposes of this chapter, only the issues of content and proof will be discussed.

Lamer CJ began by describing the characteristics of aboriginal title:

- Aboriginal title is a *sui generis* interest in land. This distinguishes it form a 'normal' proprietary interest, such as the fee simple. It is also *sui generis* in the sense that it's characteristics cannot be completely understood by reference either to the common law rules of real property or the rules of property found in aboriginal legal systems. It must be understood by reference to both common law and aboriginal perspectives; (at para 112)
- Aboriginal title is inalienable. When aboriginal title has in the past been described as 'personal' [for example in *St Catherine's Milling*] it is only 'personal' in the sense that it is inalienable. It is a special proprietary interest which competes on equal footing with other proprietary interests; (at para 113)
- Aboriginal title has two sources. First, aboriginal title arises from the prior occupation of Canada by aboriginal peoples, in other words it arises from the physical fact of possession, which derives from the common law principle that occupation is proof of possession in law; Second, aboriginal title also arises from the relationship between common law and pre-existing systems of aboriginal law; (at para 114)
- Aboriginal title is held communally. It is a collective right to land held by all members of an aboriginal nation. (at para 115)

Lamer CJ went on to describe the content of aboriginal title at common law:

- Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a range of purposes, which need not be aspects of those aboriginal practices which are integral to distinctive aboriginal cultures; (at paras 111 and 117)

  This conclusion was reached for the following reasons:

  1. In *Guerin*, Dickson J held that the aboriginal interest in reserve lands and

in lands held under aboriginal title is the same. Section 18 of the *Indian Act* describes the nature of the aboriginal interest in reserve lands, and that section does not restrict the use of reserve lands to activities which are integral to distinctive aboriginal cultures. Therefore, lands held subject to aboriginal title are also capable of being used for a broad variety of purposes; (at para 121)

2. the *Indian Oil and Gas Act* presumes that the aboriginal interest in reserve land includes mineral rights. Thus, aboriginal title also encompasses mineral rights, and land held pursuant to aboriginal title should also be capable of exploitation, even though this is not a traditional use for those lands; (at para 122)
3. the conclusion that the content of aboriginal title is not restricted to those uses with their origins in practices and customs integral to the distinctive culture has wide support in the critical literature. (at para 123)

- Lands held pursuant to aboriginal title cannot be used in a manner which is irreconcilable with the nature of the attachment to land which forms the basis of the group's claim to aboriginal title. (at para 125) This inherent limit on aboriginal title arises because of the source of aboriginal title (namely prior occupation). The law of aboriginal title seeks not only to determine the historic rights of aboriginal peoples to land; but also to afford legal protection to prior occupation in the present day. Inherent in the protection of historic patterns of occupation is a recognition of the importance of the continuity of the relationship of the aboriginal community to its land over time.(at para 126) That relationship should not be prevented from continuing into the future.(at para 127) Thus, if occupation is established with reference to the use of the land as a hunting ground, then the successful claimants may not use it in such a fashion as to destroy its use as hunting grounds (by strip mining, for example).(at para 128) The rule against alienation also seeks to preserve the relationship with land.(at para 129)

- As 'aboriginal rights' generally refers to activities, and aboriginal title is a right to land, the tests for proof of aboriginal rights and for aboriginal title are different, although they share similar broad qualities. The test for aboriginal rights is laid down in *Van der Peet* (the 'integral to the distinctive culture' test), and discussed earlier in the chapter. Lamer CJ stated that in order to make out a claim for aboriginal title, the group asserting title must satisfy the following criteria:
  1. that the lands must have been occupied prior to sovereignty. (at para 145) Therefore, the date for establishment of aboriginal title - sovereignty - differs from that for the establishment of an aboriginal right - European contact. Both the aboriginal and common law perspectives are relevant to establishing occupation. (at para 148) Although the 'integral to the

distinctive culture' test is not applied to claims for aboriginal title, the connection of the claimant group with the land must be of central significance to the group; (at para 150)

2. that if present occupation is relied upon as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation because the relevant time for the determination of the aboriginal title is at the time before sovereignty. However, although there must be continuity, this requirement must not be interpreted too strictly, as there may be periodic disruptions, perhaps as the result of the unwillingness of European colonisers to recognize aboriginal title. To interpret continuity too strictly would risk perpetuating that historical injustice. Lamer CJ noted with approval the requirement of the High Court in *Mabo (No. 2)* that there must be 'substantial maintenance of connection'. (at paras 152-3) If there is substantial maintenance of the connection, it does not matter that the precise nature of the occupation may have changed over time; (at para 154)
3. that at sovereignty, occupation must have been exclusive. Exclusivity vests in the aboriginal community, which holds title, the ability to exclude others from the lands held pursuant to that title. Exclusivity is a common law principle derived from the notion of fee simple ownership and must be imported into the concept of aboriginal title with caution. Therefore, the test required to establish exclusive occupation must take into account the context of the aboriginal society at sovereignty and be sensitive to the realities of that society. (at para 156) Exclusive occupation can be demonstrated even if other groups were present, by demonstrating the intention and capacity to retain exclusive control. (at para 157) Joint title could arise from shared exclusivity (at para 158) If occupation falls short of exclusive occupation, it may still be possible to establish aboriginal rights which fall short of aboriginal title. (at para 159)

La Forest J agreed with the conclusions of Lamer CJ, but disagreed as to various aspects of his reasoning. The main points on which he disagreed are as follows:

- His Honour was reluctant to define 'aboriginal title' too precisely. Specifically, he agreed with Dickson J in *Guerin* that the only two features of aboriginal title which should be set down are that, first, aboriginal title is inalienable, and second, that in dealing with this interest the Crown is under a fiduciary obligation to treat aboriginal peoples fairly; (at para 190)
- specific provisions of the *Indian Act* and the *Indian Oil and Gas Act* do not necessarily apply to areas subject to aboriginal title simply because the interest of an Indian Band in its reserve is derived from, and of the same nature as, aboriginal title; (at para 192)

- while sovereignty is generally the appropriate time at which occupation must be specified, there may be other relevant moments. For example, after sovereignty an aboriginal community may have moved to a new area where they have remained until the present day. This may have been due to natural causes, e.g., flooding, or clashes with settlers. Aboriginal title should not be denied simply because the relocation occurred post-sovereignty; (at para 197)
- continuity may be maintained where the presence of more than one group in an area has an impact on continuity. For example, one group may cede its possession of a territory to another, or merge with another, or even conquer another; (at para 199)
- proof of occupancy is necessarily also proof that the land is of central significance to a group; (at para 199)

The remainder of La Forest J's comments related to the s 35(1), of the *Constitution Act, 1982* and the *Sparrow* justification test.

Comparison of aboriginal rights/title in Canada and native title in Australia

Post-*Delgamuukw* there is a clear difference between aboriginal title in Canada and native title in Australia. In Canada, the Supreme Court has made a distinction between aboriginal rights, which fall short of aboriginal title, and aboriginal title based on use and occupation. Aboriginal title is defined as a *sui generis*, exclusive right to land. In Australia, the content of native title, by contrast, would comprehend both aboriginal rights short of aboriginal title and aboriginal title. The content of native title depends on the customs and traditions of the claimant group. Native title might amount to an exclusive right of possession, but also may amount to a right to enter land for hunting, or fishing, or ceremonial purposes. In most cases, it is suggested that on similar facts, similar results would be reached in each jurisdiction. However, as the following examples show, that may not always be the case.

1. The first example is a claim based on traditional fishing practices. In Canada, such a claim could be run three ways. First, it could amount to an aboriginal right. Second, if the fishing practices always occurred at the same stream, it may amount to a site-specific aboriginal right. In either case, it would need to be proven that the fishing practices were integral to the distinctive culture of the claimant group. Third, the claim could be part of a wider claim for aboriginal title over the area. In this case, there would be no need to show that the fishing practice was integral to the distinctive culture of the claimant group, as it would be part of, or in the Supreme Court's words, parasitic on, the larger claim of aboriginal title. In Australia, by comparison, the claimants would simply seek to prove a native title, consisting of the right to fish, based on the customs and traditions of the claimant group.

2. The second example involves a factual situation in which an aboriginal title claim is made over an area of land. In Canada, the traditional owners would need to show exclusive use and occupation of the area. In this scenario, the claimant group has reasonably permanent settlements in the area, and hunt and fish over the remainder of the area. If they could show that their activities in the area were exclusive, this may well found a claim of aboriginal title, hunting and fishing rights being a part of that total claim, giving the aboriginal title holders the right to exclude all others (Indigenous or non-Indigenous) from the area. If not, they may be able to claim aboriginal title in the settlement areas, and aboriginal rights to engage in certain activities in the remainder of the area, as long as those activities were integral to the distinctive culture of the claimant group. In Australia, by comparison, the traditional owners would make a claim of native title - the outcome of which would directly depend on their customs and traditions. In the area in which there were settlements, the outcome may well be similar to that in *Mabo (No. 2)* itself, in which the Murray Islanders had a right similar to that of beneficial ownership. Over the rest of the area there would be a native title right to hunt and fish. If according to custom the traditional owners had the right to exclude all others, then their native title right will be exclusive of all other Indigenous peoples. However, it would not necessarily allow the native title holders to exclude non-indigenous groups.
3. The third example involves a claim whereby traditional owners trade resources with other groups as part of a ceremonial practice. Is this right to trade (either in a traditional or modernised form) part of native title in Australia, or an aboriginal right in Canada? In Canada, this practice could amount to an aboriginal right if it is integral to the distinctive culture of the claimant group. In other words, it must be central to their culture. As the case of *N.T.C. Smokehouse*, discussed above, illustrates, it may not always be possible to prove that. If it cannot be proved, then it will not be recognised as an aboriginal right, at least not one deserving of the protection of s 35(1) of the *Constitution Act, 1982*. As an alternative, if the claim is part of a broader one for aboriginal title, that right may well be recognised, as it will not be necessary to apply the 'integral to the distinctive culture' test. The right will be 'parasitic' on aboriginal title. In Australia, by comparison, if the practice is established according to traditional custom, and still continues, it should be able to be recognised as part of native title.

To summarise, the main points of distinction are:

- there is no necessary idea of exclusivity attached to a native title claim. By contrast, aboriginal title is defined as a right of exclusive use and occupation;
- in Canada, aboriginal rights and aboriginal title have different dates of

establishment. In Australia, as we only have one doctrine – that of native title – all claims have the same date of establishment;

- the doctrine of aboriginal rights does provide a way to avoid the problem of proving a 'connection with the land'. This is particularly problematic in the recognition of customary rights in the offshore.[7]

- the 'integral to the distinctive culture' test is not part of the law in Australia. It is intimately linked to s 35(1) of the *Constitution Act, 1982* in Canada, and is designed to identify rights that should receive the protection of that section, not to identify all potential aboriginal rights.

In conclusion, it should be noted that the doctrine of native title in Australia is flexible enough to encompass almost all claims that can be brought under either the doctrine of aboriginal title or aboriginal rights in Canada. In addition, the requirements of proof for native title may be simpler, as there is no need to prove that a practice was 'integral' to the claimant group. Finally, as native title encompasses most types of claims, it avoids the problems of having to determine at an early stage what kind of claim to bring - one for aboriginal rights or one for aboriginal title. Presumably, in many cases in Canada claimants will need to plead both.

New Zealand

There have been very few cases in New Zealand that have considered the doctrine of aboriginal title. This is so for two reasons. The first is the establishment of the Native Land Court in 1862 under the *Maori Affairs Act*. The purpose of the Act was to replace Crown right of pre-emption of customary land by free trade. Until that time land had to be purchased by the Crown from the Maori before it was available for grant. After 1863, once Maori had their customary title investigated by the Land Court, a freehold title was issued and then the land was freely alienable, not only to the Crown, but to private purchasers.

In conjunction with this, section 84 of the *Native Lands Act* 1909 provided that:

> Except so far as may be expressly provided in any other Act, the Maori customary title to land shall not be available or enforceable by proceedings in any Court or in any other manner as against Her Majesty the Queen or against any Minister of the Crown or any person employed in any Department of State acting in the execution of his office.

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[7] On this point see the section on 'Severability of aboriginal rights from the soil' at the end of this chapter.

This had the effect of restricting Maori claimants to the statutory jurisdiction of the Native Land Court. The modern descendent of this provision, s 155 of the *Maori Affairs Act 1953*, was finally repealed by the *Maori Affairs Act 1987*, thus making claims at common law possible.

Second, in 1975, the *Waitangi Tribunal Act* was passed. Under this Act, claims may be made to the Waitangi Tribunal. This has generally obviated the need to take action through the courts.[8]

Early Cases on Aboriginal Title

> *R. v. Symonds* (1847) N.Z.P.C.C. 387.
> *Re Lundon and Whitaker Claims* (1872) 2 N.Z.C.A. 41.
> *Wi Parata v. Bishop of Wellington* (1878) 3 N.Z. Jur 72
> *Nireaha Tamaki v. Baker* (1894) 11 N.Z.L.R. 483.
> *Nireaha Tamaki v. Baker* [1901] A.C. 561.

There were a number of early decisions on native title in New Zealand. These were all brought prior to the enactment of the *Native Lands Act*.

The foundation case on Maori title is *R. v. Symonds*.

In *R. v. Symonds*, a Mr McIntosh obtained a certificate from the governor of New Zealand purporting to waive the Crown's exclusive right of acquiring Maori land. McIntosh then purchased some of this land from the Maori. Later the Crown granted some of the same land to a Mr Symonds. McIntosh sought to have the grant to Symonds set aside. All three members of the New Zealand Supreme Court held that the Crown's certificate was ineffective as a waiver due to procedural flaws. With respect to native title, Chapman J made some comments about the nature of Maori title, and its relationship to the Crown's interest in land. These comments were cited with approval by Hall J in *Calder*, and by the Privy Council in *Nireaha Tamaki v. Baker* [1901] AC 561.

The following is an extract from the judgment of Chapman J in *Symonds*:

> The practice of extinguishing Native titles by fair purchases is certainly more than two centuries old. It has long been adopted by our government in our American colonies, and by that of the United States. It is now part of the law of the land, and although the Courts of the United States, in suits between their own subjects, will not allow a grant to be impeached under pretext that the Native title had not been extinguished, yet they would not hesitate to do so in a suit by one of the Native Indians. . . . Whatever may

[8] For information on the Waitangi Tribunal, see Chapter One 'Context'.

> be the opinion as to the strength or weakness of Native title . . . it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers. But for their protection and for the sake of humanity, the government is bound to maintain it, and the courts to assert, the Queen's exclusive right to extinguish it.
> . . .
> The assertion of the Queen's pre-emptive right supposes only a modified dominion as residing in the Natives. But it is also a principle of our law that the freehold never can be in abeyance; hence the full recognition of the modified title of the Natives, and its most careful protection, is not theoretically inconsistent with the Queen's seisin in fee as against her European subjects. This technical seisin against all the world except the natives is the strongest ground whereon the due protection of their qualified dominion can be based. **[at 390-1]**.

Chapman J repeated his views in *Symonds* in *Re Lundon and Whitaker Claims*, where he stated that:

> The Crown is bound, both by the common law of England and by its own solemn engagements, to a full recognition of Native proprietary right. Whatever the extent of that right by established Native custom appears to be, the Crown is bound to accept it. (at 49)

However, towards the end of the nineteenth century, the courts resiled from their earlier decisions regarding Maori title. In *Wi Parata v. Bishop of Wellington* the Supreme Court considered the effect of a Crown grant of land issued to the Bishop of Wellington. There had been no extinguishment of Maori title prior to the grant. Prendergast CJ held that the issue of a Crown grant implies that the Crown intended to extinguish native title. Further, executive decision to extinguish was not justiciable. According to Prendergast CJ, Maori have mere rights of occupation. (at 77-78)

Wi Parata was followed by the Court of Appeal in *Nireaha Tamaki v Baker*, in which the Maori plaintiff sought an injunction to prevent the sale of a block of land by the respondent, the Commissioner for Public Lands. The plaintiff claimed that the land was his, either by virtue of unextinguished Maori customary title, or by an order of the Native Land Court (although no certificate of title was ever issued).

In that case, Prendergast CJ stated that:

> . . . the mere assertion of the claim of the Crown is in itself sufficient to oust the jurisdiction of this or any other Court in the colony. There can be no known rule of law by which the validity of the dealings in the name and under the authority of the Sovereign with the Native tribes of this country for the extinction

> of their territorial rights can be tested. Such transactions began with the settlement of these lands; so that Native custom is inapplicable to them. The Crown is under a solemn engagement to observe strict justice in the matter, but of necessity it must be left to the conscience of the Crown to determine what is justice. The security of all titles in the country depends on maintenance of this principle. (at 488)

The decision of the Supreme Court was reversed by the Privy Council on appeal. In fact, the Privy Council was quite impolite about the decisions of the Supreme Court in both *Wi Parata* and *Nireaha Tamaki*. The Privy Council was in no doubt that an enforceable native title could exist as a matter of law.

The following is an extract from the Privy Council decision in *Nireaha Tamaki:*

> A more formidable objection to the jurisdiction [of the Court] is that no suit can be brought upon a native title. . . The [native title], it was said, depends on the grace and favour of the Crown, declared in the Treaty of Waitangi, and the Court had no jurisdiction to enforce it or entertain any question about it. Indeed, it was said in the case of *Wi Parata v. Bishop of Wellington*, which was followed by the Court of Appeal in this case, that there is no customary law of the Maoris of which the Courts of Law can take cognizance. Their Lordships think that this argument goes too far, and that it is rather late in the day for such an argument to be addressed to a New Zealand Court. It does not seem possible to get rid of the express words of the 3rd and 4th sections of the Native Rights Act, 1865, by saying (as the Chief Justice said in the case referred to) that "a phrase in a statute cannot call what is non-existent into being." It is the duty of the Courts to interpret the statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them in evidence. By the 5th section it is plainly contemplated that cases might arise in the Supreme Court in which the title or some interest in native land is involved, and in that case provision is made for the investigation of such titles and the ascertainment of such interests being remitted to a Court specially constituted for the purpose. . . [O]ne is rather at a loss to know what is meant by such expressions as "native title", "native lands", "owners" and "proprietors" or the careful provision against sale of Crown lands until native title has been extinguished, if there be no such title cognizable by the law, and no title therefore to be extinguished. Their Lordships think that the Supreme Court are bound to recognise the fact of the "rightful" possession and occupation of the natives" until extinguished in accordance with law. . . **[at 577-578] [footnote omitted]**

The Privy Council also approved the decision in *Symonds*.

However, in the following year the New Zealand Court of Appeal in effect declined to follow the Privy Council and applied the *Wi Parata* decision: see *Hohepa Wi Neera v. The Bishop of Wellington* (1902) 21 N.Z.L.R. 655, a case which had the same facts as *Wi Parata*. The Court held that the root of all title must be the Crown. It was in response to the Privy Council decision that section

84 of the *Native Lands Act* 1909 (outlined above) was enacted. This had the effect of codifying the decision in *Wi Parata*.

The common law effectively remained at that point until the 1986 decision in *Te Weehi v. Regional Fisheries Office* (1986) 1 N.Z.L.R. 682, discussed below.

Aboriginal Title

> *Te Runanganui o Te Ika Whenua Inc Society v. Attorney-General* [1994] 2 N.Z.L.R. 20.
>
> *Ngai Tahu Maori Trust Board v. Director General of Conservation* [1995] 3 N.Z.L.R. 553.

The recognition of aboriginal title in New Zealand was discussed by the New Zealand Court of Appeal in *Te Runanganui o Te Ika Whenua Inc Society*. The case concerned a proposal to constitute certain energy companies and to transfer to them the undertakings of the Bay of Plenty Electric Power Board. That board owned and controlled a dam on the Wheao River. Te Ika Whenua, which represent certain Maori interests, lodged a claim to the river with the Waitangi Tribunal and brought proceedings seeking an interim declaration that the Minister of Energy not recommend the approval of the transfer. The appellants argued that they had property rights in the rivers, based on aboriginal title, and that the transfers would prejudice those rights.

The Court of Appeal did not determine whether on the facts the appellants had established aboriginal title over the rivers, but discussed the concept of aboriginal title generally and concluded that aboriginal title was part of the law in New Zealand. In doing so, Cooke P, who delivered his judgment on behalf of the Court, held that:

- ‘aboriginal title’ and ‘Maori customary title’ are interchangeable expressions; (at 23)
- aboriginal title is a compendious expression to cover the rights over land and water enjoyed by the indigenous or established inhabitants of a territory up to the time of its annexation; (at 23)
- on colonisation, the Crown acquires a radical title, but that radical title is subject to the existing ‘native rights’; (at 24)
- the existing native rights are usually, although not always, communal or collective; (at 24)
- the nature and incidents of aboriginal title are matters of fact dependent on the evidence in the particular case; (at 24)

As authority for the above propositions, Cooke P relied on the earlier New Zealand cases, *R. v. Symonds* (1847) N.Z.P.C.C. 387 and *Nireaha Tamaki v. Baker* (1909) N.Z.P.C.C. 371, as well as the decisions of the Australian High Court in *Mabo v. State of Queensland (No. 2)* (1992) 175 C.L.R. 1.

Although the Court of Appeal affirmed that aboriginal title is recognised in New Zealand, the appellants were denied relief on the basis that they had little prospect of successfully arguing a claim of aboriginal title as the ownership and control of the area had been vested in the Bay of Plenty Electric Power Board for more than a decade.

The decision in *Ngai Tahu* did not directly involve aboriginal title, but concerned a claim based on the Treaty of Waitangi. The Ngai Tahu held a permit, which enabled it to engage in a commercial whale-watching business. In 1993 the Director-General of Conservation issued another permit for the same purpose to another company. The Ngai Tahu brought an action claiming that it was entitled on treaty principles to a period of operation during which it was insulated from competition. Section 4 of the *Conservation Act 1987*, under which the permits were issued, provides that: 'the Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi'.

The Court held that the second article of the Treaty of Waitangi, which in the English version guarantees Maori 'the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess', must extend to such sea fisheries as the tribes possessed. (at 558) Although the Court did not specifically discuss aboriginal title, they appeared to accept that aboriginal title in the form of a right to take dolphin, whale and seals could exist offshore. The Court stated that:

> It has been found in the High Court that there is a strong case that before 1840 Maori had a highly developed and controlled fishery over the whole coast, at least where they were living. See the quotation from Greig J made in the judgment of this Court in *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641, 646-647. The view that Maori had customary or aboriginal title or treaty rights (it being unnecessary to distinguish between them in the context) and that the Crown has fiduciary duties extending to its treatment of those rights may be further supported by the judgment of this Court in *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301, 303-306, and the authorities there cited. (at 559)

Customary fishing rights

> *Te Weehi v. Regional Fisheries Office* (1986) 1 N.Z.L.R. 682.
> *Te Runanga o Muriwhenua Inc v. Attorney-General* [1990] 2 N.Z.L.R. 641.

Although there have been few cases on aboriginal title in New Zealand, there have been a number of cases concerning customary fishing rights. Of these, the best known is that of *Te Weehi.*

Te Weehi was charged with possessing undersized paua, contrary to the *Fishing (Amateur Fishing) Regulations* 1983. Section 88 of that Act provides that nothing in it (which of course includes subordinate legislation made under its authority) shall affect 'Maori fishing rights.' Thus, as a defence, Te Weehi argued that he was taking shellfish in the customary Maori way for personal and family consumption. The shellfish were taken for immediate eating, and only on a small scale and that prior to collecting the paua he had obtained permission from a local Maori elder. Extensive evidence showed that there was a customary right for particular Maori to collect limited quantities of shell fish from beaches over which their tribe, or a tribe from which they had permission (as here) had control. Te Weehi successfully argued that the words of s 88 included not only rights to take fish embodied in other statutes, but also rights derived from the common law, including aboriginal title.

In order to understand the decision in *Te Weehi* it is important to understand the restrictions placed on Te Weehi's defence. Te Weehi faced two problems.

- the first occurred because of s 155 of the *Maori Affairs Act* 1953 (outlined above). That section prohibits claims against the Crown based on customary title to land. Therefore, he could not bring a claim for exclusive ownership of the land, but was instead forced to establish a 'non-territorial' aboriginal title. This amounts to a right to fish, divorced from the underlying ownership of the land or waters;
- the second problem was that there is a long line of New Zealand authority which establishes that a Maori exclusive right of fishery in the tidal zone is incompatible with the Crown's ownership of the foreshore by prerogative right. These cases include *Waipapakura v. Hempton* (1914) 33 N.Z.L.R. 1065 and *Keepa v. Inspector of Fisheries* [1965] N.Z.L.R. 322.

Therefore, in order to succeed, Te Weehi had to establish a non-territorial, non-exclusive customary right to take paua.

On the first point, Williamson J held that a non-territorial customary right had been established. The claim under consideration was not one of ownership of the foreshore, but the right to take a meal of shellfish over another tribe's land by courtesy of that tribe. He held that the customary right to fish could exist independently of ownership of the land and noted that at common law fishing rights can exist independently of ownership. In order to make such a finding, he declined to follow two earlier decisions, *Inspector of Fisheries v. Weepu* [1956] N.Z.L.R. 920 and *Keepa v. Inspector of Fisheries* [1965] N.Z.L.R. 322, in which it had been held that fisheries are part of title to the land. (at 690)

On the second point, Williamson J distinguished the earlier cases, which held that an exclusive Maori fishery was incompatible with Crown ownership of the foreshore, on the grounds that there was no attempt on the facts to establish an exclusive fishery. To the contrary, Te Weehi was fishing on the land of another tribe, by courtesy of that tribe in accordance with long tradition. (at 690)

It should be noted that *Te Weehi* was not appealed. However, in a later case, *Te Runanga o Muriwhenua*, the Court of Appeal indicated in *obiter* that should the issue in *Te Weehi* come before the court, it might well come to the same conclusion as Williamson J in *Te Weehi*.

Te Runanga o Muriwhenua concerned the fishing rights of the iwi of the Muriwhenua and others representing various Maori tribes to most of the coastal lands of New Zealand. A new quota management system for New Zealand fisheries was introduced in 1986. At the same time, a claim for fisheries areas was before the Waitangi Tribunal. Despite this, quotas were allocated under the new system. When the Tribunal later made a preliminary finding that the Muriwhenua had made extensive fishing use of the sea out to the twelve nautical mile limit, various applications were made to the High Court for the purposes of stopping the allocation of individual transferable fishing quotas on the grounds that the allocation would be contrary to the principles of the Treaty of Waitangi. The High Court granted various interlocutory injunctions and appeals were made on several procedural points to the Court of Appeal.

During the course of determining these procedural matters, the Court of Appeal made various comments as to the nature of customary fishing rights. In particular, the Court stated that:

> While this Court cannot at the present stage rule on questions of law that are not before us for decision and have not been fully argued, there is clearly a real possibility that the view of the law, and in particular Maori customary fishing rights, provisionally taken by Grieg J [the trial judge] will prove to be right. The judgment of Williamson J in *Te Weehi v. Regional Fisheries Officer* [1986] 1 N.Z.L.R. 680 points in the same direction. (at

654)

The Court went on to cite with approval recent decisions of the Canadian Supreme Court on aboriginal title, including *R. v. Guerin* (1984) 13 D.L.R. (4th) 321, which is discussed earlier in this chapter.

Although the general issue of whether fishing can constitute a native title right has not been definitively determined in Australia, there seems little doubt that both hunting and fishing can constitute native title. The issue of whether rights to fish can constitute a native title right has arisen indirectly in two decisions: *Mason v. Tritton* (1994) 34 N.S.W.L.R. 572 and *Sutton v. Derschaw*, unreported decision of the Supreme Court of Western Australia, 15 August 1995. In *Mason*, Kirby P concluded that fishing could constitute a native title right. The other two members of the Court, Young and Priestly JJ declined to determine the issue. In *Sutton*, Heeney J followed the judgment of Kirby P in *Mason* (at 12).

However, *Te Weehi* raises several other questions which have not yet been considered in Australia. The first is the question of whether rights to fish can be severed from the soil. In other words, can there exist a customary right to fish which is recognised by the law, even if it does not amount to a native title right? This issue is discussed below in the section 'severance of aboriginal rights from the soil'.

Te Weehi also alerts us to the question of the effect of Crown ownership of the foreshore by Royal Prerogative on a customary right to fish in the inter-tidal zone. Does this extinguish native title rights to the foreshore? This issue is discussed in some length in Chapter 4.

Further Reading and References

Minister of Agriculture and Fisheries v. Love [1988] D.C.R. 370.
Minister of Agriculture and Fisheries v. Hakaira & Scott [1989] D.C.R. 289.
Green v Ministry of Agriculture and Fisheries [1990] 1 N.Z.L.R. 411.
Rawere v. Minister of Agriculture and Fisheries (1991) 6 C.R.N.Z. 693.
Paku v. Minister of Fisheries and Agriculture [1992] 2 N.Z.L.R. 223.
Taranaki Fish and Game Council v. McCritchie, [1997] D.C.R. 446.
McHugh, P.G., 'Aboriginal Title in the New Zealand Courts', (1984) 2 *Canterbury L.R.* 235.
Brookfield, F.M., 'Maori Fishing Rights and The Fisheries Act 1983: *Te Weehi's* case', [1987] *Recent Law* 63.
McHugh, P.G. 'The Legal Status of Maori Fishing Rights in Tidal Waters', (1984) 14 *V.U.W.L.R.* 247.
Litchfield, M., 'Confiscation of Maori Land', (1985) 15 *V.U.W.L.R.* 335.

Severance of aboriginal rights from the soil

R. v. Van der Peet (1996) 137 D.L.R. (4th) 289.
R. v. Cote (1996) 138 D.L.R. (4th) 385.
R. v. Adams (1996) 138 D.L.R. (4th) 657.
Delgamuukw v. British Columbia, as yet unreported decision of the Supreme Court of Canada, December 11, 1997.
Te Weehi v. Regional Fisheries Officer [1986] 1 N.Z.L.R. 682.
Te Runanga o Muriwhenua Inc v. Attorney-General [1990] 2 N.Z.L.R. 641.
United States v. Winans 198 U.S. 371 (1905).

In several cases it has been held that aboriginal rights can be severed from the soil.

In *Van der Peet*, L'Heureux-Dubé J stated that aboriginal rights are severable from, and can exist independently of, aboriginal title (at 333-4). She did not elaborate on this statement.

In *Cote*, which is to be read together with *Adams*, members of the Algonquin people were convicted of the offence of entering a controlled harvest zone in the Outaouais region of Quebec. The appellants argued that they had an aboriginal right to fish which was incidental to aboriginal title. It is, however, the subject of some controversy whether aboriginal title exists in Quebec.

Lamer CJ[9] held that the intervention of French sovereignty over Quebec did not negate the existence of aboriginal rights.(at 406) He also held that an aboriginal right to fish does not necessarily rest in an underlying claim to aboriginal title over the territory in which the fishing took place.(at 400) Lamer CJ stated that:

> However, as I stressed in *Adams*, at para 29, a protected aboriginal right falling short of aboriginal title may nonetheless have an important link to the land. An aboriginal practice, custom or tradition entitled to protection as an aboriginal right will frequently be limited to a specific territory or location, depending on the actual pattern of exercise of such an activity

[9] Sopinka, Gonthier, Cory, Iacobucci, Major, McLachlin and La Forest JJ concurred with Lamer CJ.

> prior to contact. As such, an aboriginal right will often be defined in site-specific terms, with the result that it can only be exercised upon a specific tract of land. (at 401)

This was reiterated by the Supreme Court in *Delgamuukw*, discussed above.

In the United States, treaty-reserved rights are severable from ownership. In other words, they can be exercised independently of title to, or occupation of, the land. In *United States v. Winans*, the Yakoma Indian tribe had ceded its lands and by a treaty of cession reserved to themselves both a smaller area of land and the "right of taking fish at all usual and accustomed places, in common with citizens of the Territory." The Court held that this entitled the tribe to continue to exercise fishing rights in their former homelands. The traditional fishing rights could be exercised independently of an underlying aboriginal title in the land, and could be characterised as servitudes.[10] The Court confirmed that fishing rights were not created by the treaty. It merely reserved a pre-existing aboriginal right to fish. See also *Lac Court Oreilles Band v. Voight* 700 F 2d 341 (1983)

It has also been held that customary rights can be severed from the soil in several New Zealand cases. The first of these is the decision in *Te Weehi*. This decision hinged on the severability of customary fishing rights from the soil, and is discussed in some detail earlier in the chapter. Further, in *Te Runanga o Muriwhenua Inc*, the facts of which are also discussed earlier in the chapter, the Court noted that fishing rights can be severed from the soil. The Court held that:

> In principle the extinction of customary title to land does not automatically mean the extinction of fishing rights. See for instance *St Catherine's Milling and Lumber Company v. R* (1888) 14 App Cas 46. The survival of fishing rights though land titles have been extinguished was recognised even as to the foreshore by Chief Judge Fenton in his *Kauwaeranga Judgment* of 1870, published in (1984) 14 VUWLR 227, and nothing was decided to the contrary by this Court in *Re the Ninety Mile Beach* [1963] NZLR 461. If anything, the case for the survival of sea fishing rights may be stronger. (at 655)

In Australia, the issue of severability remains undetermined. In *Mason v. Tritton* (1994) 34 N.S.W.L.R. 572, the New South Wales Court of Appeal declined to determine that issue. Mason was charged under the *Fisheries and Oyster Farms (General) Regulations* 1989 (NSW) with shucking and possession of more than the maximum allowable catch of oysters. In his defence, Mason claimed to be a member of a group of people who have a traditional native title right to fish and

[10] An example of a servitude is an easement.

harvest the ocean waters in the area.

This case raised two issues:

1. does fishing (in this case for abalone) constitute a native title right; and
2. if fishing does constitute a native title right, can native title operate as a defence to breach of regulations.

The second point is discussed in Chapter Five ‘Extinguishment and Regulation’. However, arguably the more important issue in the case was whether there is a native title right to fish. Kirby P held that such a right did exist. However, in order to do so he had to prove a ‘connection with the land’ as required by the High Court decision in *Mabo (No. 2)*. Kirby P held that fishing rights themselves provide evidence of a connection with the land. He held that:

> In a very real sense, usufructuary rights such as fishing and hunting rights or practices provide evidence of a wider proprietary interest, which may become the subject of an Aboriginal community’s native title claim. Such fishing and hunting rights, in my view, provide real evidence of an Aboriginal communities “connection with” the land. (at 578)

This does raise the question of what constitutes ‘the land’ in the case of the offshore.

Kirby P declined to determine whether what he called a ‘mere right to fish’ could be established. In seeking to establish such a right in Australia, the arguments in *Te Weehi* could provide guidance.

Chapter Three

The Evolution of Native Title Rights

Introduction

In *Mabo v. State of Queensland (No. 2)* 175 C.L.R. 1, Deane and Gaudron JJ held that:

> Since [native title] preserves entitlement to use or enjoyment under the traditional law or custom of the relevant territory or locality, the contents of the rights and the identity of those entitled to enjoy them must be ascertained by reference to that traditional law or custom. The traditional law or custom is not, however, frozen as at the moment of establishment of a Colony. Provided any changes do not diminish or extinguish the relationship between a particular tribe or other group and particular land, subsequent developments or variations do not extinguish the title in relation to that land. (at 100)

The degree to which customs can develop or evolve and still form the basis for a claim of native title remains untested in Australia. The impact of European settlement on indigenous life had resulted in customs, including those that found native title, evolving or changing to meet new social conditions. Just how far can customs change from those at the time of colonial settlement, and still form the basis of a native title claim? For example, can native title rights include a commercial dimension? This might consist, for example, of a right to fish other than merely for subsistence and domestic use. This area is likely to become of increasing importance, particularly considering that over ninety offshore claims have now been lodged. Similar questions arise with respect to other customary laws, for example marriage and adoption. Although this question remains untested in Australia, there are a number of cases from overseas jurisdictions which can provide guidance on this issue. The cases also show a growing trend in various countries towards the recognition of modern forms of traditional practices.

Before reading this Chapter, we recommend that you read Chapter 1 ‘Context’ and Chapter 2 ‘Recognition’. In particular, you should read that part of Chapter 2 concerning the distinction in Canadian law between aboriginal rights and aboriginal title.

Canada

A number of cases have arisen in Canada in recent years in which the courts have considered modern forms of traditional rights. These rights may arise either under treaty or, more commonly, at common law. The majority of recent

decisions have considered fishing rights. Only *Delgamuukw v. R.* (1993) 104 D.L.R. (4th) 470 (BCCA), (1997) D.L.R. (4th) (Supreme Court of Canada) specifically concerns aboriginal title to land.

Rights Arising Under Treaty

> *R. v. Simon* (1986) 24 D.L.R. (4th) 390.
> *R. v. Horseman* (1990) 55 C.C.C. (3d) 353.

In *R. v. Simon*, the appellant was charged with the offences of unlawful possession of a rifle during closed season. As a defence, the accused relied on the provisions of the Treaty of 1752 between the Micmac Indians and the Governor of Nova Scotia. If such a treaty right existed, it prevailed over provincial law by virtue of s 88 of the *Indian Act*. The treaty provided that: 'it is agreed that the said Tribe of Indians shall not be hindered from, but have free liberty of hunting and Fishing as usual. . .' The Crown contended that the right to hunt in the Treaty was limited to hunting for purposes and by methods usual in 1752. The Court rejected this argument.

> . . . I do not read the phrase "as usual" as referring to the types of weapons to be used by the Micmac and limiting them to those used in 1752. Any such construction would place upon the ability of the Micmac to hunt an unnecessary and artificial constraint out of keeping with the principle that Indian treaties should be liberally construed. (at 402-403)

Therefore, the Court was clearly of the opinion that it would be unreasonable to restrict the Micmac to methods of hunting used at the time of European contact. This accords with the decision of the High Court in *Mabo v. State of Queensland (No. 2)* (1992) 175 C.L.R. 1. Although useful, this case represents the lowest level of evolution of rights - the transition from traditional methods of hunting to use of guns. That is quite different, for example, from arguing that a subsistence right has evolved into a commercial right.

In *R. v. Horseman*, Horseman, a member of the Horses Lake Indian Band, was convicted of selling a grizzly hide contrary to s 42 of the *Wildlife Act* R.S.A. 1980, c W-9. Horseman had killed a grizzly in self-defence while hunting moose. At that time he did not have a licence to do so. Some time later, in straitened financial circumstances he decided to sell the pelt. He therefore applied for a licence to hunt and sell grizzly, which he was issued. This licence entitled him to hunt and kill one bear and sell the hide to a licensed dealer. He used this licence to sell the grizzly pelt he already had in his possession. He was subsequently charged with wildlife trafficking.

Horseman's defence was that the *Wildlife Act* did not apply to him as he was within his Treaty No. 8 rights when he sold the bear hide. He claimed that he could, at any time, on lands covered by the treaty, kill grizzly for food and sell the hide in order to buy food.

One of the questions at issue in the case was whether the hunting and fishing rights reserved by Treaty 8 included a commercial dimension. The Court held that an examination of the historical background to the Treaty showed that the hunting rights reserved by the treaty included hunting for commercial purposes. The Treaty protected those hunting rights that the Indian's possessed before the treaty came into effect. The majority held that:

> The economy of the Indian population at the time of the treaty had clearly evolved to such a degree that hunting and fishing for commercial purposes was an integral part of their way of life. (at 374)

Horseman, of course, concerned treaty, rather than common law, rights. Further, the decision was prior to the Supreme Court clearly laying down the 'integral to the distinctive culture' test. However, all members of the Court were clearly of the opinion that, by 1899, the aboriginal right had evolved to include a commercial right. The appeal was, however, dismissed, as the majority held that this commercial right had subsequently been constricted to a right to hunt for non-commercial purposes, by the later enactment of the *Natural Resources Transfer Agreement* of 1930 (Alberta).

In this case, the Court did not really consider the issue of evolution of rights. Rather, they relied on evidence that at the time the treaty was entered into (1899) the Band's customs had evolved to include a commercial dimension. Unlike the later case of *Van der Peet*, the Court did not consider whether there was a connection between the evolved right in 1899 and customs at the time of European contact. This corresponds with United States authority on evolution of rights and treaties. In both Canada and the United States it is the date of entry into the treaty which is relevant for assessing the customs underlying the treaty. As will be seen, this is more generous than the position at common law (as exemplified by *R. v. Van der Peet* (1996) 137 D.L.R. (4th) 289), as it sets a much later date for assessing customs and practices.

Although both of these cases do concern treaty rights, and therefore are not directly applicable to Australia, they both evince the beginning of a 'trend' towards recognition of the fact that aboriginal rights and customary law generally are not static, but dynamic in nature. It should be noted that *Simon* was referred to with approval by the New Zealand Waitangi Tribunal in the 'Ngai Tahu Sea Fisheries Report', WAI 27, para 10.2.3 (extracted below).

Common Law Rights

> *R. v. Sparrow* (1990) 70 D.L.R. (4th) 385.
> *R. v. Gladstone* (1996) 137 D.L.R. (4th) 648.
> *R. v. Van der Peet* (1996) 137 D.L.R. (4th) 289.
> *R v. N.T. Smokehouse Ltd* (1996) 137 D.L.R. (4th) 528.
> *Delgamuukw v. R.* (1993) 104 D.L.R. (4th) 470 (BCCA).
> *R. v. Delgamuukw*, as yet unreported decision of the Supreme Court of Canada, 11 December, 1997 (SCC).

In recent years there have been a number of Canadian decisions which have considered evolution of common law rights. One of the earliest of these was the decision of the British Columbia Court of Appeal in *Delgamuukw*. At the Court of Appeal level, *Delgamuukw* essentially concerned a claim for aboriginal rights, rather than aboriginal title specifically. On appeal to the Supreme Court, the pleadings were amended to include a specific claim for aboriginal title. The Supreme Court's decision is discussed separately below. In *Delgamuukw* (BCCA) the various judges do refer to modern forms of traditional rights. However, the question of modern forms was not directly at issue, and their comments can be seen as no more than affirming that the law will recognise modern forms of aboriginal rights, a proposition which in any case had not been in doubt since the decision in *R. v. Sparrow* (1990), 70 D.L.R. (4th) 385, where the Court noted that:

> The scope of the existing Musqueam right to fish must now be delineated. The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an integral part of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their cultural and physical survival. As we stated earlier, the right to do so may be exercised in a contemporary manner. (at 402)

In *Delgamuukw*, Macfarlane JA (with whom Taggart JA concurred), stated that:

> I pause to observe that not all practices in existence in 1846 were necessarily to be regarded as aboriginal rights. To be so regarded those practices must have been integral to the distinctive culture of the aboriginal society from which they are said to have arisen.

> A modernized form of such a practice would be no less an aboriginal right: see Sparrow. A practice which had not been integral to the organized society and its distinctive culture, but which became prevalent as a result of European influences would not qualify for protection as an aboriginal right. (at 493-494)

As to the evolution of aboriginal rights, it was left to the Supreme Court in the recent 'trilogy' of *Van der Peet*, *Gladstone* and *N.T.C. Smokehouse* to outline the circumstances in which the law will recognise the modern form of a right. According to the Supreme Court, in order to establish a modern form of a traditional right it is necessary to characterise the modern right being practiced, and then compare it with those rights pre-existing contact.

Characterising the right

As noted in Chapter 2, the 'integral to the distinctive culture' test is drawn from the decision of the Supreme Court in *Van der Peet*. In that case, as well as *Gladstone* and *N.T.C. Smokehouse*, this test was applied in order to determine whether commercial rights, for example the right to sell fish caught, were included within the ambit of aboriginal rights. In all three cases, the appellants were convicted of offences against fisheries regulations. The appellants' defence was that the regulations at issue infringed an existing aboriginal right contrary to s 35(1) of the *Constitution Act, 1982*. In order to determine whether the current practices of selling or trading in fish constituted an aboriginal right, it was necessary to consider what modern form traditional rights might take, and whether in each individual case the right claimed was in fact a modern or evolved form of a traditional right. In both *Van der Peet* and *Gladstone*, the majority dismissed the appeals. However, in *Gladstone* the Court found that a right to sell herring spawn on kelp had been established.

According to the majority in *Van der Peet*, the first step in assessing any claim to exercise an aboriginal right is to correctly identify the nature of the right being claimed. Once the nature of the right has been established, the evidence presented can be assessed in order to determine whether that right is integral. In other words, the Court characterises the present practice, and then examines the evidence to determine whether this practice was integral prior to contact. The following extract illustrates the Court's approach.

> [51] Related to this is the fact that in assessing a claim to an aboriginal right a court must first identify the nature of the right being claimed; in order to determine whether a claim meets the test of being integral to the distinctive culture of the aboriginal group claiming the right, the court must first correctly determine what it is that is being claimed. The correct characterization of the appellant's claim is of importance because whether or not the evidence supports the appellant's claim will depend, in

> significant part, on what, exactly, that evidence is being called to support.
> . . .
> The nature of an applicant's claim must be delineated in terms of the particular practice, tradition or custom under which it is claimed; the significance of the practice, tradition or custom to the aboriginal community is a factor to be considered in determining whether the practice, tradition or custom is integral to the distinctive culture, but the significance of a practice, tradition or custom cannot, itself, constitute an aboriginal right.
> [53] To characterize an applicant's claim correctly, a court should consider such factors as the nature of the action which the applicant is claiming was done pursuant to an aboriginal right, the nature of the governmental regulation, statute or action being impugned, and the tradition, custom or practice being relied upon to establish the right. In this case, therefore, the Court will consider the actions which led to the appellant's being charged, the fishery regulation under which she was charged and the customs, practices and traditions she invokes in support of her claim.
> [54] It should be acknowledged that a characterization of the nature of the appellant's claim from the actions which led to her being charged must be undertaken with some caution. In order to inform the court's analysis the activities must be considered at a general rather than at a specific level. Moreover, the court must bear in mind that the activities may be the exercise in a modern form of a practice, tradition or custom that existed prior to contact, and should vary its characterization of the claim accordingly.**[Van der Peet at 312-313. © Canada Law Book Company 1996]**

From the above extract, it can be seen that characterisation of the modern right involves, in part, examining the regulation that has been breached. This is, of course, because the decision in *Van der Peet* considers the question of whether provincial fishing regulations infringed s 35(1) of *Constitution Act, 1982*, a section to which there is no equivalent in Australia. In Australia, we are seeking to affirmatively establish the existence of native title rights, rather than show the existence of a right so as to determine the validity of regulations, as in *Van der Peet*. Therefore, this part of the characterisation test is irrelevant. However, this aspect is merely part of the problem of the overall approach of the majority in *Van der Peet*, which is discussed later in the Chapter.

Time frames

The issue of time frame is particularly important here. In other words, at what time must the customs and traditions relied upon be integral to the community? The majority in *Van der Peet* determined that the customs and traditions must have been integral to the culture prior to European contact.

The following is an extract from the majority judgment in *Van der Peet*

> [60] The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies. Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of

Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights.

[61] The fact that the doctrine of aboriginal rights functions to reconcile the existence of pre-existing aboriginal societies with the sovereignty of the Crown does not alter this position. Although it is the sovereignty of the Crown that the pre-existing aboriginal societies are being reconciled with, it is to those pre-existing societies that the court must look in defining aboriginal rights. It is not the fact that aboriginal societies existed prior to Crown sovereignty that is relevant; it is the fact that they *existed prior to the arrival of Europeans in North America*. As such, the relevant time period is the period prior to the arrival of Europeans, not the period prior to the assertion of sovereignty by the Crown.

[62] That this is the relevant time should not suggest, however, that the aboriginal group claiming the right must accomplish the next to impossible task of producing conclusive evidence from pre-contact times about the practices, customs and traditions of their community. It would be entirely contrary to the spirit and intent of s. 35(1) to define aboriginal rights in such a fashion so as to preclude in practice any successful claim for the existence of such a right. The evidence relied upon by the applicant and the courts may relate to aboriginal practices, customs and traditions post-contact; it simply needs to be directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. It is those practices, customs and traditions that can be rooted in the pre-contact societies of the aboriginal community in question that will constitute aboriginal rights.

[63] I would note in relation to this point the position adopted by Brennan J. in *Mabo*, supra, where he holds, at p. 60, that in order for an aboriginal group to succeed in its claim for aboriginal title it must demonstrate that the connection with the land in its customs and laws has continued to the present day:

> ". . . when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition. "

The relevance of this observation for identifying the rights in s. 35(1) lies not in its assertion of the effect of the disappearance of a practice, custom or tradition on an aboriginal claim (I take no position on that matter) but rather in its suggestion of the importance of considering the continuity in the practices, customs and traditions of aboriginal communities in assessing claims to aboriginal rights. It is precisely those present practices, customs and traditions which can be identified as having continuity with the practices, customs and traditions that existed prior to contact that will be the basis for the identification and definition of aboriginal rights under s. 35(1). Where an aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1).

[64] The concept of continuity is also the primary means through which the definition and identification of aboriginal rights will be consistent with the admonition in

Sparrow, supra, at p. 1093, that "the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time''. The concept of continuity is, in other words, the means by which a frozen rights'' approach to s. 35(1) will be avoided. Because the practices, traditions and customs protected by s. 35(1) are ones that exist today, subject only to the requirement that they be demonstrated to have continuity with the practices, customs and traditions which existed pre-contact, the definition of aboriginal rights will be one that, on its own terms, prevents those rights from being frozen in pre-contact times. The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights.

[65] I would note that the concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, traditions and customs, and those which existed prior to contact. It may be that for a period of time an aboriginal group, for some reason, ceased to engage in a practice, tradition or custom which existed prior to contact, but then resumed the practice, tradition or custom at a later date. Such an interruption will not preclude the establishment of an aboriginal right. Trial judges should adopt the same flexibility regarding the establishment of continuity that, as is discussed, *infra*, they are to adopt with regards to the evidence presented to establish the prior-to-contact practices, customs and traditions of the aboriginal group making the claim to an aboriginal right.

[at 315-317. © Canada Law Book Company 1996]

The approach of the majority to the required time frame contrasts strongly with the minority judgment of L'Heureux-Dubé J. in *Van der Peet*. Her Honour rejected that the existence of the custom has to be established at the date of contact or sovereignty. Two reasons lay behind this. The first is the heavy evidentiary burden placed on those claiming aboriginal rights. The second is that it embodies inappropriate and unprovable assumptions about aboriginal culture and society. Her Honour rejected the approach of the majority as embodying the very 'frozen rights' approach which they purported to reject. Rather, her Honour opted for what she termed the 'dynamic rights' approach, which permits the evolution of aboriginal customs over time:

> Aboriginal rights must be permitted to maintain contemporary relevance in relation to the needs of the natives as their practices, customs and traditions change and evolve with the overall society in which they live. (at 348)
>
> The aboriginal activity must have formed an integral part of a distinctive culture for a substantial continuous period of time. This period should be assessed on: (1) the type of aboriginal practices, customs and traditions; (2) the particular aboriginal culture and society; and (3) the reference period of twenty to fifty years. (at 349-350)

It seems unlikely that her Honour's judgment will be followed in this regard in

either Canada or Australia. In both jurisdictions, the Courts remain committed to the historic origins of customary law.

McLachlin J steered a course between the majority and the minority on this issue. With respect to the issue of time frame, she stated that L'Heureux-Dubé Js view minimised the historic origin of the alleged right and agreed with the majority that a recently adopted practice is not aboriginal. However, she did not agree that in all cases it is necessary to trace this right to pre-contact times. McLachlin J held that:

- a recently adopted practice would not qualify as aboriginal; (at 372)
- aboriginal rights find their source in the customs and traditions of the particular group; (at 372)
- it is not essential that a practice be traceable to pre-contact times for it to qualify as a constitutional right; (at 372)
- there is no definitive all-or-nothing time for establishing an aboriginal right; (at 372)
- often a law or tradition can be traced to time immemorial, but what is important is the continuity between the modern practice at issue and a traditional law or custom; (at 373)
- the better question is what laws and customs held sway before superimposition of European laws and customs?; (at 373)
- the requirement of continuity does not mean that aboriginal peoples have to provide a year-by-year chronicle of how the event has been exercised since time immemorial. What is required is that the people establish a link between the modern practice and the historic aboriginal right; (at 373)
- it is not unusual for the exercise of a right to lapse for some time. This is not fatal. (at 373)

The following is an extract from McLachlin J's judgment in *Van der Peet*:

> [244] The Chief Justice and L'Heureux-Dube J. differ on the time periods one looks to in identifying aboriginal rights. The Chief Justice stipulates that for a practice to qualify as an aboriginal right it must be traceable to pre-contact times and be identifiable as an "integral'' aspect of the group's culture at that early date. Since the barter of fish was not shown to be more than an incidental aspect of Sto:lo society prior to the arrival of the Europeans, the Chief Justice concludes that it does not qualify as an aboriginal right.
> [245] L'Heureux-Dube J., by contrast, minimizes the historic origin of the alleged right. For her, all that is required is that the practice asserted as a right have constituted an integral part of the group's culture and social organization for a period of at least 20 to 50 years, and that it continue to be an integral part of the culture at the time of the assertion of the right.
> [246] My own view falls between these extremes. I agree with the Chief Justice that history is important. A recently adopted practice would generally not qualify as being

aboriginal. Those things which have in the past been recognized as aboriginal rights have been related to the traditional practices of aboriginal peoples. For this reason, this Court has always been at pains to explore the historical origins of alleged aboriginal rights. For example, in *Sparrow*, this Court began its inquiry into the aboriginal right to fish for food with a review of the fishing practices of the Musqueam band prior to European contact.

[247] I cannot agree with the Chief Justice, however, that it is essential that a practice be traceable to pre-contact times for it to qualify as a constitutional right. Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the aboriginal people in question. As Brennan J. (as he then was) put it in *Mabo v. State of Queensland* (No. 2) (1992), 175 C.L.R. 1 at p. 58, "Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory''. The French version of s. 35(1) aptly captures the governing concept. "Les droits existants – ancestraux ou issus de traites'' – tells us that the rights recognized and affirmed by s. 35(1) must be rooted in the historical or ancestral practices of the aboriginal people in question. This Court in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 (S.C.C.), adopted a similar approach: Dickson J. (as he then was) refers at p. 376, to "aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands''. One finds no mention in the text of s. 35(1) or in the jurisprudence of the moment of European contact as the definitive all-or-nothing time for establishing an aboriginal right. The governing concept is simply the traditional customs and laws of people prior to imposition of European law and customs. What must be established is continuity between the modern practice at issue and a traditional law or custom of the native people. Most often, that law or tradition will be traceable to time immemorial; otherwise it would not be an ancestral aboriginal law or custom. But date of contact is not the only moment to consider. What went before and after can be relevant too.

[248] My concern is that we not substitute an inquiry into the precise moment of first European contact – an inquiry which may prove difficult – for what is really at issue, namely the ancestral customs and laws observed by the indigenous peoples of the territory. For example, there are those who assert that Europeans settled the eastern maritime regions of Canada in the 7th and 8th century A.D. To argue that aboriginal rights crystallized then would make little sense; the better question is what laws and customs held sway before superimposition of European laws and customs. To take another example, in parts of the west of Canada, over a century elapsed between the first contact with Europeans and imposition of "Canadian'' or "European'' law. During this period, many tribes lived largely unaffected by European laws and customs. I see no reason why evidence as to the laws and customs and territories of the aboriginals in this interval should not be considered in determining the nature and scope of their aboriginal rights. This approach accommodates the specific inclusion in s. 35(1) of the *Constitution Act*, 1982 of the aboriginal rights of the Metis people, the descendants of European explorers and traders and aboriginal women.

[249] Not only must the proposed aboriginal right be rooted in the historical laws or customs of the people, there must also be continuity between the historic practice and the right asserted. As Brennan J. put it in *Mabo*, at p. 60:

> "The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise. However, when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared."

The continuity requirement does not require the aboriginal people to provide a year-by-year chronicle of how the event has been exercised since time immemorial. Indeed, it is not unusual for the exercise of a right to lapse for a period of time. Failure to exercise it does not demonstrate abandonment of the underlying right. All that is required is that the people establish a link between the modern practice and the historic aboriginal right.

[250] While aboriginal rights will generally be grounded in the history of the people asserting them, courts must, as I have already said, take cognizance of the fact that the way those rights are practised will evolve and change with time. The modern exercise of a right may be quite different from its traditional exercise. To deny it the status of a right because of such differences would be to deny the reality that aboriginal cultures, like all cultures, change and adapt with time. As Dickson C.J.C. and La Forest J. put it in *Sparrow*, at p. 1093. . . "the phrase 'existing aboriginal rights' [in s. 35(1) of the Constitution Act, 1982] must be interpreted flexibly so as to permit their evolution over time''. **[at 372-373. © Canada Law Book Company 1996]**

Evolution of aboriginal rights

According to the majority in *Van der Peet*, in order for an aboriginal practice or custom to be an aboriginal right for the purposes of s 35(1) of the *Constitution Act, 1982*, it must be integral to the distinctive culture of the society prior to European contact. However, s 35(1) protects 'existing aboriginal rights' – i.e., those rights which existed in 1982 at the time when that section was incorporated into the Constitution - not to rights existing at the date of contact. It is the modern practice that is being protected by s 35(1). However, the court's insistence on a historic dimension or aspect to aboriginal rights makes it necessary to find a link between the modern practice of the right and the practice of the right prior to contact.

In *Van der Peet*, the majority characterised the appellant's claim as an aboriginal right to exchange fish for money or other goods. This characterisation was based, in part at least, on the fact that the salmon sold had been worth only $50. The Court felt that such a small-scale transaction was not 'inherently commercial'. On the evidence, the majority found that the exchange of salmon for money or goods was not an integral part of the distinctive culture of the Sto:lo.(at 323-5) Prior to contact, exchanges of fish for goods did occur, but it was only incidental to fishing for food purposes. The exchange of salmon was not itself a significant and defining feature of Sto:lo culture. No regularised trading system was found. This was not in itself fatal, as the right claimed was

only one to exchange fish for goods, not to sell fish in the commercial marketplace, but it did indicate that the customs established were not widespread enough to be considered integral.

The following extract shows an example of the application of the majority's approach to a factual situation.

[84] Scarlett Prov. Ct. J. carefully considered all of the testimony presented by the various witnesses with regards to the nature of Sto:lo society and came to the following conclusions at p. 160:

> "Clearly, the Sto:lo fish for food and ceremonial purposes. Evidence presented did not establish a regularized market system in the exchange of fish. Such fish as were exchanged through individual trade, gift, or barter were fish surplus from time to time. Natives did not fish to supply a market, there being no regularized trading system, nor were they able to preserve and store fish for extended periods of time. A market as such for salmon was not present but created by European traders, primarily the Hudson's Bay Company. At Fort Langley the Sto:lo were able to catch and deliver fresh salmon to the traders where it was salted and exported. This use was clearly different in nature and quantity from aboriginal activity. Trade in dried salmon with the fort was clearly dependent upon Sto:lo first satisfying their own requirements for food and ceremony.
>
> This court was not satisfied upon the evidence that aboriginal trade in salmon took place in any regularized or market sense. Oral evidence demonstrated that trade was incidental to fishing for food purposes. Anthropological and archaeological evidence was in conflict. This court accepts the evidence of Dr. Stryd and John Dewhurst [sic] in preference to Dr. Daly and therefore, accepts that the Sto:lo were a band culture as opposed to tribal. While bands were guided by siem or prominent families, no regularized trade in salmon existed in aboriginal times. Such trade as took place was either for ceremonial purposes or opportunistic exchanges taking place on a casual basis. Such trade as did take place was incidental only. Evidence led by the Crown that the Sto:lo had no access to salt for food preservation is accepted.
>
> Exchange of fish was subject to local conditions of availability, transportation and preservation. It was the establishment by the Hudson's Bay Company at the fort at Langley that created the market and trade in fresh salmon. Trade in dried salmon in aboriginal times was, as stated, minimal and opportunistic."

I would add to Scarlett Prov. Ct. J.'s summation of his findings only the observation, which does not contradict any of his specific findings, that the testimony of the experts appearing before him indicated that such limited exchanges of salmon as took place in Sto:lo society were primarily linked to the kinship and family relationships on which Sto:lo society was based. For example, under cross-examination Dr. Daly

described trade as occurring through the "idiom'' of maintaining family relationships:

> "The medium or the idiom of much trade was the idiom of kinship, of providing hospitality, giving gifts, reciprocating in gifts. . ."

Similarly, Mr. Dewhirst testified that the exchange of goods was related to the maintenance of family and kinship relations.

[85] The facts as found by Scarlett Prov. Ct. J. do not support the appellant's claim that the exchange of salmon for money or other goods was an integral part of the distinctive culture of the Sto:lo. As has already been noted, in order to be recognized as an aboriginal right, an activity must be of central significance to the culture in question -- it must be something which makes that culture what it is. The findings of fact made by Scarlett Prov. Ct. J. suggest that the exchange of salmon for money or other goods, while certainly taking place in Sto:lo society prior to contact, was not a significant, integral or defining feature of that society.

[86] First, Scarlett Prov. Ct. J. found that, prior to contact, exchanges of fish were only "incidental'' to fishing for food purposes. As was noted above, to constitute an aboriginal right, a custom must itself be integral to the distinctive culture of the aboriginal community in question; it cannot be simply incidental to an integral custom. Thus, while the evidence clearly demonstrated that fishing for food and ceremonial purposes was a significant and defining feature of the Sto:lo culture, this is not sufficient, absent a demonstration that the exchange of salmon was *itself* a significant and defining feature of Sto:lo society, to demonstrate that the exchange of salmon is an integral part of Sto:lo culture.

[87] For similar reasons, the evidence linking the exchange of salmon to the maintenance of kinship and family relations does not support the appellant's claim to the existence of an aboriginal right. Exchange of salmon as part of the interaction of kin and family is not of an independent significance sufficient to ground a claim for an aboriginal right to the exchange of fish for money or other goods.

[88] Second, Scarlett Prov. Ct. J. found that there was no "regularized trading system'' amongst the Sto:lo prior to contact. The inference drawn from this fact by Scarlett Prov. Ct. J., and by Macfarlane J.A. at the British Columbia Court of Appeal, was that the absence of a market means that the appellant could not be said to have been acting pursuant to an aboriginal right because it suggests that there is no aboriginal right to fish commercially. This inference is incorrect because, as has already been suggested, the appellant in this case has only claimed a right to exchange fish for money or other goods, not a right to sell fish in the commercial marketplace; the significance of the absence of regularized trading systems amongst the Sto:lo arises instead from the fact that it indicates that the exchange of salmon was not widespread in Sto:lo society. Given that the exchange of salmon was not widespread it cannot be said that, prior to contact, Sto:lo culture was defined by trade in salmon; trade or exchange of salmon took place, but the absence of a market demonstrates that this exchange did not take place on a basis widespread enough to suggest that the exchange was a defining feature of Sto:lo society.

[89] Third, the trade engaged in between the Sto:lo and the Hudson's Bay Company, while certainly of significance to the Sto:lo society of the time, was found by the trial judge to be qualitatively different from that which was typical of the Sto:lo culture prior to contact. As such, it does not provide an evidentiary basis for holding that the

exchange of salmon was an integral part of Sto:lo culture. As was emphasized in listing the criteria to be considered in applying the "integral to'' test, the time relevant for the identification of aboriginal rights is prior to contact with European societies. Unless a post-contact practice, custom or tradition can be shown to have continuity with pre-contact practices, customs or traditions, it will not be held to be an aboriginal right. The trade of salmon between the Sto:lo and the Hudson's Bay Company does not have the necessary continuity with Sto:lo culture pre-contact to support a claim to an aboriginal right to trade salmon. Further, the exchange of salmon between the Sto:lo and the Hudson's Bay Company can be seen as central or significant to the Sto:lo primarily as a result of European influences; activities which become central or significant because of the influence of European culture cannot be said to be aboriginal rights.

[90] Finally, Scarlett Prov. Ct. J. found that the Sto:lo were at a band level of social organization rather than at a tribal level. As noted by the various experts, one of the central distinctions between a band society and a tribal society relates to specialization and division of labour. In a tribal society there tends to be specialization of labour – for example, specialization in the gathering and trade of fish – whereas in a band society division of labour tends to occur only on the basis of gender or age. The absence of specialization in the exploitation of the fishery is suggestive, in the same way that the absence of regularized trade or a market is suggestive, that the exchange of fish was not a central part of Sto:lo culture. I would note here as well Scarlett Prov. Ct. J.'s finding that the Sto:lo did not have the means for preserving fish for extended periods of time, something which is also suggestive that the exchange or trade of fish was not central to the Sto:lo way of life.

[91] For these reasons, then, I would conclude that the appellant has failed to demonstrate that the exchange of fish for money or other goods was an integral part of the distinctive Sto:lo society which existed prior to contact. The exchange of fish took place, but was not a central, significant or defining feature of Sto:lo society. The appellant has thus failed to demonstrate that the exchange of salmon for money or other goods by the Sto:lo is an aboriginal right recognized and affirmed under s. 35(1) of the *Constitution Act*, 1982. **[at 324-5. © Canada Law Book Company 1996]**

In *N.T.C. Smokehouse*, the majority applied the principles laid down in *Van der Peet*. Despite the fact that the sale of in excess of 119,000 pounds of salmon was "much closer to an act of commerce," (at 526) the majority similarly characterised the aboriginal right being claimed as the exchange of fish for goods or money. Again, the majority found that the evidence did not support a finding that the sale or barter of goods was integral to the culture of the Sheshaht. MacLeod Prov. Ct. J had concluded that:

> I am satisfied that the Sheshaht Band has an aboriginal right to fish in the area, however, the evidence does not show to me that the Sheshahts in the period of time of their residence were sellers and barterers of fish, and contrary, it appears that the Sheshaht over the past 200 years, what sales were made were few and far between. No doubt there were potlatches and meetings and

> exchanges of gifts of salmon, but there do not constitute an aboriginal right to sell the allotted fish contrary to the regulations. (at 539)

Finally, in *Gladstone*, the majority considered two possible characterisations: that the right was to exchange herring spawn on kelp for money or other goods, and the further right to sell herring spawn on kelp in the commercial market place. (at 660) Applying the test from *Van der Peet*, the majority found that both practices were integral to the culture of the Heiltsuk for the following reasons:

- both before and after contact the Heiltsuk were traders of herring spawn on kelp;
- Heiltsuk society was based, to a significant extent, on trade of herring spawn on kelp;
- the Heiltsuk demonstrated that prior to contact they traded in herring spawn on kelp to a degree best described as commercial;
- tons of herring spawn on kelp were traded; and
- trade in herring spawn on kelp was not merely incidental to some social or ceremonial purpose. (at 662)

The following is an extract from the majority judgment in *Gladstone*:

> [28] In *Van der Peet*, at para. 61, this Court held that a claimant to an aboriginal right need not provide direct evidence of pre-contact activities to support his or her claim, but need only provide evidence which is "directed at demonstrating which aspects of the aboriginal community and society have their origins pre-contact. It is those practices, traditions and customs that can be rooted in the pre-contact societies of the aboriginal community in question that will constitute aboriginal rights''. In *Van der Peet* this was described as the requirement of "continuity'' – the requirement that a practice, tradition or custom which is integral to the aboriginal community now be shown to have continuity with the practices, traditions or customs which existed prior to contact. The evidence presented in this case, accepted by the trial judge and summarized above, is precisely the type of evidence which satisfies this requirement. The appellants have provided clear evidence from which it can be inferred that, prior to contact, Heiltsuk society was, in significant part, based on such trade. The Heiltsuk were, both before and after contact, traders of herring spawn on kelp. Moreover, while to describe this activity as "commercial'' prior to contact would be inaccurate given the link between the notion of commerce and the introduction of European culture, the extent and scope of the trading activities of the Heiltsuk support the claim that, for the purposes of s. 35(1) analysis, the Heiltsuk have demonstrated an aboriginal right to sell herring spawn on kelp to an extent best described as commercial. The evidence of Dr. Lane, and the diary of Dr. Tolmie, point to trade of herring spawn on kelp in "tons''. While this evidence relates to trade post-contact, the diary of Alexander Mackenzie provides the link with pre-contact times; in essence, the sum of the evidence supports the claim of the appellants that commercial trade in

herring spawn on kelp was an integral part of the distinctive culture of the Heiltsuk prior to contact.
[29] I would note that the significant difference between the situation of the appellants in this case, and the appellants in *Van der Peet* and *N.T.C. Smokehouse*, lies in the fact that for the Heiltsuk Band trading in herring spawn on kelp was not an activity taking place as an incident to the social and ceremonial activities of the community; rather, trading in herring spawn on kelp was, *in itself*, a central and significant feature of Heiltsuk society. In *Van der Peet* and *N.T.C. Smokehouse* the findings of fact at trial suggested that whatever trade in fish had taken place prior to contact was purely incidental to the social and ceremonial activities of the aboriginal societies making the claim; here the evidence suggests that trade in herring spawn on kelp was not an incidental activity for the Heiltsuk but was rather a central and defining feature of Heiltsuk society. **[at 661-2. © Canada Law Book Company 1996]**

Problems with the majority approach

The approach of the majority, as outlined above, is problematic. The process of characterising the modern right, and then examining the evidence to see if the same right existed prior to contact, has the effect in most cases of determining the matter before it is even commenced. Equating the modern practice and the pre-contact practice merely results in entrenching the frozen rights approach and the denial of the dynamic and evolving nature of customary law. Further, despite the majority's rhetoric, they are clearly imposing European notions of commerce on a non-European culture. Essentially, in order to establish a right to sell or trade in fish they must be able to show that 'commerce' was a facet of pre-contact life.

In her dissenting judgment in *Van der Peet*, McLachlin J recognised the problematic nature of the majority's approach. Her Honour stated that:

[238] It is necessary to distinguish at the outset between an aboriginal right and the exercise of an aboriginal right. Rights are generally cast in broad, general terms. They remain constant over the centuries. The exercise of rights, on the other hand, may take many forms and vary from place to place and from time to time.
[239] If a specific modern practice is treated as the right at issue, the analysis may be foreclosed before it begins. This is because the modern practice by which the more fundamental right is exercised may not find a counterpart in the aboriginal culture of two or three centuries ago. So if we ask whether there is an aboriginal *right* to a particular kind of trade in fish, i.e., large-scale commercial trade, the answer in most cases will be negative. On the other hand, if we ask whether there is an aboriginal right to use the fishery resource for the purpose of providing food, clothing or other needs, the answer may be quite different. Having defined the basic underlying right in general terms, the question then becomes whether the modern *practice* at issue may be characterized as an *exercise* of the right.
[240] This is how we reconcile the principle that aboriginal rights must be ancestral rights with the uncompromising insistence of this Court that aboriginal rights not be

> frozen. The rights are ancestral; they are the old rights that have been passed down from previous generations. The *exercise* of those rights, however, takes modern forms. To fail to recognize the distinction between rights and the contemporary form in which the rights are exercised is to freeze aboriginal societies in their ancient modes and deny to them the right to adapt, as all peoples must, to the changes in the society in which they live.
> [241] I share the concern of L'Heureux-Dube J. that the Chief Justice defines the rights at issue with too much particularity, enabling him to find no aboriginal right where a different analysis might find one. By insisting that Mrs. Van der Peet's modern practice of selling fish be replicated in pre-contact Sto:lo practices, he effectively condemns the Sto:lo to exercise their right precisely as they exercised it hundreds of years ago and precludes a finding that the sale constitutes the exercise of an aboriginal right. **[at 370-1. © Canada Law Book Company 1996]**

On the particular facts in *Van der Peet* McLachlin J held that:

> . . . At its base, the right is not the right to trade, but the right to continue to use the resource in the traditional way to provide for the traditional needs, albeit in their modern form. However, if the people demonstrates that trade is the only way of using the resource to provide the modern equivalent of what they traditionally took, it follows that the people should be permitted to trade in the resource to the extent necessary to provide the replacement goods and amenities. In this context, trade is but the mode or practice by which the more fundamental right of drawing sustenance from the resource is exercised. (at 383)

McLachlin J's approach is clearly preferable to that of the majority. It allows for a more appropriate degree of evolution, which recognises that in order for a community to provide themselves with a viable economic base they may need to modify or change traditional practices to meet modern needs. This approach maintains the link with pre-contact practices which is a central feature of aboriginal rights in all jurisdictions, but recognises that customary law and practices are dynamic, not static, in nature. Just as European culture has changed and evolved since colonisation, so has Indigenous culture.

Delgamuukw (SCC)

As noted in Chapter 2, in *Delgamuukw*, the Supreme Court made a clear distinction between aboriginal rights generally, and aboriginal title specifically. This had been foreshadowed in the earlier decision in *R. v. Adams* (1996) 138 D.L.R. (4th) 657. In *Delgamuukw*, the issue of future possible uses of land was not directly at issue. Nevertheless, in the course of the judgments, some comments were made as to this issue. The facts of *Delgamuukw* are outlined in Chapter 2.

The majority held the following:

- that the uses to which land held pursuant to aboriginal title could be put are not restricted to activities which are integral to the distinctive aboriginal culture of the group. Aboriginal title is an interest in land, and the right to occupy and possess is framed in broad terms and not qualified by reference to traditional and customary uses; (at paras 123-4)

- that there is nevertheless an inherent limitation on the use to which lands can be put. Lands held pursuant to aboriginal title cannot be used in a manner which is irreconcilable with the nature of the claimant's attachment to those lands. This limitation derives from the fact that aboriginal title is partly sourced in the particular physical and cultural relationship of Indigenous peoples to their land, and that relationship must not be prevented from carrying on into the future. Thus, uses of land which threaten that future relationship are excluded from the content of aboriginal title. (at para 128) For example, lands held pursuant to aboriginal title could not be strip mined.

In essence, therefore, the Supreme Court in *Delgamuukw* was not really talking about the evolution or modernisation of traditional practices. Unlike native title, aboriginal title is more directly based in use and possession, leading to the creation of an interest at common law based on that use and possession. Subject to the qualifications mentioned in the judgment, which include restrictions on alienability, and that lands cannot be used in a manner irreconcilable with the nature of the attachment to land, land held pursuant to aboriginal title can be put to a variety of uses, just as the land owned by non-Indigenous Canadians can be put to a number of uses. This contrasts with Australia, where native title is based on customs and traditions, not necessarily occupation. Thus, it may well be in Australia that the courts will have to examine modern practices, and determine their relationship to pre-contact customs, in an exercise not dissimilar to that undertaken in Canada with reference to aboriginal rights.

The evidence required

As with establishing any native title claim, in order to establish a modern form of a traditional right anthropological, historical and oral evidence of the group's customs and traditions at the time of European contact is required. It is clear that in *Gladstone*, the majority were influenced by the scale of pre-contact trading, referring to the trade in 'tons'.

The following is an extract of the evidence relied on in *Gladstone*:

> [26] The facts as found by the trial judge, and the evidence on which he relied, support the appellants' claim that exchange of herring spawn on kelp for money or other goods was a central, significant and defining feature of the culture of the Heiltsuk

prior to contact. Moreover, those facts support the appellants' further claim that the exchange of herring spawn on kelp on a scale best characterized as commercial was an integral part of the distinctive culture of the Heiltsuk. In his reasons Lemiski Prov. Ct. J. summarized his findings of fact as follows:

> "It cannot be disputed that hundreds of years ago, the Heiltsuk Indians regularly harvested herring spawn on kelp as a food source. The historical/anthropological records readily bear this out.
>
> *I am also satisfied that this Band engaged in inter-tribal trading and barter of herring spawn on kelp*. The exhibited Journal of Alexander McKenzie [*sic*] dated 1793 refers to this trade and the defence lead [*sic*] evidence of several other references to such trade.
>
> The Crown conceded that there may have been some incidental local trade but questions its extent and importance. *The very fact that early explorers and visitors to the Bella Bella region noted this trading has to enhance its significance*. All the various descriptions of this trading activity are in accord with common sense expectations. Obviously one would not expect to see balance sheets and statistics in so primitive a time and setting. [Emphasis added.]"

[27] There was extensive evidence presented at trial to support Lemiski Prov. Ct. J.'s findings. In the journal of Alexander Mackenzie, referred to by the trial judge, is the following entry from 1793:

> "The Indians who had caused us so much alarm, we now discovered to be inhabitants of the islands, and traders in various articles, such as cedar-bark, prepared to be wove into mats, *fish-spawn*, copper, iron, and beads, the latter of which they get on their own coast. For these they receive in exchange roasted salmon, hemlock-bark cakes, and the other kind made of salmon roes, sorrel, and bitter berries. [Emphasis added.]"

Similarly, the journal of Dr. William Tolmie, a fur trader, includes the following entry for April 16, 1834:

> "From 15 to 20 large canoes of Wacash's people passed on their way to the Caughquil country – the canoes were laden with boxes, hampers *&c filled with dried herring spawn*, which they are to barter for Oolaghens – the covers of their boxes are fitted similarly to that of a bandbox – hampers small & twisted of cedar bark. [Emphasis added.]"

The defence expert, Dr. Barbara Lane, whose testimony was accepted by the trial judge, said in her report on the culture of the Heiltsuk people:

> "Pacific herring spawn only in certain locations. Consequently, some native groups had access to quantities of spawn beyond their needs and others had access to little or no spawn. This partly explains *the extensive trade in spawn among native groups along the coast. Tons of spawn were transported by canoe from districts with good spawning areas to places not so favored*.
>
> After the spawn was processed, flotillas of freight canoes carrying tons of spawn product travelled between districts carrying boxes and

> hampers. These canoes travelled for trading purposes from one tribe to another and were under the direction of their respective chiefs. [Emphasis added.]"
>
> All of this evidence supports the position of the appellants that, prior to contact, exchange and trade in herring spawn on kelp was an integral part of the distinctive culture of the Heiltsuk. **[at 660-661. © Canada Law Book Company 1996]**

It appears there is no necessary connection in the majority judgments between the scale of the practice and its integral nature. The reliance placed by the Court on the scale of trading can be explained by the simple fact that the more widespread a practice is, the more easily evidence can be adduced to prove it. Nevertheless, if the majority insists on equating the modern practice with a pre-contact practice it may well be necessary to establish a wide-scale activity, which is recognisable to modern, western judges as 'commerce'. The majority's approach places a high burden of proof on would-be plaintiffs. For this reason the judgment of McLachlin J is preferable. As noted above, it maintains the historic origins of native title, but places a lower evidentiary burden on plaintiffs.

In *Horseman*, the majority also relied largely on historical evidence. The following is an extract of the evidence relied on in *Horseman*:

> The economy of the Indian population at the time of the treaty had clearly evolved to such a degree that hunting and fishing for commercial purposes was an integral part of their way of life. In his "Commentary on Economic History of Treaty 8 Area" (unpublished; June 13, 1985), Professor Ray notes at p. 4:
>
> > The Indians indicated to the Treaty 8 commissioners that they wanted assurances that the government would look after their needs in times of hardships before they would sign the treaty. The Commissioners responded by stressing that the government did not want Indians to abandon their traditional economic activities and become wards of the state. Indeed, one of the reasons that the *Northwest Game Act* of 1894 had been enacted was to preserve the resource base of the native economies outside of organized territories. The government feared that the collapse of these economies would throw a great burden onto the state such as had occurred when the bison economy of the prairies failed.
>
> Professor Ray, in conclusion on this point, states at pp. 8-9:
>
> > [C]ommercial provision hunting was an important aspect of the commercial hunting economy of the region from the onset of the fur trade in the late 18th century. However, no data exists that makes it possible to determine what proportion of the native hunt was intended to obtain provisions for domestic use as opposed to exchange.
> >
> > Furthermore, in terms of economic history, I am not sure any attempts to make such distinctions would be very meaningful in that Indians

> often killed animals, such as beaver, primarily to obtain pelts for trade. However, the Indians consumed beaver meat and in many areas it was an important component of the diet. Conversely, moose, caribou and wood buffalo were killed in order to obtain meat for consumption and for trade. Similarly, the hides of these animals were used by Indians and they were traded. For these reasons, differentiating domestic hunting from commercial hunting is unrealistic and does not enable one to fully appreciate the complex nature of the native economy following contact. **[at 374. © Canada Law Book Company 1996]**

Applicability of Canadian Law to Australia

The decisions on common law rights discussed above could be used in Australia. The following points should be noted:

1. the cases which are determined in the context of s 35(1) of the *Constitution Act, 1982* are in some manner informed by the judges' views as to the purpose of that section. Nevertheless, aboriginal rights exist independently of s 35(1) and arise from pre-existing practices, just as native title in Australia is based in traditional laws and customs;
2. as stated in Chapter 2, the 'integral to the distinctive culture' test is arguably narrower than the High Court's decision in *Mabo (No. 2)* and the characterisation of the right depends to some extent on the regulations that it is argued have been infringed. Therefore, the characterisation test would require some modification;
3. McLachlin J's judgment is the closest to the approach of the High Court in *Mabo (No. 2)* and broader than that of the majority;
4. the High Court did not discuss the evolution of rights in *Mabo (No. 2)*, other than to reject the notion of 'frozen rights'. It is therefore open for arguments to be made, perhaps by analogy to the above case law, as to the manner and degree of evolution of traditional practices; and
5. although these cases can prove of use, there is no way of predicting what the High Court's approach to this issue will be.

Further References and Reading

Murdock and Johnson v. The Queen (1996) 38 C.R.R. (2d) 15 - a traditional aboriginal right may be exercised in a contemporary manner but here no evidence that the Mi'kmaq's traditional use of tobacco included dealing, bartering or trading in tobacco products.

R. v. Pamejawon (1994) 25 C.R.R. (2d) 207 (Ontario Court of Appeal) - high stakes gambling was not a modern version of aboriginal rights either as an incident of aboriginal title or as an incident of a right of self-government.

Manychief v. Poffenroth - (1994) 25 Alta.L.R. (3d) 393 (Alberta Queen's Bench). The provincial *Fatal Accidents Act* provided rights to wives of deceased, but did not recognise common law relationships. The plaintiff had lived with the deceased for 8 years, but they did not have a 'church wedding'. The plaintiff made a claim under the Act as a wife by customary blood marriage. The judge found that there was an existing Aboriginal right to customary marriage, but that in this case the relationship was a common law relationship like those found in the non-native community, not a modern form of a traditional customary marriage.

Meyers, Piper, Rumley, *Asking the Minerals Question: Rights in Minerals as an Incident of Native Title,* (1997) 2(2) *Aust. Indigenous L.R.* 203

United States

United States v. Michigan 471 F. Supp.192 (1979).
Puyallup Tribe v. Department of Game (Puyallup I) 391 U.S. 392 (1968).

A number of cases concerning treaty rights have discussed Indian rights to commercial fishing. As with Canadian decisions in this area concerning treaty rights, the Courts' approach is that in order for their to be a commercial right now, there must have been a commercial dimension to the tribe's fishing practices prior to entering the treaty. This is clearly an easier burden of proof than in those Canadian cases concerning aboriginal rights, rather than treaty rights, because the date at which the commercial right must be established is the date of entry into the treaty - rather than at first contact. These cases, of course, turn to some extent on the wording of the treaty reservations.

In *Puyallup I*, the Treaty of Medicine Creek provided that 'the right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all the citizens of the Territory'. The Puyallup and Nisqually Indians used set nets for subsistence and large scale commercial fishing. Use of set nets was contrary to state law.

The Court held that as the treaty did not secure a right to fish 'in the accustomed manner', the right to commercially fish (which the court was prepared to assume existed at the time of entry into the treaty) was not protected from state regulation.

The Court stated that:

> The treaty right is in terms the right to fish "at all usual and accustomed places." We assume that fishing by nets was customary at the time of the Treaty; and we also assume that there were commercial aspects to that fishing as there are at present. But the manner in which the fishing may be done and its purpose, whether or not commercial, are not mentioned in the Treaty. We would have quite a different case if the Treaty had preserved the right to fish at the "usual and accustomed places" in the "usual and accustomed" manner. But the Treaty is silent as to the mode or modes of fishing that are guaranteed. Moreover, the right to fish at those respective places is not an exclusive one. Rather, it is one "in common with all citizens of the Territory." Certainly the right of the latter may be regulated. And we see no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State. (at 398)

In *United States v. Michigan*, the United States sought to protect the Bay Mills Indian Community's rights to fish in certain waters of the Great Lakes which vested in the tribe by virtue of aboriginal occupation and use, the Treaty of Ghent of 1814, and the Treaty with the Ottawa and Chippewa Nation of 1836. The United States asked that the State be enjoined from interfering with the Indians' treaty-confirmed rights to fish in the Great Lakes. According to the Court, when the Indians granted to the United States their ownership in the land and waters of the Great Lakes described in Article First of the 1836 Treaty, they retained all those rights not specifically conveyed. Among the retained rights was their aboriginal right to continue to fish in the ceded waters of the Great Lakes. Thus, although they sought to protect a treaty right, that treaty right was based on the reservation of a pre-existing aboriginal right to fish. Applying *United States v. Winans* 198 U.S. 371 (1905), the Court noted that:

> The conceptual framework, then, for interpreting the treaty is that the grant or cession in the treaty is not made from the United States to the Indians. Rather, the Indians were the grantors of a vast area they owned aboriginally and the United States was the grantee. (at 254)

And:

> The Indians' claim to reserved fishing rights here depends upon their having possessed such rights at the time of the cession. The legal predicate to this holding is a holding that they possessed aboriginal rights in the area of cession. (at 255).

As a matter of fact, the Court found that the Ottawa and Chippewa Indians of

northern Michigan had relied upon the catching of fish in the Great Lakes for subsistence and for commerce for centuries, and that such a reliance has been the one most important single aspect of their lives from a time at least one hundred years before any contact with Europeans right up until the time of the signing of the Treaty of 1836. Therefore, the court ruled that the plaintiff Indians held an aboriginal and treaty right under the Treaty of Ghent to catch fish in the Great Lakes at the time of the 1836 Treaty. Thus, the Indians impliedly reserved the right to subsistence and commercial fishing in the Treaty because of this resource's importance to the Indian community at and before the time they entered into the Treaty.

With regard to the evidence presented, the Court held that:

> The plaintiffs submitted evidence that, in this northern region of the present United States, where agriculture has always been difficult but fish have been in abundance, Indians have relied upon fishing as basic to their livelihood since 10,000 years before Christ. They submitted evidence that the Indians adopted gill nets from their eastern cousins shortly after the birth of Christ, and used them productively for centuries, even though, as defendants said, white men could not get a catch from such nets unless made of much finer materials. The plaintiffs presented experts who testified that the Michigan Indians grew to depend upon the fisheries to secure European goods and that their earliest participation in the European market economy rested upon their expertise at fishing. It is this sort of evidence which this court had to evaluate in order to determine whether the Ottawas and Chippewas so depended upon subsistence and commercial fishing at the time they signed the treaty of 1836 that they could not have knowingly signed away their right to fish. (at 214)

With respect to the treaty right to fish, the Court held that both the means and the scale would continue to evolve.

> Similarly, the means used to fish were not restricted by the Treaty of 1836 nor by the Indians in any other agreement with the United States. The Indians' right to fish, like the aboriginal use of the fishery on which it is based, is not a static right. The reserved fishing right is not affected by the passage of time or changing conditions. The right is not limited as to species of fish, origin of fish, the purpose of use or the time or manner of taking. The right may be exercised utilizing improvements in fishing techniques, methods and gear. It may expand with the

> commercial market which it serves, and supply the species of fish which that market demands, whatever the origin of the fish. (at 260)

Applicability to Australia

Both of the above cases concern treaty rights. In this sense they are not directly applicable to Australia. However they may be applicable in the following two ways:

1. they evidence a general trend in other jurisdictions to recognise the continuing importance of fisheries and hunting resources to Indigenous peoples, and the need to secure to Indigenous peoples an adequate livelihood; and
2. the rights reserved are based on pre-existing aboriginal rights to fish. The logical result of the courts' recognition of a commercial right to fish at the time of entry into the Treaty is that they also recognised that, broadly speaking, aboriginal rights can evolve to include a commercial dimension. However, such a view allows for the effect of European occupation on Indigenous peoples, a view that the majority of the Supreme Court of Canada was only prepared to countenance in *Van der Peet* if it could still be shown that the rights were inherently commercial in some way prior to contact. It remains to be seen what approach the High Court of Australia takes in relation to this.

New Zealand

There have been few native title cases in New Zealand. Rather, most claims have been brought to the Waitangi Tribunal, or have concerned the Crown's fiduciary duty to Maori. Although some native title claims were commenced in the early 1990's, these were largely claims to the offshore, and the process was side-tracked by the Sealord's Deal. Only one New Zealand decision is of relevance to this section.

Case Law

> *Ngai Tahu Maori Trust Board v. Director General of Conservation* [1995] 3 N.Z.L.R. 553.
>
> *Te Runanga o Muriwhenua Inc v. Attorney-General* [1990] 2 N.Z.L.R. 641.
>
> *Te Runanganui o Te Ika Whenua Inc Society v. Attorney-General* [1994] 2 N.Z.L.R. 20.
>
> *Taranaki Fish and Game Council v. McCritchie* [1997] DCR 446.

Te Runanganui o Te Ika Whenua concerned a proposal to constitute certain energy companies and to transfer to them the undertakings of the Bay of Plenty Electric Power Board. That board owned and controlled a dam on the Wheao River. Te Ika Whenua lodged a claim to the river with the Waitangi Tribunal and brought proceedings seeking an interim declaration from the Court that the Minister of Energy not recommend that an order be made approving the transfer as it would prejudice their aboriginal rights.[1] In passing, the Court of Appeal noted, even though the appellants had not claimed that the dams were taonga within article two of the Treaty of Waitangi, that:

> . . . however liberally Maori customary title and treaty rights may be construed, one cannot think that they were ever conceived as including the right to generate electricity by harnessing water power. Such a suggestion would have been far outside the contemplation of the Maori chiefs and Governor Hobson in 1840. No authority from any jurisdiction has been cited to us to suggest that aboriginal rights extend to the right to generate electricity. (at 24)

In *Ngai Tahu Maori Trust Board*, the Court of Appeal appeared to accept that aboriginal title in the form of the right to take dolphin, whale and seals could exist offshore. The Ngai Tahu held a permit which enabled it to engage in the whale-watching business. In 1993 the Director-General of Conservation issued another permit for the same purpose to another company. The Ngai Tahu brought an action claiming that it was entitled on treaty principles to a period of operation during which it was insulated from competition. Section 4 of the *Conservation Act* 1987, under which the permits were issued, provides that: 'the Act shall be so interpreted and administered as to give effect to the principles of the Treaty of Waitangi'. The Court held that art. II of the Treaty of Waitangi, which refers to 'fisheries' must also include sea fisheries. (at 558) Their Honours did predicate the decision on the right claimed being a Treaty right, but implied that a customary title over fisheries was also possible. In discussing whether commercial whale watching was a 'modern-form' of a traditional right, the Court stated that:

> . . . however liberally Maori customary title and treaty rights may be construed, tourism and whale watching are remote from anything in fact contemplated by the original parties to the treaty. (at 560)

Earlier, the Court also stated that:

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[1] The Court of Appeal's discussion of aboriginal title is considered in Chapter Two 'Recognition'.

> It has been found in the High Court that there is a strong case that before 1840 Maori had a highly developed and controlled fishery over the whole coast, at least where they were living. . . The view that Maori had customary or aboriginal title and treaty rights (it being unnecessary to distinguish between them in the context) and that the Crown had fiduciary duties extending to its treatment of those rights may be further supported by the judgment of this Court in *Te Runanga o Wharekauri Rekohu Inc v. Attorney-General* [1993] NZLR 301, 303-306 and the authorities there cited. (at 559)

Recently, customary fishing rights were again recognised in *Taranaki Fish and Game Council*. In that case, the defendant was a Maori who was charged with fishing for trout without a licence contrary to the terms of the *Conservation Act* 1987. However, that Act contains a defence which provides that 'Nothing in this Act shall affect any Maori Fishing Rights'. This was the same wording as defence in the *Fisheries Act* which was relied upon in *Te Weehi*. In addition, s 4 of the *Conservation Act* provides that the Act shall be 'so interpreted and administered as to give effect to the principles of the Treaty of Waitangi'. The defendant had lived in the area and fished in the river since childhood. The river was within the rohu (area) over which his hapu had manawhenua. He genuinely believed that he was exercising a traditional Maori fishing right according to proper protocol. This claim was supported by evidence. However, trout are an introduced species to New Zealand. This raised the question of whether a Maori Fishing Right, within the meaning of the *Conservtion Act* included introduced species. Becroft J held that:

- the principles of the Treaty are not confined to express terms. The Treaty is to be interpreted as a living instrument; (at 462)
- it is unclear whether Maori fishing rights mentioned in the *Conservation Act* derive from common law or the Treaty or both. However, the rights referred to in s 4 of the *Conservation Act* include both; (at 463)
- aboriginal title rights may more easily be 'frozen in time' than Treaty rights which are 'living'. However, there is judicial comment to the effect that there is little difference between the two (*Te Runanga o Muriwhenua*), although there is Waitangi Tribunal has argued that they are different (*Muriwhenua Fishing Claim* 1988 WAI022); (at 463)
- the difference or similarity does not arise in this case because of the reference to the Treaty in s 4. If they are virtually the same then they are to be given a wide interpretation; Fisheries means the activity and business of fishing, including fishing places, species and the right to fish, and a development right. This suggests that the Treaty right includes more than species caught in 1840; (at 468-9)

- case law from other jurisdictions suggests that aboriginal fishing rights should not be limited to indigenous species and traditional methods; (at 469) and
- it is proper to ask what would have been within the reasonable contemplation of the parties on signing the Treaty in 1840. Would the parties have anticipated the introduction of new species into the colonies rivers and lakes? It is difficult to exclude such an expectation, as the Maori had already seen the introduction of new species by the British; (at 473)

Becroft J also made reference to *Ngai Tahu Trust Board*, discussed above, and to the *Muriwhenua Fishing Claim* and the *Ngai Tahu Sea Fisheries Report*, both discussed below. (at 472)

Waitangi Tribunal Reports

The evolution of rights has been considered by the Waitangi Tribunal. Although Tribunal reports do not constitute judicial authority, they are evidence of a growing recognition of what the Tribunal calls the 'development right'. In both the *Muriwhenua Fishing Claim* (WAI 22) and the *Ngai Tahu Sea Fisheries Report* (WAI 27), the Waitangi Tribunal recognised this 'development right'. In the Ngai Tahu Report, the tribunal stated that:

> 10.2.1 It is common ground between the claimants, the Crown and the fishing industry that inherent in the Treaty of Waitangi is a right to development. This was recognised by the Muriwhenua tribunal in the context of a discussion of new technology and the right to development. The tribunal found:
> (a) The Treaty does not prohibit or limit any specific manner, method or purpose of taking fish, or prevent the tribes from utilising improvements in techniques, methods or gear.
> (b) Access to new technology and markets was part of the quid pro quo for settlement. The evidence is compelling that Maori avidly sought Western technology well before 1840. In fishing, their own technology was highly developed, and was viewed with some amazement by early explorers. But there is nothing in either tradition, custom, the Treaty or nature to justify the view that it had to be frozen.
> (c) An opinion that Maori fishing rights must be limited to the use of the canoes and fibres of yesteryear ignores that the Treaty was also a bargain.
> It leads to the rejoinder that if settlement was agreed to on the basis of what was known, non-Maori also must be limited to their catch capabilities at 1840.
> Maori no longer fish from canoes but nor do non-Maori use wooden sailing boats. Nylon lines and nets, radar and echo sounders were unknown to either party at the time. Both had the right to acquire new gear, to adopt technologies developed in other countries and to learn from each other.
> (d) The Treaty offered a better life for both parties. A rule that limits Maori to their old skills forecloses upon their future. That is inconsistent with the Treaty. (The Crown has generally accepted these principles).

(e) The right to development is recognised in domestic and international law, in domestic law in *Simon v the Queen* (1985) 24 DLR (4th) 390, 402, for example.
10.2.2 As the tribunal noted, the Crown generally accepted points (a) to (d) but not point (e).
. . .
10.2.3 Crown counsel challenged the Muriwhenua tribunal's reliance on the Canadian case of *Simon v The Queen* (1985) 24 DLR (4th) 390 as authority for the proposition that the right to development is recognised in domestic law. We agree with Mr Carruthers that unless the principles of a case such as *Simon v The Queen* are adopted by the New Zealand courts it cannot be said they have been recognised in New Zealand domestic law. But having said that, we believe, were the question of whether the Treaty must be interpreted as including the right to develop the fishery to become justiciable in the New Zealand courts, that the right to develop would be recognised in our domestic law. The Crown itself concedes that it is a right inherent in the Treaty of Waitangi. This being so, if the issue were to fall within the jurisdiction of a New Zealand court the Crown would be bound to support recognition of such a right just as it does before us in the context of our jurisdiction.
10.2.6 We have noted that the Crown in its statement on the right to development accepts that the traditional Maori fishing rights included a commercial element and that the right to develop the fishery also included the right to employ new techniques, knowledge and equipment for commercial purposes. This was concurred in by the fishing industry. It was also the view of the claimants.
The Crown, however, further maintained that when the tribes chose to undertake development of their commercial interest in the fisheries they are amenable to appropriate programmes of conservation and management techniques introduced by government from time to time. Crown counsel said nothing in this context as to any obligation on the Crown to consult with Maori before instituting any such measures. We consider the question of the need for consultation with iwi on this and related matters later in this report.**[© Waitangi Tribunal Muriwhenua Fisheries Claim, Wai 022, 1988]**

Applicability generally

Although the High Court rejected 'frozen rights' in *Mabo (No. 2)* it remains to be seen what approach the Court takes to determining what kind of modern practices will be seen as an evolution of traditional rights. In summary, a number of approaches can be seen overseas:

- the majority of the Supreme Court of Canada appear to take the view that in order for a modern commercial right to be recognised, there must have been something inherently commercial about the group's traditional practices prior to contact;
- according to McLachlin J what is at issue is the right to continue to use the resource in the traditional way to provide for the traditional needs, albeit in their modern form. Therefore, trade is merely the mode or practice by which the more fundamental right of drawing sustenance from the resource is

exercised. If it is necessary to trade in order to provide traditional needs, then that should be permitted;

- According to both Canadian and United States case law, if commercial rights are in existence at the date of entry into a treaty, then the treaty rights will have a commercial aspect.

The Canadian cases dealing with aboriginal rights are applicable to Australia, keeping in mind the same proviso made with respect to these cases in Chapter Two: that these cases are to some degree affected by the Court's views of the purpose of s 35(1) of the *Constitution Act, 1982*. Treaty cases are unlikely to be seen by the Courts as applicable, other than as evidencing a general trend of recognition of the importance of traditional resources to modern livelihood. This is not so much because the rights are treaty rights, which in many cases are merely reservations of pre-existing aboriginal rights, but because the effect of European contact between the time of contact and entry into a treaty is uncertain. The later date of entry into a treaty allows for the evolution of rights in response to European contact. The Supreme Court in *Van der Peet* rejected the suggestion that evolution could occur as a result of European trading patterns after contact.

However, the decision in *Mabo (No. 2)* is sufficiently underdeveloped in this area as to leave some scope for argument before the High Court based on the decisions in this chapter. As with the general notion of recognition of aboriginal rights, there is a difference between what may be argued in Australia, and what will be accepted by the courts. It is suggested that McLachlin J's approach in *Van der Peet* represents the best arguments available for use in Australia.

Distribution of Resources

Once a right to resources has been established, the next issue to be determined is how resources should be divided between Indigenous and non-Indigenous groups. For example, if a commercial right to take a particular species of fish is established, how do we allocate rights to take that fish between the native title holders and commercial fishers? Should Indigenous peoples have priority, should there be a 50-50 split, or should it be determined according to need, relative population or area of coastline held under native title?

In Canada, Australia and the United States different answers have been given to the above questions, and different models established for distribution of resources. All of these models are highly dependent on facets of the legal and political system in which they arise, and are not directly applicable to Australia. Therefore, we have provided a reading list for each jurisdiction, which gives examples of means by which allocation of resources has occurred.

Canada

- *R. v. Sparrow* (1990) 70 D.L.R. (4th) 385.
- *R. v. Gladstone* (1996) 137 D.L.R. (4th) 648.
- The various comprehensive land claims agreements which are considered in Chapter One 'Context'.

United States

In the United States there has been a series of decisions in which the Supreme Court has determined the allocation of anadromous fish resources. These decisions have been based on particular treaty entitlements.

- *Puyallup Tribe v. Department of Game of Washington* 391 U.S. 392 (1968) (*Puyallup I*).
- *Department of Game of Washington v. Puyallup Tribe* 414 U.S. 44 (1973) (*Puyallup II*).
- *Puyallup Tribe. v. Department of Game of Washington* 433 U.S. 165 (1977) (*Puyallup III*).
- *Antoine v. Washington* 420 U.S. 194 (1975).
- *Washington v. Washinton State Commercial Passenger Fishing Vessel Association* 443 U.S. 658 (1979) (*The Fishing Vessel Case*).

New Zealand

Sealord's Deal - this is covered in some detail in Chapter One 'Context'. The agreement is appended to the decision of the New Zealand Court of Appeal in *Te Runanga o Wharekauri Rekohu v. Attorney General* [1993] 2 N.Z.L.R. 301. There has been an ongoing controversy over the allocation of fishing quota both to Maori in general, as well as among the various iwi groups. With regards to this issue see: *Hauraki Maori Trust Board & Anor* v *The TOKM & Ors* CP 562/94, High Court Auckland, 24 May 1995, Anderson J.

Chapter Four

The Offshore and Rights to Water

General

Indigenous peoples have a long standing relationship to both land and waters and, unlike western law, often make no distinction between terrestrial areas and those areas covered by waters.[1] Given the relative recentness of *Mabo (No 2)*, which recognised native title to land, it is not surprising that within Australia there has to date not been a full consideration of the legal aspects of Indigenous rights in waters, including native title to offshore areas. The legal question of whether the common law recognises and protects native title rights in the sea has yet to be examined by the High Court although the Federal Court recently considered this issue in *Croker Island*.[2] Whether the High Court accepts the particular reasoning in the *Croker Island case* remains to be seen. Although there is limited overseas case law on this issue, that case law would suggest that there are alternative approaches to the reasoning Olney J adopted in the *Croker Island case*.

In respect of the 'offshore' and water rights there are variable definitions of given areas. Accordingly in this chapter 'the offshore' is defined very broadly to include the foreshore, estuaries, 'tidelands' and mouths of rivers, as well as waters off the coast. Within Australia the offshore is divided into a number of zones with inland waters forming part of the states. Under the *Native Title Act* 1993 (Cth), an offshore place is defined in section 222 as:

> . . . any land or waters to which this Act extends, other than land or waters in an onshore place; "onshore place" means land or waters within the limits of a State or Territory to which this Act extends.

Less certainty is evident in overseas case law. It is often difficult to discern exactly what areas are being referred to in cases which adopt generic terms such as 'offshore'. Therefore caution should be used in directly applying the cases without resort to the factual evidence on which they were based in order to pin

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1 For an overview of Indigenous peoples' association with offshore areas see Meyers, G., O'Dell, M., Wright, G., and Muller, S., *A Sea Change in Land Rights Law: The Extension of Native Title to Australia's Offshore Areas*, AIATSIS Native Title Research Unit, Research Monograph, 1996, at 1-19.

2 *Croker Island* refers to the case of *Yarmirr & Ors* v *The Northern Territory of Australia & Ors*, [1998] 71 FCA 6 July 1998, unreported.

point the exact locations being discussed.

Indigenous rights in the off shore areas and rights to water are discussed in overseas cases in a number of ways including:

- Aboriginal title rights which are regarded as an extension of the 'connection with land' where there are adjacent land and water areas.
- General Aboriginal title where there is no distinction made between land and water.
- Non territorial rights which are to some extent disassociated from the title to the underlying structure of the water body, e.g., rights of fishing.

Canada

Aboriginal Rights to Water on a General Basis

As Bartlett noted, 'All of Canada was originally subject to aboriginal title. The question however is whether aboriginal title includes a right to water'.[3] He concluded that the use of water was an integral part of the occupation and possession of territory and thus a right to water is an integral part of aboriginal title. While it is argued that traditional use of territories included use of water, it remains unclear how far into the offshore that traditional right extends. It has been suggested that it would extend along the Pacific and Atlantic coasts and into the Arctic areas. However, there is little case law directly on point. Other aspects of rights to water such as rights to traditional fishing areas are less controversial. In this section, rights to water are used in two senses; first the right or title to land areas covered by water, and secondly rights of use of water such as trapping and fishing.

Further, under the Canadian claims settlement process, the use of water and rights to water are included in the scope of the agreements derived under this process. The agreements are extremely specific and relate directly to the territories and people under the agreement. For example under the first agreement, the James Bay and Northern Quebec Agreement, the seashore, beds and shores of the principal lakes and rivers in the region are excluded from lands set aside for the Cree and Inuit people. The second settlement, the western Arctic or Inuvialuit Final Agreement reserved a right of public access in a one hundred foot strip along the sea coast, rivers and lakes. Further, the Inuvialuit people have a non-exclusive, but preferential, right to fish in the offshore and their ownership of the land apparently does not give power to regulate offshore

[3] R. Bartlett, *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights,* The Canadian Institute of Resources Law, University of Calgary, 1988, at 7.

activity.

Moreover, given the detailed nature of the Agreements it is unlikely that a court would imply into such agreements greater rights based on aboriginal title, particularly as the agreements have been adopted by statute. The Agreements, while a useful model in general for Australia in dealing with native title claims to the offshore, need to be regarded in the light of the specific constitutional and political setting of Canada.

Further References

Bartlett, R. *Aboriginal Water Rights in Canada: A Study of Aboriginal Title to Water and Indian Water Rights*, The Canadian Institute of Resources Law, University of Calgary, 1988.

James Bay and Northern Quebec Native Claims Settlement Act, S.C. 1976-7, c. 32.

Aboriginal Title and Aboriginal Rights in the Offshore

Calder v. Attorney-General of British Columbia (1973) 34 D.L.R. (3d) 145.
Peters v. R. (1983) 42 B.C.L.R. 373.
R. v. Van der Peet (1996) 137 D.L.R. (4th) 289.
R. v. Gladstone (1996) 137 D.L.R. (4th) 648.
R. v. Nikal (1996) 133 D.L.R. (4th) 658.
R. v. Adams (1996) 138 D.L.R. (4th) 657.

Aboriginal title

In Canada, there is limited case law which directly considers aboriginal title in the offshore. In *Calder* it appears that several of the areas claimed were offshore[4]. The Nishga Tribe Council claimed marine areas including Observatory Inlet, Portland Canal and Portland Inlet. This information appears once in the facts and is not repeated. There is no indication that the Court made any distinction made between land and water in *Calder.*

Bartlett has suggested that the 1982 case of *Peters v. R,* is a case authority for

4 See general discussion of the case in Chapter Two, 'Recognition'.

the existence of offshore native title.[5] In *Peters*, the Ohiaht Indian band sought an injunction against the Minister of Lands, Parks and Housing, seeking to prevent the granting of a licence to use the foreshore of a beach on Crown lands as an experimental area for commercial clam production. The band alleged that the development would prevent them from gathering clams on the beach as they had since time immemorial, and that that was an aboriginal right within s 35(1)of the Canadian *Constitution Act, 1982*. The respondents moved to strike out the petition on the grounds that no aboriginal title or rights could exist in British Columbia. Esson J refused to find that there was no question to try, as the question of whether or not aboriginal title could exist in British Columbia had not been finally disposed of in *Calder*. (For a discussion, see *Peters***,** note 87, at 381). While it is true that the judge did not allude to any potential problems with a claim along the foreshore, this case in itself provides limited authority for offshore native title. The case was decided on an entirely procedural basis, and the judge did not finally decide the substantive legal issues about offshore aboriginal title.

Aboriginal rights in the offshore

In *Van der Peet*, McLachlin J made several references to native title offshore. Her Honour noted that:

> [t]he aboriginal right to fish may be defined as the right to continue to obtain from the river or the sea in question that which the particular aboriginal people have traditionally obtained from the portion of the river or the sea. If the aboriginal peoples show that they traditionally sustained themselves from the river or the sea, then they have a *prima facie* right to continue to do so, absent a treaty exchanging that right for other consideration. . . (at 382-383.)

Further:

> It may now be affirmed with confidence that the common law accepts all types of aboriginal interests . . . What the laws, customs and resultant rights are "must be ascertained as a matter of fact" in each case, *per* Brennan J in *Mabo*, at p.58. It follows that the Crown in Canada must be taken to have accepted existing native laws and customs and the interests in the land and waters they give rise to, even though they found no counterpart in the law of England. In so far as an aboriginal people under

[5] R. Bartlett, 'Aboriginal Sea Rights at Common Law: *Mabo* and the Sea', in *Turning the Tide*: Papers from the Conference on Indigenous Peoples and Sea Rights, held from 14 July-16 July 1993, Faculty of Law, Northern Territory University, 1993, at 13-14 .

> internal law or custom had used the land and its waters in the past, so it must be regarded as having the continuing right to use them, absent extinguishment or treaty. (at 380.)

What makes these comments particularly interesting is that it was made in the context of a review of common law native title, which included references to *Calder*, *Johnson v. M'Intosh*, *Guerin* and *Mabo (No. 2)*. The comments were not specifically directed towards an analysis of s 35(1) *Constitution Act, 1982*. Her Honour later noted that:

> [t]he right to trade the products of the land and adjacent waters for other goods is not unlimited. The right stands as a continuation of the aboriginal people's historic reliance on the resource. (at 384.)

And:

> A further limitation is that all aboriginal rights to the land or adjacent waters are subject to limitation on the grounds of conservation. These aboriginal rights are founded on the right of the people to use the land and adjacent waters. There can be no use, on the long term, unless the product of the lands and adjacent waters is maintained. (at 384.)

Notably, McLachlin J did not characterise this limit as existing on the basis of s 35(1), but rather as a feature of common law native title.

Although it is not clear from the facts in *Gladstone* exactly where the appellants were fishing, it appears they were doing so in 'tidal waters'. However, it is unclear from any of the judgments to what 'tidal waters' refers. In the context of determining whether or not the appellant's aboriginal right survived the justification test in s 35(1) *Constitution Act, 1982*[6], the Court considered the effect of s 35(1) on the Magna Carta public right to fish in tidal waters. In this context it was held in *Sparrow* that aboriginal rights holders have priority in fisheries. However, the Court also noted that:

> . . . the aboriginal rights recognised and affirmed by s.35(1) exist within a legal context in which, since the time of Magna Carta, there has been a common law right to fish in tidal waters that can only be abrogated by the enactment of competent legislation:
> . . .
> [I]t has been unquestioned law since Magna Carta no new exclusive fishery could be created by Royal grant in tidal waters,

6 See Chapter One, 'Context', for a discussion of s 35 (1) *Constitution Act, 1982.*

> and that no public right of fishing in such waters, then existing, can be taken away without competent legislation. [*Attorney-General of British Columbia* v. *Attorney-General of Canada*, [1914] A.C. 153 (J.C.P.C.), at p.169-70, per Viscount Haldane]
>
> While the elevation of common law aboriginal rights to constitutional status obviously has an impact on the public's common law rights to fish in tidal waters, it was surely not intended that, by the enactment of s.35(1), those common law rights would be extinguished in cases where an aboriginal right to harvest fish commercially existed. . . As a common law, not constitutional, right, the right of public access to the fishery must clearly be second in priority to aboriginal rights; however the recognition of aboriginal rights should not be interpreted as extinguishing the right of public access to the fishery. (at 679, note 36 of the case.)

It would appear from this that the Supreme Court is of the opinion that there cannot be an exclusive aboriginal right to fish in tidal waters. See also *R v. Nikal* (1996) 133 D.L.R. (4th) 658.

Can Tests for Rights in Internal Waters be extended to the Offshore

Adams was a case concerning the claim of aboriginal rights as a defence to a breach of regulation. (See Chapter Two for details of the case) While the case concerned fishing rights in internal waters it is interesting as the Court clearly differentiated land areas and extinguishment of aboriginal title to land from the rights existing in the adjacent waters. In this case, the Crown argued for extinguishment of fishing rights and the court as given below then considered a distinction between title to lands and aboriginal rights to fish:

> While these events may be adequate to demonstrate a clear and plain intention in the Crown to extinguish any aboriginal *title to the lands* of the fishing area, neither is sufficient to demonstrate that the Crown had the clear and plain intention of extinguishing the appellant's aboriginal *right to fish for food* in the fishing area. The enlargement of the body of water on which the appellant has the aboriginal right to fish for food does not relate to the existence of that right, let alone demonstrate a clear and plain intention to extinguish it. The surrender of lands, because of the fact that title to land is distinct from the right to fish in the waters adjacent to those lands, equally does not demonstrate a clear and plain intention to extinguish a right. The surrender agreement dealt only with the Mohawks proprietary interest to the lands in question; it did not deal with the free-standing aboriginal right to fish for food which existed in the waters adjacent to those lands. There is no evidence to suggest what the parties to the surrender agreement, including the Crown, intended with regards to the right of the Mohawks to fish in the area; absent such evidence the Sparrow test for extinguishment cannot be said to have been met. **[© Canada Law Book Company**

1996 at 676]

The Court then considered whether the enhancement of sports fishing was a 'compelling and substantial objective' which would provide a justification for the infringement of the right to fish. It was concluded that sports fishing, without evidence of a meaningful economic dimension, was not of sufficient importance to warrant the limitation of aboriginal rights. (at 679). A similar test to *Adams* may be applied to inter-tidal and offshore areas in Australia where Indigenous people have traditionally fished in offshore waters adjacent to an area claimed under native title or even where native title to adjacent land was subsequently found to be extinguished. The recognition of fishing rights 'at large' in *Mason v Tritton* as adopted by Kirby J and the concept of rights to the waters of the sea exclusive of the seabed and subsoil in *Croker Island,* suggests that such a view may be accepted in Australia, although in the absence of judicial determination, it is difficult to indicate which tests are relevant.[7]

Canadian case law provides a rich source of 'tests' relating to recognition and possible extinguishment of native title in the offshore, together with much factual detail. The cases discussing the interaction of regulation and aboriginal rights are particularly pertinent to Australia.

United States

While there is considerable case law discussing Indian rights to the offshore areas in the USA, much of the case law concerns treaty based rights or specific reservations by statute or government grant for Indian use, rather than aboriginal title. In this section, the main focus is case law dealing with aboriginal rights, but, where appropriate, reference is made to cases on treaty and reservation rights.[8]

On discovery, the fee title to lands (and presumably to waters) was vested in the United States, and a right of occupancy remained with the Indian Nations. For a discussion of the sovereignty of the United States government in the offshore see *United States v. California* 332 U.S. 19; 67 S. Ct. 1658; (1947).

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7 For a more complete discussion see 'severance' of aboriginal rights from the soil in Chapter Two 'Recognition'.

8 See generally Chapter Two 'Recognition'.

Aboriginal Title in the Offshore - the Gambell Cases

> *The People of the Village of Gambell v. Clark* 746 F2d 572 (1984) (Court of Appeals for 9th Circuit) (*Gambell I*).
>
> *Amoco Production Co et al v. Village of Gambell* 480 U.S. 531 (1987) (*Gambell II*).
>
> *Gambell v. Hodel* 869 F 2d. 1273 (1989) (Court of Appeal for the 9th Circuit) (*Gambell III*).
>
> *Gambell v. Babbitt* 999 F. 2d. 403 (1993) (Court of Appeal for the 9th Circuit) *(Gambell IV).*
>
> *Inupiat Community of the Arctic Slope v United States* 548 F. Supp 182 (D. Alaska, 1982).

Aboriginal title to the offshore was discussed in the *Village of Gambell and Stebbins cases* (*Gambell I-IV).* In one of these cases, *Gambell III,* it has been held that it is possible to have a claim of aboriginal title to the offshore.[9] Although some of the reasoning in this case is a little strained, it does appear to constitute authority for this issue, and is not dependent on those facets of aboriginal rights in the United States which are particular to that jurisdiction. These cases appear to be the only United States authorities to consider aboriginal title and the offshore. However, the court's reasoning in the key case, *Gambell III,* is rather superficial and some care needs to be taken with this line of authority.

Background to the cases

In 1971, the US Federal Congress passed the *Alaska Native Claims Settlement Act* (A.N.C.S.A.) 43 U.S.C. §§1601-1629e.[10] This Act arose out of a conflict between the new State of Alaska and the Alaskan Natives over large areas of federal land. The *Alaska Statehood Act* L. 85-508, 72 Stat. 339 (1958) gave the new state the right to select over 100 million acres of land for state ownership. The state selected large areas of federal land and made applications for patents for the land. The native Alaskans claimed the same land. When oil was discovered the conflict between the state and native Alaskans worsened. In 1966 the Secretary of the Interior froze all public land transactions in Alaska and in 1971 Congress passed the Act in an attempt to accommodate all interests: State, Native, Conservation, and Oil Companies.

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9 R. Bartlett, *supra* note 8, considered these cases authority for the proposition that native title can be claimed in the offshore: at 11-13.

10 This statute can be found on the net at: http://www.law.cornell.edu/uscode/43/ch33.html.

Section 4 of the Act extinguished all claims based on aboriginal rights in return for over 900 million dollars compensation and the grant of 40 million acres of land. Section 4(b) of the Act provides that:

> All aboriginal titles, if any, and claims of aboriginal land in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

In the early 1980s, the Secretary of the Interior offered to sell leases for about 2.4 million acres in the Norton Sound Basin off the western shore of Alaska for oil and gas exploration under the *Outer Continental Shelf Lands Act*.[11] Several companies submitted bids for the leases, and the People of the Villages of Gambell and Stebbins brought legal action seeking a court order to enjoin (stop) the sale on the grounds that oil and gas development without their consent would adversely affect their aboriginal rights to subsistence hunting and fishing. The following provides a chronological account of the series of cases that ensued.

Gambell I

In *Gambell I*, the peoples of the two villages sought to prevent the sale of the oil and gas leases. There were two questions at issue:

1. First had any aboriginal rights to hunt and fish in the offshore been extinguished by the A.N.S.C.A.;
2. Second, the claimants asserted that the Secretary (federal govt.) failed to evaluate the impact of such leases on the subsistence culture of Native Alaskans as required by s 810 of the *Alaska National Interest Lands Conservation Act.*

Essentially, these questions required the Court to determine the geographic scope of both Acts to determine if they applied to the continental shelf; i.e., was the operation of the Acts confined to those areas where the US government had clear sovereignty. For the purposes of answering these questions the court was prepared to assume that the appellants had an aboriginal right to hunt and fish in the offshore. There appeared to be no question that aboriginal rights to the offshore were capable of existing. They merely assumed for the purposes of argument that such rights existed *as a matter of fact*. The Court held that the A.N.S.C.A. did extinguish offshore aboriginal rights, and that the *Conservation Act* did apply to the continental shelf.

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11 *Outer Continental Shelf Lands Act*, 43 U.S.C. §§1331-1356 http://www.law.cornell.edu/uscode/43/ch29.html

Gambell II

The finding in *Gambell 1* was overturned by the Supreme Court, which declared that the *Conservation Act* did not apply to the offshore and deliberately did not affirm the Court of Appeal's ruling that the A.N.S.C.A. extinguished aboriginal rights in the offshore. The Supreme Court returned the issue to the Court of Appeal for reconsideration.

Gambell III

The issue of whether aboriginal subsistence rights in the continental shelf area existed as a matter of law, now fell to be determined by the Court of Appeal. Five counter arguments were raised:

1. that the existence of aboriginal subsistence rights in the Continental Shelf was inconsistent with U.S. external sovereignty;
2. that there could be no subsistence rights because the U.S. had not extended full sovereignty to the Continental Shelf;
3. that the existence of subsistence rights was incompatible with the international regime of the sea;
4. that any rights were extinguished by the ANSCA; and
5. that if the rights did exist they were pre-empted by the *Outer Continental Shelf Lands Act*.

The Court of Appeal rejected the first argument (at 1276-127). There is no inherent inconsistency between Indian title and the U.S. external sovereignty over the continental shelf. It is clear from the earlier case of *Inupiat Arctic Slopes Community* that there can be no claim of Native Alaskan sovereignty over the offshore, as that would be inconsistent with U.S. external sovereignty. In the *Inupiat* case, the Inupiat People argued that they had title to an area in the Beaufort Sea based on tribal sovereignty, self-determination and, to a lesser extent, on unextinguished aboriginal rights. The District Court held that any exercise of external sovereignty by the Inupiat would be inconsistent with the external sovereignty of the United States (at 188). However, a claim of Indian title, because it is based on use and occupation rather than an assertion of sovereignty, is not inconsistent. Indian title therefore was held to be subordinate to, and consistent with, the national interest. Therefore, the federal government's interests in the outer continental shelf did not extinguish the asserted Aboriginal hunting and fishing subsistence rights (at 1277).

With respect to the second issue, the respondents argued that as the United States has not asserted full territorial sovereignty over the offshore, it does not have fee simple title which can be 'burdened' by Indian title. As Indian title is a dependent, possessory right, it cannot exist unless the United States has the underlying fee. The Court agreed that there had been no complete extension of

US sovereignty to the Outer Continental Shelf, but that as a practical matter the U.S. had extended its dominion 200 miles beyond the three mile territorial sea. Section 4 of the *Outer Continental Shelf Lands Act* extends the Constitution, laws and civil and political jurisdiction of the United States to the outer continental shelf. Section 4 of that Act states that: '[t]he Constitution and laws and civil and political jurisdiction of the United States are hereby extended to the subsoil and seabed of the outer Continental shelf . . . to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State'. (at 1277).

This position can be contrasted with the rejection of the extension of the common law to the offshore in *Croker Island*. The position adopted in *Croker Island* provides that recognition of the existence of native title in the offshore is dependent on statutory recognition via the *Native Title Act 1993* (Cth).

The Court noted that in the *Gambell case*, the United States had in fact exercised its control over the Outer Continental Shelf by leasing portions of it to oil companies. Thus, the alleged conflict between the oil companies and those claiming aboriginal hunting and fishing rights in the OCS had in fact arisen out of the United State's power over that area.

Unfortunately, the Court did not discuss the nature of that sovereignty asserted by the United States over the Outer Continental Shelf. Sovereignty is a relative concept, depending on where it is asserted. The Court implicitly recognised this, but failed to consider what 'level of sovereignty' must be asserted by a sovereign state in order to support aboriginal title. However, the Court did acknowledge that something less than full territorial sovereignty is sufficient. However, it is possibly that the Court is sliding over the difficult issue of sovereignty when in *Gambell III*, at 1728, note 115, the court, quoting from *Johnson v. M'Intosh*, at 589-90, stated that:

> Underlying the aboriginal rights doctrine are concerns of humanity and policy. As the Supreme Court said in *Johnson* 21 U.S. at 589-90, in the event of a conquest,
>
> > "[t]he conquered shall not be wantonly oppressed . . . Humanity demands, and a wise policy requires, that the rights of the conquered to property should remain unimpaired; that the new subjects should be governed as equitably as the old, and that confidence in their security should gradually banish the painful sense of being separated from their ancient connections and united by force to strangers."
>
> . . . We find that, under the circumstances, the concerns

> underlying the aboriginal rights doctrine quoted from Johnson above, are fully implicated. "Humanity demands and a wise policy requires", that the aboriginal subsistence rights of the villages not be ignored, if in fact they exist in the area of the OCS [Outer Continental Shelf] that has been leased in this case. There is no justification for withholding recognition of aboriginal rights in the OCS merely because the United States has not exerted other aspects of its territorial sovereignty in that region which are wholly unrelated to the conflict today. (at 1277-8)[12]

The final point of relevance from *Gambell III* is whether the subsistence rights of the Native Alaskans were inconsistent with principles of international law, including freedom of the high seas. As the United States cannot exclude others from using the high seas, how can there be any recognition of exclusive subsistence hunting and fishing rights? Nor can the villagers as private citizens possess rights in the high seas greater than those possessed by the United States. The Court sidestepped this by noting that in the present case the only dispute is between the Alaskans and oil companies, thus any conflict in the international community was only speculative and did not need resolution at that time.(at 589-90).

However, it would seem that the United States clearly possessed 'sufficient' sovereignty to grant what was presumably an oil and gas lease granting some form of exclusive rights. Although, it might be noted that the nature of an oil and gas lease is perhaps better described as a *profit a prendre*.

In answering the fourth question, the Court found that the claims were not extinguished by A.N.S.C.A. The question of whether the claim was extinguished by the *Outer Continental Shelf Lands Act* was remanded to the District Court.

Gambell IV

The action died in 1993 with *Gambell IV*. The Alaskan Natives appealed from the District Court, which granted the government summary judgement, as it found that there was not enough evidence to support the claims. The Court of Appeal held that the action was 'moot' as the oil companies which had purchased the leases at issue had now relinquished those leases.

The nature of aboriginal rights

Notably, the issues in the *Gambell cases* were clearly limited to claimed

[12] For a discussion of these issues in relation to Australia see *Croker Island* at para 40-51, and para 131-134.

subsistence rights. There was no attempt by the Native Alaskans to argue ownership of minerals in the seabed, or more than traditional hunting and fishing rights. In *Gambell I,* the Court of Appeal recognised that the appellant's claim of aboriginal title 'rests upon immemorial use for hunting and fishing extending far to sea', (at 576, note 113.) The Court did recognise that Native Alaskans hunt on the large belts of ice which form next to the land during winter months, which they treat as a 'mere extension of the land'. (at 576). However, there is no indication that the Court viewed a claim as simply because it was over ice, which was just an extension of land. Rather, the Court refers constantly to claims with respect to the 'waters', (at 574) and 'submerged lands'. With regard to Australia, these cases confirm that the extent to which Indigenous peoples' customs and traditions, extend to the offshore areas is crucial to the recognition of aboriginal title to the offshore.

Thus while it would appear that the *Gambell cases* provide support for the recognition of aboriginal title to the offshore, it should also be noted that the circumstances that gave rise to the cases may not have direct parallels in Australia due to the impact of the Australian offshore constitutional settlement.[13]

Applicability to Australia

In discussing the offshore it is relevant to note the impact of emerging norms of self-determination and control of resources in international law on the scope of Indigenous people's rights. This factor sits alongside the trend at the international level where nation states are asserting increasingly wider areas of offshore sovereignty and control pursuant to the *Law of the Sea Convention* and other treaties under this framework convention.

Whether native title or aboriginal title could be conceived of as a 'burden' on the radical title of nation states asserting sovereignty and other degrees of control in the offshore, was not explicitly rejected in *Croker Island*. Rather, Olney J found that native title conferring exclusive use was inconsistent with Australia's international obligations such as rights of innocent passage through offshore areas over which Australia asserted sovereignty. Moreover, in *Croker Island*, recognition of native title in the offshore was dependent on the Commonwealth *Native Title Act 1993* rather than the common law. Further, whether aboriginal title in the offshore, however it is recognised, may in some situations be held to be co-extensive with this wider scope of national sovereignty also remains for decision. Again the *Gambell cases* tend to support an extension of aboriginal rights consistent with the widening scope of national sovereignty in offshore zones.

[13] See *Croker Island case*.

Equal Footing Doctrine

> *United States v. Aam*, 887 F.2d 190 9th Cir. (1989).
>
> *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983).
>
> *Choctaw Nation v. State of Oklahoma*, 397 U.S. 620 (1970).
>
> *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918).

As the USA is a federation like Australia, the interaction of federal and state sovereignty and jurisdiction over the offshore areas is of importance to issues of aboriginal title to the offshore. The following discusses cases where aboriginal title to submerged lands has been considered in relation to the presumption that the states received title to the beds of navigable waters upon 'joining' the United States. While the United States has sovereignty in the offshore, the states are held to have title to 'internal waters' such as some bays and navigable waters. When the various states joined the existing union of states, it is held that they did so on an 'equal footing' with the original states. Thus, under the *equal footing doctrine*, the federal government held title to the beds of navigable waters in trust for future states. The Federal Congress retained the power to convey lands beneath navigable waters before states effectively 'join the union' to carry out public purposes appropriate to the objectives for which the United States held the territory. Indian reservations were regarded as an appropriate public purpose.

In recent years there has been a series of United States cases in which the issue of aboriginal title to submerged lands has been considered in relation to the *equal footing doctrine*. Concerns triggering such actions have included interests in mineral rights, the assertion of regulatory jurisdiction over hunting and fishing on the reservation, the environmental impact of shoreline development on established fisheries, and the preservation of traditional subsistence uses.[14] While these cases largely deal with 'recognised title' as distinct from aboriginal title,[15] it is suggested that the findings of those cases may have wider application.

Courts, in interpreting the equal footing doctrine, have found that it is only where the Federal Congress 'definitely declared or otherwise made very plain'

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14 A. Geiger Oakley, 'Note: Not On Clams Alone: Determining Indian Title To Intertidal Lands – United States v. Aam, 887 F.2d 190 (9th Cir. 1989)', (1990) 65 *Washington Law Review* 713.

15 See Chapter Two , 'Recognition'.

that they were conveying the bed of the navigable waters at the point of establishing the reservation or grant for Indian use, will the presumption that the title passes to the states be displaced. The resolution of many disputes regarding title to those lands has turned on whether the 'public exigency' exception to the equal footing doctrine applied.

Chronology of cases

In earlier cases such as *Alaska Pacific Fisheries* and *Choctaw Nation* the Court relied on canons (or presumptions) of construction to find that title to submerged lands had vested in the Indians. The canons require that where there is doubt about the interpretation to be given, the meaning most favourable to Indian interests, should be adopted. The Courts looked to the circumstances surrounding the establishment of each Indian reservation to interpret the meaning of the instrument creating the reservation. In *Alaska Pacific*, the Court held that Congress reserved the waters adjacent to the reservation for the Indians because the Indians depended on the waters for both economic development and subsistence. In *Choctaw Nation* it was held that title to a riverbed was vested in the tribe because the treaty establishing the reservation promised the Indians virtually complete sovereignty over the reserved lands.

The *Aam case* concerned the Port Madison Indian Reservation, which came into being under the 1855 Treaty of Point Elliott and was subsequently enlarged to include approximately eleven miles of coastline along Puget Sound. During the 1880s. Much of the land within the reservation was parcelled out to individual Indians and eventually transferred to non-Indians, many of whom subsequently obtained deeds to the adjacent tidelands from the State of Washington. When the landowners sought to prevent the use of the tidelands by Suquamish Tribe members, the United States government and the Suquamish brought legal actions to secure title to the tidelands adjacent to the reservation. The plaintiffs argued that the treaty reserved the tidelands for the tribe's exclusive use. (at 721)

In determining Indian title to submerged lands, the Court in the *Aam case* drew upon *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983). The Puyallup Tribe sued to quiet title to submerged lands exposed when the Army Corps of Engineers redirected the course of a navigable river. In deciding whether the tribe had title to the riverbed, the court weighed the equal footing doctrine against the canons of construction and found that the government's intent to convey title to the bed of a navigable body of water is 'made very plain' and it included the submerged lands. A significant factor in this holding was that the Government at the time was aware of the vital importance of the submerged lands and the water resource to the tribe at the time of the grant. Presumably, the importance to the tribe of the navigable water was to enable the

exercise of traditional subsistence rights.

The *Puyallup* test was applied in the *Aam case* and, as a matter of factual evidence, the court found that the tidelands adjacent to the reservation were particularly important to the Suquamish in times of crisis, and that shellfish of the tidelands were a staple in the their diet. Nevertheless, the district court concluded that the United States did not convey the disputed tidelands to the Suquamish Tribe. The Court held that the Suquamish failed to show that the tidelands lay within the boundaries of the reservation established by the treaty and the order by which it was later enlarged. The Court also was unconvinced that a public exigency existed, or that the United States was plainly aware that the tidelands contained resources important to the tribe. Crucial to the finding was that the court held that the tribe did not establish that it depended for its survival on the tidelands. As it stands, this decision, which requires tribes to show a high degree of exclusive dependency, for subsistence needs, on tidelands makes it difficult for Indian tribes to establish title to offshore areas. It has been suggested that the court misapplied the *Puyallup* test in *Aams* by not giving sufficient weight to an interpretation of the treaty favouring Indian interests and by converting the *Puyallup* test to one which was unrealistically difficult to establish.[16]

Nonetheless, the *Aams case* provides the potential for Indian title to tidelands to be recognised based on subsistence uses even though at a factual level it may be difficult to substantiate such a claim. In applying such case law in Australia, it must be remembered that this case concerned a recognised Indian title. Further, it is doubtful whether Australian courts would be prepared to find that native title constituted an exclusive use of the tidelands/foreshore. While the cases on the 'equal footing doctrine' may be of relevance to issues surrounding native title and the rights of states to the beds of navigable rivers, internal waters and historic bays, whether this case law would assist the resolution of issues as to native title rights directly in the off shore zone is less certain.

New Zealand

Aboriginal Title and Aboriginal Rights in the Offshore

Aboriginal title and aboriginal rights arise from common law recognition of Maori rights of possession and occupancy. Currently it is unclear whether the rights of Maori possession and occupation of territory, including offshore areas, as guaranteed in the Treaty of Waitangi, are co-extensive with the common law. The second article of the Treaty of Waitangi guaranteed to Maori the undisturbed possession of their lands, forests and fisheries. In *New Zealand Maori Council v. AG* [1987] 1 N.Z.L.R. 641, the court found that the treaty

16 Geiger-Oakley *supra* note 15.

should be interpreted widely by giving effect to the principles of the Treaty rather than to a more narrow, literal interpretation. In this context the court identified a principle of direct relevance to the offshore - Maori were to retain rangatiratanga over their resources and taonga (taonga means highly prized things such as fishing grounds, harbours and foreshores and intangible assets such as cultural heritage.)

The recognition of customary rights in the offshore

The nature of Maori customary use and occupation of territory is based on tribal control. Often there is no distinction between land and water areas as Maori society and economy is strongly tied to exploitation of the resources in the waters, especially fishing. At a factual level it is apparent that Maori made extensive use of the offshore areas as part of their traditional way of life. As The Waitangi Tribunal found in the *Muriwhenua Fishing Claim* (WAI 22):

> The Muriwhenua tribes made a full and extensive fishing use of the fresh waters and seas within and around their mainlands and islands, including the swamps, lakes, rivers, inlets, estuaries, harbours, foreshores, beaches and seas. That use is evidenced by the substantial knowledge of fishing lore, grounds and methods retained by Muriwhenua people of today and by various written accounts.
> An intensive all year fishing use was made of the seas to about three miles off-shore. [This band includes the bulk of the modern rock lobster fishery, all of the paua, kina, other shell-fish and the seaweed resources, and large proportions of many of the prime fin-fish fisheries, the Northland long-line snapper fishery for example, and all set-net and seine fisheries for species like mullet, flounder, rig, school shark, moki and kahawai].
> Throughout the balance of the continental shelf, to about 12 miles from the shore, fishing was intensive and regular but mainly seasonal. Expeditions coincided with the off-shore migrations of such species as hapuku, bass and snapper. Also fished were species more typical of off-shore areas such as tuna, pelagic sharks, tarakihi, piper, mackerel and squid. We find that the Maori hapu and tribes of Muriwhenua made a full and extensive fishing use of the sea surrounding their lands and for a distance of some 12 miles out from the shore.
> Occasional fishing use was made of an area beyond that but the 12 mile limit involved a regular fishing use. It is also quite apparent that while favoured fishing grounds were well known, named and capable of ready identification, fishing occurred throughout the whole area. There was not one part of the seas within that zone over which the hapu and tribes of Muriwhenua can be considered not to have exercised some fishing user.[17] **[at 11.2.1. © Waitangi Tribunal, Muriwhenua Fishing Claim 1988 WAI 22]**

Given the importance of the sea to Maori customary uses, there is surprisingly

[17] Information from the Waitangi Tribunal, Department of Courts, Report of The Waitangi Tribunal on The Muriwhenua Fishing Claim 1988, at 11.2.1. Located on the internet at http://www.knowledge-basket.co.nz/topic4/waitr_db/text/wai022/22ch11.html

little case law dealing with aboriginal title to the offshore and only a few cases considering aboriginal rights in the offshore. In Chapter One, 'Context', and Chapter Two, 'Recognition', the historical factors that have contributed to the paucity of case law on aboriginal title/rights in New Zealand are identified in the context section and the recognition chapter.

With the establishment of the Waitangi Tribunal in 1975, the Tribunal became the main forum dealing with Maori customary claims based upon grievances in respect of the Treaty of Waitangi. Many of the claims dealt with offshore areas and fishing rights (for a more complete discussion, see Chapter One, 'Context'). In the late 1980s, the Tribunal considered a number of claims to offshore fisheries. The powers of the Tribunal are recommendatory only, but arguably in conjunction with several key appellate Court decisions of the late 1980s and early 1990s concerning the distribution of resource ownership, they provided a strong impetus, for the later offshore resource settlements including the 'Sealords' settlement deed. (See Chapter One, 'Context'.)

The Waitangi Tribunal Fisheries Reports

The Fisheries reports contain valuable insights into the kinds of factual evidence that were presented in order to establish the Maori claims to fishing rights. Several of the Waitangi Tribunal reports in the late 1980s confirmed the factual existence of traditional Maori fishing rights.

Examples of the Fisheries reports include:

- Ngai Tahu Sea Fisheries Report
  http://www.knowledge-basket.co.nz/topic4/waitr_db/text/wai027s/ch13_11.html
- Muriwhenua Fisheries Claim / SOE Claim
  http://www.knowledge-basket.co.nz/topic4/waitr_db/text/wai022/toc.html
- The Fisheries Settlement Report of 4 November 1992
  http://www.knowledge-basket.co.nz/topic4/waitr_db/text/wai307/toc.html.

Statutory Basis for Indigenous Rights in the Offshore in New Zealand

As noted in the Report of the Waitangi Tribunal on the Manukau Claim, the essential problem for Maori people in claiming fishing rights has been the historic failure of the law to recognise such rights:

> In the first fishing laws the Legislature was prepared to recognise that there could be a customary claim to fisheries, but no machinery was provided to convert those claims to defined

rights. Section 8 of the *Fish Protection Act* 1877 provided;

> "Nothing in this Act contained shall be deemed to repeal, alter or affect any of the provisions of the Treaty of Waitangi, or to take away, annul or abridge any of the rights of the aboriginal natives to any fishery secured to them thereunder". (WAI 8, at 6.2).

Later legislation omitted this provision which protected both treaty and arguably customary fishing rights. The omission was partially remedied in 1903 by the *Sea Fisheries Amendment Act* of that year which provided that nothing in the part of the Act dealing with sea fisheries 'shall affect any existing Maori fishing rights'. It is notable that any reference to the Treaty of Waitangi was not included in this later legislation. The relevant 'saving' provision for Maori customary rights was carried through in subsequent legislation. Until *Te Weehi*, courts consistently interpreted this provision as referring to either statutorily confirmed treaty-based rights, or rights conferred by statute, (See Chapter One, 'Context').

An early legislative recognition of a tribal right to parts of the sea arose from concern in the 1890s about the depletion of oyster beds in various northern New Zealand harbours. The resulting *Oyster Fisheries Act* 1892 enabled areas to be closed to oyster fishing. However, the *Sea Fisheries Act* 1894, provided for oyster beds near marae to be reserved for exclusive Maori use. In the Report of the Waitangi Tribunal on the Manukau Claim[18], the tribunal noted one example of a specific grant under which Maori people could exercise customary fishing and gathering rights in the offshore. A Crown grant records the recognition of a grant of land at Whatapaka to Maori, together with an adjacent shell-bank in the harbour. The shell-bank is no longer recorded on the Certificate of Title because the people have lost the shell-bank. Until 1878 (see section 147 of the New Zealand *Harbours Act* 1878), the Maori Land Court could issue titles to tidal lands uncovered at low tide. However later legislation would appear to have been inconsistent with this grant as the effect of the *Manukau Harbour Control Act* 1911 was to vest all tidal land in the Harbour Board. This included all land previously granted, including the valuable shell-fish bed that the people of the Whatapaka marae had owned.[19]

In the period from 1903 to 1962 legislation existed which allowed for reserving other tribal fishing grounds, but it seems none were actually reserved. The *Maori Councils Amendment Act* 1903 provided for the gazetting of Maori

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18 Report of the Waitangi Tribunal on the Manukau Claim, Waitangi Tribunal Department of Courts 1985 at http://www.knowledge-basket.co.nz/topic4/waitr_db/text/wai008/toc.html

19 Report of the Waitangi Tribunal on the Manukau Claim, WAI 8, Waitangi Tribunal Department of Courts 1985, at 6.2.

fishing grounds 'exclusively for the use of the Maoris of the locality or of such hapus or tribes as may be recommended'. The provision was re-enacted in section 33 of the *Maori Social and Economic Advancement Act* 1945 and (eventually repealed by the *Maori Welfare Act* 1962). The reserves required the consent of the Minister of Fisheries and no reserves were made. In the 1950s the New Zealand Maori Council urged hapu throughout the country to list their important fishing areas and to seek their reservation, but it appears none were reserved. However, a more comprehensive scheme in relation to Maori fishing rights emerged in the *Maori Fishing Act* 1989. This Act, and the later fisheries resource settlements,[20] are important legislative developments that need to be seen as part of the background to the case law relating to aboriginal rights in the offshore.

Customary fishing rights

> *Te Weehi v Regional Fisheries Officer* [1986] 1 N.Z.L.R. 680.
>
> *Te Runanga o Muriwhenua Inc v Attorney General* [1990] 2 N.Z.L.R. 641
>
> *Waipapakura v Hempton* (1914) 33 N.Z.L.R. 1065.

Customary Maori fishing rights as considered in most of the New Zealand cases concerning aboriginal rights in the sense that the right to fish, collect shell fish, etc., are not tied to 'title' to the underlying seabed or beach area. As understood, they are Indigenous sea rights 'at large'.[21] In *Te Weehi*, the Court clearly recognised a non territorial customary right to collect shellfish along the foreshore that was not linked to Maori ownership of the foreshore:

> In my view a customary right to take shellfish from the sea along the foreshore need not necessarily relate to ownership of the foreshore" (at 690 per Williamson J).

Such a characterisation of Maori rights as 'non-territorial' overcomes the problem of Crown ownership of the foreshore as an exercise of the royal prerogative.

In *Te Runanga o Muriwhenua Inc v Attorney General* the characterisation of customary Maori fishing rights as non-territorial rights found favour with the New Zealand Court of Appeal. Moreover the Court of Appeal considered the

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20 See Chapter One, 'Context'.

21 See G. Meyers, et al, *supra* note 1, at 63- 65.

relationship of the extinguishment of customary title to land and the possibility of the continued existence of customary fishing rights in the following manner:

> In principle the extinction of customary title to land does not automatically mean the extinction of fishing rights. . . The survival of fishing rights though land titles have been extinguished was recognised even as to the foreshore by Chief Judge Fenton in his Kauwaeranga judgment of 1870. . . If anything the cases for the survival of sea rights may be stronger. (at 655).

More recently, some question has arisen as to the extent of royal prerogatives establishing Crown ownership of lands and resources such as the foreshore, tidal waters and beds of lakes, which were 'received' into New Zealand upon colonisation. There is no direct vesting legislation establishing Crown ownership of such territory and resources. The royal prerogatives are part of the common law and only so much of the common law as was appropriate to the situation existing in the colony at the time was 'received' in a colony. It might be argued that the prerogatives may be more limited than as understood in Britain due to the local circumstance of the Treaty of Waitangi guaranteeing Maori possession over their lands, forests and fisheries. However, early cases such as *Waipapakura v Hempton* treat the operation of the common law prerogatives as identical in New Zealand and Britain.

In *Waipapakura v Hempton* the court noted:

> Now, in English law - and the law of fishery is the same in New Zealand as in England, for we brought in the common law of England with us, except in so far as it has not in respect of sea-fisheries been altered by our statutes - there cannot be fisheries reserved for individuals in tidal waters or in the sea near the coast. (at 1071)

But the court went on to state, 'In the tidal waters . . . all can fish unless a specially defined right has been given to some of the King's subjects which excludes others'. (at 1071)

The nature of the relationship of Crown prerogatives to aboriginal rights and indeed aboriginal title is complex and is yet to be fully resolved in overseas caselaw and in Australia.[22]

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[22] Te Puni Kokiri, *Notes on Aboriginal Title Analysis* - prepared for the Australian Indigenous Delegation 12 December 1997 at 14. In relation to Australia see *Croker Island* per Olney J at para 135.

Maori Rights in the Foreshore

The foreshore occupies a special situation under English common law. Within New Zealand there is a long line of cases dealing with Maori rights to the foreshore, which rely on the savings provisions in s 88(2) of the *Fisheries Act* 1982, and its predecessor s 77(2) of the *Fisheries Act* 1908.[23] These cases are discussed briefly below as the chronology of cases dealing with the recognition of aboriginal title and rights in the offshore/foreshore form a major component of the chapter on recognition. Further, all of these cases prior to *Te Weehi* have held that an exclusive right to fish in tidal waters is incompatible with the Crown's ownership of the foreshore (*Te Weehi* did not concern an exclusive right).

Preservation of Maori rights in the offshore

> *Waipapakura v Hempton* (1914) 33 N.Z.L.R. 1065.
> *Inspector of Fisheries v Ihaia Weepu* [1956] N.Z.L.R 920.
> *Keepa and Wiki v Inspector of Fisheries* [1965] N.Z.L.R. 322.

In *Waipapakura v Hempton* it was stated that:

> It may be, to put the case the strongest possible way for the Maoris, that the Treaty of Waitangi meant to give an exclusive right to the Maoris, but if it meant to do so no legislation has been passed conferring the right, and in the absence of such, both *Wi Parata v The Bishop of Wellington* 3 NZ Jur NS SC 72 and *Nireaha Tamaki v Baker* [1901] AC 561 are authorities for saying that until given by statute no such right can be enforced . . . (at 1071-2)

In *Weepu*, another s 77(2) cases, FB Adams J had held that 'a fishing right can be dissevered from ownership of the soil, but that it is in its nature a profit of the soil and dependent upon and an incident of the ownership of the soil'. (at 926). Similar comments were made by the court in *In Re the Bed of the Wanganui River* [1962] N.Z.L.R. 600.

A similar conclusion to *Waipapakura* was also reached in *Keepa v Inspector of Fisheries.* In *Keepa*, the appellants were prosecuted for breaches of the *Teheroa Regulations*, in that they took undersized teheroa from the Ninety Mile Beach

[23] These statutes may be found in law libraries which contain collections of New Zealand Statutes.

out of season. Although in *Keepa*, Hardie Boys J noted that Crown prerogative and Maori customary rights can exist together. (at 326). It was added that customary fishing rights may still exist where Maori customary land adjoins the seashore. However it seems at a practical level that this will not occur. As noted by the Treaty of Waitangi Tribunal: 'we know of no Maori customary land left adjoining the seashore. Freehold orders have been made for nearly all the Maori land left in New Zealand'.[24]

A non-territorial aboriginal right in the foreshore

> *Te Weehi v. Regional Fisheries Officer* [1986] 1 N.Z.L.R. 680.
> *Green v Ministry of Agriculture and Fisheries* [1990] 1 N.Z.L.R. 411.

In *Te Weehi*, in order to find a customary right which could form the basis of a defence under s 88(2) of the *Fisheries Act*, Williamson J had to establish that the appellants' rights were of a non-exclusive, non-territorial nature.[25] He noted that at common law fishing rights can exist independently of ownership and declined to follow the earlier decisions of *Keepa and Wiki v Inspector of Fisheries* [1965] NZLR 322 and *Inspector of Fisheries v Ihaia Weepu* [1956] NZLR 920.

In 1990 the issue of customary rights to fish in tidal waters again came before the New Zealand courts in *Green.* The appellants were charged with possessing tehoroa in breach of the *Fisheries (Amateur Fishing) Regulations* but argued that s 88(2) provided a defence. The Court distinguished *Te Weehi* on the grounds that the claim to take tehoroa was an exclusive one, based on a right to ownership and control of the foreshore. The Court held, on the basis of earlier authority such as *Re the Ninety Mile Beach* [1963] N.Z.L.R. 461 and *In Re the Bed of the Wanganui River* [1962] N.Z.L.R. 600, that such an exclusive right was incompatible with the Crown's ownership of the foreshore.

Applicability to Australia

The 'non-territorial' aboriginal title that was recognised in *Te Weehi* is similar to the concept of aboriginal rights as understood in some Canadian cases where the rights such as fishing and hunting, unlike native title, do not have to have a 'connection with the land'. Although in this context, reference should be made to the discussion in *Mason v Tritton* (1994) 34 NSWLR 572, by Justice Kirby,

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24 Report on the Manukau claim, *supra* at 6.2.

25 See Chapter Two 'Recognition' for discussion on this point.

and Olney J in *Croker Island*. Therefore it may be possible that in Australia, a distinction can be made between title to an underlying offshore area and aboriginal rights in the offshore on a similar basis to the decision in *Te Weehi*.

Aboriginal Title

> *Te Tau Ihu o te Waka a Maui* (Marlborough Sounds claim), 22 December 1997 Hingston J, 22A Nelson Minute Book 1 – 10.

While the question of the nature and extent of Crown 'ownership' of the foreshore and tidal waters has to some extent been avoided by the adoption of a non-territorial categorisation of aboriginal rights, the issue of aboriginal title to the foreshore and sea bed has again arisen in a recent decision of Te Kooti Whenua Maori (Maori Land Court). The decision concerned a claim by Maori to the foreshore and sea bed of Marlborough Sounds located at the top of the South Island. Although the decision is only a single judge at first instance in a interim determination, the Marlborough Sounds claim raises fundamental issues regarding the extinguishment of customary rights in the offshore and recognises aboriginal title in a territorial sense in the offshore.

The central question for determination was identified by Hingston J as, '[w]hether since the signing of the Treaty of Waitangi in 1840 Maori Customary Rights to the foreshore and sea bed in and around the Marlborough Sounds in New Zealand have been extinguished'. (at page 1 of 22A Nelson Minute Book). Hingston J assumed without deciding that there were existing Maori customary rights prior to 1840 in the absence of any evidential inquiry.

Foreshore

The Crown argued that the *Ninety Mile Beach case* was determinative of the issues surrounding the claim to the foreshore. The *Ninety Mile Beach case* is discussed in the chapter on extinguishment and we recommend you read that section first. As noted, it is doubtful that the issue would be decided this way if it was now to come before the New Zealand Court of Appeal. Moreover, as the *Ninety Mile Beach case* deals with specific factual questions surrounding the conversion of customary Maori title, it is unlikely to be followed in Australia.

In the *Marlborough Sounds case*, the Crown argument rested on an extension of the principle enunciated by North J in *Ninety Mile Beach* to the effect that once an application for investigation of title to land having a sea boundary was completed and title issued by the Maori Land Court (previously the Native Land Court) then the customary (aboriginal) title was extinguished to low water mark. If the Court fixed the title boundary at high water mark then ownership of the

foreshore was forfeited to the Crown. The Crown argument that this principle should apply to lands fronting the foreshore that have not been 'the subject of a full title investigation' by the Maori Land Court, such as in the case of the Marlborough Sounds, was rejected by Kingston J. Reasons cited included:

- To extend the *ratio* would be contrary to Greeson J's finding that the Maori should not lose customary rights by a side wind;
- Treaty jurisprudence in the last decade had paid regard to the interests of Maori; and
- The proposition by North J was not tested by the Privy Council. The current New Zealand Court of Appeal could well have a different view, even if the result for the Crown was 'inconvenient'.

Accordingly Hingston J did not feel bound by *Ninety Mile Beach*. Instead he found that where, as in Marlborough Sound, Maori had been separated from their customary lands adjacent to the foreshore, the customary rights still remained. These rights to the foreshore existed where not included in any initial purchase of adjacent lands or where not having being expressly extinguished since by the sale of adjacent lands.

Seabed and territorial sea

The applicant's arguments advanced to support the claim to the seabed relied on the idea that the Crown gained a radical title in the offshore and as such, this title is subject to Maori customary rights, (on this point see *Faulkner v Tauranga District Council* [1996] 1 N.Z.L.R. 357). The Crown argued that even if Maori rights were recognised, they had been extinguished by s 7 of the *Territorial Sea and Exclusive Economic Zone Act.* Counsel for the Port of Marlborough argued for the extinguishment of any customary rights, if recognised, by subsequent express statutes.

In the absence of relevant authorities Hingston J isolated three questions:

1. What was the position before the Treaty of Waitangi?
2. Did the assumption of sovereignty or later legislation up to 1965 take away pre 1840 customary rights?
3. If the answer to 2 is no then how did the *Territorial Sea and Exclusive Economic Zone Act* change the law in relation to Maori customary rights in the seabed?

In response to question 1, Hingston J indicated that there was insufficient evidence to decide the issue but assumed the rights were established in order to answer question 2.

Hingston J found that the assumption of sovereignty did not disturb existing Maori rights to the sea bed. Moreover he found that the sea bed was land in a similar manner to the foreshore. Consequently, the Court, pursuant to the statutory objectives of the *Te Ture Whenua Maori Act* 1993, if satisfied that the land is held in accordance with Tikanga Maori, has jurisdiction to investigate title to land and determine ownership. On this jurisdictional basis it was determined that title to the seabed did not pass to the Crown before the 1965 Act.

The response to question three was more complex. The applicant's argument that the Crown assumed a radical title subject to existing native rights was accepted and the reasoning in *Mabo (No 2)* and *Wik* was 'desirable and helpful in coming to the conclusions . . .' The court found that the *Territorial Sea and Exclusive Economic Zone Act* 1965 went no further than to statutorily assume sovereignty and a title similar to the radical title of the common law. Kingston J found that the Crown could not have assumed sovereignty in 1840 because at that time the common law did not recognise a title to the sea bed. Such a position effectively overcomes the difficulties involved in the arguments as to the offshore extent of the common law and the assumption of sovereignty.

In line with the 'clear and plain intention' test for extinguishment Hingston J found the aboriginal rights in the seabed not extinguished by s 7 of the legislation. A more complete discussion of this aspect of the decision can be found in Chapter Three, above.

While the reasoning in the case would appear to overcome several of the major problems that confront a claim to aboriginal title in the offshore, the precedential value of the case may be limited without approval of the decision by higher authority, and bearing in mind the particular jurisdiction of the Maori Land Court. There are currently appeals lodged.

Nonetheless, the adoption of the argument that the Crown assumes a radical title rather than beneficial ownership in the offshore is of interest, particularly as *Mabo (No 2)* and *Wik* were the authorities upon which this position was based. The consequent point that the progressive statutory assumption of sovereignty in the offshore under international law, as incorporated into domestic statute, is a statutory assumption of a common law title 'burdened by' aboriginal title is also of interest. A different approach to this issue was adopted by Olney J in *Croker Island.* In that case Justice Olney rejected the view that native title existed as a radical title which extended to the offshore, by drawing a distinction between land and water areas, stating that:

> This issue does however highlight the differences between cases in which native title is sought to be enforced in respect of land over which sovereignty has been exercised

> and in respect of which the Crown acquired a radical title burdened by the native title of the indigenous inhabitants on the one hand, and cases where the capacity to enforce native title (for example, over waters of the sea) is based upon a statutory right. In *Mabo No 2* the acquisition of sovereignty exposed the native title to extinguishment by a valid exercise of sovereign power inconsistent with the continued right to enjoy native title [81]. In that case there was no scope for the exercise of sovereign power prior to the acquisition of sovereignty over the land but that is not so in relation to the waters of the sea. The former colonies and later the States and Commonwealth exercised sovereign rights over the sea adjacent to Australia long before the *Native Title Act* provided the opportunity for the recognition of native title below the low water mark and if in the exercise of such rights there have been legislative or executive acts which are inconsistent with the continued right to enjoy native title rights, there would seem to be no reason to say other than that to the extent of any inconsistency the native title rights have been extinguished. And it would be consistent with principle that any questions relating to inconsistency and extinguishment should be judged by the same tests as are explained in the judgments in *Mabo No 2* and *Wik*.[26]

On this basis, His Honour found that the common law does not extend beyond the low water mark. Thus native title rights in the offshore are dependent on statutory recognition pursuant to ss 6 and 10 of the *Native Title Act 1993* (Cth). However a distinction was drawn between recognition at law and the consequent ability to enforce native title rights and the longer existence of those rights.[27] Acquisition of sovereignty under international treaties was not the basis for recognition of native title rights according to Olney J Instead such rights, statutorily recognised, are subject to Australia's obligations under these treaties.[28]

Applicability of New Zealand Cases to Australia:

- Native title and acquisition of sovereignty in the offshore - Recent case law in Australia and New Zealand reveal a divergence on this point. Since *Croker Island* it is clear that there is a different basis for recognising native title in the offshore between the two countries. In *Marlborough Sounds* it was proposed that incremental acquisition of sovereignty under statute and international law was 'burdened' by aboriginal customary rights. In *Croker Island* the statutory recognition of native title in the offshore was not held to be of a radical title character. Recognition of native title in the offshore

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26 *Yarmirr & Ors* v *The Northern Territory of Australia & Ors*, [1998] 771 FCA 6 July 1998, unreported.

27 Above n. 24 at paragraphs 129-131.

28 Above n. 24 at paragraph 132-134.

required a legislative act of direct application.[29] Olney J also found that any native title rights in the offshore were of a non-exclusive nature and which co-exist with other interests. Native title rights in the offshore are also subject to Australia, as a sovereign nation, meeting its international obligations, such as ensuring rights of public navigation in the offshore.

- Similar to New Zealand, it is generally understood in Australia that the Crown has ownership of the foreshore by the exercise of Royal prerogative. However this common law right may be held to be more limited than in the UK. The resolution of the nature of Crown ownership in the foreshore requires further judicial determination.

- The strong line of New Zealand authority establishing non-territorial aboriginal rights in the offshore offers a different approach to recent law in Australia. Whether the reasoning in *Croker Island* is accepted by higher authority remains to be seen Therefore, the exact scope for the application of the New Zealand case law remains tentative. Although Meyers, et al, suggested that the concept of connection to land adopted in *Mabo (No 2)* could encompass spiritual non-physical connection. Consequently 'at large' rights as understood in Canada and New Zealand could exist in Australia even over offshore areas where there is no adjoining native title lands.[30] However the reasoning of Olney J in the *Croker Island case* may pose a barrier to advocacy of such 'at large' formulations of aboriginal rights which are not limited to non-exclusive, subsistence rights.

Conclusion

In summary, given the importance of the offshore to Maori customary aboriginal use, New Zealand offers a useful basis of comparison for Australian native title claims in the offshore. However the importance of the Treaty of Waitangi stands as a point of contrast even if it is largely accepted that aboriginal rights to the offshore are not dependent on the treaty. Further, while much of the case law has arisen in the context of specific legislative savings provisions, the cases do highlight issues which are of significance in the Australian offshore context. Notably, the question of co-existence of native title interests and other interests such as those of commercial fishing, whether a non-territorial, non exclusive native title interest can exist in the offshore, and the nature of the Crown title in the offshore.[31]

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29 Above n. 24 at paragraph 130.

30 G. Meyers, et al, *supra* note 1, at 61-66.

31 It is accepted that these issues were considered in the *Croker Island case* but the overseas case law suggests viable alternative approaches to these questions.

Further Reading:

A.P. King, 'The Foreshore - Have the Public Any Rights over It?', (1968) *New Zealand Law Journal*, 254.

New Guinea

Tolain & Ors v Administration of Papua and New Guinea In re Vulcan Land, [1966] [P & N.G.L.R.] 232.

Administration of Papua v. Daera Guba (1972-3) 130 C.L.R. 353.

The section of New Guinea, formerly known as Papua, became part of the British Crown's dominions in 1888. When Papua was declared a British protectorate in 1884, the Crown expressed the desire to respect the land rights of the indigenous Melanesian peoples. Subsequently the British Crown purchased land from indigenous 'owners' based upon agreements in accordance with local customary law.

It is interesting to note the following obiter comments from Chief Justice Barwick in *Daera Guba*, decided some twenty years before *Mabo v. State of Queensland (No 2)* (1992) 175 C.L.R. 1, that: '. . . the title of the Papuans whatever its nature according to native custom was confirmed in them expressly by legislative acts. . .'(at 397) His Honour went on to state that such legislation:

> [was not] inconsistent with the traditional result of occupation or settlement, namely that though the indigenous people were secure in their usufructuary title to land, the land came from inception of the colony into the dominion of Her Majesty. That is to say, the ultimate title subject to the usufructuary title was vested in the Crown. (at 397)

McNeil, writing before *Mabo (No 2)*, indicated that:

> These obiter remarks suggest the acquisition of sovereignty did not destroy the land rights which the Papuans had under their own laws. If the Crown acquired an interest it was subject to their pre-existing interest.[32]

The *Daera Guba case* clearly recognises Papuan customary land title.

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32 K. McNeil, *supra* note 27, at 186.

In R*e Vulcan*, an earlier case from the Supreme Court of the Territory of Papua and New Guinea, also discussed the links between customary practices and 'ownership'. It foreshadowed the *Mabo (No. 2)* decision in its reference to the customs and traditions of Indigenous peoples as a basis for the recognition of Indigenous title.

In *Re Vulcan*, the land which was the subject of the dispute had previously been submerged but following a volcanic eruption had become dry land. The previously submerged land was part of an area where Papuan 'owners' had allocated use of sea areas on a customary basis. During the Japanese occupation of the area the register of land titles had been destroyed. Subsequently, the later New Guinea Administration lodged a claim to the land over which some Indigenous people had returned to using following the eruption. Customary rights were also asserted over Vulcan. The claim was referred to the Commissioner of Titles who made an order declaring the Administration was absolute owner and part of the land was held in trust for the Indigenous peoples. The appellants appealed, claiming all of Vulcan as of customary right. The Court held that the Commissioner did not have the jurisdiction (power) to make the order but it also found that the Administration had become the registered owner prior to destruction of the register.

Of most interest are the obiter comments about how the concept of land ownership differed between English understandings and the situation in the Territory. By reference to cases such as *Amodu Tijani v The Secretary of Southern Rhodesia* [1921] A.C. 399 the court determined that 'owner' was by reference to a communal group and that ownership under customary practices conferred the ability to use the land and exclude others. The Court found that these customary practices, or vunatarais as the communal kinship group rights were known, extended to the reef area between the mainland and the original Vulcan island prior to the eruption. In effect, the court found that 'for practical purposes', the appellant group had 'owned' the reefs and the intervening area between high water and the reefs on the basis of customary use.

The significance of this case to the Australian situation lies largely in the importance of customary practices which established a control and 'connection with' the offshore areas, particularly the reefs. The discussion of the communal form of 'ownership' and use of the reef and foreshore areas closely parallels the discussion of the Meriam peoples' use of their land in *Mabo (No 2).*

Applicability to Australia

In summary, the case law from the overseas jurisdictions highlights the issues which are likely to arise in offshore native title claims in Australia. A common feature of overseas cases is the extent to which indigenous peoples made use of the offshore and other water areas as a central part of customary practices, both

at a subsistence level and for trading and other cultural activities.

The main difficulties in applying these 'factual' situations to Australia appear to relate to the different statutory and constitutional regimes operating in each country. The particular facets of the Australian situation which may need to be borne in mind include:

- The difficulties in applying overseas cases due to the particular constitutional framework in Australia. Whilst the Commonwealth has sovereignty in the offshore, the existence of the Offshore Constitutional Settlement and legislation giving effect to that settlement have made the situation complex. The title to the immediate three mile offshore zone vests in the states, pursuant to the *Coastal Waters State Title Act 1980* (Cth). The provisions of complementary legislation, the *Coastal Waters (State Powers) Act 1980,* also need to be considered.
- The foreshore occupies a special situation under English common law. The Crown is presumed to have 'ownership' over the foreshore, beds of tidal rivers and coastal waters under common law as an exercise of the royal prerogative. Therefore if title to these areas is asserted by an individual, the person asserting title must show a grant from the Crown. However, the courts have treated the necessity to show a Crown grant fairly flexibly and it may often be regarded as a 'legal fiction'. Nonetheless, the presumption tends to be that the title to the foreshore has remained with the Crown due to the special function that the foreshore has as an area of passage and public access. There are common law public rights of navigation and fishing in tidal and coastal waters. On this point see A*ttorney General for the Province of British Columbia* v *Attorney General for the Dominion of Canada* [1914] AC 153 at 169.

- The nature of these 'public' rights would tend to preclude any one individual or group having exclusive use and occupancy of the land underneath the waters. Thus any native title or aboriginal rights in the offshore must be considered in relation to the special nature of public rights in the foreshore and tidal waters. It is therefore difficult to argue that native title would provide a right of exclusive use.[33] In this regard see also the *Native Title Act 1993*, which preserves rights of public access to the foreshore. For a more complete discussion on the foreshore see K McNeil *Common Law Aboriginal Title,* Clarendon Press, Oxford, 1989, pp.103-105.

- Where it is held that native title does exist in the foreshore as a 'non exclusive use' or perhaps as an aboriginal title burdening the radical title of

[33] See *Yamirr & Ors* v *The Northern Territory of Australia &Ors,* [1998] 771 FCA 6 July 1998, unreported at paragraphs 133-136.

the Crown, then there remains the problem of potential extinguishment.[34] Certain state *Harbours Acts* and *Lands Acts* contain provisions which 'vest' the foreshore in the Crown. In *Croker Island* it was held that any minerals in the sea bed also vested in the Crown. Notably, though the precise nature of the interest that accrues upon vesting remains unresolved and has yet to be precisely delineated at common law. Again, it will be necessary for judicial determination and/or clarifying legislation to resolve the issue.

- The interaction of international law with common law in respect of the various zones established under the *Law of Sea Convention*, i.e., regimes relating to territorial sea, continental shelf and Exclusive Economic Zone. Notably in *Croker Island* it was found that native title in the offshore was qualified to the extent that Australia must meet its obligations under international treaties.
- The interaction of native title with statutory regulation such as environmental conservation regimes, fisheries legislation and other legislation that has offshore effect must be considered.

[34] For a discussion of the 'tests' for extinguishment see Chapter Five 'Extinguishment'.

Chapter Five

Extinguishment and Regulation of Native Title

Introduction

> *United States v. Santa Fe Pacific Railway Co.* 314 U.S. 339 (1941).
>
> *Mabo v. State of Queensland (No. 2)* (1992) 175 C.L.R. 1.
>
> *The Wik Peoples v. Queensland* (1996) 141 A.L.R. 129.
>
> *Western Australia v. The Commonwealth (The Native Title Act Case)* (1995) 183 C.L.R. 373.

In Australia, Canada and the United States it is recognised that a 'clear and plain' intention is required to extinguish native title. The 'clear and plain' test in all three jurisdictions can be traced to the decision of the United States Supreme Court in *Santa Fe Pacific Railway Co.* Surprisingly, despite the number of cases concerning extinguishment of native title, it is still unclear in all jurisdictions what is meant by 'clear and plain'. We do know, however, that the 'clear and plain' requirement does not necessarily equate to express language. It was accepted, for example, in *Mabo (No. 2)*, *The Wik Peoples* and the *Native Title Act Case* that the requirement of clear and plain intention does not necessarily connote that express language must be used.

In the *Native Title Act Case*, the High Court held that:

> After sovereignty is acquired, native title can be extinguished by a positive act which is expressed to achieve that purpose generally . . . provided that the act is valid and its effect is not qualified by a law which prevails over it or over the law which authorises the act. Again, after sovereignty is acquired, native title to a particular parcel of land can be extinguished by the doing of an act that is inconsistent with the continued right of Aboriginals to enjoy native title to that parcel - for example, a grant by the Crown of a parcel of land in fee simple - provided that the act is valid and its effect is not qualified by a law which prevails over it or over the law which authorises the act. (at 422)

This chapter considers United States and Canadian case law on the 'clear and plain' intention test. What constitutes a clear and plain intention? Allied to this,

of course, is the question of what effect regulation has on native title. Although it is accepted that mere regulation will not extinguish native title, there is a fine line between regulation and extinguishment. New Zealand will receive little attention as there has been virtually no case law from that jurisdiction on the issue of extinguishment.

United States

Although some general principles relating to extinguishment and regulation can be elicited from United States case law, some care must be taken with cases relating to regulation. As will be seen later in the chapter, much of the case law revolves around jurisdictional issues that are inapplicable to Australia. As noted above, the 'clear and plain' intention test originated in the United States. Recently, however, it has been recast as the 'actual consideration and choice' test. This part of the chapter considers the origins of clear and plain, the new actual consideration and choice test, and gives some understanding of the complex jurisdictional issues surrounding the effect of regulation on aboriginal rights.

Terminology - Abrogation and Extinguishment

> *United States v. Dion* 476 U.S. 734 (1986).

Some understanding of terminology is required before considering case law from the United States on extinguishment. In case law, two different terms are used: extinguishment and abrogation. The term 'extinguishment' has the expected meaning of a permanent termination of aboriginal title. The term is only used with respect to the ending of aboriginal, or unrecognised, title. On the other hand, the extinguishment of treaty rights is generally referred to as abrogation. This term is also occasionally used in the context of aboriginal rights. By virtue of the plenary power doctrine,[1] Congress has the power to abrogate treaty rights.

The decision of the United States Supreme Court in *Dion* is an example of abrogation of treaty rights.

In *Dion*, a member of the Yankton Sioux was charged with violation of the *Endangered Species Act* as he had killed several bald eagles on the Yankton Sioux Reservation. As a defence he claimed that the Yankton Sioux Treaty of 1858 reserved for the Tribe the exclusive right to hunt on reservation lands, and this included the right to hunt for bald eagles. The issue before the Court was whether the *Endangered Species Act* or the *Eagle Protection Act* abrogated

[1] See Chapter One 'Context' for an explanation of the plenary power doctrine.

Sioux treaty rights to hunt eagles. Those Acts made it an offence to take bald or golden eagles.

The Court held that a clear and plain intention is required to abrogate treaty rights. By considering the legislative history of the *Eagle Protection Act*, and noting the inclusion of a provision allowing Indian tribes to take eagles for religious purposes under the authority of a permit, the Court concluded that Congress intended to abrogate the Yankton Sioux treaty rights. In other words, Congress intended to take away the treaty right to hunt eagle.

In this chapter it is intended to consider only the test for extinguishment of aboriginal title - the 'clear and plain' intention test. There have been few cases on extinguishment of aboriginal title. However, essentially the same test is used to determine whether there has been an extinguishment of aboriginal title, as whether there had been an abrogation of treaty rights.

Power to Extinguish Aboriginal Title

> *Johnson and Graham's Lessee v. M'Intosh*, 8 Wheat. 543, 21 U.S. 543 (1823).

In *Johnson v. M'Intosh*, Marshall CJ held that discovery gave the discoverer the exclusive right to appropriate the lands occupied by the Indians:

> The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest; and gave also a right to such a degree of sovereignty, as the circumstances of the people would allow them to exercise. (at 586)

From the above statement, two important points can be made:

1. As Indian title is considered merely a permissive right of occupancy, it may be extinguished by Congress at any time. This position has been accepted in numerous cases. Further examples include *Miami Tribe of Oklahoma v United States*, 146 Ct Cl 421, 175 F Supp 926 (1959). *Prairie Band of Potawatomi Indians v United States* 143 Ct Cl 131, 165 F Supp 139 (1958). This is also the position at common law in Australia, although the *Racial Discrimination Act 1975* (Cth) and the *Native Title Act 1993* (Cth) now impose some restraints on governments' ability to extinguish native title.

2. the power of Congress to extinguish is exclusive. Indian title cannot be extinguished either by the actions of third parties or the States. This position has been confirmed in a number of cases, including *United States v. Santa Fe Railway* 314 U.S. 339 (1941) and *United States v Alcea Band of Tillamooks [No. 1]* 329 US 40 (1946). This is because the power to extinguish is a sovereign one, and thus can only be exercised by the sovereign body, the United States. This contrasts with the situation in Australia, where extinguishment of native title can be effected by either a State or the Commonwealth.

However, it will not lightly be implied that the government of the United States intended to take (or extinguish) Indian title. In order for that to occur, there must be a 'clear and plain' indication that Congress intended to extinguish aboriginal title.

Clear and Plain Intention

Origins of the clear and plain intention test

> *United States v. Santa Fe Railway* 314 U.S. 339 (1941).

The foundation case on 'clear and plain' intention is that of the United States Supreme Court in *Santa Fe Railway*. In 1865, Congress passed an act which allowed traditional Walapais land to be set aside as a reservation. Some time later that land was conveyed to the predecessor in title of the Santa Fe Railway Co. The 1865 Act did not expressly indicate that in creating the reserve it intended to extinguish the rights of the Walapais to their land.

The issue in the case was whether the Walapais' rights in their ancestral lands had been extinguished.

The Supreme Court held that:

- In passing the Act to allow for creation of the reservation, Congress was merely making an offer to the Walapais, an offer which they did not accept;
- there had been no extinguishment, as there had been no 'clear and plain indication' that Congress intended to extinguish the Walapais' rights in their ancestral lands;
- therefore, the title of Santa Fe Railway to the land was subject to Walapais' Indian title.

The following is an extract from *Santa Fe*:

> We search the public records in vain for any clear and plain indication that Congress in creating the Colorado River reservation was doing more than making an offer to the Indians, including the Walapais, which it was hoped would be accepted as a compromise of a troublesome question. We find no indication that Congress by creating that reservation intended to extinguish all of the rights which the Walapais had in their ancestral home. That Congress could have effected such an extinguishment is not doubted. But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards. As stated in *Choate v. Trapp*, 224 U.S. 665, 675, the rule of construction recognized without exception for over a century has been that "doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith." And see *Minnesota v. Hitchcock*, 185 U.S. 373, 395-396. Nor was there any plain intent or agreement on the part of the Walapais to abandon their ancestral lands if Congress would create a reservation. Furthermore, the Walapais did not accept the offer which Congress had tendered. In 1874 they were, however, forcibly removed to the Colorado River reservation on order from the Indian Department. But they left it in a body the next year. And it was decided "to allow them to remain in their old range during good behavior." They did thereafter remain in their old country and engaged in no hostilities against the whites. No further attempt was made to force them onto the Colorado River reservation, even though Congress had made various appropriations to defray the costs of locating the Arizona Indians in permanent abodes (Act of March 3, 1865, 13 Stat. 541, 559; Act of July 27, 1868, 15 Stat. 198, 219; Act of July 15, 1870, 16 Stat. 335, 357), including the Colorado River reservation. Act of March 2, 1867, 14 Stat. 492, 515; Act of May 29, 1872, 17 Stat. 165, 188. On these facts we conclude that the creation of the Colorado River reservation was, so far as the Walapais were concerned, nothing more than an abortive attempt to solve a perplexing problem. Their forcible removal in 1874 was not pursuant to any mandate of Congress. It was a high-handed endeavor to wrest from these Indians lands which Congress had never declared forfeited. No forfeiture can be predicated on an unauthorized attempt to effect a forcible settlement on the reservation, unless we are to be insensitive to the high standards for fair dealing in light of which laws dealing with Indian rights have long been read. Certainly, a forced abandonment of their ancestral home was not a "voluntary cession" within the meaning of @ 2 of the Act of July 27, 1866. *Atlantic & Pacific R. Co. v. Mingus*, 165 U.S. 413, 438-439. **[at 353- 356 (footnotes omitted)]**

A number of things are notable about this decision. The most obvious, of course, is that the Supreme Court gave no indication as to what actions by the government would have indicated a clear and plain intention, leaving the meaning of 'clear and plain' uncertain. Second, it appears that the origin of the 'clear and plain' requirement is in fact the guardian-ward relationship between the federal government and the Indian nations, a feature of the United States legal system that has no parallel in Australia. Despite this, the 'clear and plain intention test' has been accepted by both the Supreme Court of Canada in *Calder v. Attorney-General of British Columbia* (1973) 34 D.L.R. (3d) 145 and

Van der Peet (1996) 137 D.L.R. (4th) 289 as the applicable test in Canada, and by the High Court in *Mabo (No. 2)* as applicable to Australia.

Not surprisingly, following *Santa Fe* some confusion remained as to what constitutes a clear and plain intention.

Clear and plain intention test confirmed

> *Oneida Indian Nation v. County of Oneida (Oneida II)* 470 U.S. 226 (1985).
> *Lipan Apache Tribe v. United States*, 180 Ct. Cl. 487 (1967).
> *United States v. Pueblo of San Ildefonso* 206 Ct Cl 649, 513 F 2d 1383 (1975).
> *United States v. Gemmill* 535 F.2d 1145 (9th Cir. 1976).

The clear and plain intention test has been applied in a number of cases since *United States v. Santa Fe* 314 U.S. 339 (1941). However, no clear picture emerged as to the meaning of 'clear and plain' intention. Cases on extinguishment of aboriginal title largely confined their discussion to the facts, which usually involved treaties of cession or executive actions which have no parallel in Australia, with little or no consideration of the parameters of the 'clear and plain' intention test. Examples of two such cases are given below.

In *Lipan Apache Tribe*, the Lipan and Mescalero Apache tribes sought compensation for the loss of their ancestral lands within the State of Texas. They sought to hold the United States responsible for the actions of its officers, agents, and troops who in 1858 and 1859 joined with Texas forces to drive the Indians from their lands. It was necessary, therefore, to show that they still had aboriginal title at the time Texas joined the United States.

The United States Court of Claims held that there had been no 'clear and unambiguous' act of extinguishment. The Court stated that:

> To the extent that the Commission and the appellee believe that affirmative governmental recognition or approval is a prerequisite to the existence of original title, we think they err. Indian title based on aboriginal possession does not depend upon sovereign recognition or affirmative acceptance for its survival. Once established in fact, it endures until extinguished or abandoned. United States v. Santa Fe Pac. R.R., supra, 314 U.S. at 345, 347. It is "entitled to the respect of all courts until it should be legitimately extinguished. . ." Johnson v. M'Intosh, supra, 21 U.S. (8 Wheat.) at 592. See Clark v. Smith, 38 U.S. (13 Pet.) 195, 201 (1839); Worcester v. State of Georgia, 31 U.S. (6 Pet.) 405, 420, 439 (1832); Mohave Tribe v. United States, supra, 7 Ind. Cl.

> Comm. at 262.
> The correct inquiry is, not whether the Republic of Texas accorded or granted the Indians any rights, but whether that sovereign extinguished their pre-existing occupancy rights. Extinguishment can take several forms; it can be effected "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise . . ." United States v. Santa Fe Pac. R.R., supra, 314 U.S. at 347. While the selection of a means is a governmental prerogative, the actual act (or acts) of extinguishment must be plain and unambiguous. In the absence of a "clear and plain indication" in the public records that the sovereign "intended to extinguish all of the [claimants'] rights" in their property, Indian title continues. Id. at 353. **[at 492]**

In *Oneida II*, the Oneida Indian Nations brought an action against Oneida and Madison Counties for fair rental for lands allegedly owned since time immemorial and ceded in the late 1700s to the State of New York. The Oneida Indian Nations argued that either the cession was ineffective as it had been without the consent of the federal government, or that an unconscionably low price had been paid and therefore damages in the form of fair rental should be awarded. The question arose whether aboriginal title had been extinguished by two treaties in which some additional land had been ceded to New York by the Oneida Nations.

As in *Lipan*, the Court held that a plain and unambiguous act is required. The following is an extract from *Oneida II*.

> The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians. Thus, it is well established that treaties should be construed liberally in favor of the Indians, *Choctaw Nation v. United States*, 318 U.S. 423, 431-432 (1943); *Choate v. Trapp*, 224 U.S. 665, 675 (1912), with ambiguous provisions interpreted to their benefit, *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930); *Winters v. United States*, 207 U.S. 564, 576-577 (1908). "Absent explicit statutory language," *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 690 (1979), this Court accordingly has refused to find that Congress has abrogated Indian treaty rights. *Menominee Tribe v. United States*, 391 U.S. 404 (1968). See generally F. Cohen, Handbook of Federal Indian Law 221-225 (1982 ed.) (hereinafter F. Cohen).
> The Court has applied similar canons of construction in non treaty matters. Most importantly, the Court has held that congressional intent to extinguish Indian title must be "plain and unambiguous," *United States v. Santa Fe Pacific R. Co.*, 314 U.S., at 346, and will not be "lightly implied," id., at 354. Relying on the strong policy of the United States "from the beginning to respect the Indian right of occupancy," *id.*, at 345 (citing *Cramer v. United States*, 261 U.S. 219, 227 (1923)), the Court concluded that it "[c]ertainly" would require "plain and unambiguous action to deprive the [Indians] of the benefits of that policy," 314 U.S., at 346.
> In view of these principles, the treaties relied upon by petitioners are not sufficient to

show that the United States ratified New York's unlawful purchase of the Oneidas' land. The language cited by petitioners, a reference in the 1798 treaty to "the last purchase" and one in the 1802 treaty to "land heretofore ceded," far from demonstrates a plain and unambiguous intent to extinguish Indian title. There is no indication that either the Senate or the President intended by these references to ratify the 1795 conveyance. See 1 Journal of the Executive Proceedings of the Senate 273, 312, 408, 428 (1828). **[at 247-248]**

See also: *United States v. Pueblo of San Ildefonso* 513 F.2d 1383 (Ct. Cl. 1975) and *United States v. Gemmill* 535 F.2d 1145 (9th Cir. 1976).

The 'Actual Consideration and Choice Test'

United States v. Dion 476 U.S. 734 (1986).
United States v. Nuesca 945 F 2d 254 (1991).
United States v. Bresette 761 F. Supp. 658 (1991).
South Dakota v. Bourland 508 U.S. 679 (1993).

It was not until the decision in *Dion* that there was any judicial guidance as to the clear and plain intention test. This case actually concerned Congressional abrogation of treaty hunting rights, rather than extinguishment of aboriginal title. In essence, the Supreme Court was asked to decide whether the effect of certain federal conservation Acts was to abrogate a treaty right to hunt. In *Dion*, the Court recast the 'clear and plain' intention test as the 'actual consideration and choice' test.

The facts of *Dion* are outlined at the beginning of this chapter, under the heading of 'terminology'.

In *Dion*, the Supreme Court held that:

- Congress' intention to abrogate Indian treaty rights must be clear and plain - *United States v. Santa Fe*; (at 739)
- over the years the standard for determining how a clear and plain intention is to be demonstrated has varied; (at 739)
- although an explicit statement by Congress is preferable, the test is whether there is clear evidence that Congress actually considered the conflict between its intended action on one hand and the Indian treaty rights on the other, and chose to resolve that conflict by abrogating treaty rights (at 740); the *Bald Eagle Protection Act* did not explicitly abrogate treaty rights to hunt. However, the Court held that Congressional intention to abrogate was

strongly suggested on the face of the Act:

> [t]he provision allowing taking of eagles under permit for the religious purposes of Indian tribes is difficult to explain except as a reflection of an understanding that the statute otherwise bans the taking of eagles by Indians, a recognition that such a prohibition would cause hardship for the Indians and a decision that the problem should be solved not by exempting Indians from the coverage of the statute, but by authorising the Secretary to issue permits to Indians where appropriate. (at 740)

- the legislative history of the statute supported the view that Congress intended to abrogate treaty rights. The House Committee considering the amendments specifically alluded to the importance of hunting these creatures to the Indian tribes. Therefore, the Court considered that Congress believed that in passing the amendment it was abrogating treaty rights. (at 742-3);
- as their rights were abrogated by the *Eagle Protection Act*, it was unnecessary to consider the *Endangered Species Act*. (at 745)

The following is an extract from *Dion*:

> All parties to this litigation agree that the treaty rights reserved by the Yankton included the exclusive right to hunt and fish on their land. See Brief for United States 19; Brief for Respondent 7. As a general rule, Indians enjoy exclusive treaty rights to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty or have been modified by Congress. F. Cohen, Handbook of Federal Indian Law 449 (1982) (hereinafter Cohen). These rights need not be expressly mentioned in the treaty. See *Menominee Tribe v. United States*, 391 U.S. 404 (1968); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78 (1918). Those treaty rights, however, little avail Dion if, as the Solicitor General argues, they were subsequently abrogated by Congress. We find that they were.
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> It is long settled that "the provisions of an act of Congress, passed in the exercise of its constitutional authority, if clear and explicit, must be upheld by the courts, even in contravention of express stipulations in an earlier treaty" with a foreign power. *Fong Yue Ting v. United States*, 149 U.S. 698, 720 (1893); cf. *Goldwater v. Carter*, 444 U.S. 996 (1979). This Court applied that rule to congressional abrogation of Indian treaties in *Lone Wolf v. Hitchcock*, 187 U.S. 553, 566 (1903). Congress, the Court concluded, has the power "to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so." *Ibid*.
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> We have required that Congress' intention to abrogate Indian treaty rights be clear and plain. Cohen 223; see *United States v. Santa Fe Pacific R. Co*., 314 U.S. 339, 353 (1941). "Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights. . . " *Washington v. Washington Commercial Passenger Fishing Vessel Assn*., 443 U.S. 658, 690 (1979). We do not construe statutes as abrogating treaty rights in "a backhanded way," *Menominee Tribe v. United*

States, 391 U.S., at 412; in the absence of explicit statement, "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." Id., at 413, quoting *Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 160 (1934). Indian treaty rights are too fundamental to be easily cast aside.

We have enunciated, however, different standards over the years for determining how such a clear and plain intent must be demonstrated. In some cases, we have required that Congress make "express declaration" of its intent to abrogate treaty rights. See *Leavenworth, L., & G. R. Co. v. United States*, 92 U.S. 733, 741-742 (1876); see also Wilkinson & Volkman 627-630, 645-659. In other cases, we have looked to the statute's "legislative history" and "surrounding circumstances" as well as to "the face of the Act." *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 587 (1977), quoting *Mattz v. Arnett*, 412 U.S. 481, 505 (1973). Explicit statement by Congress is preferable for the purpose of ensuring legislative accountability for the abrogation of treaty rights, cf. *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942). We have not rigidly interpreted that preference, however, as a per se rule; where the evidence of congressional intent to abrogate is sufficiently compelling, "the weight of authority indicates that such an intent can also be found by a reviewing court from clear and reliable evidence in the legislative history of a statute." Cohen 223. What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty. **[at 737-740, footnotes omitted]**

In *United States v. Nuesca* two native Hawaiians were convicted for the taking of two green turtles and a Hawaiian monk seal in violation of the *Endangered Species Act.* The two argued that the Act did not apply to them on the grounds that native Hawaiians have aboriginal rights to hunt green sea turtles and Hawaiian monk seals. They relied on the decision in *Dion*, and argued that the *Endangered Species Act* revealed no clear and plain intention to abrogate their aboriginal rights.

The Court held that:

- the two had no treaty rights on which they could rely (in distinction to the situation in *Dion*). Nor could they point to any evidence that hunting turtles or seals is a traditional aspect of native Hawaiian life;
- in absence of any traditional right to hunt seal or turtles, no question of abrogation of rights arose. (at 257)

In *United States v. Bressette*, Bresette and others were prosecuted for violations of the federal *Migratory Birds Act.* Bresette sold 'dream catchers' in his store which were made from the feathers of migratory birds protected under the Act. As a defence, the defendants claimed that they had a right to sell the dream catchers. The issue in the case, therefore, was whether the defendants had the right, as members of the Chippewa tribe, to sell migratory bird feathers obtained from land ceded by the Chippewa in two treaties? This required the Court to answer two questions:

1. Do the Chippewa have a treaty right to sell such feathers?
2. Did Congress abrogated the treaty right in enacting the Migratory Bird Treaty Act?

The Court held that:

- the treaties of cession included clauses guaranteeing the right to hunt on lands ceded under the treaty; (at 660-661)
- as treaties must be construed broadly and as the Indians would have understood them at the time of entry into the treaty, that right to hunt included the right to collect feathers. The Chippewas traditionally took numerous forms of birds, including migratory birds, for trading; (at 661-662)
- the *Migratory Birds Act* evidenced no clear and plain intention to abrogate treaty rights. After considering both the Act itself, and the legislative history, the Court concluded that 'the legislative history contains insufficient evidence that treaty rights were specifically considered and eliminated in the creation of the *Migratory Bird Treaty Act*'. (at 643)

The Supreme Court again considered the issue of 'clear and plain' intention in *South Dakota v. Bourland*, where they applied their earlier decision in *Dion*.

In *Bourland*, the Supreme Court considered the right of members of a former reserve to control access to hunting and fishing on those former tribal lands. Following severe flooding along the Cheyenne River, Congress passed the *Flood Control Act* of 1944 and the *Cheyenne River Act* of 1954 which allowed for the taking of tribal land in South Dakota for the construction of several dams and reservoirs required for flood relief measures. The Cheyenne River Sioux Tribe received compensation for the land, as well as the right of free access to the shoreline of the new reservoir in order to hunt and fish. Between 1945 and 1988 the Tribe and the State of South Dakota enforced their respective game and fishing regulations in the taken area. However, in 1988, the Tribe refused to continue to recognise state hunting licences on former reserve lands. South Dakota sought to stop the Tribe from excluding non-Indians from former trust lands.

The Supreme Court held that:

- Indian regulatory control over non-Indian hunting and fishing on lands taken for federal water projects had not survived the passing of the *Flood Control Act*; (at 689-90)
- what is required is evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve the conflict by abrogating the treaty; (at 693)
- explicit wording in the Act is not required to achieve this. However, s 4 of the

Flood Control Act, which provides that the lands taken were to be open for general recreational use by the public, had divested the Tribe of its exclusive control of the area; (at 693)

- s 10 of the *Cheyenne River Act* had given the Army Corps of Engineers regulatory control over the area, thus extinguishing the Tribe's regulatory control over licensing; (at 697) and
- although Congressional policy and the legislative debates were relevant to determining whether rights had been extinguished, in the end what is most important is the effect of the alienation of land on Indian rights, not the underlying purposes of the legislation authorising that alienation:

> . . . regardless of whether land is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress had broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control. (at 692)

The decision in *South Dakota v. Bourland* has been the subject of considerable criticism on the grounds that no clear and plain intention could actually be discerned from either piece of legislation at issue in that case. Blackmun J, who dissented, held that Congress' intention was not to extinguish the tribe's authority over hunting and fishing. Rather, Congress intended to build a dam. Blackmun J stated that:

> The United States did not take this land with the purpose of destroying tribal government or even with the purpose of limiting tribal authority. It simply wished to build a dam. The Tribe's authority to regulate hunting and fishing on the taken acres is consistent with the uses to which Congress has put the land, and, in my view, that authority must be understood to continue until Congress clearly decides to end it. (at 698)

Extinguishment by Adverse Dominion - Grants in Fee Simple

> *United States v Atlantic Richfield Co.* 435 F Supp 1009 (1977, DC Alaska).
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> *Marsh v Brooks* 55 US 513 (1853).

The High Court held in *Mabo (No. 2)* that native title will be extinguished by the grant of a fee simple estate. Case law in the United States takes a similar position. It is important to recognise that as power to extinguish aboriginal title is exclusively federal, then it will only be the grant of a fee simple estate by Congress, which will extinguish title. When a fee simple grant is given by a State over land subject to aboriginal title, then the new holder of the fee simple

takes the estate subject to the Indian right of occupation.

Cases indicate that the requisite clear and plain intention to extinguish aboriginal title to lands may be demonstrated in a lawful conveyance of the lands by the Congress to a settler. In *United States v Atlantic Richfield*, the Court held that that aboriginal title, as opposed to Indian title recognized by treaty or reservation, is legally extinguishable when the United States makes an otherwise lawful conveyance of land pursuant to federal statute. The Court held that Congressionally authorized conveyance of lands from the public domain demonstrates the requisite intent to extinguish the Indian right of exclusive use and occupancy to those lands. Thus, when the Secretary of the Interior issued a patent to a homesteader in Alaska, aboriginal title was extinguished with respect to the patented land.

This case is consistent with the earlier decision of *Marsh v Brooks*, where a settler entered Indian lands, aboriginal title to which had not been extinguished, and made improvements on the lands. When a grant was applied for, the recorder of titles granted 640 acres, adding the notation 'if Indian rights extinguished'. The court determined that, despite this notion, following congressional confirmation of the patent of title, the settler had title to the land.

Regulation

The issue of the effect of regulation on aboriginal title in the United States is a complex one. Some hint of this has been given in Chapter Two, where hunting and fishing rights in the United States are examined. Who may regulate rights, and what effect that regulation has, depends on the complex interplay between tribal sovereignty, federal and state jurisdiction.

As will be seen below, states have limited power to regulate Indian rights. As extinguishment can only be effected by the federal government, state regulation cannot extinguish aboriginal or treaty rights.

Interaction between tribal sovereignty and state laws

The following is a summary of the interaction between tribal sovereignty and state hunting, fishing and conservation laws. Obviously this is of no direct relevance to Australia. However, it is important to understand the general framework of the law in this area, so that specific decisions on regulation can be understood in their context.

Broadly speaking, there are three major issues that dominate this area:

1. *the jurisdiction of a state to enforce its hunting, fishing and conservation laws on an Indian reservation.* Indians exercising on-reservation hunting and fishing rights have historically been exempt from all state conservation and licensing laws, although they will be subject to federal and tribal laws. See, for example, *Mattz v. Arnett* 412 U.S. 481 (1973). However, some cases suggest that state regulation of hunting and fishing rights may be permitted if it is non-discriminatory and necessary for conservation purposes: See *Puyallup Tribe v. Department of Game* 433 U.S. 165 (1977) and *United States v. Oregon* 657 F 2d. 1009 (1981).
2. *the jurisdiction of a tribe to enforce its hunting and fishing regulations on-reservation with respect to non-Indians*. The situation with respect to this is unclear. The leading decision is that of the United States Supreme Court in *United States v. Montana*. In that case, the Crow Tribal Council had passed a resolution which prohibited hunting and fishing within the reservation by everyone other than members of the Crow Tribe. This included, therefore, non-Indians living on fee simple lands within the boundaries of the reservation. At the same time, Montana continued to authorise hunting and fishing within the reservation by the issuing of hunting and fishing licences. The Court was called on to resolve the conflict. The Court held that the tribe did not have the power to proscribe hunting and fishing by those living on fee simple lands within the reservation as regards fishing on their own lands, but could regulate their activities on other lands within the reservation. However, the enforcement of tribal regulations were to be without subjecting non-Indians to the criminal jurisdiction of tribal courts. Montana also retained power to regulate hunting and fishing by non-members within the limits of the reservation. Montana cannot force the Crow to admit non-members to the reservation, but if non-members did obtain permission to enter they remained subject to Montana's fish and game laws as well as tribal regulations. Thus, a non-member required a licence from both Montana and the Crow.
3. *the jurisdiction of the state to enforce laws with respect to hunting and fishing off-reservation.* The general rule is that the states have the power to regulate the exercise of off-reservation hunting and fishing rights. However, off-reservation food-gathering rights can only be created by explicit language which guarantees these rights and specific federal treaty or statutory provisions may pre-empt state jurisdiction off-reservation. The extent of the pre-emption depends on the intention of the parties as reflected in the language of the treaty and the circumstances in which the treaty was negotiated. See, for example, *Washington v. Washington State Commercial Fishing Vessel Association* 443 U.S. 658 (1979). In *Puyallup Tribe v. Department of Game* 391 U.S. 392 (1968) the Court held that off-reservation

fishing rights may not be qualified by the state, although the manner of fishing, size of the take etc., could be regulated by the state in the interest of conservation, provided that the regulation met appropriate standards and did not discriminate against the Indians. Unfortunately, this decision has left the scope of state jurisdiction very uncertain, leading to a flood of litigation.

Federal regulation

United States v Eberhardt 789 F 2d. 1354 (1986).

There is obviously considerable overlap between this area and that of the extinguishment/ abrogation of rights discussed above. As noted, abrogation can be effected by regulation in the form of a total prohibition.

In *United States v. Eberhardt*, the appellants had been charged with the unlawful sale of anadromous fish caught within the Hoopa Valley Indian Reservation in violation of regulations made by the federal Department of the Interior which prohibited commercial fishing by Indians on that part of the Klamath River which flowed through the Reservation. The regulations did allow continued fishing for reasons of ceremony or personal consumption. The issue before the Court was whether or not the Department of the Interior had the power to regulate on-reservation activities.

The Court of Appeals for the Ninth Circuit held that:

- by virtue of general trust statutes which authorise it to manage Indian affairs, the Department of the Interior has power to regulate fisheries; (at 1359)
- the Department of the Interior was not claiming the trust statutes gave power to abrogate treaty rights, but rather to enact regulations to protect and conserve the fisheries resource for the benefit of the Indians; (at 1360)
- the Department of the Interior's regulations were designed to manage the fishery for the benefit of the Indians, not to extinguish any reserved tribal rights. The Department made it clear that the ban on commercial fishing was temporary and that commercial fishing could resume when the fishery could withstand the increased harvest; (at 1361)
- hence there was no intention to abrogate fishing rights.

Therefore, it is clear that the federal government has the power to regulate on-reservation rights. There is no reason why this would not also apply to aboriginal rights. If there is no clear and plain intention to abrogate (extinguish), then there will only be valid regulation of the right. Thus, regulation in the form of a total prohibition will only constitute extinguishment or abrogation if there is clear and plain intention to extinguish.

Applicability to Australia

United States case law concerning the parameters of the 'clear and plain' doctrine is clearly applicable to Australia. While care must be taken with those decisions that consider the effect of regulation on aboriginal rights, the decision in *United States v. Eberhardt* 789 F 2d. 1354 (1986) could be used as authority in Australia. Whether the court would accept these decisions is, however, doubtful. For the sake of brevity, the problems with the approach of the courts in the United States will be discussed after the Canadian section of this chapter, as the same problems also apply to some judgments of the Supreme Court of Canada.

Canada

Overview

> *Delgamuukw v. British Columbia*, as yet unreported decision of the Supreme Court of Canada, 11 December, 1997.

There have been few Canadian cases dealing with the extinguishment of aboriginal title. This reflects the few cases in which plaintiffs have sought to establish aboriginal title through the courts. The majority of cases have rather concerned the effect of regulation on hunting or fishing rights.

Prior to 1982

Under s 91(24) of the *Constitution Act, 1867* the federal government is given exclusive power over Indians and their lands. Prior to the enactment of s 35(1) of the *Constitution Act, 1982*, treaty and common law rights could be extinguished by valid federal legislation, or subjected to valid federal regulation. Extinguishment required clear and plain intention.

The Provinces had, and continue to have, no power to extinguish aboriginal title. They can, however, subject it to regulation by virtue of s 88 of the *Indian Act* 1985 C. I-5, as long as that regulation consists of a law of general application.[2] This proposition has recently been confirmed by the Canadian Supreme Court in *Delgamuukw*.[3] The majority in that case held that British Columbian 'laws of general application' do apply to Indians and Indian lands (for example labour relations legislation and motor vehicle laws), but that those laws do not extinguish aboriginal rights. The majority noted that this was so even though those laws may be 'necessarily inconsistent' with the continued

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2 See Chapter One 'Context', for more information on s 88 and application of provincial laws.

3 The facts of this case are outlined in Chapter Two 'Recognition'.

existence of particular aboriginal rights. Lamer CJ stated that:

> The only laws with sufficiently clear and plain intention to extinguish aboriginal rights would be laws in relation to Indians and Indian lands. As a result, a provincial law could never, *proprio vigore*, extinguish aboriginal rights, because the intention to do so would take the law outside provincial jurisdiction. (at para 180)

Thus, as British Columbia does not have constitutional power to legislate with respect to 'Indians or Indian lands', any legislation of general application that may apply to Indians or their lands could never display a clear and plain intention to extinguish. This can be contrasted with the situation in Australia, where the states do have the constitutional power to extinguish native title.

In addition, provincial laws are subordinate to treaties by virtue of s 88 of the *Indian Act*.

Post-1982

Post 1982, by virtue of s 35(1) *Constitution Act, 1982*, no rights, arising either by virtue of treaty or common law, can be extinguished. Legislation, either provincial or federal, can validly regulate rights as long as it meets the test in *R. v. Sparrow* (1990) 70 D.L.R. (4th) 385. Although aboriginal rights cannot be extinguished post-1982, the question of extinguishment is still relevant. Section 35(1) only protects those rights that still existed at the time of its enactment. Thus, in order to determine whether an aboriginal right should be protected, the Court will need to examine whether it still existed in 1982. In other words, had it already been extinguished by 1982?

Aboriginal Title

Clear and plain intention

> *Calder v. Attorney-General of British Columbia* (1973) 34 D.L.R. (3d) 145.
>
> *R. v. Sparrow* (1990) 70 D.L.R. (4th) 385.

In Canada, as in the United States, aboriginal title may only be extinguished by a 'clear and plain' intention. This can be traced to the Supreme Court decision in *Calder*. In that case, Hall J held that:

> It would . . . appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and the intention must be "clear and

> plain". . . (at 210)

As authority for this proposition, Hall J relied upon earlier United States decisions, including *Lipan Apache Tribe et al v. United States* 180 Ct. Cl. 487 (1967), which is discussed above.

The 'clear and plain' intention test was confirmed in *R. v. Sparrow*. Sparrow, a member of the Musqueam, was charged with the offence of fishing with a drift-net longer than permitted by the terms of an Indian food fishing licence which had been issued to the band of which he was a member. He argued as a defence an unextinguished aboriginal right protected by s 35(1) of the *Constitution Act, 1982.*

The Court confirmed that a clear and plain intention to extinguish was required (at 401). With respect to the *Fisheries Act*, the Court held that:

- there was nothing in the *Fisheries Act*, or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish; (at 401) and
- that provisions which required Indians fishing for food to obtain licences were a manner of controlling the fisheries, not defining the underlying rights:

> In the context of aboriginal rights, it could be argued that, before 1982, an aboriginal right was automatically extinguished to the extent that it was inconsistent with a statute. As Mahoney J stated in *Baker Lake* at p. 551
>
> > Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right, then that is the effect that the courts must give it. That is as true of an aboriginal title as any other common law right.
>
> See also *Ontario (Attorney General) v. Bear Island Foundation* at pp.407-8. That in Judson J.'s view was what had occurred in *Calder*, *supra*, where, as he saw it, a series of statutes evinced a unity of intention to exercise a sovereignty inconsistent with any conflicting interest, including aboriginal title. But Hall J. in that case stated (at p. 210) that "the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and *that intention must be 'clear and plain'*" (emphasis added). The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right. (at 401)

The Supreme Court's view of the law prior to the enactment of s 35(1) of the *Constitution Act, 1982,* accords with that of the High Court in *Mabo v. State of*

Queensland (No. 2) (1992) 175 C.L.R. 1.

Extinguishment by implication

> *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development* (1979) 107 D.L.R. (3d) 513.
>
> *Delgamuukw v. R* (1993) 104 D.L.R. (4th) 470 (BCCA).

Native title and aboriginal title can only be extinguished by clear and plain intention. In Australia, 'clear and plain' does not require explicit language: *Mabo v. State of Queensland (No. 2)* (1992) 175 C.L.R. 1, *The Wik Peoples v. Queensland* (1996) 187 C.L.R. 1. For example, native title can be extinguished by the grant of an interest which is inconsistent with the continued existence of that title. This process is generally referred to as extinguishment by necessary implication. However, it is still unclear in Canada whether aboriginal rights and title can be extinguished by necessary implication. As yet, the Supreme Court of Canada has made no determination on this issue. In fact, in at least two decisions, the Supreme Court of Canada has declined to determine the issue of whether extinguishment of aboriginal title can be implied: see *Canadian Pacific Ltd v. Paul* (1988), 53 D.L.R. (4th) 487 and *R. v. Simon* (1985), 24 D.L.R. (4th) 390. The question has arisen, however, in two lower court decisions, *Hamlet of Baker Lake* and *Delgamuukw* (BCCA), which are reproduced below. It should be noted that the Supreme Court in *Delgamuukw* did not consider this issue.

The issue of extinguishment by necessary implication first arose in *Hamlet of Baker Lake*. That case concerned an action by the Inuit of the Baker Lake area of the Northwest Territories for a declaration that they had aboriginal title to an area of approximately 78,000 km around the community of Baker Lake. The plaintiffs also sought to restrain the government from issuing land use permits, prospecting permits and granting mining leases in the Baker Lake area. The appellants succeeded in demonstrating aboriginal title. Therefore, the question arose whether that aboriginal title had been extinguished. Two possible causes of extinguishment were identified:

1. the *Royal Charter* of 1670 which granted Rupert's Land to the Hudson Bay Company;
2. the *Territorial Lands Act* R.S.C. 1970, c. T-6, particularly s 4 which gives the Governor in Council the power to authorise the sale, lease or other disposition of all interests in land in the Northwest Territories. There was no exemption in the Act for lands subject to aboriginal title, although such an exemption had existed in previous versions of the Act.

Mahoney J held that neither had extinguished the aboriginal title. Specifically, he held that:

- Parliament's intention to extinguish need not be explicit; (at 551)
- if the necessary result of legislation is adverse to any right of aboriginal occupancy, then that effectively shows a clear and plain intention to extinguish; (at 552)
- with respect to the grant of land under the *Royal Charter*, the Hudson Bay's occupation of the territory granted was notional at best. The grant of title was intended solely to define its ownership of the land in relation to the Crown. (at 548-9) The Charter stated that:

  > . . . and further WEE DOE by these presentes for us our heires and successors make create and constitute the said Governor and Company for the tyme being and theire succesors the true and absolute Lordes and Proprietors of the same Territory lymittes and places aforesaid. . . TO BEE HOLDEN of us our heires and successors as of our Mannor of East Green which in our County of Kent in free and common Soccage. . . (at 547)

  While it may have been true that the grant of title was only intended to define the ownership of land in relation to the Crown, the words 'free and common soccage' reveal that the Crown did grant title in fee simple;
- with respect to the *Territorial Lands Act*, there was no clear and plain intention to extinguish. The *Territorial Lands Act* was not an Act by which complete adverse dominion was asserted by the Crown; (at 557). Further, Mahoney J stated that:

  > I will merely note, at this point, that the Governor in Council and the Commissioner in Council have acted on their statutory authority in many areas. That fact and the purport of those regulations and ordinances are not material to the question of the complete extinguishment of aboriginal title. Such extinguishment must be affected by Parliament itself enacting legislation inconsistent with the continued existence of an aboriginal title; it cannot depend on the exercise of authority delegated by that legislation. That is not to say that the rights comprised in an aboriginal title cannot be abridged by legislation, delegated or otherwise, without the title being completely extinguished. (at 555-6)

Mahoney J's statement above is not on all fours with the High Court's decision in *Mabo (No. 2)*. In *Mabo (No. 2)* it was held that *either* action by the legislature, or the executive acting under the authority of validly enacted legislation, could extinguish native title (at para 75). In either case, however,

that action must show a clear and plain intention to extinguish, although it need not be express. For example, in *Mabo (No. 2)*, it was accepted that the provisions of the *Constitution Act 1867* (Qld) and the various *Land Acts* give the Governor-in-Council the power to grant inconsistent estates, and the actual grant of an inconsistent estate by the Governor in Council will extinguish native title.

The doctrine of extinguishment by necessary implication was considered at some length by the British Columbia Court of Appeal in *Delgamuukw*. Notably, the judgment of Lambert JA with respect to necessary implication was quoted with approval by Toohey J in *The Wik Peoples v. Queensland* (1996) 141 A.L.R. 129, at 184.

At issue in the *Delgamuukw* case was the effect of thirteen Colonial Instruments, enacted between 1858 and 1870, on aboriginal title in British Columbia. Those thirteen instruments include nine proclamations by the Governor of the Colony and nine ordinances.[4] The same proclamations were at issue in *Calder*. In *Calder*, Judson J had found that the proclamations extinguished aboriginal title by adverse dominion:

> In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation. (at 167)

Hall J, on the other hand, held that there was no clear and plain intention to extinguish:

> It would, accordingly, appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be "clear and plain". There is no such proof in the case at bar; no legislation to that effect. (at 210)

An example of the tenor of these Proclamations is the second proclamation, which stated in s 1 that: 'All the lands in British Columbia, and all Mines and Mineral therein, belong to the Crown in fee'.

The trial judge, McEachern J, had held that although intention to extinguish need not be explicit, he could not imagine any clearer intention to extinguish than the second Proclamation:

> To put it in a nutshell, I find that the legislation passed in the

[4] British Columbia did not become part of the Dominion of Canada until 1871.

> colony and by the Imperial Parliament that all the land in the colony belonged to the Crown in fee, altogether from many other enactments, extinguished any possible right of ownership on the part of the Indians.(at 528)

Macfarlane JA (with whom Taggart JA agreed) held that although the sovereign's intention must be clear and plain if it is to extinguish an aboriginal right, it has never been held in Canada that express legislation was required to achieve this. His Honour held that aboriginal rights can be extinguished where the intention is 'declared expressly or manifested by unavoidable implication.' (at 523) The test is whether it is possible for the interest authorised under legislation and the aboriginal title to co-exist.

On the facts, Macfarlane JA held that:

- the historical purpose of the Proclamations was to attract permanent settlers to a colony which had been destabilised by the gold rushes; (at 529)
- the acquisition of aboriginal lands was not the intention of the proclamations, although there was a need to reconcile the conflicting claims of settlers and aboriginal peoples; (at 529)
- settlement at the time was slow and did not seriously impinge on aboriginal land use; (at 530)
- the proclamation did no more than declare that only the Crown was competent to convey lands to settlers; (at 530)
- putting in place a statutory scheme did not necessarily mean that aboriginal interests were to be disregarded. The colonial instruments did not foreclose the possibility of the co-existence of aboriginal and Crown interests. (at 531)

The following is an extract from the judgment of Macfarlane JA in *Delgamuukw*:

> In my view, the honour of the Crown, arising from its role as the historic protector of aboriginal lands, requires a clear and plain intention to extinguish aboriginal title that is express or manifested by unavoidable implication.
> Consequently, applying the clear and plain test to extinguishment of aboriginal rights, there can only be extinguishment by necessary implication if the only possible interpretation of the statute is that aboriginal rights were intended to be extinguished.
> The clear and plain test, whether applied to vested rights, property rights, or aboriginal rights, ensures respect for and protection of those special rights. Although aboriginal rights cannot be easily described in terms of English property law, they are to be regarded as unique and important. But, like vested rights and property rights, they may be impaired or extinguished with or without compensation by a clear and plain exercise of competent legislative power. However, the legislative intention to do so will be implied only if the interpretation of the statute permits no other result. *Sparrow* has made it clear that if the intention is only to limit the exercise of the right it should not be inferred that the right has been extinguished.

> It must be remembered that the Crown had power to impair or extinguish the Indian interest. Exercise of the power could be exercised in many ways: by conveyance of title; by lease; by a licence to remove or control resources; by permits to hunt or to fish. Some involved impairment, others extinguishment.
> Whether the intention to extinguish an aboriginal right is clear and plain must of necessity depend upon the nature of the Indian interest affected by the grant, and the nature of the grant itself.
> Before concluding that it was intended that an aboriginal right be extinguished one must be satisfied that the intended consequences of the colonial legislation were such that the Indian interest in the land in question, and the interest authorized by the legislation, could not possibly co-exist. Again, if the consequence is only impairment of the exercise of the right it may follow that extinguishment ought not to be implied. **[at 524-525. © Canada Law Book Company 1993]**

Lambert JA held that extinguishment by implication occurs where an enactment brings into existence a legislative scheme which is inconsistent with aboriginal title or rights, and which makes it clear and plain that the legislative scheme is to prevail to the extent of the inconsistency.

On the facts Lambert JA held:

- the provisions relating to fee simple title must be understood in the context of setting up an orderly system of purchase, pre-emption and settlement; (at 675)
- the concept that the Crown in right of British Columbia could hold an estate in fee simple from the Crown Imperial is both incorrect constitutionally and incorrect in terms of estates in land. As the Crown has radical title, it cannot also hold an estate in fee simple. The Crown's title remains an allodial title and its nature was not changed by the imposition of a statutory scheme, although for the purposes of administration of the statutory scheme the Crown may be said to hold land in fee simple. At the time British Columbia was settled, the concept of fee simple was better understood than that of radical title, which may have accounted for the terminology in the proclamations. The simple meaning of the scheme was that no one in British Columbia could in future acquire any rights in land in British Columbia without complying with the statute (at 674-5)

  [It is also the case in Australia that it is incompatible with the doctrines of tenure and estates for the Crown to own land in fee simple, although provision is made for Crown ownership by legislation in most jurisdictions. See, for example, the *Land Act 1994* (Qld) s 17. Usually, however, land is reserved for public purpose. This reservation will not necessarily extinguish native title (*Mabo (No. 2)* at 68)];
- in any case, if aboriginal title is a burden on the radical title of the sovereign, and if the radical title is acquired on the assertion of sovereignty, then there is

nothing in the taking of fee simple title by the Crown which would free either the radical title or the subordinate fee simple estate from the burden constituted by the aboriginal title; (at 675)

- those in government who did not recognise the existence of aboriginal title could not have formed the requisite intention to extinguish it; (at 676)

  [In *R. v. Van der Peet* (1996) 137 D.L.R. (4th) 289, McLachlin J held that the Government needs to have considered the aboriginal right and have chosen to extinguish (at 386). However, her comments in this respect were the subject of express disapproval by La Forest J in *R. v. Gladstone* (1996) 137 D.L.R. (4th) 648, at 698.]

- the notion that aboriginal title is extinguished by the effect of legislation, rather than its purpose, is inappropriate, unless there is an absolutely inescapable (that is, necessary, clear and plain) inference of purpose from the effect; (at 677)

  [However, according to the majority in *The Wik Peoples v Queensland* (1996) 141 A.L.R. 129, it is the effect of the legislation, rather than the legislature's intention, which is relevant to any consideration of the extinguishment of native title: see, for example, at 273, per Kirby J.]

- if the Colonial Instruments extinguished aboriginal title by the act of vesting the fee simple title in the Crown, then the effect would have been, in one fell swoop, to turn the Indian peoples from being peoples occupying their ancestral territories as they had done for generations, into trespassers in their own villages and in their own hunting territories. (at 677) Similar comments were made by Brennan J in *Mabo (No. 2)* with respect to the effect of s 91 of the *Crown Lands Alienation Act* (Qld) which made it an offence for a person to be found in occupation of Crown lands 'unless lawfully claiming under a subsisting lease or licence'. Brennan J held that:

  > To construe s 91 or similar provisions as applying to the Meriam people in occupation of the Murray Islands would be truly barbarian. Such provisions should be construed as being directed to those who were or are in occupation under colour of a Crown grant or without any colour of right; they are not directed to indigenous inhabitants who were or are in occupation of land by right of their unextinguished native title. (at 66)

The following is an extract from Lambert JA's judgment in *Delgamuukw*:

> *Express (or explicit) extinguishment* is extinguishment brought about by the sovereign power acting legislatively in an enactment which provides on its face and in its terms for extinguishment, either on the coming into force of the enactment or on the happening of an event described in the enactment.
> *Implicit extinguishment* is extinguishment brought about by the sovereign power acting legislatively in an enactment which does not provide in its terms for

extinguishment but which brings into operation a legislative scheme which is not only inconsistent with aboriginal title or aboriginal rights but which makes it clear and plain by necessary implication that, to the extent governed by the existence of the inconsistency, the legislative scheme was to prevail and the aboriginal title and aboriginal rights were to be extinguished.

In the case of *implicit extinguishment* the extinguishment brought about by the clear and plain intention demonstrated by the necessary implication may be brought about by the enactment of the legislation itself, because the necessity for extinguishment may occur at that point (which I will call *implied extinguishment*), or it may be brought about by the administrative or executive actions authorized by the legislation, because the necessity for extinguishment may occur only when the administrative or executive action occurs (which, because this term has been used already in the cases and not because it is perfectly descriptive, I will call *extinguishment by adverse dominion*).**[at 668-9. © Canada Law Book Company 1993]**

Factual or legal inconsistency

> *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development* (1979) 107 D.L.R. (3d) 513.
>
> *Delgamuukw v. R* (1993) 104 D.L.R. (4th) 470.
>
> *R. v. Badger* (1996) 133 D.L.R. (4th) 324.
>
> *The Wik Peoples v. Queensland* (1996) 141 A.L.R. 129.

In light of the recent decision in *The Wik Peoples*, one question to be considered is that of factual/legal inconsistency. In *The Wik Peoples*, the majority rejected the factual inconsistency approach, holding that it is not the exercise of rights which extinguishes native title, but the grant of an interest. Therefore, it is the grant of an estate in fee simple which extinguishes native title, not what you might subsequently do on or with that land. However, in Canada the position seems to be the reverse. Factual, rather than legal inconsistency, is looked at by the Court in order to determine whether aboriginal rights have been extinguished. The one possible exception to this is the decision in *Hamlet of Baker Lake*.

In *Hamlet of Baker Lake*, Mahoney J considered the effect of the granting of land to the Hudson's Bay Company by Royal Charter on aboriginal title. Mahoney J held that there was no extinguishment of aboriginal title. However, he also held that:

> The coexistence of an aboriginal title with the estate of the ordinary private land holder is readily recognized as an absurdity. The communal right of aborigines to occupy it cannot be reconciled with the right of a private owner to peaceful

> enjoyment of his land. However, its coexistence with the radical title of the Crown is characteristic of aboriginal title and the company, in its ownership of Rupert's Land, aside from its trading posts, was very much in the position of the Crown. Its occupation of the territory was, at most notional. (at 549)

Of course, arguably more than the Crown's radical title was at issue. As noted above, the land was granted to the Company 'in free and common soccage'. However, Mahoney J clearly felt that the Hudson's Bay Company was not to be equated with an 'ordinary private land owner.' Therefore, the judgment appears to support the position that the grant of an estate in fee simple will extinguish native title.

The position is clearer in the remaining cases. In *Delgamuukw*, the Court of Appeal considered the co-existence of aboriginal rights and the grant of an interest by the Crown. Strictly speaking, the following comments are in *obiter* as Macfarlane JA found that after British Columbia joined the Dominion of Canada in 1871, the province lacked the constitutional authority to extinguish aboriginal rights.

Macfarlane JA held that although the Crown has the power to extinguish native title, whether or not extinguishment has occurred in each case depends upon a comparison of the nature of the aboriginal interest at issue and the nature of the Crown grant. This comment of itself would not necessarily lead to the conclusion that Macfarlane JA takes the view that factual, rather than legal, inconsistency is the test. However, he goes on to give an example of interests that can co-exist. The example given is that of aboriginal use of land and the grant of a fee simple interest in the same land:

> [a] fee simple grant of land does not necessarily exclude aboriginal use. Uncultivated, unfenced, vacant land held in fee simple does not necessarily preclude the exercise of hunting rights: *R v. Bartleman* (1984), 12 D.L.R. (4th) 73. . . On the other hand the building of a school on land usually occupied for aboriginal purposes will impair or suspend a right of occupation.
>
> Two or more interests in land less than fee simple can co-exist. A right of way for power lines may be reconciled with an aboriginal right to hunt over the same land, although a wildlife reserve might be incompatible with such a right. Setting aside land as a park may be compatible with the exercise of certain aboriginal customs: *R. v. Sioui* (1990), 70 D.L.R. (4th) 427 at pp. 464-5, 56 C.C.C. (3d) 225, [1990] 1 S.C.R. 1025.
>
> The ownership issue aside, logging in forest areas may or may not impair or interfere with an aboriginal interest. For instance,

> interference may occur in areas which are integral to the distinctive culture of the particular aboriginal people, e.g., an area of religious significance or where cultural pursuits are followed. In other areas there may be no interference. (at 532)

The following is a short extract from the judgment of Macfarlane JA:

> Consequently, applying the clear and plain test to extinguishment of aboriginal rights, there can only be extinguishment by necessary implication if the only possible interpretation of the statute is that aboriginal rights were intended to be extinguished.
> The clear and plain test, whether applied to vested rights, property rights, or aboriginal rights, ensures respect for and protection of those special rights. Although aboriginal rights cannot be easily described in terms of English property law, they are to be regarded as unique and important. But, like vested rights and property rights, they may be impaired or extinguished with or without compensation by a clear and plain exercise of competent legislative power. However, the legislative intention to do so will be implied only if the interpretation of the statute permits no other result. *Sparrow* has made it clear that if the intention is only to limit the exercise of the right it should not be inferred that the right has been extinguished.
> It must be remembered that the Crown had power to impair or extinguish the Indian interest. Exercise of the power could be exercised in many ways: by conveyance of title; by lease; by a licence to remove or control resources; by permits to hunt or to fish. Some involved impairment, others extinguishment.
> Whether the intention to extinguish an aboriginal right is clear and plain must of necessity depend upon the nature of the Indian interest affected by the grant, and the nature of the grant itself.
> Before concluding that it was intended that an aboriginal right be extinguished one must be satisfied that the intended consequences of the colonial legislation were such that the Indian interest in the land in question, and the interest authorized by the legislation, could not possibly co-exist. Again, if the consequence is only impairment of the exercise of the right it may follow that extinguishment ought not to be implied. **[at 524-5. © Canada Law Book Company 1993]**

In *Delgamuukw*, Lambert JA made a similar finding that the grant of a fee simple would not necessarily extinguish aboriginal title (at 670). In doing so, he specifically disagreed with Brennan J that it is the effect of the grant that necessarily extinguishes aboriginal title. After reviewing Brennan J's comments he stated:

> I do not think that there is any basis in principle for saying that inconsistency between the grant and native title necessarily means that it is the native title that must give way. If the point were addressed in the legislation itself, and a clear and plain intention to extinguish, should there be an inconsistency, were shown, then extinguishment would be the result. But if the clear and plain intention to extinguish in the event of an inconsistency

> were not shown, then I do not understand the nature of the rule of law or principle which would decree that the new grant should prevail over the longstanding aboriginal title. I do not think that the effect of a grant should determine the test of legislative intention, unless it is clear and plain from the effect that the intention is clear and plain. I should also add that Mr. Justice Brennan's proposition that the effect of the grant is enough to extinguish aboriginal title and rights even if the intention is not clear and plain, is contrary to the test enunciated in *Sparrow*, at p. 401. (at 671-672)

In *Badger*, the three accused were charged with an offence under the *Wildlife Act*, S.A. 1984, c. W-9.1 connected with the shooting of moose. All three accused were Indians with status under Treaty No. 8, which provided that the Indians shall have the right to pursue their 'usual vocations of hunting, trapping and fishing'. All three accused were hunting on lands that had been included in the surrender under the treaty but were now privately owned. It is clear from the decision of the trial judge that the privately owned lands were held in fee simple. The case partly turned on the issue of whether the three had a 'right of access' to those lands as provided under the Alberta *Natural Resources Transfer Agreement* 1930.[5] Cory J held that:

- where lands are privately owned, it must be determined on a case-by-case basis whether they are lands 'to which Indians have a right of access' under the Treaty; (at 350-351)
- if the lands are occupied by being put to visible use which is incompatible with hunting, Indians will not have a right of access; (at 350-351)
- if privately owned land is unoccupied and not put to visible use, Indians, pursuant to Treaty No. 8, will have a right of access in order to hunt for food; (at 350).

On the facts it was found that two of the accused had been hunting on land which was visibly used. Therefore they had no right to hunt or fish. (at 351) The third accused was hunting on a portion of the land which showed no signs of occupation. There were no fences or signs. It was not apparent that this land was being put to use. Therefore, he had a right of access for the purposes of hunting for food. (at 351). As a result, the treaty right to hunt continued even after a grant of an estate in fee simple had been made to a third party.

The following is an extract from *Badger*:

> [53]The evidence led at trial indicated that in 1899 the Treaty No. 8 Indians would

[5] See Chapter One 'Context' for an explanation of the *Natural Resources Transfer Agreement.*

> have understood that land had been "required or taken up'' when it was being put to a use which was incompatible with the exercise of the right to hunt. Historian John Foster gave expert evidence in this case. His testimony indicated that, in 1899, Treaty No. 8 Indians would not have understood the concept of private and exclusive property ownership separate from actual land use. They understood land to be required or taken up for settlement when buildings or fences were erected, land was put into crops, or farm or domestic animals were present. Enduring church missions would also be understood to constitute settlement. These physical signs shaped the Indians' understanding of settlement because they were the manifestations of exclusionary land use which the Indians had witnessed as new settlers moved into the west. The Indians' experience with the Hudson's Bay Company was also relevant. Although that company had title to vast tracts of land, the Indians were not excluded from and, in fact, continued hunting on these lands. In the course of their trading, the Hudson's Bay Company and the Northwest Company had set up numerous posts that were subsequently abandoned. The presence of abandoned buildings, then, would not necessarily signify to the Indians that land was taken up in a way which precluded hunting on them. Yet, it is dangerous to pursue this line of thinking too far. The abandonment of land may be temporary. Owners may return to reoccupy the land, to undertake maintenance, to inspect it or simply to enjoy it. How "unoccupied'' the land was at the relevant time will have to be explored on a case-by-case basis.
>
> [54]An interpretation of the treaty properly founded upon the Indians' understanding of its terms leads to the conclusion that the geographical limitation on the existing hunting right should be based upon a concept of visible, incompatible land use. This approach is consistent with the oral promises made to the Indians at the time the treaty was signed, with the oral history of the Treaty No. 8 Indians, with earlier case law and with the provisions of the Alberta *Wildlife* Act itself. **[at 345. ©Canada Law Book Company 1996]**

Badger, of course, involves a treaty right and as such is not directly applicable to Australia, even though that treaty right would have been a pre-existing aboriginal right to hunt prior to the signing of the treaty. Further, the principle that treaties should be interpreted liberally, and as the Indians would have understood them at the time of signing, played a considerable part in the judgment. Nevertheless, in *Badger* the Supreme Court takes a similar approach to that taken by the British Columbia Court of Appeal in *Delgamuukw*. *Delgamuukw*, of course, concerned aboriginal rights, not a treaty right. This suggests that the Supreme Court may take a similar view as to factual inconsistency and aboriginal rights should the issue come before it.

Clearly, Australian Courts are unlikely to agree that the grant of a fee simple need not extinguish native title. The grant of an estate in fee simple is the example constantly given by the High Court of an action that extinguishes native title. Further, it has also been held in Australia that it is the effect of the grant which determines whether native title is extinguished, not either the Crown's intention or the enjoyment of rights by the grantee: see *Mabo v. State*

of Queensland (No. 2) (1992) 175 C.L.R. 1, at 68, per Brennan J; The *Wik Peoples v Queensland* (1996) 141 A.L.R. 129, at 220, per Gummow J. This view was confirmed by the Federal Court in *Fourmile v. Selpam*, as yet unreported decision (1998) 67 F.C.A. In other words, as the grant of an estate in fee simple confers exclusive possession, native title must be extinguished by necessary implication. It is irrelevant whether or not the new owner actually does anything with the land which is inconsistent with continuing native title rights. This is also congruent with the conclusion reached in *Wik* with respect to the grant of a pastoral lease. The grant of the lease, not the factual carrying out of pastoral activities, extinguished native title (*The Wik Peoples* at 273). The High Court's legal inconsistency test is more stringent than that of Canada's factual inconsistency, and will inevitably lead to more native title rights being held to have been extinguished.

Effect of a reservation of land

> *Delgamuukw v. R* (1993) 104 D.L.R. (4th) 470 (BCCA).

In *Delgamuukw*, Macfarlane JA also considered the possibility of co-existence of aboriginal title and another interest, where that other interest was less than a fee simple estate.

> Two or more interests in land less than fee simple can co-exist. A right of way for power lines may be reconciled with an aboriginal right to hunt over the same land, although a wildlife reserve might be incompatible with such a right. Setting aside land as a park might be compatible with the exercise of certain aboriginal customs: *R. v. Sioui* (1990) 70 D.L.R. (4th) 427 at pp. 464-5. . .
>
> The ownership issue aside, logging in forest areas may or may not impair or interfere with an aboriginal interest. For instance, interference may occur in areas which are integral to the distinctive culture of the particular aboriginal people, e.g. an area of religious significance or where cultural pursuits are followed. In other areas there may be no interference.(at 532-3)

These examples given by Macfarlane JA of interests that can co-exist would seem applicable to Australia. According to Brennan J in *Mabo (No. 2)*, the dedication or reservation of land (as opposed to the granting) for public purposes will not necessarily extinguish native title, although later use of the land, for example the construction of a building, may extinguish native title: *Mabo v. State of Queensland (No. 2)* (1992) 175 C.L.R. 1, at 68. On the

question of whether the reservation of land for a road will extinguish native title, see *Fourmile v. Selpam*, as yet unreported decision of the Federal Court of Australia (1998) 67 F.C.A.

Vesting of ownership in the Crown

> *R. v. Alphonse* (1993) 83 C.C.C. (3d) 417.

In *R. v. Alphonse*, the British Columbia Court of Appeal held that the aboriginal rights of the Shuswap people had not been extinguished by the *Wildlife Act* of British Columbia, despite s 2 which deems all property in wildlife within the province to be vested in the Crown. The accused had been charged with hunting during a closed season without a permit to hunt. Section 2 of the *Wildlife Act* provides that:

> 2(1) Subject to subsection (2), the property in all wildlife within the Province is vested in the Crown in right of the Province.
>
> (2) A person who lawfully kills wildlife and complies with all applicable provisions of this Act and the regulations acquires the right of property in that wildlife.

MacFarlane JA, with whom Taggart, Hutcheon and Wallace JJA concurred, held that the Act did not reflect a clear and plain intention to extinguish aboriginal hunting rights. There was no inconsistency between Crown ownership of wildlife by the Crown, and the continued existence of aboriginal rights. His Honour stated that:

> . . . an Indian, exercising his aboriginal right to hunt on unoccupied Crown land, or lawfully on other lands, who complies with the Act and valid regulations thereunder, can do so, despite the fact that the Crown is the owner of all wildlife within the province. In short, it is possible that the aboriginal right to hunt can co-exist with the ownership by the Crown of all wildlife. Therefore it is not extinguished, but is subject to valid regulation.(at 445)

In the same case, Lambert JA did not deal directly with the question of whether the vesting of ownership of wildlife in the Crown extinguished the aboriginal right to hunt. Rather, he distinguished the right to hunt from ‘ownership’ of the animal being hunted, and noted that Alphonse had not argued that he ‘owned’ the deer, but merely a right to hunt and kill it, derived from aboriginal hunting rights. Although in his opinion that was sufficient to deal with the case, he did note that in any case, no clear and plain intention to extinguish was obvious from the legislation. However, Lambert JA did allude to one important question which was not examined by the majority. Alphonse was not hunting on Crown

owned lands, but rather privately owned lands. Did the Crown grant in fee simple to Onward Cattle Co. Ltd extinguish the right to hunt? Lambert JA simply concluded that the legislation passed by the province authorising the issuing of fee simple titles did not exhibit a clear and plain intention, while the actual issuance of a fee simple title occurred after 1871, at which date British Columbia joined the Dominion and power to extinguish aboriginal rights in the Province became exclusively vested in the Crown by virtue of s 91(26) of the *British North America Act* 1867.

On appeal, the Supreme Court of Canada in *Delgamuukw* only considered the question of whether the province of British Columbia has constitutional power to extinguish aboriginal title. The Court concluded that it does not.

In contrast, in Australia it has been held that the vesting of ownership in the Crown does extinguish native title: See *Wik Peoples*, (1994) 120 A.L.R. 465 (ownership of minerals) and *Fourmile v. Selpam*, as yet unreported decision of the Federal Court (1998) 67 FCA, per Drummond J (roads). Whether or not this view will prevail remains to be determined.

Regulation - Van der Peet, Gladstone and N.T.C. Smokehouse

> *R. v. Sparrow* (1990) 70 D.L.R. (4th) 385.
> *R. v. Gladstone* (1996) 137 D.L.R. (4th) 648.
> *R. v. Van der Peet* (1996) 137 D.L.R. (4th) 289.
> *R v. N.T.C. Smokehouse Ltd* (1996) 137 D.L.R. (4th) 528.

In both *Sparrow* (at 400) and *Mabo (No. 2)* (at 64-65 per Brennan J and 134 per Deane and Gaudron JJ), the courts distinguished regulation of aboriginal rights and extinguishment of those rights. Generally speaking, the rule is that mere regulation does not effect extinguishment. However, it is sometimes difficult to define the line between extinguishment and regulation - particularly where an activity, for example fishing for a particular species, is prohibited. Neither *Sparrow* nor *Mabo (No. 2)* gave any guidance as to what constitutes 'mere regulation'. In the recent cases in *Gladstone, Van der Peet* and *N.T.C. Smokehouse* the Supreme Court examined the effect of various fisheries regulations on aboriginal rights to fish. All three cases concerned offences against fishing regulations, and in all three the appellants relied, as a defence, on s 35(1) of the *Constitution Act, 1982*.[6]

[6] As to the operation of s 35(1) of the *Constitution Act, 1982* see Chapter One 'Context'.

R. v. Van der Peet

In *Van der Peet*, the appellant was convicted of selling 10 salmon contrary to the *British Columbia Fishery (General) Regulations* SOR/84-248 and the Fisheries Act R.S.C. 1970, c. F-14. The offence was selling fish caught under the authority of an Indian food fish licence. The appellant, who was a member of the Sto:lo did not contest the facts leading to the conviction, but rather defended the charges on the basis that in selling the fish she was exercising an existing aboriginal right to sell fish.

The majority held that the appellant's aboriginal right did not include the sale of fish and therefore did not go on to consider whether that aboriginal right had been extinguished. However, both McLachlin J and L'Heureux-Dubé J (in dissent) found that the appellant had established such a right and therefore did consider whether various fishing regulations had extinguished the aboriginal right.

In *Van der Peet*, the regulation at issue was a 1917 Order in Council (Order in Council, P.C. 2539, September 11, 1917) which, after a lengthy preamble, purported to generally limit aboriginal rights to fish to subsistence rights. The preamble noted that since time immemorial it had been the practice of the Indians of British Columbia to catch salmon by spear in the upper non-tidal portions of the river, and that it had been the practice to allow the Indians to catch salmon for subsistence purposes. However, as great difficulty was being experienced in preventing the Indians from catching salmon in such waters for commercial purposes, a licensing scheme was introduced, and the following subsection, s 8(2) of the Special Fishery Regulations for the Province of British Columbia, was substituted for the original:

> 2. An Indian may, at any time, with the permission of the Chief Inspector of Fisheries, catch fish to be used as food for himself and his family, but for no other purpose. . . An Indian shall not fish for or catch fish pursuant to the said permit except in the waters by the means or in the manner and within the time expressed in the said permit, and any fish caught pursuant to such permit shall not be sold or otherwise disposed of and a violation of the provisions of the said permit shall be deemed to be a violation of these regulations.[7]

Following *Sparrow*, McLachlin J held that a distinction should be drawn between:

1. regulation of the exercise of a right; and

[7] The Order in Council is reproduced in full in *Gladstone*, at 665.

2. extinguishment of the right itself.

The argument was twofold: that the enactment of a regulatory scheme (the fisheries regulations) had not extinguished the appellant's rights; and that, specifically, Order 17 had not extinguished the right to take fish for sale. The Crown conceded that the passing of the fisheries regulations did not extinguish the aboriginal right to fish for food, but did maintain that Order 17 had extinguished the right to take fish for sale.

McLachlin J adopted the United States Supreme Court's test in *Dion* (discussed above), that what is essential to satisfy the 'clear and plain' test is clear evidence that the government actually considered the conflict between its intended action on the one hand and the Indian right on the other and chose to resolve the conflict by abrogating the aboriginal right. (at 385)

McLachlin J held that:

- there was no indication that the government of the day considered the aboriginal right on the one hand, and the effect of its proposed action on that right on the other, as required by the 'clear and plain' test (at 386)
- the regulation merely affirms that free fishing by natives for sale will not be permitted, This does not meet the test for regulatory extinction of aboriginal rights which requires: acknowledgment of the right; conflict of the right with the proposed policy; and resolution of the two. (at 386)
- in order to determine Parliament's intention, one must consider the regulatory scheme as a whole. (at 387)

The second minority judge, L'Heureux-Dubé J, remitted the question of extinguishment to trial.

The following is an extract from McLachlin J's judgment in *Van der Peet*;

> [286]For legislation or regulation to extinguish an aboriginal right, the intention to extinguish must be "clear and plain'': *Sparrow*, *supra*, at p. 1099. The Canadian test for extinguishment of aboriginal rights borrows from the American test, enunciated in *United States v. Dion*, 476 U.S. 734 (1986), at pp. 739-40: "what is essential [to satisfy the "clear and plain'' test] is clear evidence that [the government] actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty'' or right.
> [287] Following this approach, this Court in *Sparrow* rejected the Crown's argument that pre-1982 regulations imposing conditions on the exercise of an aboriginal right extinguished it to the extent of the regulation. To accept that argument, it reasoned at p. 1091, would be to elevate such regulations as applied in 1982 to constitutional status and to "incorporate into the Constitution a crazy patchwork of regulations''. Rejecting this "snapshot'' approach to constitutional rights, the Court distinguished

between regulation of the exercise of a right, and extinguishment of the right itself.
[288] In this case, the Crown argues that while the regulatory scheme may not have extinguished the aboriginal right to fish for food (*Sparrow*) it nevertheless extinguished any aboriginal right to fish for sale. It relies in particular on Order-in-Council, P.C. 2539, of September 11, 1917
. . .
[289] The argument that Regulation 2539 extinguished any aboriginal right to fish commercial faces two difficulties. The first is the absence of any indication that the government of the day considered the aboriginal right on the one hand, and the effect of its proposed action on that right on the other, as required by the "clear and plain'' test. There is no recognition in the words of the regulation of any aboriginal right to fish. They acknowledge no more than an "aboriginal practice'' of fishing for food. The regulation takes note of the aboriginal position that the regulations confining them to food fishing are "ineffective''. However, it does not accept that position. It rather rejects it and affirms that free fishing by natives for sale will not be permitted. This does not meet the test for regulatory extinction of aboriginal rights which requires: acknowledgment of right, conflict of the right proposed with policy, and resolution of the two.
[290] The second difficulty the Crown's argument encounters is that the passage quoted does not present a full picture of the regulatory scheme imposed. To determine the intent of Parliament, one must consider the statute as a whole: *Driedger on the Construction of Statutes*, 3rd ed., Ruth Sullivan ed. (Toronto: Butterworths, 1994). Similarly, to determine the intent of the Governor-in-Council making a regulation, one must look to the effect of a regulatory scheme as a whole.
[291] The effect of Regulation 2539 was that Indians were no longer permitted to sell fish caught pursuant to their right to fish for food. However, Regulation 2539 was only a small part of a much larger regulatory scheme, dating back to 1908, in which aboriginal peoples played a significant part. While the 1917 regulation prohibits aboriginal peoples from selling fish obtained under their food rights, it did not prevent them from obtaining licences to fish commercially under the general regulatory scheme laid down in 1908 and modified through the years. In this way, the regulations recognized the aboriginal right to participate in the commercial fishery. Instead of barring aboriginal fishers from the commercial fishery, government regulations and policy before and after 1917 have consistently given them preferences in obtaining the necessary commercial licences. Far from extinguishing the aboriginal right to fish, this policy may be seen as tacit acceptance of a "limited priority'' in aboriginal fishers to the commercial fishery of which Dickson J. spoke in *Jack* and which was approved in *Sparrow*. **[at 385-387. © Canada Law Book Company 1996]**

N.T.C. Smokehouse

In *N.T.C. Smokehouse*, the appellant, a company which owned and operated a food processing plant was charged under the same act and regulations with the offences of selling and purchasing fish not caught under the authority of a commercial fishing licence, and of selling and purchasing fish caught under the authority of an Indian food licence. In a series of transactions, the corporation

bought and sold over 119,000 pounds of Chinook salmon which were caught by members of the Sheshaht and Opetchesaht Bands under the authority of Indian food licences. Again the majority found that the aboriginal right had not been established, and therefore only the minority judges, L'Heureux-Dubé and McLachlin JJ considered the issue of extinguishment.

L'Heureux-Dubé J held that the Sheshaht and Opetchesaht peoples' right to fish included the right to sell, trade and barter fish for livelihood and support, and that this right had not been extinguished. Specifically on the point of extinguishment, she held that:

- clear and plain extinguishment is required in order to extinguish; (at 554)
- extinguishment can be accomplished thorough a series of legislative acts; (at 555)
- mere regulation cannot extinguish; (at 555)
- 'clear and plain' means that the Government must address the aboriginal activities in question and explicitly extinguish them by making them no longer permissible; (at 555)
- on the facts, there had been no extinguishment as the statute and regulations did not address aboriginal fishing in any way that demonstrates an intention to abolish aboriginal interests in the fishery. Regulation in the form of licensing requirements, and catch and gear restrictions do not equal extinguishment. (at 555)

Gladstone

In *Gladstone* the appellants, members of the Heiltsuk Band were charged with the offences of offering to sell herring spawn on kelp caught under the authority of an Indian food licence. The appellants took 35 pounds of herring spawn on kelp to a fish store to attempt to sell and had another 4200 pounds nearby. They were convicted of an offence contrary to s 20(3) of the *Pacific Herring Fishery Regulations* SOR/84-324.

In *Gladstone*, all members of the court accepted that commercial trade in herring spawn on kelp was an integral part of the distinctive culture of the Heiltsuk prior to contact and was not merely incidental to social or ceremonial activities. Thus, an aboriginal right to trade herring spawn on kelp on a commercial basis was established. The question then arose whether such a right had been extinguished.[8]

All members of the Supreme Court affirmed that the test for extinguishment is whether or not there is a clear and plain intention. However, they were not

[8] On this point, see Chapter Three 'Evolution of Rights'.

unanimous as to what constituted a clear and plain intention. In *Gladstone*, two different sets of regulations were at issue. The first regulations at issue were contained in s 21A the *British Columbia Fishery Regulations* SOR/54-659, which expressly related to the herring spawn on kelp fishery and provided that no person shall take, collect, buy, sell or barter herring eggs, but that an Indian may at any time do so for subsistence purposes. The second was the same 1917 Order in Council that was at issue in *Van der Peet.* The majority[9] held that neither set of regulations extinguished the aboriginal right at issue, as there was no clear and plain intention to do so.

With respect to the first set of regulations, the majority held that:

- clear and plain intention does not require express language; (at 664)
- a regulatory scheme which is inconsistent and varies over time does not express a clear and plain intention to extinguish; (at 664) and
- the Crown had only demonstrated that it controlled fisheries, not that it acted so as to delineate the extent of aboriginal rights. (at 664)

In the following extract from *Gladstone*, the majority considered the effect of the first set of regulations:

> [31]The test for determining when an aboriginal right has been extinguished was laid out by this Court in *Sparrow*. Relying on the judgment of Hall J. in *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313, 34 D.L.R. (3d) 145 (S.C.C.), the Court in *Sparrow* held at p. 1099 that "[t]he test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right''. Further, the Court held that the mere fact that a right had, in the past, been regulated by the government, and its exercise subject to various terms and conditions, was not sufficient to extinguish the right. The argument that it did so (*Sparrow*, at p. 1097)
>
> > . . . confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished.
>
> The regulations relied on by the Crown in that case were, the Court held at p. 1099, "simply a manner of controlling the fisheries, not defining underlying rights''.
> [32]The reasoning used to reject the Crown's argument in *Sparrow* applies equally to the Crown's argument in this case. To understand why this is so it will be necessary to review the legislation relied upon by the Crown in its argument that the Heiltsuk's right to harvest herring spawn on kelp on a commercial basis was extinguished prior to 1982.
> [33]There are two types of legislative action relied upon by the Crown: the provisions of the *Fisheries Act* which, prior to 1955, prohibited the destruction of the fry of food

[9] The majority in this case was composed of Lamer CJC, Sopinka, Gonthier, Cory, Iacobucci and Major JJ.

fishes'', and the provisions of the Fisheries regulations relating directly to the herring spawn fishery. The former are exemplified by s. 39 of the Fisheries Act of 1927, R.S.C. 1927, c. 73, which stated that "The fry of food fishes shall not be at any time destroyed''; identical provisions existed in the 1932 and 1952 *Fisheries Acts*. The latter first appeared in 1955. In 1955 the 1954 *British Columbia Fishery Regulations* were amended by SOR/55-260, s. 3, by the addition of a new section 21A:

> 21A. No person shall take or collect by any means herring, eggs from herring spawning areas, and no person shall buy, sell, barter, process or traffic in herring eggs so taken; but an Indian may at any time take or collect herring eggs from spawning areas for use as food by Indians and their families but for no other purpose.

Similar prohibitions on the harvest and sale of herring spawn continued until 1974. At that time the section was amended so that the provision read

> 21A(1) Subject to subsection (2) no person shall, except by written permission of the Regional Director, by any means take or collect herring eggs from herring spawning areas, or buy, sell, barter, process or traffic in herring eggs so taken.
>
> (2) An Indian may at any time take or collect herring eggs from herring spawning areas for use as food for himself and his family.

This regulatory scheme remained in place until 1980 when the provision (which had been transferred to s. 17 of the *Pacific Herring Fishery Regulations*) was amended to read

> 17. No person shall
>
> (a) take or collect herring roe except under authority of a licence issued pursuant to the Pacific Fishery Registration and Licensing Regulations; or
>
> (b) possess herring roe unless it was so taken or collected.

According to the submissions of the Crown, no further modifications to this regulatory scheme took place prior to the enactment of the *Constitution Act*, 1982.

[34]None of these regulations, when viewed individually or as a whole, can be said to express a clear and plain intention to extinguish the aboriginal rights of the Heiltsuk Band. While to extinguish an aboriginal right the Crown does not, perhaps, have to use language which refers expressly to its extinguishment of aboriginal rights, it must demonstrate more than that, in the past, the exercise of an aboriginal right has been subject to a regulatory scheme. In this instance, the regulations and legislation regulating the herring spawn on kelp fishery prior to 1982 do not demonstrate any consistent intention on the part of the Crown. At various times prior to 1982 aboriginal peoples have been entirely prohibited from harvesting herring spawn on kelp, allowed to harvest herring spawn on kelp for food only, allowed to harvest herring spawn on kelp for sale with the written permission of the regional director and allowed to take herring roe pursuant to a licence granted under the *Pacific Fishery Registration and Licensing Regulations*. Such a varying regulatory scheme cannot be said to express a clear and plain intention to eliminate the aboriginal rights of the appellants and of the Heiltsuk band. As in *Sparrow*, the Crown has only demonstrated that it controlled the fisheries, not that it has acted so as to delineate the extent of

aboriginal rights. **[at 663-664 , © Canada Law Book company 1996]**

With respect to the Order in Council, the majority held that the purpose of the Regulation was to ensure that conservation goals were met so that salmon reached their spawning grounds in the upper parts of the river, and to ensure the special protection of the Indian subsistence food fishery. The purpose was not to eliminate aboriginal rights to fish commercially. Thus, the failure to recognise an aboriginal right, here the right to fish commercially, and the failure to grant special protection to it, do not constitute a clear and plain intention to extinguish. (at 666)

L'Heureux-Dubé J (dissenting as to law) applied her own judgment in *Van der Peet* and added the following:

> [149] In the case at bar, the respondent argues that the test is met when the aboriginal right and the activities contemplated by the legislation cannot co-exist. Such an approach, based on the view adopted by the United States Supreme Court in *United States v. Santa Fe Pacific Railroad Co*., 314 U.S. 334 (1941), is irreconcilable with the "clear and plain intention'' test favoured in Canada. As a result, the legislation relied upon by the respondent is insufficient to extinguish the aboriginal right to sell, trade and barter fish for commercial purposes. In fact, as in *Sparrow, supra,* such legislation merely regulates aboriginal activities and does not amount to extinguishment.(at 707)

McLachlin J (dissenting as to law) applied the 'actual consideration and choice test' from *United States v. Dion* 476 U.S. 734 (1986), and held that a measure aimed at the conservation of a resource is not inconsistent with a recognition of an aboriginal right to make use of that resources and thus did not extinguish it. The prohibition on possessing herring spawn on kelp was a conservation measure and did not extinguish the aboriginal right at issue.(at 713) Although her Honour's approach appears in keeping with *Dion,* in fact her analysis reveals a more generous approach to determining whether a right has been extinguished than that of the United States Supreme Court. In *South Dakota v. Bourland* 508 U.S. 679 (1993), the Supreme Court, applying *Dion*, noted that:

> When Congress reserves limited rights to a tribe or its members, the very presence of such a limited reservation [of free access to former hunting and fishing grounds] suggests that the Indians would otherwise be treated like the public at large. (at 694)

Thus, in *Dion*, the fact that the Eagle Preservation Act contained an exemption allowing the Secretary of the Interior to permit the taking of an eagle for religious purposes was explicable only in terms that it otherwise banned the taking of all eagles (and hence the right to do so was extinguished). To the

contrary, in *Gladstone*, McLachlin J, along with other members of the Court, held that the fact that Parliament allowed hunting for subsistence purposes with a permit was merely evidence of a protection of that right, and did not extinguish other Indian rights, notably the Indian right to take fish commercially.

In *Gladstone*, La Forest J also dissented, but only with respect to the effect of the Order in Council on the aboriginal rights at issue. He held that:

- the Order in Council exhibited a 'plain, clear and unequivocal intention on the part of the Crown to extinguish aboriginal rights relating to commercial fisheries in British Columbia'; (at 697)
- The preamble to the Order in Council and s 8(2) made it clear that the 'concession' on the part of the Crown in favour of aboriginal peoples regarding traditional fishing practices was not to have any commercial dimension. It expressly provided that the engaging of commercial practices in the exercise of the Indian statutory right to fish for food was regulatory offence; (at 697)
- therefore, where the Crown expressly addresses an issue, and limits the scope of the right, the excluded rights are extinguished. (at 697)

In particular, La Forest J disapproved of the approach taken by McLachlin J in both *Van der Peet* and *Gladstone* to the issue of extinguishment, and the 'actual consideration and choice test' from *Dion* on the grounds that it places an unrealistically high standard for extinguishment that could never be met by the Crown. La Forest J stated that it is unrealistic to expect the Crown to have actually considered the right, and have chosen to extinguish it, given the fact that historically the Crown did not even recognise aboriginal title.

The following is an extract from La Forest J's judgment in *Gladstone*:

> [113] I cannot come to any other conclusion than that Order-in-Council P.C. 2539 evinces a clear and plain intention on the part of the Crown to extinguish aboriginal rights relating to commercial fisheries -- should they ever have existed. When the Crown has specifically chosen to address the issue of the translation of aboriginal practices into statutory rights and has expressly decided to limit the scope of these rights, as was done in British Columbia in relation to Indian fishing practices, then it follows, in my view, that aboriginal rights relating to practices that were specifically excluded were thereby extinguished.
> [114] I also note that, as the respondent explained, s. 8(2) has always been a central feature of the regulatory scheme regarding the Indian food fishery in British Columbia since 1894 (*Fishery Regulations for the Province of British Columbia*, P.C. 650); see, for example, s. 13(2) of the 1922 Regulations (*Special Fishery Regulations for the Province of British Columbia*, P.C. 1918), s. 15 of the 1925 Regulations (*Special Fishery Regulations for the Province of British Columbia*, P.C. 483), s. 11(2) of the

1930 Regulations (*Special Fishery Regulations for the Province of British Columbia*, P.C. 512), s. 10(2) of the 1938 Regulations (*Special Fishery Regulations for the Province of British Columbia*, P.C. 899), s. 32 of the 1954 Regulations (*British Columbia Fishery Regulations*, SOR/54-659), s. 29 of the 1977 Regulations (*British Columbia Fishery (General) Regulations*, SOR/77-716), s. 27 of the 1984 Regulations (*British Columbia Fishery (General) Regulations*, SOR/84-248). Thus, in light of the provision's rationale as stated explicitly in Order-in-Council 2539, it seems to me that it has always been a central feature of the regulatory scheme regarding the Indian food fishery in British Columbia that the Crown did not perceive the Indians' fishing rights rooted in practices integral to their distinctive culture for centuries as extending to commercial fisheries.

[115] My colleague Justice McLachlin, in her reasons, expresses the opinion in *Van der Peet*, *supra*, that Order-in-Council P.C. 2539 did not extinguish aboriginal rights to fish commercially for two reasons. The first is that a clear and plain intention on the part of the Crown to extinguish an aboriginal right can only be found if three elements are present: acknowledgment of an aboriginal right, conflict of the right proposed with policy and resolution of the two. Order-in-Council P.C. 2539 fails to meet that test, she states, because "there is no recognition in the words of the regulation of any aboriginal right to fish''; see para. 289. Her second reason is that aboriginal peoples of British Columbia have never been totally prohibited from engaging in commercial fisheries since it has always been available to them to do so according to the regulatory scheme relating to commercial fisheries.

[116] I do not agree with my colleague that finding a clear and plain intention should require an acknowledgment of the existence of an *aboriginal right* on the part of the Crown. Although the fiduciary nature of the relationship between the Crown and aboriginal peoples must be taken into account in assessing whether or not a clear and plain intention to extinguish an aboriginal right exists in a given scheme, one must be careful not to set standards that could realistically never be met by the Crown since this would, as a practical matter, render virtually meaningless the Crown's power to extinguish aboriginal rights. Historically, the Crown has always been very reluctant to recognize any legal effect to concepts such as "aboriginal rights'' and "aboriginal title'', as this Court discussed at length in *Sparrow*, *supra*, at pp. 1103 *et seq*. This historical reality cannot be ignored in assessing whether a plain and clear intention to extinguish an aboriginal right exists in a given context. To require specific acknowledgment of the existence of an aboriginal right by the Crown in the manner proposed by my colleague McLachlin J. would for that reason not, in my view, be realistic. Indeed such an approach has been implicitly rejected by this Court; see, for example, *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, 53 D.L.R. (4th) 487 (S.C.C.).

[117] I also disagree with my colleague's reasoning that Order-in-Council P.C. 2539 does not constitute a clear and plain intention to extinguish an aboriginal right because aboriginal peoples had always been permitted to participate in commercial fisheries in accordance with the distinct regulatory scheme relating to commercial fisheries. As I mentioned, I think the Order-in-Council speaks for itself. It seems to me that when, in regulations dealing specifically with the rights of the Indians to fish, it prohibited them from engaging in commercial fisheries, it must have intended to limit their rights *qua*

> Indians. I do not see that it is necessary for the Crown to prohibit them from fishing under regulations directed not only to Indians but also to all members of the public. **[at 697-699 © Canada Law Book Company 1996]**

Summary of *Gladstone, Van der Peet* and *N.T.C. Smokehouse*

The different approaches of the members of the Court in the above three cases to regulation and extinguishment can be summarised as follows:

- *the majority*: the majority held that 'clear and plain' does not require express language, and therefore accepted that extinguishment can occur by necessary implication. However, the majority in all three cases framed their comments on extinguishment narrowly. They only addressed the particular question of whether the fisheries regulations at issue in the cases extinguished aboriginal rights. However, they did clarify that the controlling of a resource will not necessarily extinguish aboriginal rights. It is difficult from these judgments to get any sense of how they will, for example, determine the issues raised in the British Columbia Court of Appeal in *Delgamuukw*: namely the effect of the Imperial Proclamations on aboriginal title. These questions were not at issue before the Supreme Court in *Delgamuukw*, and therefore still remain to be determined.

- La Forest J took by far the strictest line of all the judges on extinguishment. He held that, where the Crown expressly addresses an issue, and limits the scope of the right, the excluded rights are extinguished.

- McLachlin J followed the decision of the United States Supreme Court in *Dion* and applied the 'actual consideration and choice test'. This requires clear evidence that the government actually considered the conflict between its intended action on the one hand and the Indian right on the other and chose to resolve the conflict by abrogating the aboriginal right.

- L'Heureux-Dubé J held that to extinguish an aboriginal right the Government must directly address the aboriginal activities in question and explicitly extinguish them by making them no longer permissible. She also rejected the argument that the clear and plain intention test is met when the aboriginal right and activities contemplated by the legislation cannot co-exist. Therefore, it appears that her view on extinguishment may be even broader than that of the British Columbia Court of Appeal in *Delgamuukw*.

Total Prohibitions

R. v. Gladstone (1996) 137 D.L.R. (4th) 648.
Kruger and Manuel v. R. (1978) 75 D.L.R. (3d) 434.

Kruger and Manuel is interesting because it was decided prior to the enactment of s 35(1) of the *Constitution Act*, 1982. For that reason it is directly applicable to Australia because it considers the common law position and is uninfluenced by the judges' opinions as to how s 35(1) affects the scope of hunting and fishing rights.

In *Kruger and Manuel* the accused were charged with hunting without a permit during the closed season contrary to the *Wildlife Act*. Section 4 of that Act provided that 'no person shall hunt out of season without the requisite permit'. The accused argued that the provincial game laws did not apply to them by virtue of s 88 of the *Indian Act*. Dickson CJ delivering the Court's judgment held that the *Wildlife Act* did apply to them, as it was a 'law of general application' within that section:

> . . . The British Columbia Court of Appeal was not asked to decide, nor did it decide, as I read its judgment, whether aboriginal hunting rights were or could be expropriated without compensation. It is argued that the absence of compensation supports the proposition that there has been no loss or regulation of rights. That does not follow. Most legislation imposing negative prohibitions affects previously enjoyed rights in ways not deemed compensatory. The *Wildlife Act* illustrates the point. It is aimed at wildlife management and to that end it regulates the time, place and manner of hunting game. It is not directed towards the acquisition of property.(at 437)

Clearly, therefore, Dickson CJ did not consider that a total prohibition amounts to an extinguishment.

In *Gladstone*, the majority noted that prior to 1982 there had been times when aboriginal peoples had been entirely prohibited from harvesting herring spawn on kelp by fisheries regulations, but nevertheless held that there had been no clear and plain intention to extinguish. (at 665)

In the same case, La Forest J stopped short of stating that a total prohibition of an activity indicated a plain and clear intention to extinguish. Having decided that the right was extinguished by the Order in Council, it was unnecessary for his Honour to determine the effect of the Regulations on the right. However, the tenor of his judgment is that his Honour was of the opinion that a total prohibition may well extinguish an aboriginal right:

> . . . I prefer not to discuss this issue [of whether regulation can amount to a clear and plain intention to extinguish] in further detail and will not, therefore, discuss whether the prohibition relating to commercial harvesting of herring spawn on kelp in

> force until 1974 *in itself* indicates a plain and clear intention on the part of the Crown to extinguish the aboriginal right claimed by the appellants. It is not necessary for me to do so since I have already concluded that the Crown has expressed a clear and plain intention in Order in Council P.C. 2539 to extinguish any aboriginal rights relating to commercial fisheries in British Columbia – assuming they ever existed. The question whether extinguishment of aboriginal rights can occur by necessary implication and if so, in what circumstances, is therefore left to another day.(at 700)

The issue of the effect of a total prohibition on native title has not been determined yet in Australia.

Applicability

In the following passage from *Mabo (No. 2)*, Brennan J held that the 'clear and plain' intention test is part of the law of Australia:

> . . . the exercise of a power to extinguish native title must reveal a clear and plain intention to do so, whether the action be taken by the Legislature or by the Executive. This requirement, which flows from the seriousness of the consequences to indigenous inhabitants of extinguishing their traditional rights and interests in land, has been repeatedly emphasized by courts dealing with the extinguishing of the native title of Indian bands in North America. It is unnecessary for our purposes to consider the several juristic foundations -- proclamation, policy, treaty or occupation – on which native title has been rested in Canada and the United States but reference to the leading cases in each jurisdiction reveals that, whatever the juristic foundation assigned by those courts might be, native title is not extinguished unless there be a clear and plain intention to do so: *Calder v. Attorney-General of British Columbia* (1973) SCR, at p 404; (1973) 34 DLR (3d), at p 210; *Hamlet of Baker Lake v. Minister of Indian Affairs* (1979) 107 DLR (3d) 513, at p 552; *Reg. v. Sparrow* (1990) 1 SCR.1075, at p 1094; (1990) 70 DLR (4th) 385, at p 401; *United States v. Santa Fe Pacific Railroad Co*. (1941) 314 US , at pp 353, 354; *Lipan Apache Tribe v. United States* (1967) 180 Ct Cl 487, at p 492. That approach has been followed in New Zealand: *Te Weehi v. Regional Fisheries Officer* (1986) 1 NZLR 680, at pp 691-692. It is patently the right rule. **[at 64]**

The Canadian cases concerning the clear and plain intention test, and the effect of regulation on aboriginal title, are applicable to Australia. Whether the courts will follow them is a different issue. As was noted at the end of the United States section of this chapter, there are some problems with reconciling the approach of United States courts, and the judgments of some members of the Supreme Court of Canada, with the decisions in *Mabo (No. 2)* and *The Wik Peoples*.

The following points need to be taken into consideration:

- the Canadian decisions which involve section 35(1) can be used in Australia, with some caution. The reasoning provided in Chapter Two 'Recognition' for their applicability to Australia also applies here;
- the decisions of the majority in *Van der Peet*, *Gladstone* and *N.T.C. Smokehouse* take a similar approach to that of the High Court in *Mabo (No. 2)*;
- There may be some problems with applying the approaches of McLachlin and L'Heureux-Dubé JJ in *Van der Peet*, *Gladstone* and *N.T.C. Smokehouse*. Both judgments place emphasis in the intention of the Crown. This is not surprising given that the test for extinguishment is named the clear and plain *intention* test. However, it was held by several members of the High Court in *The Wik Peoples* that the word 'intention' does not actually refer to the Crown's intent:

  > [clear and plain] "intention" does not refer to any particular state of mind of the legislators, who may not have averted to the rights and interests of the indigenous inhabitants. Moreover, statute law may be the result of a compromise between contending factions and interests groups and of accommodations between and within political organisations which are not made public and cannot readily be made apparent to a court. To speak here of "intention" will seldom assist and may impede the understanding of the effect of the legislation in question, unless it be kept in mind that what is involved is the "intention" manifested by the legislation. As Holmes put it, "[w]e do not inquire what the legislature meant; we only ask what the statute means. (at 220, per Gummow J) [footnotes ommitted].

  Similarly, Brennan J in *Mabo (No.2)* stated that:

  > The extinguishing of native title does not depend on the actual intention of the Governor in Council (who may not have adverted to the rights and interests of the indigenous inhabitants or their descendants), but on the effect which the grant has on the right to enjoy native title. (at 68)

  The same problem applies to the application of United States case law on the 'actual consideration and choice test'.
- A further problem with the actual consideration and choice test was outlined by La Forest J in *Gladstone*. As the Crown has historically not recognised native title, Australian courts may be reluctant to impose a test which requires the Crown to specifically have considered native title and determined to extinguish it. Obviously this poses less of a problem in the United States where aboriginal title has been judicially recognised since 1823.

- The major point of difference between Canada and Australia lies in the different approaches as to what extinguishes aboriginal/native title. Is aboriginal title extinguished by physically inconsistent use of the land, or the legal effect of Crown grants? In Canada, the courts suggest the former, while in Australia the Courts have taken the latter approach.

New Zealand

> *Te Weehi v. Regional Fisheries Officer* [1986] 1 N.Z.L.R. 682.
>
> *Faulkner v. Tauranga District Council* [1996] 1 N.Z.L.R. 357.
>
> *Te Tau Ihu o Te Waka a Maui - Marlborough Sounds Claim* (22 December, 1997, Judge Hingston J MLC, 22A Nelson Minute Book 1-10).
>
> *Te Runanganui o Te Ika Whenua Inc Society* [1994] 2 N.Z.L.R. 20.

Te Weehi was charged with possessing undersized paua, contrary to the *Fishing (Amateur Fishing) Regulations* 1983. Section 88 of that Act provides that nothing in it (which of course includes subordinate legislation made under its authority) shall affect 'Maori fishing rights'. Thus, as a defence, Te Weehi argued that he was taking shellfish in the customary Maori way for personal and family consumption. The shellfish were taken for immediate eating, and only on a small scale and that prior to collecting the paua he had obtained permission from a local Maori elder. Extensive evidence showed that there was a customary right for particular Maori to collect limited quantities of shell fish from beaches over which their tribe, or a tribe from which they had permission (as here) had control. Te Weehi successfully argued that the words of s 88 included not only rights to take fish embodied in other statutes, but also rights derived from the common law, including aboriginal title. The question of extinguishment was only peripherally discussed.

The following is an extract from *Te Weehi*:

> The Canadian cases follow the general approach that customary rights of native or aboriginal peoples may not be extinguished except by way of specific legislation that clearly and plainly takes away the right. Similar expressions of view can be found in United States of America cases such as *Lipan Apache Tribe v United States* 180 Ct Cl 487 (1967) at p 492. Obviously the investigation of any particular customary right claimed is a detailed process requiring evidence of a convincing nature. It may relate to limited rights in very limited areas. Certainly in order to be effectively enforced the rights must be capable of definition with some precision.
> . . .
> After reading the findings of the Waitangi Tribunal and the articles referred to and after hearing the detailed submissions of counsel, I have further considered the application of the important decisions of Waipapakura, *Weepu and Keepa* to this case. I note that the customary right contended for in this case is not based upon ownership of land or upon an exclusive right to a foreshore or bank of a river. In that sense this claim is a "non territorial" one. The customary right involved has not been expressly extinguished by statute and I have not discovered or been referred to any adverse legislation or procedure which plainly and clearly extinguishes it. It is a right limited to the Ngai Tahu tribe and its authorised relatives for personal food supply. It differs significantly from the rights contended for in the *Weepu and Keepa* decisions. So far as the *Waipapakura* decision is concerned I note that there is no suggestion of any set nets or structures in the soil of the foreshore and no exclusive right is contended for in this case. It follows that I prefer the reasoning in the *Weepu* decision concerning the preservation of customary rights unless extinguished rather than the view that such rights are excluded unless specifically preserved or created in a statute. **[at 691-692]**

This case was cited with approval by Brennan J in *Mabo (No. 2)* (at 64). On the specific issue of the effect of Crown ownership of the foreshore on aboriginal title, see Chapter Four 'The Offshore'.

Te Runanganui o Te Ika Whenua Inc Society concerned a proposal to constitute certain energy companies and to transfer to them the undertakings of the Bay of Plenty Electric Power Board. That board owned and controlled a dam on the Wheao River. Te Ika Whenua, which represent certain Maori interests, lodged a claim to the river with the Waitangi Tribunal and brought proceedings seeking an interim declaration that the Minister of Energy not recommend the approval of the transfer as it would prejudice those rights. The Court of Appeal did not consider the issue of whether the appellants could actually establish aboriginal title, but did outline the law relating to aboriginal title in New Zealand. In the following extract, the Court comments on extinguishment:

> It has been authoritatively said that [aboriginal title] cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers, and then only to the Crown and in strict compliance with the provisions of any relevant statutes. It was so stated by Chapman J in *R v. Symonds* (11847) NZPCC 387, 390, in

a passage later expressly adopted by the Privy Council, in a judgment delivered by Lord Davey, in *Nireaha Tamaki v. Baker* (1901) NZPCC 371, 384.
Chapman J also spoke of the practice of extinguishing native titles by fair purchase. An extinguishment by less than fair conduct or on less than fair terms would be likely to be a breach of the fiduciary duty widely and increasingly recognised as falling on the colonising power. See the fisheries case, *Te Runanga o Muriwhenua Inc v Attorney-General* [1990] 2 NZLR 641, 655; the Sealord case at p 306; the authorities mentioned in those two cases; and now further the judgments in the Canadian Federal Court of Appeal in *Eastmain Band v. James Bay and Northern Quebec Agreement (Administrator)* (1992) 99 DLR (4^{th}) 16 and *Apsassin v. Canada (Department of Indian Affairs and Northern Development)* (1993) 100 DLR (4^{th}) 504. It may be that the requirement of free consent has at times to yield to the necessity of the compulsory acquisition of land or other property for specific public purposes which is recognised in many societies; but there is an assumption that, on any extinguishment of the aboriginal title, proper compensation will be paid, as stated by Lord Denning, in delivering the judgment of a Judicial Committee of the Privy Council the other members of which were Earl Jowitt and Lord Cohen, in *Adeyinka Oyekan v Musendiku Adele* [1957] 2 All ER 785, 788. **[at 24]**

The test for extinguishment by legislation was discussed in *Faulkner*. The case concerned the effect on customary title of the bringing of land under the Torrens system, where the Crown issues a state-guaranteed fee simple title. In determining this issue, Blanchard J stated that:

> Customary or aboriginal (Crown recognised) title is a burden on the Crown's feudal title. It is well settled that customary title can be extinguished by the Crown only by means of a deliberate Act authorised by law and unambiguously directed towards that end. Unless there is legislative authority or provisions such as were found in ss 85 and 86 of the Native Land Act 1909, the Executive cannot, for example, extinguish customary title by granting the land to someone other than the customary owners. If it does so the grantee's interest is taken subject to the customary title: *Nireaha Tamaki v Baker* (1901) NZPCC 371. Customary title does not disappear by a side wind. Where action taken by the Crown which arguably might extinguish aboriginal title is not plainly so intended the Court will find that the aboriginal title has survived.(at 363)

As one authority for the above proposition, Blanchard J cited the judgment of Brennan J in *Mabo v. State of Queensland (No. 2)* (175) C.L.R. 1, at 64. However, Blanchard J's judgment would not represent the law in Australia. In Australia, if an estate is granted to a third party, native title will be extinguished as that granting would be seen as indicating a clear and plain intention. The extent of the extinguishment depends on the estate granted. For example, the grant of an estate conferring exclusive possession will extinguish all native title

rights. The grant of an estate not conferring exclusive possession would extinguish to the extent of the inconsistency: see *The Wik Peoples v. Queensland* (1996) 141 A.L.R. 129. Blanchard J. s statement more accurately reflects the state of the law in the United States.

On the facts, Blanchard J held that the Crown had extinguished the Crown-recognised customary title when it took the district by statute.

In *Marlborough Sounds*, Hingston J considered the effect of the *Territorial Sea and Fishing Zone Act* (1965) on possible Maori customary title in the offshore. That Act implemented the 1958 *Geneva Convention on the Territorial Sea* into domestic law, whereby New Zealand's sovereignty over the territorial sea was confirmed. Hingston J confirmed that a clear and plain intention is required in order to take away customary rights. He held that by virtue of international law, a sovereign title of a similar import and characteristics as radical title was acquired with respect to the territorial sea, and that consequently no extinguishment occurred. This case is further discussed in Chapter Four 'The Offshore'.

Native Title as a Defence to Breach of Regulation

> *Kruger and Manuel v. R.* (1977) 75 D.L.R. (3d) 434.
> *Te Weehi v. Regional Fisheries Officer* [1986] 1 N.Z.L.R. 682.

In *Kruger and Manuel* the two accused were charged with hunting without a permit during the closed season contrary to the *Wildlife Act*. Section 4 of that Act provided that 'no person shall hunt out of season without the requisite permit'. The accused argued that the provincial game laws did not apply to them by virtue of s 88 of the *Indian Act*. Dickson CJ delivering the Court's judgment held that the *Wildlife Act* did apply to them, as it was a 'law of general application' within that section. Notably, this case occurred prior to the enactment of s 35(1) of the *Constitution Act, 1982* and it was thus unavailable as a defence. In the course of his judgment, Dickson CJ noted the following considering regulation of hunting and fishing rights:

> However abundant the right of Indians to hunt and to fish, there can be no doubt that such right is subject to regulation and curtailment by the appropriate legislative authority. . . In the absence of treaty protection or statutory protection, Indians are brought within provincial regulatory legislation.(at 439)

This comment succinctly states the law relating to the effect of regulation on

Indian title, and the unavailability of Indian title as a defence to breach of regulation prior to the enactment of s 35(1). Although we do not have an equivalent section to s 88 of the *Indian Act* (which is not required as the Commonwealth in Australia does not have exclusive jurisdiction over Aboriginal peoples), this comment would appear to also represent the law in Australia, and is consistent with the decision of the New South Wales Court of Appeal in *Mason v. Tritton* (1994) 34 N.S.W.L.R. 572.

Dickson CJ went on to state that:

> . . . Assuming, without deciding, that the theory of aboriginal title as elaborated by Hall J in *Calder et al. V. A.-G. B.C.* (1973), 34 D.L.R. (3d) 145 . . . is available in respect of present appellants it has been conclusively decided that such title, as any other, is subject to Regulations imposed by validly enacted federal laws: *Noll Derriksan v. The Queen* (a recent decision of this Court not yet reported). That was also the result in *R. v. George*, [1966] 3 C.C.C. 137 . . . *Daniels v. The Queen*, [1969] 1 C.C.C. 299 . . . and *Sikeya v. The Queen*, [1965] 2 C.C.C. 129. . . The latter two cases are instructive as the hunting rights there stood on stronger ground in that they were protected, in the case of *Sikeya*, by treaty, and in *Daniel's* case by the Manitoba Natural Resources Agreement. In neither case did the protection prevail against the federal *Migratory Birds Convention Act*. . .(at 443)

In *Te Weehi*, Te Weehi relied on s 88 of the *Fisheries Act* as a defence to a charge of taking undersized paua. Section 88 provided that 'nothing in the Act shall affect Maori fishing rights'. Te Weehi established a customary right to fish, and therefore succeeded in his defence. However, it is clear that in the absence of s 88 he would have had no defence.

These decisions are consistent with the approach of the New South Wales Court of Appeal in *Mason v. Tritton* (1994) 34 N.S.W.L.R. 572.

Further References

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Chapter Six

Fiduciary Duties

Introduction

In Canada, the United States and New Zealand, the Courts have held that the Crown or government owes enforceable fiduciary duties to Indigenous peoples. In all cases this duty can be invoked in appropriate circumstances to restrain executive action. However, as will be seen, in all three jurisdictions the duty is dependent on facets of the particular legal system which are inappropriate to Australia. This is a complex area of law, and only the outline of the major cases can be given. A comprehensive list of readings is provided at the end of the chapter.

United States

Domestic Dependent Nation Doctrine

> *Cherokee Nation v. Georgia* 30 U.S. (5 Pet.) 1 (1831).
> *Worchester v. Georgia* 31 U.S. (6 Pet.) 515 (1832).
> *Coe v. the Commonwealth* (1993) 68 A.L.J.R. 110.

In the United States, the government's fiduciary duty to Indian Nations has its roots in the historical relationship between the United States and the Indian Nations. This historical relationship is in turn the basis of what is known as the Federal-Indian trust relationship, or the Federal-Indian trust doctrine which arises out of the position of the Indian Nations as 'domestic dependent nations'. The origins of the Federal-Indian trust relationship can be traced to the early decisions of the United States Supreme Court in *Cherokee Nation v. Georgia* and *Worchester v. Georgia*. Neither of these decisions directly involved Indian rights. However, the nature of the relationship between the government and Indian Nations was a central issue in both. Chief Justice Marshall was faced with the problem of reconciling the fact that it had been practice to treat with the Indian Nations as sovereigns, with the fact that they were geographically located within the boundaries of the United States, itself a sovereign body.

In *Cherokee Nation*, the Cherokee sought an injunction in the Supreme Court to stop the state of Georgia from enforcing state laws in Cherokee territory and from taking over Cherokee lands. It was necessary for the Supreme Court to determine whether it had original jurisdiction in the matter under art. III, 2 of the Constitution. That section gives the Supreme Court jurisdiction in

controversies 'between a state or citizens thereof, and foreign states, citizens or subjects'. Was the Cherokee Nation a 'foreign state'?

Chief Justice Marshall held that:

- the relationship between the United States and the Indian Nations is unique;
- the Indians have an acknowledged right to occupy lands which are geographically within the boundaries of the United States;
- the Indian Nations acknowledge themselves by treaty to be under the protection of the United States;
- the Indian Nations are not foreign nations, but domestic dependent nations;
- these Nations are in a 'state of pupilage'. In other words, the United States acts as their guardian.

The following is an extract from *Cherokee Nation*:

> The condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term *foreign nation* is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist no where else.
> The Indian territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories, and laws, it is so considered. In all our intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper; and the Cherokees in particular were allowed by the treaty of Hopewell, which preceded the constitution, "to send a deputy of their choice, whenever they think fit, to congress." Treaties were made with some tribes by the state of New York, under a then unsettled construction of the confederation, by which they ceded all their lands to that state, taking back a limited grant to themselves, in which they admit their dependence.
> Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. **[at 16-17]**

Marshall CJ reiterated these views in *Worchester v. Georgia*. In *Coe v the*

Commonwealth, Mason CJ (sitting alone at first instance) rejected an argument that Aboriginal peoples in Australia retain some sovereignty as 'domestic dependent nations'. He made it clear that that sovereignty is vested in the Commonwealth of Australia. Aboriginal peoples in Australia retain no sovereignty, and the United States case law on 'domestic dependent nation' is inapplicable in Australia. (at 115)

Three consequences follow in the United States from the characterisation of Indian Nations as 'domestic dependent'. The first is that the various Indian Nations are seen as retaining some inherent 'tribal sovereignty', although the limits of this are unclear. The second is that the guardian-ward analogy forms the basis of the federal-Indian trust doctrine, as guardians are generally seen as owing fiduciary duties to their wards. The third (considered below) is that the United State's power as guardian is seen as giving it a plenary power over Indians which allows it not only to enact laws in their favour, but to disregard or extinguish treaty and other rights.

Federal-Indian Trust Doctrine

United States v. Kagama 118 U.S. 375 (1886).
Lone-wolf v. Hitchcock 187 U.S. 553 (1903).
United States v. Wheeler 345 U.S. 313 (1978).
Pyramid Lake Paiute Tribe of Indians v. Morton 354 F. Supp 252 (D.D.C. 1972).
Manchester Band of Pomo Indians Inc v. United States 363 F. Supp 1238 (N.D. Cal 1973).

The Federal-Indian trust doctrine effectively lay dormant until the 1800s, when it was resurrected in order not to protect Indian rights, but rather to infringe them. At this time assimilationist politics were at their height, and the rights of Indian Nations to manage their own affairs were being removed. In the decisions in *United States v. Kagama* and *Lone-wolf v. Hitchcock*, the Supreme Court recast the government's trust obligation not as an obligation to protect, but as a source of unwritten Congressional power which gave Congress the right to abrogate treaty and other Indian rights.

In *Kagama*, two Indians were indicted under the *Major Crimes Act* (a federal Act) for murdering another Indian on a reservation. The issue in the case the applicability of federal criminal law on a reservation. The *Major Crimes Act* was clearly not an exercise of any clause of the United States Constitution which authorised Congress to make laws with respect to Indians.

The Court held that:

- the Indian Nations are wards of the United States;
- this relationship leads to a duty of protection on the part of the United States;
- that duty brings with it a source of Congressional power;
- the *Major Crimes Act* was a valid exercise of Congressional power.

As a result of *Kagama*, although the Indian Nations retain a form of sovereignty, they are clearly subject to the power of Congress.

The following is an extract from *Kagama*:

> It will be seen at once that the nature of the offence (murder) is one which in almost all cases of its commission is punishable by the laws of the States, and within the jurisdiction of their courts. The distinction is claimed to be that the offence under the statute is committed by an Indian, that it is committed on a reservation set apart within the State for residence of the tribe of Indians by the United States, and the fair inference is that the offending Indian shall belong to that or some other tribe. It does not interfere with the process of the State courts within the reservation, nor with the operation of State laws upon white people found there. It effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation.
> . . . These Indian tribes *are* the wards of the nation. They are communities dependent on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and receive from them no protection. Because of the local ill feeling, the people of the States where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. . . **[at 383-4]**

Cases such as *Kagama* and *Lone-Wolf* provided Congress with the power to disregard or breach Indian rights. The trust doctrine provided a source of Congressional power, but with no counterbalancing duty to protect Indian rights, until well into the 20th Century.

The Courts remain unwilling to utilise the trust doctrine as a mechanism by which to limit Congressional (i.e., legislative power). Even now it remains the case that Congressional power to breach either treaty rights, or rights held by Indian Nations as a facet of inherent tribal sovereignty, is unlimited. See *United States v. Wheeler* 345 U.S. 313 (1978), except by relevant Constitutional limitations, for example the due process and equal protection clauses, as well as the provision of just compensation for taking of recognised Indian lands.

However, in the 1930s, the Courts began to recognise that although Congressional (i.e., legislative) power was not limited by the trust doctrine,

executive decision making was subject to fiduciary standards. Between the mid-1930s and the mid-1970s, the Courts subjected federal Executive decision making to fiduciary standards. The problem with these decisions is that the Courts never made clear the source of the fiduciary duty. Sources given by the Courts variously included the guardian-ward relationship, the *Indian Nonintercourse Act*, and various treaties, or even the above in combination with Title 25 of the United States Code Two examples of this line of decisions are the cases of *Pyramid Lake* and *Manchester Band of Pomo Indians*.

A significant problem faced by Indian litigants in these cases was the problem of sovereign immunity. As the United States possesses sovereign immunity, it must unequivocally consent to be sued. Federal accountability in damages originally arose only in the circumstances of special jurisdictional statutes. Thus, remedies against the government for breach of fiduciary duty were limited to those allowable under the specific jurisdictional statute invoked in each case. This generally did not include monetary damages.

In *Pyramid Lake*, the tribe sought to overturn regulations which authorised diversions of water by a federal dam and reclamation project. The result of this project was that the water level in the lake on the reservation was diminished. The diversions violated no specific treaty or statutory provisions. Nevertheless, the Court held that in order to fulfil the fiduciary duty to the tribe, the Secretary of the Interior was under an obligation to ensure that all water not previously allocated by court decree or contract must go to the Pyramid Lake. The Court in this case made no real attempt to provide a basis for the federal trust obligation, but contented itself with mentioning that their exists:

> . . . [a] vast body of case law . . . recognis[ing] the trustee obligation [which] is amply complemented by the detailed statutory scheme for Indian Affairs set forth in Title 25 of the United States Code.(at 256)

In *Manchester Band of Pomo Indians*, the Indian band brought an action against officers of the Interior and Treasury Departments to recover damages for the failure of those officers to managed certain funds held in trust for the band. The Court agreed that the United States has a solemn trust obligation to the Native American people, and followed the earlier Supreme Court decision of *Seminole Nation*, where that Court held that the United States government is:

> [U]nder a humane and self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians should therefore be judged by the most exacting fiduciary standards.

(*Seminole Nation* 316 U.S. 286 (1942), at 296-7)

As a justification for imposing obligations on the officers of the Interior and Treasury, the Court in *Manchester Band* relied on the general language in *Seminole Nation*, quoted above, as well as the decision in *Pyramid Lake*, although it did not inquire as to the Court's reasoning in that decision for holding the Secretary of the Interior to be under a fiduciary obligation.

An Enforceable Obligation - Mitchell II

> *United States v. Mitchell (Mitchell II)* 463 U.S. 206 (1982).

By the time of the Supreme Court decision in *Mitchell II*, a number of statutes had finally removed most of the barriers posed by sovereign immunity.[1] Jurisdiction in this case was based on the *Indian Tucker Act*, which allowed the award of monetary compensation. Thus, in *Mitchell II*, the Supreme Court was able finally to award monetary damages against the United States for breaches of trust in connection with its management of forest resources on the Quinault Reservation. The forests on these lands had long been managed by the Department of the Interior, which generally exercises control over the harvesting of Indian timber. The tribe alleged that the Department of the Interior had failed to obtain fair market value for the timber, or any payment at all on part of it, and that they had not managed the timber on a sustainable yield basis. Notably, they were required to do all of the above by the legislation which gave them management rights over timber on Indian reservations.

The Court found two possible sources for a fiduciary duty:

- the first arose from statute. The Court found that all the necessary elements of a trust were present: a trustee (the United States), a beneficiary (the Indian band) and something that could form the subject matter of a trust (the Indian timber, lands and funds). The statutes and regulations at issue clearly established the fiduciary obligations of the Government. Express language was not required. However, the requisite intention for forming the trust could be inferred from statute or treaty, in this case the comprehensive statutory scheme created by the timber statutes and regulations. The Court then

[1] See, for example, the *Indian Tucker Act*, Ch. 359, 24 Stat. 505 (1887) (codified as amended in 28 U.S.C.), which provided that the Court of Claims has jurisdiction to award damages in certain cases; *Indian Claims Commission Act* of 1846, Ch. 959, 60 Stat. 1049 (codified at 25 U.S.C. §70 to 70v-3 (1976 & Supp. v 1981); *Administrative Procedure Act*, Act of Oct. 21, 1976, Pub. L. No. 94-574, 90 Stat. 2721 (codified at 5 U.S.C. §702 (1982), allowing Indian tribes to seek review of wrongful agency actions.

analogised to the general law of trusts, and held that the compensation was payable;

- the second source of the duty was the *actual* assumption of government control and supervision over the timber and lands. That would found a fiduciary obligation even in the absence of specific statutory language showing intention from which a trust could be inferred.

The following extract from *Mitchell II* describes the two bases of the fiduciary duty:

> The Secretary of the Interior's pervasive role in the sales of timber from Indian lands began with the Act of June 25, 1910, §§ 7, 8, 36 Stat. 857, as amended, 25 U. S. C. §§ 406, 407. Prior to that time, Indians had no right to sell timber on reservation land, and there existed "no general law under which authority for the sale of timber on Indian lands, whether allotted or unallotted, can be granted." H. R. Rep. No. 1135, 61st Cong., 2d Sess., 3 (1910) (quoting letter of the Secretary of the Interior). Congress recognized that this situation was undesirable "because in many instances the timber is the only valuable part of the allotment or is the only source from which funds can be obtained for the support of the Indian or the improvement of his allotment." *Ibid*. The 1910 Act empowered the Secretary to sell timber on unallotted lands and apply the proceeds of the sales for the benefit of the Indians, § 7, and authorized the Secretary to consent to sales by allottees, with the proceeds to be paid to the allottees or disposed of for their benefit, § 8. Congress thus sought to provide for harvesting timber "in such a manner as to conserve the interests of the people on the reservations, namely, the Indians." 45 Cong. Rec. 6087 (1910) (remarks of Rep. Saunders).
>
> From the outset, the Interior Department recognized its obligation to supervise the cutting of Indian timber. In 1911, the Department's Office of Indian Affairs promulgated detailed regulations covering its responsibilities in "managing the Indian forests so as to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests." U.S. Office of Indian Affairs, Regulations and Instructions for Officers in Charge of Forests on Indian Reservations 4 (1911). The regulations addressed virtually every aspect of forest management, including the size of sales, contract procedures, advertisements and methods of billing, deposits and bonding requirements, administrative fee deductions, procedures for sales by minors, allowable heights of stumps, tree marking and scaling rules, base and top diameters of trees for cutting, and the percentage of trees to be left as a seed source. *Id*., at 8-28. The regulations applied to allotted as well as tribal lands, and the Secretary's approval of timber sales on allotted lands was explicitly conditioned upon compliance with the regulations. *Id*., at 9.
>
> Over time, deficiencies in the Interior Department's performance of its responsibilities became apparent. Accordingly, as part of the Indian Reorganization Act of 1934, 48 Stat. 984, Congress imposed even stricter duties upon the Government with respect to Indian timber management. In § 6 of the Act, now codified as 25 U. S. C. § 466, Congress expressly directed that the Interior Department manage Indian forest resources "on the principle of sustained-yield management." Representative Howard,

co-sponsor of the Act and Chairman of the House Committee on Indian Affairs, explained that the purpose of the provision was "to assure a proper and permanent management of the Indian forest" under modern sustained-yield methods so as to "assure that the Indian forests will be permanently productive and will yield continuous revenues to the tribes." 78 Cong. Rec. 11730 (1934). See *United States v. Anderson*, 625 F.2d 910, 915 (CA9 1980), cert. denied, 450 U.S. 920 (1981). Referring to the relationship between the Indians and the Government as a "sacred trust," Representative Howard stated that "[t]he failure of their governmental guardian to conserve the Indians' land and assets and the consequent loss of income or earning power, has been the principal cause of the present plight of the average Indian." 78 Cong. Rec., at 11726.

Regulations promulgated under the Act required the preservation of Indian forest lands in a perpetually productive state, forbade the clear-cutting of large contiguous areas, called for the development of long-term working plans for all major reservations, required adequate provision for new growth when mature timber was removed, and required the regulation of run-off and the minimization of erosion. The regulatory scheme was designed to assure that the Indians receive "the benefit of whatever profit [the forest] is capable of yielding." *White Mountain Apache Tribe v. Bracker*, 448 U.S., at 149 (quoting 25 CFR § 141.3(a)(3) (1979)).

In 1964 Congress amended the timber provisions of the 1910 Act, again emphasizing the Secretary of the Interior's management duties. Act of Apr. 30, 1964, 78 Stat. 186. As to sales of timber on allotted lands, the Secretary was directed to consider "the needs and best interests of the Indian owner and his heirs." 25 U. S. C. § 406(a). In performing this duty, the Secretary was specifically required to take into account

> "(1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs, (2) the highest and best use of the land, including the advisability and practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs." *Ibid.*

The timber management statutes, 25 U. S. C. §§ 406, 407, 466, and the regulations promulgated thereunder, 25 CFR pt. 163 (1983), establish the "comprehensive" responsibilities of the Federal Government in managing the harvesting of Indian timber. *White Mountain Apache Tribe v. Bracker*, 448 U.S., at 145. The Department of the Interior - through the Bureau of Indian Affairs – "exercises literally daily supervision over the harvesting and management of tribal timber." *Id.*, at 147. Virtually every stage of the process is under federal control.

. . .

In *United States v. Mitchell*, 445 U.S., at 542, this Court recognized that the General Allotment Act creates a trust relationship between the United States and Indian allottees but concluded that the trust relationship was limited. We held that the Act could not be read "as establishing that the United States has a fiduciary responsibility for management of allotted forest lands." *Id.*, at 546. In contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship

and define the contours of the United States' fiduciary responsibilities.
The language of these statutory and regulatory provisions directly supports the existence of a fiduciary relationship. For example, § 8 of the 1910 Act, as amended, expressly mandates that sales of timber from Indian trust lands be based upon the Secretary's consideration of "the needs and best interests of the Indian owner and his heirs" and that proceeds from such sales be paid to owners "or disposed of for their benefit." 25 U. S. C. § 406(a). Similarly, even in its earliest regulations, the Government recognized its duties in "managing the Indian forests so as to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests." U.S. Office of Indian Affairs, Regulations and Instructions for Officers in Charge of Forests on Indian Reservations 4 (1911). Thus, the Government has "expressed a firm desire that the Tribe should retain the benefits derived from the harvesting and sale of reservation timber." *White Mountain Apache Tribe v. Bracker*, 448 U.S., at 149.
Moreover, a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). "[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection." *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183, 624 F.2d 981, 987 (1980).
Our construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people. This Court has previously emphasized "the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people." *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942). This principle has long dominated the Government's dealings with Indians. *United States v. Mason*, 412 U.S. 391, 398 (1973); *Minnesota v. United States*, 305 U.S. 382, 386 (1939); *United States v. Shoshone Tribe*, 304 U.S. 111, 117-118 (1938); *United States v. Candelaria*, 271 U.S. 432, 442 (1926); *McKay v. Kalyton*, 204 U.S. 458, 469 (1907); *Minnesota v. Hitchcock*, 185 U.S. 373, 396 (1902); *United States v. Kagama*, 118 U.S. 375, 382-384 (1886); *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831). **[at 219-226]**

Applicability to Australia

The Federal-Indian trust doctrine in obviously not applicable to Australia. The doctrine is based on the status of Indian Nations as domestic dependent nations. In *Mabo (No. 2)* (1992) 175 C.L.R. 1, it was held that Indigenous peoples in Australia retain no sovereignty. In *Coe v. Commonwealth* (1993) 68 A.L.J.R. 110, Mason CJ rejected the application of the domestic dependent nation doctrine to Australia. (at 115)

The obvious problem with applying either of the bases in *Mitchell II* to

Australia is identifying the source of the duty or trust. Unlike the United States, we have little in the way of extensive statutory allocation of, and management of, Indigenous resources. The high level of regulatory control in the United States comes from the recognition that Indian Nations own resources on their reserves. In Australia we still have to establish that native title includes rights to resources, and some significant hurdles stand in the way of this. Of course, a fiduciary duty potentially operates with respect to more than just resources. However, the same problem of identifying the legal source of the government's power and control remains. In *Mabo (No. 2)*, Toohey J held that the source of such a duty may lie in the protectorate and social welfare legislation of last century.(at 202 per Toohey J) However, there are other significant problems with this approach, which are outlined below under the heading of 'applicability to Australia'. As far as the trust analogy is concerned, a further problem is the identification of the subject matter of the trust. This would require a court to determine that native title is a property interest, or that it could nevertheless form the body of a trust.

Further References:

Navajo Tribe of Indians v. United States (Accounting Claims) 624 F. 2d 981 (Ct. Cl 1980).

Navajo Tribe of Indians v. United States (Uranium, Vanadium, Copper, Rock, Sand and Gravel Claims) 9 Ct. Cl. 227 (1985) - breach of fiduciary duty with respect to management of tribal mineral resources.

Navajo Tribe of Indians v. United States (Timber and Sawmill Claims) 9 Ct. Cl. 336 (1986) - breach of fiduciary obligation owed in management of tribal timber lands.

St Paul Intertribal Housing Board v. Reynolds 564 F. Supp 1408 (D. Minn 1983).

Peyote Way of God, Inc v. Thornburgh 922 F. 2d. 1210 (1991).

Canada

There are two distinct aspects to the fiduciary duty in Canada. The first, and most applicable to Australia, arose in the cases of *Guerin* and *Blueberry River Indian Band*. The second is dependent on s 35(1) of the *Constitution Act, 1982*, and the Supreme Court's interpretation of that provision in *R. v. Sparrow* and *Hydro-Quebec*. It is important to any understanding of the fiduciary duty to keep the two streams separate.

Executive Decisions Affecting Indian Lands

> *Guerin v. R.* (1984) 13 D.L.R. (4th) 321.
> *Blueberry River Indian Band v. R.* (1995) 130 D.L.R. (4th) 193.
> *Mitchell v. Penguis Indian Band* (1990), 71 D.L.R. (4th) 193.

Guerin

The Canadian Supreme Court first recognised the existence of an enforceable obligation on the Crown with respect to dealings with Indian land in 1984 in *Guerin*. That decision considered the narrow issue of whether on surrender of Indian reserve lands under the provisions of the federal *Indian Act* an obligation arose on the Crown to deal with those lands for the benefit of the surrendering band. It did not consider the wider aspect of whether a general obligation on the Crown to deal with Indian lands in all situations exists. In *Mabo (No. 2)*, Brennan J cited *Guerin* as authority for the proposition that if the Crown accepts a surrender of Aboriginal land on specific terms a fiduciary duty may arise.(at 60) This narrow holding accords with the actual decision in *Guerin.*

Guerin concerned the surrender for lease of 162 acres of reserve lands by the Musqueam band in 1957, 'in trust, to lease the same to such person or persons, and upon such terms as the Government of Canada may determine most conducive to our welfare and the welfare of our people.' The Crown entered a 75 year lease in 1958 upon terms and conditions substantially less advantageous than those discussed with the band. Despite the band's requests, no copy of the lease was made available to them until 1970. The Chief of the Musqueam band, in a representative action on behalf of the band, sought a declaration that the Crown in right of Canada was in breach of its trust responsibility in respect of the leasing. The band also requested substantial damages.

There is no majority decision in *Guerin*, although the decision of Dickson J is generally considered to be the leading decision, and has been subsequently followed. Dickson J's judgment is ambiguous, and provides a number of different bases for the decision. These include:

- the historic relationship between Aboriginal peoples and the Crown;
- the nature of Indian title;
- the statutory framework for disposing of Indian lands (the *Indian Act*) and the surrender requirements; and
- the discretion conferred by s 18 of the *Indian Act*.

Dickson J began by generally stating that:

> . . . the nature of Indian title and the framework of the statutory

> scheme established for disposing of Indian lands places upon the Crown an equitable obligation . . . to deal with the land for the benefit of the Indians.(at 334)

However, according to Dickson J, this is not sufficient to ground the obligation. He makes it clear that Indian title in itself is not sufficient to provide the basis of a fiduciary duty:

> [T]he fiduciary relationship between the Crown and the Indians has its roots in the concept of aboriginal, native or Indian title. The fact that Indian bands have certain interest in lands does not, however, in itself give rise to a fiduciary relationship between the Indians and the Crown. The conclusion that the Crown is a fiduciary depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown.(at 334)

The requirement that Indian lands be surrendered to the Crown is contained in section 37 of the Indian Act. Dickson J noted that the purpose of the surrender requirement is to interpose the Crown between the Indians and prospective purchasers or lessees of their land so as to prevent the Indians from being exploited.(at 340) The *Indian Act* confirms the Crown's historic responsibility to act on behalf of the Indians, and s 18(1) confers upon the Crown a discretion to decide for itself where the Indians' best interests lie. In essence, it is this discretion which transforms the Crown's obligation to protect Indian interests into a fiduciary obligation:

> . . . where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.(at 341)

Therefore, according to Dickson J, the source of the fiduciary obligation lies in the requirement that Indian title be surrendered to the Crown, combined with the statutory discretion given to the Crown by s 18(1) of the *Indian Act* to decide where the Indian's best interests lie.(at 141-2) It is the Crown's discretion which transforms the Crown's historic obligation to protect Indian interests into a fiduciary obligation. The Court did not specify the source of the Crown's 'historic obligation to protect Indian interests'. However, in *Mitchell v. Penguis Indian Band*, the Court commented briefly on the nature of the historic relationship of the Crown and Aboriginal peoples:

> As is clear from the comments of the Chief Justice in Guerin . . . legislative restrictions on the alienability of Crown land are but the continuation of a policy that has shaped the dealings between

> the Indians and the European settlers since the time of the Royal proclamation of 1763. The historical record leaves no doubt that native peoples acknowledged the ultimate sovereignty of the British Crown, and agreed to cede their traditional homelands on the understanding that the Crown would thereafter protect them in the possession and use of such lands as were reserved for their use. . .(at 225)

Of course, the historical relationship between Aboriginal peoples and the Crown in Canada and that between Indingeous peoples and the Crown in Australia is different.

The Supreme Court did not consider the fiduciary duty again until the decision in *Blueberry River Indian Band*. Other decisions between 1984 and 1995 considered the fiduciary duty in the context of s 35(1) of the *Constitution Act, 1982*.

Blueberry River Indian Band

Blueberry River Indian Band concerned the surrender of an Indian reserve. In the early part of the century, the Beaver Indian Band received a reserve in British Columbia in return for surrendering their aboriginal title buy treaty. In 1940, the Band surrendered the mineral rights on the reserve to the Crown in trust 'to lease' for its benefit. In 1945, the Band surrendered the entire reserve 'to sell or lease'. The Director of Indian Affairs (the DIA) sold the land to the Director of the Veteran's Land Act (the DVLA). In turn, the DVLA sold the reserve as smaller parcels to returning soldiers. Some time later, oil and gas were discovered on the land, the revenue from which went to the veterans who now owned the land. In 1977, an officer of the Department of Indian Affairs realised that the Band had lost its mineral rights, as these had not been reserved out of the transfer of the land to the DVLA. The Band argued that the Crown was under a fiduciary duty to them prior to the surrender of the lands, as well as a duty after surrender to lease or sell the land in their best interests, which was breached by failing to reserve the mineral rights when the reserve land was sold to the DVLA.

In *Blueberry River Indian Band*, the majority and the minority reached essentially the same conclusion, they did so for different reasons. To complicate matters, rather than analysing the Crown's obligations in terms of fiduciary law, the majority analogised to trusts law, finding a 'trust of Indian Land'. It is quite difficult to determine general principles from this case.

Gonthier J, for the majority, held that the surrender in 1940 of the mineral rights to the Crown in trust to lease for the benefit of the band amounted to a 'trust in Indian land'. The 1945 surrender, therefore, amounted to a variation of trust. All

the terms of the trust were contained in the surrender deed. This leads to the question of what is a 'trust in Indian land'. Gonthier J did not specify the nature of this trust, but did note that it was not a trust as we normally think of it. Presumably this is because the majority in *Guerin* (at 342) denied that a trust could arise on surrender, as there was no trust property. Gonthier J then concluded that as the Crown was a trustee, it had a fiduciary obligation to exercise its discretion to lease or sell the surrendered interests in the best interests of the Band. The transfer of the minerals to the DVLA clearly was not in the best interests of the Band, particularly in light of the fact that as a matter of policy on transfer of non-Indian lands to the DIA it was Government policy to reserve out the minerals. The failure to reserve out the minerals therefore constituted a breach of trust.

The minority's analysis is in terms of the fiduciary duty in *Guerin*. McLachlin J posed two questions:

1. What was the Crown's obligation prior to surrender with respect to that surrender?
2. Was the Crown under a fiduciary duty with respect to the disposal of the minerals after surrender?

On the first issue, whether the Crown is under a duty prior to surrender, McLachlin J concluded that there was no obligation on the Crown. Her Honour did not consider whether the nature of the relationship between the Crown and First Nations Peoples was fiduciary in nature, but rather examined the narrower issue of the nature of the duty owed by the Crown when a band wishes to make a surrender. Her Honour considered that an obligation could be imposed by the terms of the *Indian Act*, or as a matter of general fiduciary law.

With regard to the issue of whether the specific terms of the *Indian Act* impose an obligation on the Crown to refuse the Band's surrender of its reserve if the decision to do so was not in the Band's best interests, McLachlin J concluded that the Crown's obligation was limited to preventing exploitative bargains. (para 35) The appellants argued that the tone of the *Indian Act* and the power of the Crown over reserve lands leads to the conclusion that the Crown is under an obligation to protect the Indians from themselves. To the contrary, McLachlin J determined that the provisions of the *Indian Act* are designed to strike a balance between the two extremes of autonomy of action and protection of Indigenous interests. The purpose of the surrender requirement is to prevent the Indians from exploitation. The band had a right to decide whether it wished to surrender the reserve, and only if its decision would lead to exploitation was the Crown obliged to refuse the surrender.(para 35) According to McLachlin J, the measure of control given to the band under the Act to exercise over surrender negates the contention that any general duty is imposed on the Crown by the Act with

respect to the surrender of the reserve.(para 36)

Further, her Honour considered that, as a matter of general fiduciary law, no obligation arose on the Crown on the particular facts at hand. As did the Court of Appeal, McLachlin J considered the circumstances generally in which a fiduciary obligation will arise. However, her Honour concluded that in the circumstances the band had not entrusted its power of decision making as to whether or not to surrender the reserve to the Crown. Consequently, no fiduciary obligation arose. The evidence showed that the band understood that in surrendering its reserve it was giving up forever all rights to that reserve.

On the second issue of whether the Crown was under a fiduciary obligation with respect to the disposal of the minerals surrender, McLachlin J concluded that such an obligation did exist. Her Honour could hardly do otherwise in light of the earlier decision in *Guerin*. On the above two issues, therefore, McLachlin J's decision does not advance the law significantly from the position taken by the Supreme Court in *Guerin* in 1984. According to Her Honour, prior to the surrender the Band retains some control over the decision whether or not to surrender the reserve, and consequently, no fiduciary obligation arises. Post-surrender, however, the Crown has the discretion and control as to the best means as by which to implement the terms of the surrender. A fiduciary obligation arises in order to regulate the manner in which the Crown deals with the Band's interests on their behalf. McLachlin J's decision, therefore, confirms that discretion and control vested in the Crown with respect to Indigenous interests is the cornerstone of the fiduciary obligation. This disagrees, however, with the conclusions of the Federal Court of Appeal that there exists a general fiduciary duty to deal with Indian land even prior to surrender.

As can be seen from the above, *Blueberry River* turns on the particular facts and the provisions of the *Indian Act*. It is quite difficult to extract any principles from the case. The factual situation is so narrow, that it adds little to *Guerin*, except perhaps to emphasise the importance of the *Indian Act* to this area of law.

Further References:

Kruger v. R. (1985), 17 D.L.R. (4th) 591 -breach of fiduciary duty on expropriation of parcels of reserve land to construct an airport - Federal Court of Appeal.

*Chippewas of Kettle and Stony Point v. Canada (Attorney General) (*1997) 141 D.L.R. (4th) 1 - fiduciary duty and validity of surrender of land - motion for summary judgment dismissed by Ontario Court of Appeal.

The Fiduciary Duty and Section 35 of the Constitution Act, 1982

> *R. v. Sparrow* (1990), 70 D.L.R. (4th) 385.

The concept of a broad fiduciary relationship encompassing all of the Crown's dealings with the Aboriginal peoples of Canada first appeared in the decision of the Supreme Court of Canada in *Sparrow*. In *Sparrow* the appellant, a member of the Musqueam Nation in British Columbia, was charged under the *Fisheries Act* with fishing with a drift net longer than that permitted by the terms of his Band's Indian food fishing licence. He admitted that the facts alleged constitute the offence, but defended the charge on the basis that he was exercising an existing aboriginal right to fish, and that the net length restriction contained in the Band's licence was invalid in that it was inconsistent with s 35(1) of the *Constitution Act, 1982*.

The Court unanimously held that s 35 provides constitutional protection to those aboriginal rights which were not extinguished prior to the coming into force of the *Constitution Act, 1982*. It was further held, however, that the Federal parliament still has the power to infringe these rights by regulation, provided that the legislation which so infringes meets a test laid down by the Court.[2] According to the Supreme Court, the appellant bears the burden of showing that the net length restriction constitutes a *prima facie* infringement of the collective aboriginal right. Once this is established the onus shifts to the Crown to demonstrate that the infringement is justifiable. In determining when an infringement by Parliament of an aboriginal right will be justified, the Supreme Court referred to a number of considerations which are relevant, one of which according to the court is the 'special trust relationship' between the Crown and Aboriginal peoples. In explaining why a justification test was needed the Court stated that:

> . . . the words "recognition and affirmation" [in s 35(1) of the *Constitution Act, 1982*] incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. (at 409)

Finally, the Court held that:

> . . . *Guerin*, together with *R. v. Taylor and Williams* (1981), 62 C.C.C. (2d) 227, 34 O.R. (2d) 360 (C.A.) ground a guiding principle for s.35(1) That is, the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. (at 408)

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2 See Chapter One 'Context' for the infringement test from *Sparrow*.

Notably, it is the existence of s 35(1) which allows the fiduciary principle to act as a restraint on the exercise of legislative power - not the fiduciary principle on its own. The fiduciary principle provides the standard for determining when federal legislation, which infringes Aboriginal rights, will be justifiable and when it will be struck down. However, if there is no question of legislative infringement of Aboriginal rights then s 35(1) will not be invoked. In the absence of such a legislative infringement, the fiduciary principle remains confined to the parameters indicted by the decisions in *Guerin* and *Blueberry River*.

Further References:

Quebec (Attorney General) v. Canada (National Energy Board) (Hydro-Québec Case) (1994), 112 D.L.R. (4th) 129 - confirmed the relationship between s 35(1) and the fiduciary duty. The Supreme Court held that the fiduciary relationship did not impose a duty on a quasi-judicial agency, the National Energy Board, to make its decisions in the best interests of the appellants, or to allow additional disclosure of information to the appellants. The Court would not allow the independence of a quasi-judicial agency to be compromised by subjecting them to fiduciary obligations which require that their decisions be made in accordance with a fiduciary duty.

New Zealand

New Zealand Maori Council v. A.G. [1987] 1 N.Z.L.R. 641.

Prior to reading this section, we recommend that you read the part of Chapter 1 ‘Context’, which considers the Treaty of Waitangi.

In New Zealand the Treaty of Waitangi signifies a partnership between the Crown and Maori which requires each to act towards the other reasonably and with the utmost good faith. The relationship between the treaty partners creates responsibilities analogous to fiduciary duties. The Crown’s duty is an active one, and extends to the active protection of Maori people in the use of their lands and waters to the fullest extent possible.

The leading case on the partnership between Maori and Pakeha remains that of the Court of Appeal in *New Zealand Maori Council v. AG*. The case concerns the *State-Owned Enterprises Act 1986*, which provided for the establishment of 14 State Owned Enterprises (corporations). The Act also contained provisions enabling the transfer of government assets to the new State Owned Enterprises. It was proposed that 10 million hectares of land owned by the Crown would

pass to the various State Owned Enterprises established under the Act. After the introduction of the *State Owned Enterprises Bill* into Parliament, several Maori tribes expressed fears that potential claims to the Waitangi Tribunal would be jeopardised by the transfer of Crown assets to corporations which was envisaged by the Act. If Crown land ceased to be Crown land then it might preclude the Crown from transferring land back to the Maori in accordance with recommendations of the Waitangi Tribunal. Section 9 of the Bill provided that nothing in the Act should permit the Crown to act in a manner that was inconsistent with the principles of the Treaty of Waitangi. The New Zealand Maori Council applied for a review of the proposed exercise of the statutory power to transfer Crown land to a State Owned Enterprise.

The Court held that this was a firm declaration by Parliament that the Crown could not act inconsistently with the principles of the Treaty, with the result that that s 9 overrode the rest of the Act. The phrase 'principles of the Treaty of Waitangi' was chosen to reflect that the Maori and English texts in the Treaty are not translations of each other and do not necessarily convey exactly the same meaning.

With respect to the principles of the Treaty that bound the Crown by virtue of s 9, the Court held:

- that the Treaty signifies a partnership between peoples;
- the relationship between Treaty partners creates obligations analogous to fiduciary obligations;
- the Crown, acting towards its partner in utmost good faith, must act reasonably to ensure that the principles of the Treaty are upheld;
- for their part, the Maori have undertaken duties of co-operation and loyalty to the Crown.

The following is an extract from the *New Zealand Maori Council* case:

> The Treaty signified a partnership between races, and it is in this concept that the answer to the present case had to be found. For more than a century and a quarter after the Treaty, integration, amalgamation of the races, the assimilation of the Maori to the Pakeha, was the goal which in the main successive Governments tended to pursue. In 1967 in the debates on the Maori Affairs Amendment Bill, a measure facilitating the alienation of Maori land, the responsible Minister, the Hon JR Hanan, saw it as "the most far-reaching and progressive reform of the Maori land laws this century . . . based upon the proposition that the Maori is the equal of the European . . . The Bill removes many of the barriers dividing our two people" (353 *New Zealand Parliamentary Debates* 3657). Another supporter of the Bill expressed the hope that "it will mark the beginning of the end of what still remains of apartheid in New Zealand" (ibid, 3659). Such ideas are no longer in the ascendant, but there is no reason to doubt that in their day the European Treaty partner and indeed many Maoris entertained them in good faith as the true path to progress for both races. Now the

> emphasis is much more on the need to preserve Maoritanga, Maori land and communal life, a distinctive Maori identity.
> . . .
> In this context the issue becomes what steps should be taken by the Crown, as a partner acting towards the Maori partner with the utmost good faith which is the characteristic obligation of partnership, to ensure that the powers in the State-Owned Enterprises Act are not used inconsistently with the principles of the Treaty. It was argued for the applicants that whether in any instance the transfer of a particular asset would be inconsistent with the principles of the Treaty is a question of fact. That is so, but it does not follow that in each instance the question will admit of only one answer. If the Crown acting reasonably and in good faith satisfies itself that known or foreseeable Maori claims do not require retention of certain land, no principle of the Treaty will prevent a transfer.
> . . .
> What has already been said amounts to acceptance of the submission for the applicants that the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. Counsel were also right, in my opinion, in saying that the duty of the Crown is not merely passive but extends to active protection of Maori people in the use of their lands and waters to the fullest extent practicable. There are passages in the Waitangi Tribunal's Te Atiawa, Manukau and Te Reo Maori reports which support that proposition and are undoubtedly well-founded. I take it as implicit in the proposition that, as usual, practicable means reasonably practicable. It should be added, and again this appears to be consistent with the Tribunal's thinking, that the duty to act reasonably and in the utmost good faith is not one-sided. For their part the Maori people have undertaken a duty of loyalty to the Queen, full acceptance of her Government through her responsible Ministers, and reasonable co-operation. **[© New Zealand Council of Law Reporting, 1987, at 664-5 per Cooke P]**

The fiduciary principle was also argued in a series of cases, known as the *Maori Broadcasting Cases*. The cases arose out of two distinct, but linked, sets of facts. The first, concerned the transfer of television and radio assets to a State Owned Enterprise, and culminated in the Privy Council decision in *New Zealand Maori Council v. AG* [1994] 1 N.Z.L.R. 513. The applicants argued that the transfer of these assets without the additional establishment of adequate systems to protect Maori language rights (recognised as taonga within Art. II of the Treaty of Waitangi) would be a breach of s 9 of the *State Owned Enterprises Act* and a breach of fiduciary duty.

The Crown's fiduciary duty does not require it to totally subordinate its interests to those of the Maori people. In this respect, the Crown's fiduciary duty differs from the traditional private law fiduciary principle. Rather, the question to be asked is whether the Crown is acting reasonably in a Wednesbury sense. In other words, what the Crown has to do in order to discharge its duties varies with the circumstances. For example, in some circumstances the Crown may be required to provide funding, in others it may be obligated to protect vulnerable

property interests. In order to act reasonably in the Maori Broadcasting Cases, the Crown had two choices: it could either not transfer the assets to the State Owned Enterprise, or it could transfer the assets and take additional steps to ensure that its obligations with respect to Maori language rights were fulfilled:

> Foremost among those "principles" [in the Treaty] are the obligations which the Crown undertook of protecting and preserving Maori property, including the Maori language as part of taonga, in return for being recognised as the legitimate government of the whole nation by Maori. The Treaty refers to this obligation in the English text as amounting to a guarantee by the Crown. This emphasises the solemn nature of the Crown's obligation. It does not however mean that the obligation is absolute and unqualified. This would be inconsistent with the Crown's other responsibilities as the government of New Zealand and the relationship between Maori and the Crown. This relationship the Treaty envisages should be founded on reasonableness, mutual cooperation and trust. It is therefore accepted by both parties that the Crown in carrying out its obligations is not required in protecting taonga to go beyond taking such action as is reasonable in the prevailing circumstances. While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time. For example in times of recession the Crown may be regarded as acting reasonably in not becoming involved in heavy expenditure in order to fulfil its obligations although this would not be acceptable at a time when the economy was buoyant. Again, if as is the-case with the Maori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfil its obligations and may well require the Crown to take especially vigorous action for its protection. This may arise, for example, if the vulnerable state can be attributed to past breaches by the Crown of its obligations, and may extend to the situation where those breaches are due to legislative action. Indeed any previous default of the Crown could, far from reducing, increase the Crown's responsibility. **[© New Zealand Council of Law Reporting, 1994, at 517]**

The issue of Maori Broadcasting rights resurfaced in *New Zealand Maori Council v. AG* [1996] 3 N.Z.L.R. 140, but this time radio, rather than television rights, were at issue. Having transferred Radio New Zealand to a State Owned Enterprise several years earlier, in 1995, the government announced that it intended to sell Radio New Zealand's commercial radio assets by tender. The New Zealand Maori Council sought an injunction preventing the sale on the grounds that Crown control of the radio station was critical to compliance with Art. II of the Treaty. The Crown argued that it was not breaching s 9 of the *State Owned Enterprises Act* or the Treaty as it had made provision for reserved Maori radio frequencies, provided access to transmission and production facilities and funding for programming.

In deciding whether to grant interim relief, the Court of Appeal followed the Privy Council decision and considered whether or not the sale of the radio

stations would impair the ability of the Crown to fulfil its obligations to preserve the Maori language. This really came down to a question of whether the Crown had put in place sufficient policies to ensure that broadcasting would not be impaired by the sale. The appellants argued that the only policy mechanism which would work was regulation of the commercial industry. Based on expert evidence, the Court rejected this claim, as compulsory Maori broadcasting by commercial channels was likely to merely turn off existing audiences. In essence this was a finding that the reservation of frequencies, access to transmission and production facilities and funding support and incentives were adequate to fulfil the Crown's obligations.

Thus far, all cases which have concerned the fiduciary principle have been based upon a statutory incorporation of the principles of the Treaty of Waitangi as is found in s 9 of the *State Owned Enterprises Act*. However, there is no reason why the fiduciary duty should not have an existence independent of reliance on the Treaty. So far this remains untested, as all cases have relied on the protective obligations undertaken by the Crown at the time that the Treaty was signed.

Further References:

Ngai Tahu Maori Trust Board v. Director-General of Conservation [1995] 3 N.Z.L.R. 553 - s 4 of the *Conservation Act* provides that the *Marine Mammals Protection Act* must be interpreted and administered so as to give effect to the principles of the Treaty of Waitangi. While this mean that those administering the Act must act in good faith, consult and be fully informed of Maori interests, it did not mean that Maori holding a permit allowing commercial whale watching operations must be given a right of veto over the grant of permits to others.

New Zealand Maori Council v. AG [1992] N.Z.L.R. 576 - the first Maori Broadcasting Case - New Zealand Court of Appeal.

Applicability to Australia

In Canada, New Zealand and the United States, the fiduciary duty is dependent upon, and originates in, the particular historical and legal framework of each jurisdiction. For this reason, it is difficult to transport the fiduciary principle to Australia.

In Canada, the fiduciary principle is arguably dependent upon particular provisions of the *Indian Act*, an Act which has no counterpart in Australia. Even if the duty were more broadly based in the nature of Indian title and the historic relationship between the Crown and First Nations peoples, that historic relationship was very different to that between the Crown and Indigenous

peoples in Australia. Those cases which rely on s 35(1) of the *Constitution Act, 1982* are simply inapplicable to Australia in this context.

In the United States, the fiduciary principle rests in part on the Federal-Indian trust relationship, which is in turn dependent on the status of Indian Nations as subordinate sovereign nations. In the United States, a fiduciary duty may also arise because of pervasive control of Indian land and resources, as evidenced by statute. It is difficult to find the same degree of pervasive control in Australia, most obviously because in this jurisdiction it is still undecided whether Aboriginal and Torres Strait Islander peoples even have rights to resources recognised as a part of native title. Those enactments relied upon by Toohey J in *Mabo (No. 2)* as possibly founding a duty - the Protectorate Legislation - are quite different from the kind of statute relied upon by the Supreme Court in *Mitchell II*.

In New Zealand, the fiduciary principle clearly originates in the principles of the *Treaty of Waitangi* and legislation which forces governmental recognition of those principles - for example s 9 of the *State Owned Enterprises Act* 1986. There are no counterparts to these in Australia.

Finally, there are some additional problems with arguing the fiduciary principle in Australia. These are:

- the fiduciary principle more generally is still given a very narrow scope in Australia. In Canada, by contrast, in recent years the fiduciary principle has expanded its scope into many new and non-traditional areas, of which the Crown-First Nations relationship is but one. In the recent High Court decision in *Breen v. Williams* (1996) 138 A.L.R. 259, a case which concerned the duties owed by a doctor to her patient, the High Court declined to follow recent cases of the Supreme Court of Canada which have broadened the fiduciary principle. See, for example, *M.(K.) v. M.(H.)* (1992), 96 D.L.R. (4^{th}) 289 and *McInerney v. McDonald* (1992), 93 D.L.R. (4^{th}) 415;
- the different nature of the historic relationship between the Crown and Indigenous peoples in Australia and that of Aboriginal peoples and the Crown in the United States, Canada and New Zealand;
- there are possible problems posed in Australia by the *Statute of Limitations*. These statues vary between states and should be consulted in each jurisdiction;
- the doctrine of parliamentary sovereignty. The fiduciary principle, as a private law duty, will not stand up to a contrary legislative enactment. This is of particular importance in the case of legislatively enacted mining agreements as were at issue in *The Wik Peoples v. Queensland* (1996) 141 A.L.R. 129. See also *Director of Aboriginal and Islanders Advancement v.*

Peinkinna and Others [1978] 58 A.L.J.R. 286 (P.C.).

Finally, the recent High Court decision in *Thorpe v. Commonwealth [No. 3]* (1997) 71 A.L.J.R. 767 should be noted. In that case, Kirby J, sitting in the High Court's original jurisdiction, struck out claims of breach of fiduciary duty against the Commonwealth as presenting no justiciable matter on which the Court could adjudicate within the terms of ss 75 and 76 of the Constitution. This decision was based on the specific claims made in the case, rather than on the basis that it could not be argued that the Crown was under a fiduciary duty to Indigenous peoples in Australia. However, in the course of his judgment, Kirby J clearly indicated a belief that it would be problematic to argue the fiduciary principle in Australia for two reasons. The reasons indicated by his Honour are essentially those identified above. However, Kirby J does not rule out that such a claim may be possible, albeit difficult, to establish.

Further Reading:

Bartlett, R.H., 'The Fiduciary Obligations of the Crown to the Indians', (1989) 53 *Sask. L.R.* 301.

Bowker, A., '*Sparrow*'s Promise: Aboriginal Rights in the B.C. Court of Appeal', (1995) 53 *U. of T. Fac. of Law Rev.* 1.

Brennan, F., 'Mabo and the Racial Discrimination Act: The Limits of Native Title and Fiduciary duty under Australia's Sovereign Parliament', in The Law Book Company, *Essays on the Mabo Decision,* The Law Book Company Limited, Sydney, 1993.

Bryant, M.J., 'Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law', (1993) 27 *U.B.C.L. Rev.* 19.

Chambers, R.P., 'Judicial Enforcement of the Federal Trust Responsibility to the Indians', (1975) 27 *Stan. L.R.* 1215.

Dorsett. S., '*Apsassin v. The Queen in right of Canada:* Re-examining the Source of the Crown's Fiduciary Obligation to Indigenous Peoples' (1996) 3(78) *A.L.B.* 7.

Hurley, J., 'The Crown's Fiduciary Duty and Indian Title: Guerin v. The Queen [13 D.L.R. (4th) 321]', (1985) 30 *McGill L.J.* 559.

McNeil, K., 'Envisaging Constitutional Space for Aboriginal Governments', (1994) 19 *Queen's L.J.* 95.

Slattery, B., 'First Nations and the Constitution: A Question of Trust', (1992) 71 *Can. Bar. Rev.* 261.

Slattery, B., 'Understanding Aboriginal Rights', (1987) 66 *Can. Bar. Rev.* 727.

Chapter Seven

Compensation

Overview

An understanding of the context of overseas law with respect to compensation issues is vital as each country has different constitutional structures and statutory provisions which affect general compensation regimes for property, and more specifically the instances where Indigenous peoples' 'rights' are compensable. Therefore it is recommended that the context section for each jurisdiction be read prior to reading this chapter.

The format for the discussion of overseas cases on compensation is divided into two sections dealing with:

- the 'right' to compensation, and
- the process to determine the amount of compensation, which involves questions of the valuation of aboriginal rights.

Extinguishment and Compensation

Until recently, there has been little support at common law for a right to compensation upon extinguishment or some form of 'impairment' of aboriginal rights/title. Historically, the power to extinguish aboriginal title was generally seen as the exercise of a sovereign power and thus no question of compensation arose absent constitutional or statutory protection. Many statutory schemes provide for determination with respect to compensation in specialised tribunals or courts, e.g., Court of Claims in the USA.

At common law, the sovereign power to extinguish without compensation is often integrally linked with the characterisation of the interests held by Indigenous peoples. Where aboriginal title is not characterised as 'property', it may fall outside general protection for property rights. In most common law jurisdictions there exist constitutional protection for property rights and various statutory schemes for the payment of compensation upon acquisition of property.

Given the '*sui generis*' categorisation of native title interests in many jurisdictions, the extent to which this form of title represents a compensable interest is an emerging issue about which there is little judicial guidance. The recent *Delgamuukw* decision of the Supreme Court of Canada is remarkable as the Court found that where there was an 'infringement' of aboriginal title, fair compensation would ordinarily be required.

Valuation

The question of the valuation of native title interests for compensation purposes is problematic. It remains unsettled whether given the *sui generis* nature of such rights, it is possible to apply market based valuations. Whether a peoples' cultural and spiritual attachment to land and waters can be included in this process also remains unresolved. However valuation can take into account in some manner the special value to the owner of the land. The measure of special value being, ". . . that which a prudent man in [the owners' position] would have been willing to give for the land rather than fail to obtain it.", (*Pastoral Finance Association Ltd v The Minister* [1914] A.C. 1083). Yet this process still relies upon a 'market' standard and presumes a monetary method of compensation. There is negligible guidance on this question of 'special value' in overseas case law.

An early decision of the Privy Council, *Raja Vyricherla Narayayana Gajapatiraju* v *Revenue Division Officer, Vizapatam* [1939] A.C. 302 [1939] 2 All ER., effectively precluded a recognition of the 'special value' of country to Indigenous peoples.[1] In *Raja Vyricherla* the special attachment or sentimental value of the land was noted but it was held that this factor could not be included in the assessment of the amount of compensation as that quantum should reflect market value:

> It is often said that it is the value of the land to the vendor that has to be estimated. This however, is not in strictness accurate. The land for instance, may have for the vendor a sentimental value far in excess of its market value. But the compensation must not be increased by reason of any such consideration.(at 312)

However, the *Raja Vyricherla* case was decided well before the landmark cases such as *Calder* and *Mabo (No 2)*, which recognised aboriginal title, therefore its value as a precedent remains unclear and it may not be followed as a guide to valuing 'unique' native title interests. Moreover in *Dominic Kanak v The National Native Title Tribunal* (1995) 61 F.C.R. 103, the Australian Federal Court recognised the spiritual nature of native title interests.

Compensation on Other Bases

In most common law jurisdictions, there is little direct case law on compensation for aboriginal title or rights as distinct from compensation for acquisition or impairment of forms of 'recognised' title, or where compensation has a statutory basis. Also, it should be noted that much of the recent case law

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[1] For a good overview of the compensation provisions (unamended) see G. Addicott, 'Native Title - Where Does Wik Leave Us?', (1997) 35 (2) *Valuer and Land Economist*, at 538-541.

on aboriginal title and rights in jurisdictions such as Canada has primarily arisen where Indigenous peoples' subsistence rights are claimed as a defence to general regulatory regimes such as environmental permits and licensing conditions. In these situations until more recently, the issue of compensation has not arisen.

Compensation Regimes under the *Native Title Act 1993* (Cth)

Before considering the case law on compensation from overseas jurisdictions it is suggested that readers familiarise themselves with the *Native title Act 1993* (Cth) [NTA] (as amended) and the provisions which allow for compensation under that legislation. While a detailed outline of the legislative provisions will not be provided, some general issues are highlighted. There are a number of different, although interrelated compensation mechanisms under the NTA.[2] Some amendments have recently been made to the NTA, although these do not change the general structure of the provisions.

Racial Discrimination Act 1975

An important substratum underpinning the compensation provisions in the NTA is the operation of the *Racial Discrimination Act* 1975 (Cth) which incorporates principles from the *International Covenant on the Elimination of All Forms of Racial Discrimination*, and which seeks to ensure a non discriminatory treatment of property interests. The result of this is that Indigenous peoples' property interests must be treated in a similar manner to non-indigenous property interests.

Calculating the Amount of Compensation.

As noted, within Part 2, Division 5 of the NTA there are provisions relating to the method of determining the amount and kind of compensation payable. Of particular importance is s 51A, which provides that:

> The total compensation payable under this Division for an act that extinguishes all native title in relation to particular land or waters must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in the land or waters.

Note that a definition of 'extinguish' has now been provided for in s 237A. Section 51A(2) provides that that section is subject to s 53 ('just terms' compensation). The restriction of compensation to freehold value provides for a similar outcome to that under United States compensation cases.

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[2] See for example, D. Ritter, 'Compensation under the Native Title Act', (1996) 34 (1) *Valuer and Land Economist*, 18-22, at 18.

The restriction of compensation to freehold value applies to claims for compensation made before the coming into force of s 51A: see Schedule 5, part 5 (Transitional), s 18.

Constitutional Guarantee of 'just terms'

Under s 51(31) of the Commonwealth Constitution, the Commonwealth government is legally obliged to provide compensation on 'just terms' where it compulsorily acquires property. Sections 18 and 53 of the NTA import the concept of compensation on just terms where there is a determination that compensation is payable under Part 2, Division 5 of the NTA.

Conclusion

The statutory regime for compensation under the NTA is rather complex especially as it uses common law property concepts as a reference point, incorporates the principles of international law through the *Racial Discrimination Act* and involves constitutional 'just terms' guarantees through the similar compensable interest test. In the *Dunghutti Determination*, compensation was resolved by a negotiated settlement among a number of parties and was not an amount decided in court proceedings. Valuations of the land were undertaken but compensation was agreed and the detail of the compensation package has remained confidential.

Canada

The Right to Compensation

St Catherine's Milling and Lumber Co v The Queen (1889) 14 A.C. 46.

A.G. Canada v A.G. Ontario [1897] A.C. 199 (*The Indian Annuities case).*

Pawis v. The Queen (1979) 102 D.L.R. (3rd) 602.

Calder v Attorney General of British Columbia (1973) 34 D.L.R. (3d) 145.

Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development (1979), 107 D.L.R. (3d) 513.

Sikeya v. The Queen (1965) 50 D.L.R. (2d) 80.

Kruger and Manuel v. R (1978) 75 D.L.R. (3d) 434.

Until recently, within Canadian native title law there are few cases on

compensation for aboriginal interests. The reasons for this are outlined below.

Early cases

Historically, the manner in which aboriginal interests were legally categorised meant that they were not seen as interests giving rise to a right to compensation:

- Early cases characterised aboriginal rights as personal and usufructuary in nature and dependent on the goodwill of the Crown as held in *St Catherine's Milling*. This characterisation of Indian aboriginal title as personal and usufructuary meant that the interest was able to be taken away at the will of the Crown and thus it was not in the nature of a property right for which compensation would be paid.
- Even where Indian interests were based on treaties, the nature of the rights were seen as akin to a licence, again a non-compensable interest. In *A.G. Canada v A.G. Ontario* [1897] AC 199 *(The Indian Annuities case)*, the Privy Council held, in relation to the payment of annuities in respect of ceded lands, that:

  > . . . under the treaties, the Indians obtained no right to their annuities . . . beyond a promise and agreement, which was nothing more than a personal obligation by its governor . . . that the latter should pay the annuities as and when they became due; that the Indians obtained no right which gave them an interest in the territory which they had surrendered. . . (at 213).

  The 'mere licence' nature of Indian interests is emphasised by reference to a personal and not a legal obligation on the governor to pay the annuities for the surrendered land.

- The *Indian Annuities case* was followed in *Pawis.* In *Pawis* it was argued that the Crown owed a trust obligation to First Nations peoples based upon entry into the Lake Huron Treaty with the Ojibway Indians. Similar to the situation in the later *Guerin* case there was a problem in identifying what constituted the trust property. Applying the principle from *The Indian Annuities case*, Marceau J held that the privilege to hunt and fish represented in the Lake Huron Treaty, was not a right capable of being administered by a trustee, thus it was not an interest which could be protected by the trust doctrine. Marceau J characterised the hunting and fishing interests of *Pawis* as analogous to no more than those of a licencee. (at 213)

Again, the characterisation of the nature of the Indian interest effectively precluded a consideration of compensation (damages). The later *Guerin* case where the court found a fiduciary obligation on the Crown in its dealings with Indian lands is discussed in detail in the fiduciary duty chapter. It is unlikely that Canadian courts would continue to follow the characterisation of Indian

interests that was evident in the earlier cases if the question again arose for decision. However such an issue is unlikely to arise due to the Constitutional protection afforded to Indian rights under s 35(1) of the *Constitution Act, 1982*.

Compensation 1971-1982

Prior to the Constitutional protection of Indian rights pursuant to s 35(1) of the *Constitution Act, 1982,* there was a period following *Calder* when there was the possibility of arguing a compensation claim for the extinguishment of aboriginal rights, (aboriginal rights having been recognised in *Calder*). In *Calder*, the leading judgment of Hall J held that the Nishga peoples' claim to aboriginal title to their land in British Columbia was valid and was based upon occupancy and use since time immemorial. Further such title had not been extinguished. Given the majority finding of non-extinguishment of the aboriginal title, then the question of compensation was irrelevant.

In *Hamlet of Baker Lake*, the Inuit people sought a declaration of aboriginal title to an area around the community of Baker Lake, however the issue of compensation was not argued.

Specific issues which arose relating to compensation with respect to hunting and fishing rights are rather complex as they overlap with the issue of the validity of applicable regulation. The inter-relation of regulation and compensation is discussed in *Kruger and Manuel*.

In *Kruger and Manuel* two Indians in British Columbia were charged under s 4 of the *Wildlife Act 1966* with killing four deer during the 'closed' season. In the lower court, the Indians were acquitted on the ground that they had an aboriginal right to hunt on unoccupied land which derived from the Proclamation of 1763. (See Chapter One 'Context' regarding Canada). The protections for Indian interests in the Proclamation were later codified in the *Indian Act*. However s 88 of the *Indian Act* provided that laws of general application would be applicable to Indian peoples, save for any treaty or other statutory exceptions. At the British Columbia Court of Appeal level, the court found that while the Proclamation had the force of a statute, it was not a Canadian statute, thus the *Wildlife Act* prevailed.

In the Supreme Court it was argued in Kruger and Manuel's defence that the Court of Appeal was wrong in holding that aboriginal hunting rights could be expropriated without compensation and without explicit federal legislation.

In reply to this argument Dickson J for the Supreme Court made the following statement:

> The British Columbia Court of Appeal was not asked to decide, nor did it decide, as I read its judgement, whether aboriginal

> hunting and fishing rights could be expropriated without compensation. It is argued the loss of compensation supports the proposition that there has been a loss of rights. That does not follow. Most regulation imposing a negative prohibition affects previously enjoyed rights in ways not deemed compensatory. The *Wildlife Act* illustrates this point. It is aimed at wildlife management and to that end regulates the time, place and manner of hunting game. It is not directed to the acquisition of property.(at 437 per Dickson J).

The *Wildlife Act* as a law of general application validly regulated the hunting of game and thus no compensation was available for 'infringement' of the aboriginal right.

This case has relevance for Australia in that it discusses the extent to which general legislation can regulate native title rights. The question whether compensation may be available at common law for an 'impairment' of native title rights has not directly arisen for decision in Australia. However with respect to hunting and fishing rights, s 211 of the NTA does provide an exemption from regulatory schemes for Indigenous subsistence rights. However, if compensation under the NTA is available upon a 'similar compensable interest test', then arguably if valid regulation is applicable to ordinary title holders without giving rise to compensation then on a comparative basis it may also not be available for native title holders. However the recent *Delgamuukw* decision discussed below should be noted.

Finally, following *Calder*, the Canadian Government entered into a claims settlement process, which meant that many 'compensation' issues became part of the negotiated agreement process rather than being decided in litigation.[3]

Post-1982: Constitutional Protection

> *R. v. Sparrow* (1990) 70 D.L.R. (4th) 385.
> *R. v. Gladstone* (1996) 137 D.L.R. (4th) 648.
> *Delgamuukw v. British Columbia*, as yet unreported decision of the Supreme Court of Canada, 11 December, 1997.

Post 1982, aboriginal title and aboriginal rights were protected under s 35(1) of the *Constitution Act, 1982*. Given the protection afforded by the constitutional provisions, the issue of compensation consequent upon extinguishment effectively became redundant.

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3 See generally Chapter One 'Context' for a discussion of the claims settlement process.

There are a number of cases which consider the inter-relation of constitutionally protected aboriginal rights and regulation. In cases such as *Sparrow*, the question arose whether constitutionally protected aboriginal rights had been infringed by provincial legislation. In this situation it was held that the appropriate remedy is an exception from the infringing legislation, rather than compensation. In these regulatory contexts, provided the legislation or other statutory regulation meets the justificatory test set out in *Sparrow*, and as further developed in later cases, then the regulation will be valid. Again no issue of compensation for the 'impairment' of aboriginal rights appears to be considered in the cases.

Until the Supreme Court decision in *Delgamuukw*, there was little guidance on whether the Canadian courts may countenance the issue of compensation for 'infringements' of aboriginal rights were they called on to decide such an issue of civil compensation rather than such rights being argued as a defence to offences under regulatory regimes. As noted in the following extract from *Sparrow:*

> We acknowledge the fact that the justificatory standard to be met may place a heavy burden on the Crown. However, government policy with respect to the British Columbia fishery, regardless of s.35(1), already dictates that, in allocating the right to take fish, Indian food fishing is to be given priority over the interests of other user groups. The constitutional entitlement embodied in s. 35(1) requires the Crown to ensure that its regulations are in keeping with that allocation of priority. The objective of this requirement is not to undermine Parliament's ability and responsibility with respect to creating and administering overall conservation and management plans regarding the salmon fishery. The objective is rather to guarantee that those plans treat aboriginal peoples in a way ensuring that their rights are taken seriously.
> Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented. **[at 416-7. © Canada Law Book Company 1990]**

These comments from *Sparrow* were noted in the later *Gladstone* case but with little further direction given on the question of expropriation and compensation. Importantly, in both instances, the comments were made in the context of a determination of a fiduciary duty and s 35(1). This context may limit the direct applicability of these points to the Australian situation.

Delgamuukw (SCC)

In *Delgamuukw* 'infringement' of constitutionally protected aboriginal interests

again was at issue. The question arose in the context of whether in a claim for aboriginal title, where there was an infringement of that title, there was a basis for compensation. The facts and the central legal issues in *Delgamuukw* are discussed in the chapters on recognition and extinguishment and those sections should be read before the present discussion.

For present purposes it is interesting to note that at the Supreme Court level the claim by the appellants was one of aboriginal title to the lands with a counter claim by the British Columbia government for a declaration that the appellants held no interest in the lands or alternatively that the cause of action ought to be for compensation from the government of Canada.

The compensation question was dealt with in obiter comments given the Court's findings on preliminary issues and the direction of a new trial of the factual evidence.

Nonetheless, given the strength and uniformity of the Court's views, the comments represent one of the clearest statements of judicial opinion on compensation issues to date.

The majority of the Court held that constitutionally recognised aboriginal rights are not absolute and may be infringed by the federal and provincial governments. The 'infringement' had to be based upon a 'compelling legislative objective' and to be consistent with the fiduciary relationship between the Crown and aboriginal peoples.

Examples of 'infringing' regulation that satisfied the first arm of this justification test included general economic development of the interior of British Columbia. The second arm required a process of consultation with, and involvement of, aboriginal peoples in land use decisions. A second requirement being that the choice of land use not impair the ability of the land to sustain future generations of aboriginal peoples. The third component of the second arm rested on the recognition that lands held pursuant to aboriginal title have an economic value and consequently compensation was relevant to the issue of whether legislation could meet the justification test. As the court indicated:

> Within the analysis of justification, there are further questions to be addressed, depending on the circumstances of the inquiry. These include the questions of whether there has been as little infringement as possible in order to effect the desired result; whether, in a situation of expropriation, fair compensation is available; and, whether the aboriginal group in question has been consulted with respect to the conservation measures being implemented.(at para 166).

The majority recognised the economic component of the land and its relationship to fair compensation, especially when modern uses to which the land could be put were considered as noted in the following extract:

> Second, aboriginal title, unlike the aboriginal right to fish for food, has an inescapably economic aspect, particularly when one takes into account the modern uses to which lands held pursuant to aboriginal title can be put. The economic aspect of aboriginal title suggests that compensation is relevant to the question of justification as well, a possibility suggested in *Sparrow* and which I repeated in *Gladstone*. Indeed, compensation for breaches of fiduciary duty are a well-established part of the landscape of aboriginal rights: Guerin. In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated. Since the issue of damages was severed from the principal action, we received no submissions on the appropriate legal principles that would be relevant to determining the appropriate level of compensation of infringements of aboriginal title. In the circumstances, it is best that we leave those difficult questions to another day. **[at para 169. © Canada Law Book Company 1997]**

La Forest and L'Heureux-Dube JJ also discussed the compensation issue in the context of a justification test. The following is an extract from their judgment:

> Under the second part of the justification test, these legislative objectives are subject to accommodation of the aboriginal peoples' interests. This accommodation must always be in accordance with the honour and good faith of the Crown. Moreover, when dealing with a generalized claim over vast tracts of land, accommodation is not a simple matter of asking whether licences have been fairly allocated in one industry, or whether conservation measures have been properly implemented for a specific resource. Rather, the question of accommodation of "aboriginal title" is much broader than this. Certainly, one aspect of accommodation in this context entails notifying and consulting aboriginal peoples with respect to the development of the affected territory. Another aspect of accommodation is fair compensation. More specifically, in a situation of expropriation, one asks whether fair compensation is available to the aboriginal peoples; see *Sparrow*, *supra*, at p. 1119. Indeed, the treatment of "aboriginal title" as a compensable right can be traced back to the Royal Proclamation, 1763. The relevant portions of the Proclamation are as follows:
>
> > . . . such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them [aboriginal peoples] or any of them, as their Hunting Grounds. . .
> >
> > We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians . . . but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands. the same shal1 be Purchased only for Us, in Our Name

> . . .
> Clearly, the Proclamation contemplated that aboriginal peoples would be compensated for the surrender of their lands; see also Slattery, supra, at pp. 751-52. It must be emphasized, nonetheless, that fair compensation in the present context is not equated with the price of a fee simple. Rather, compensation must be viewed in terms of the right and in keeping with the honour of the Crown. Thus generally speaking, compensation may be greater where the expropriation relates to a village area as opposed to a remotely visited area. I add that account must be taken of the interdependence of traditional uses to which the land was put. **[at para 203. © Canada Law Book Company 1997]**

Sui Generis Nature of Aboriginal Rights

St. Mary's Indian Band and St. Mary's Indian Band Council v. The Corporation of the City of Cranbrook and The Attorney General of Canada (1997) 147 D.L.R. (4th) 385.

The trend in overseas cases, as well as in Australia, is to categorise native/aboriginal title interests as *sui generis*. The exact nature of the relationship between such *sui generis* rights, property law and compensation is yet to be fully explored. On a narrow view this characterisation would tend to preclude aboriginal title from general property compensation regimes absent specific statutory compensation schemes. Although it is noted that in Canada, such rights have constitutional protection under s 35(1) *Constitution Act, 1982*. The rights are not traditional property rights, but are collective rights and are in keeping with the culture and existence of the group: as such aboriginal rights are inalienable. The following discussion provides a brief overview of the Canadian cases discussing aboriginal title as a *sui generis* interest.

In *St. Mary's Indian Band*, the Supreme Court heard an appeal from the Court of Appeal for British Columbia concerned with a fact situation where an Indian tribe had surrendered at market value some treaty based reservation lands for an airport but with the proviso that land would revert to a reserve if not used for public purposes. The Tribe subsequently sought to enforce taxation in relation to the surrendered land. Of relevance was the question whether common law real property principles apply to the surrender of Indian reserve lands. This required the Court to consider:

> [w]hether the *sui generis* nature of Native land rights means that common law real property principles do not apply to the surrender of the Indian reserve lands under the provisions of the *Indian Act*.(at 389)

Although the comments are strictly obiter, and can in some measure be related to the particular provisions of the *Indian Act*, they were approved in *Delgamuukw* at the Supreme Court level.

In *St. Mary's Indian Band* the court stated:

> [14] I want to make it clear from the outset that native land rights are *sui generis*, and that nothing in this decision should be construed as in any way altering that special status. As this Court held in *Guerin v. The Queen*, [1984] 2 S.C.R. 335, *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654, and *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, native land rights are in a category of their own, and as such, traditional real property rules do not aid the Court in resolving this case.
>
> [15] But what does this really mean? As Gonthier J. stated at paras. 6 and 7 in *Blueberry River*, it means that we do not approach this dispute as would an ordinary common law judge, by strict reference to intractable real property rules . . . (at 391)

The Court went on to quote with approval from *Blueberry River Indian Band v. R* , as noted in the following extract:

> An intention-based approach offers a significant advantage, in my view. As McLachlin J. observes, the law treats aboriginal peoples as autonomous actors with respect to the acquisition and surrender of their lands, and for this reason, their decisions must be respected and honoured. It is therefore preferable to rely on the understanding and intention of the Band members in 1945, as opposed to concluding that regardless of their intention, good fortune in the guise of technical land transfer rules and procedures rendered the 1945 surrender of mineral rights null and void. In a case such as this one, a more technical approach operates to the benefit of the aboriginal peoples. However, one can well imagine situations where that same approach would be detrimental, frustrating the well-considered plans of the aboriginals. In my view, when determining the legal effect of dealings between aboriginal peoples and the Crown relating to reserve lands, the sui generis nature of aboriginal title requires courts to go beyond the usual restrictions imposed by the common law, in order to give effect to the true purpose of the dealings. **[at 391-2. © Canada Law Book Company 1997]**

Whether such an approach, which displaces 'common law property rules', would be favoured in Australia remains unresolved. Further the advocacy of the approach depends in large measure upon the possibility of finding a fiduciary obligation on the part of the Crown to protect such *sui generis* interests. This factor may limit the applicability to Australia. However of note, in this context is the affirmation of the *sui generis* nature of native title interests in *Wik Peoples*

v Queensland 141 ALR 129. The majority judgments in that case also looked to a consideration of the development of the specific statute under which the pastoral lease was granted rather than a reliance on the common law property concept of a lease.

Further, if aboriginal rights as *sui generis* interests are inalienable, it would suggest that the application of market standards of valuation which rest on concepts of alienability i.e., the ability to sell the interest, may be somewhat artificial. As the majority noted in *Delgamuukw:*

> What the inalienability of lands held pursuant to aboriginal title suggests is that those lands are more than just a fungible commodity. The relationship between an aboriginal community and the lands over which it has aboriginal title has an important non-economic component. The land has an inherent and unique value in itself, which is enjoyed by the community with aboriginal title to it. The community cannot put the land to uses which would destroy that value.
>
> I am cognizant that the sui generis nature of aboriginal title precludes the application of "traditional real property rules" to elucidate the content of that title (St. Mary's Indian Band v. Cranbrook (Citv), l 1997] 2 S.C.R. 65, at para. 14). (at para 130)

As to the *sui generis* nature of aboriginal rights and title see also *Delgamuukw v. R.* (1993) 104 D.L.R. (4th) 470, *Delgamuukw v. British Columbia* (1997), as yet unreported decision of the Supreme Court of Canada, 11 December, 1997 and *Guerin v. R* (1984) 13 D.L.R. (4th) 321. These are discussed in Chapter Two.

Applicability

In conclusion, the case law dealing with compensation issues per se in Canada, largely reflect:

- the Constitutional protection of s 35(1) of the *Constitution Act*, 1982 which means that aboriginal rights cannot be extinguished - thus effectively precluding questions of compensation,
- the earlier characterisation of aboriginal rights at law as 'non-property', and thus not giving rise to a compensable interest. However the more recent status of aboriginal rights in Canada contrasts favourably with that in the United States where aboriginal title largely continues to be held to be a permissive occupancy,
- the prominence of claims which argue for breach of a fiduciary duty on the part of the Crown in its dealings with Indian land and aboriginal rights. This

situation has tended to limit direct claims for compensation as distinct from claims for other remedies, but the latest *Delgamuukw* decision indicates that compensation must be considered as pertaining to that fiduciary relationship, and

- most significantly, the more extensive negotiated settlement claims process.

United States

Overview

> *Tee-Hit-Ton Indians v United States* 348 U.S. 272 (1955).

Under United States law, compensation is only available for the taking of 'recognised title'.[4] A 'taking' refers to where the Federal government acquires territory/property. The takings clause of Fifth Amendment of the United States Constitution provides that, '. . . nor shall any private property be taken for public use, without just compensation'. The characterisation of aboriginal title as unrecognised, i.e., non-property in *Tee-Hit-Ton*, effectively precluded constitutional protection from such title.

Aboriginal title was 'recognised' where there had been Congressional recognition of a tribe's right to permanently occupy land either by executive order or, more usually, by way of statute. In contrast, aboriginal title is held to be a revocable permissive right of use and occupancy of traditional territories.[5] The view that 'permissive Indian occupancy' may be extinguished by Congress in its own discretion rests on a well established line of cases, which were discussed in Chapter Five. This is also the position at common law in Australia, although the *Racial Discrimination Act 1975* (Cth) and the *Native Title Act 1993* (Cth) now impose some restraints on governments' ability to extinguish native title. As the sovereign power can revoke a 'permissive occupancy' at any time, no compensation is payable, unless legislation specifically provides for payment. Similarly, Mason CJ, with McHugh J, and Brennan J held in *Mabo (No. 2)* that no compensation was payable for the extinguishment of native title.

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4 The distinction between recognised and unrecognised title is discussed in Chapter Two 'Recognition'.

5 See Chapter Two 'Recognition' for further detail.

State Acquisition of Aboriginal Title

> *Tuscarora Nation of Indians v. Power Authority*, 257 F.2d 885 (1958).

It appears that states cannot acquire Indian land for public purposes by appropriation without federal government approval. In *Tuscarora Nation of Indians v. Power Authority*, 257 F.2d 885 (1958), the Court of Appeals for the Second Circuit rejected the claim that the *Non Intercourse Act* did not apply to the State of New York. New York based its claim on the view that as one of the original 13 States, it never surrendered to the United States its power to 'condemn', or acquire, Indian lands. The Court of Appeals also held that while the United States ceded civil jurisdiction over Indian reservations to the State of New York, it had expressly excepted from this transfer of power, the alienation of reservation lands, a matter over which the United States had reaffirmed its paramount authority. Thus any acquisition of Indian lands and consequent rights of compensation appear to be governed by US Federal law.

The Right to Compensation for Indian / Aboriginal Title

> *Oneida Indian Nation v. County of Oneida* 414 U.S. 661 (1974) (*Oneida I*).
>
> *Shoshone Tribe v. United States*, 299 U.S. 476, 497.
>
> *Wahkiakum Band v. Bateman*, 655 F.2d 176, 180 (9th Cir. 1981).

Several early cases appeared to allow compensation for extinguishment of Indian/aboriginal title. However, the United States Supreme Court has clearly held that this is not the case. In *Tee-Hit-Ton* the United States Supreme Court determined that a group of Native Americans were not entitled to compensation for a 'taking' by the United States government of timber from traditional lands without a legislative directive to pay compensation. The compensation implications of the distinction between recognised and unrecognised interests is discussed in an extract from *Tee-Hit-Ton* as follows:

> The line of cases adjudicating Indian rights on American soil leads to the conclusion that Indian occupancy, not specifically recognised as ownership by action authorised by Congress, may be extinguished by the Government without compensation. Every American schoolboy knows that the savage tribes of this continent were deprived of their ancestral ranges by force and

> that, even when the Indians ceded millions of acres by treaty in return for blankets, food and trinkets, it was not a sale but the conquerors' will that deprived them of their land. The duty that rests on this Nation was adequately phrased by Mr. Justice Jackson in his concurrence, Mr. Justice Black joining, in *Shoshone Indians v. United States*, 324 U.S. 335, at 355, a case that differentiated "recognized" from "unrecognized" Indian title, and held the former only compensable. (at 288-90)

Wahkiakum band concerned a fishing right in the Columbia river. The finding in *Tee-Hit-Ton v. United States* 348 U.S. 272 (1954), that such an aboriginal right was a permissive occupancy, was applied to find that there was no legally enforceable obligation to pay compensation.

See also *Miami Tribe of Oklahoma v United States* 146 Ct Cl 421, 175 F Supp 926 (1959).

Takings Doctrine and Compensation for Indian Title

Tee-Hit-Ton v. United States 348 U.S. 272 (1954).

As this statement by the court in *Tee-Hit-Ton* demonstrates:

> No case in this Court has ever held that taking of Indian title or use by Congress required compensation. The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization. They seek to have the Indians share the benefits of our society as citizens of this Nation. Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability. (at 281-282).

In *Tee-Hit-Ton Indians*, a group of Alaskan Indians belonging to the Tlingit Tribe, claimed compensation for a taking by the United States government of timber from tribal lands in and around the Tongass National Forest. The compensation claimed did not arise from any statutory provision directing payment.(at 273).

The Supreme Court considered the nature of the appellant's (Tlingit's) interest in the land as a prerequisite to determining whether there had been a compensable taking. The appellant's claimed 'full proprietary ownership' of the land, or at least a recognisable right to unrestricted occupation and use. In relation to this claim the court observed:

> Either ownership or recognized possession, petitioner [the Tlingit] asserts, is compensable. If it has a fee simple interest in

> the entire tract, it has an interest in the timber and its sale is a partial taking of its right to "possess, use and dispose of it." *United States v. General Motors Corp.,* 323 U.S. 373, 378. It is petitioner's contention that its tribal predecessors have continually claimed, occupied and used the land from time immemorial; that when Russia took Alaska, the Tlingits had a well-developed social order which included a concept of property ownership; that Russia while it possessed Alaska in no manner interfered with their claim to the land; that Congress has by subsequent acts confirmed and recognized petitioner's right to occupy the land permanently and therefore the sale of the timber off such lands constitutes a taking *pro tanto* of its asserted rights in the area.(at 277).

Despite the appellant's claim of continual occupation and use, and tribal observance of 'property ownership', the Supreme Court held that unrecognised Indian title, as was the case here, was mere possession not specifically recognised as ownership of property by Congress. The Court examined relevant statutes and found no intention by Congress to grant any permanent rights to the Indians. The court confirmed that after conquest the Indian Nations were permitted to occupy portions of territory over which they had previously exercised 'sovereignty'. However it was a right which could be terminated without any legally enforceable obligation to compensate the Indians.(at 277).

In reaching their decision in *Tee-Hit-Ton*, the majority of the Court distinguished the decision in *United States v Alcea Band of Tillamooks* 329 US 40 (1946), where compensation was paid to an Indian group for an extinguishment of aboriginal title. In *Tillamooks (No. 1)*, the court had found that the extinguishment of aboriginal title was governed by the takings clause of the US Constitution. This earlier case was distinguished in *Tee-Hit-Ton* on the basis that any compensation did not arise from the position at common law but was based upon a statutory direction to pay. The *Tee-Hit-Ton* court held that this, '. . . leaves unimpaired the rule derived from *Johnson v. McIntosh* that the taking by the United States of unrecognized Indian title is not compensable under the Fifth Amendment'.(at 284)

In conclusion the majority in *Tee-Hit-Ton* held:

> In the light of the history of Indian relations in this Nation, no other course would meet the problem of the growth of the United States except to make congressional contributions for Indian lands rather than to subject the Government to an obligation to pay the value when taken with interest to the date of payment. Our conclusion does not uphold harshness as against tenderness toward the Indians, but it leaves with Congress, where it belongs,

> the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land rather than making compensation for its value a rigid constitutional principle. (at 290 -291).

There was a strong dissent in *Tee-Hit-Ton* where Douglas J found that the Indian rights to occupy and use areas of Alaska had been recognised by Congress in the first *Organic Act* for Alaska which became a law on May 17, 1884, 23 Stat. 24. Section 8 of that Act provided, 'The Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress'.(at 295).

While the distinction between recognised and unrecognised title in *Tee-Hit-Ton* was crucial to the finding that no compensation was due, it should be noted that in 1946 the US Congress enacted the *Indian Claims Act* which allows for recovery for takings of non-recognised, aboriginal title lands. (cl 3-5). *Indian Claims Commission Act* of 1946, Pub. L. No. 726, ch. 959, @ 2(5), 60 Stat. 1049.

The distinction between recognised and unrecognised aboriginal title is unlikely to arise in the Australian native title context. However, the *Tee-Hit-Ton* line of cases was followed in *Mabo (No. 2)* to arrive at the conclusion that no compensation was payable upon extinguishment of native title. Nonetheless, the *Tee-Hit-Ton* decision, while perhaps explicable on the basis of contemporary political and historical grounds in the United States, serves to reinforce the importance of the *Racial Discrimination Act 1975* (Cth), in the Australian context, as a basis for the payment of compensation.

Compensation and Tribal Groups

> *Temoak Band of W. Shoshone Indians v. United States*, 593 F.2d 994 (1979).
> *United States v. Dann*, 706 F.2d 919, 922 n. 1 (9th Cir. 1983).

To whom compensation is available for extinguishment of aboriginal title is a significant issue in the circumstances where there is a statutory direction to pay. As the concept of aboriginal title derives from tribal occupancy and use, then it follows that it is the collective group which can receive compensation and not individuals. There is also the difficulty of establishing which group has the authority to represent the interests of the tribal group. This situation has caused

considerable division during the claims process in the United States, and has parallels with the Australian situation under the current *Native Title Act.* The two cases given above are indicative of these issues. The *Dann case* in particular highlights the problems faced by individuals who were occupying traditional lands and sought to assert that their aboriginal title was not extinguished. The land however was part of a claim by the western Shoshone tribes. A determination was made that aboriginal title was extinguished and compensation was payable to the Western Shoshone tribe based upon the *Indian Claims Act* process. Eventually the Dann sisters were able to retain a small part of the lands that they had claimed under aboriginal title.

Compensation for Actions of Third Parties

> *Edwardsen v. Morton* 369 F Supp 1359 (1973) (D.D.C. 1973)
> *United States v. Atlantic Richfield Co.*, 612 F.2d 1132, 1134 (9th Cir. 1980)

Another potential source of compensation for aboriginal title occurs where third parties, rather than federal government bodies, infringe aboriginal title interests.

Edwardsen concerned the effect of the *Alaska Native Claims Settlement Act* of 1971 (ANCSA) on claims by Alaskan Natives for aboriginal title and trespass on lands they claimed to hold under aboriginal title. The object of the ANCSA was to extinguish aboriginal rights claims in exchange for a monetary settlement package. The indigenous claimants argued that exempted from the operation of ANCSA were claims for trespass in the pre-settlement period when the government had issued leases and permits to third parties (the lands in question were rich in oil deposits). The Court stated:

> As explained earlier, until their possessory rights based on use and occupancy were extinguished by Congress, plaintiffs had a right to be protected against third party intrusions. . . If plaintiffs were in fact disturbed in their use and occupancy by trespassers . . . then there accrued a cause of action for trespass. . . (at 1378)

The Court found that the right to be compensated for the trespass was still available as the right was established prior to the ANCSA. In effect the court appeared to separate the question of the extinguishment of aboriginal title over land from the right to seek compensation for trespass to traditional lands. Further the court held that the accrued right was in the nature of an interest protected under the Fifth Amendment of the US Constitution.

However a different conclusion on similar facts was reached in the later case of

United States v. Atlantic Richfield Co. In that case, the court adopted a statutory construction approach to the ANCSA by which the Court found that the Act did retrospectively extinguish any claims by Native Alaskans for trespass to aboriginal lands. Interestingly, the court declined to consider the Fifth Amendment Constitutional question, leaving that issue to be decided in a pending Court of Claims decision. The Court of Claims relied on *Tee-Hit-Ton* and held that extinguishment of the trespass claims was constitutional. The court decided that neither the claim of aboriginal title nor the trespass claim were protected property interests within the meaning of the Fifth Amendment.

Compensation for Extinguishment / Taking of Indian Title on Statutory Basis

There are a number of ways in which US statutes provide for payment of compensation. These include:

- compensation pursuant to special jurisdictional acts (note there can be a claim for compensation in respect of aboriginal title in this instance);
- claims under the Indian Claims Commission and subsequently the Court of Claims;
- specific statutes authorising compensation settlements.

Special jurisdictional acts

> *Tlingit & Haida Indians of Alaska v. United States*
> 177 F. Supp. 452, 147 Ct. Cl. 315 (1959).

The US Congress enacted legislation establishing the Court of Claims in 1855 for those with claims for money damages, including compensation for property seized by the government. Subsequently, a legislative amendment excepted any claims based on treaties with Indian Nations and foreign nations from the court's jurisdiction (power to decide). Indian Nations with land claims could only lobby the US Federal Congress to obtain relief. During this period, which lasted until after World War II, some Nations were able to obtain 'special jurisdictional acts' allowing them to bring claims in the Court of Claims seeking compensation for a variety of wrongs, including seizures of land. But the Court of Claims interpreted the scope of these special acts so narrowly that few tribes received compensation.[6]

The *Tlingit and Haida* case is an example of a claim brought under a special jurisdictional act.

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[6] N. Newton, 'Compensation, Reparations, & Restitution: Indian Property Claims in the United States', (1994) 28 *Georgia Law Review* 453 at 467.

The Tlingit and Haida Indians of Alaska brought an action under the special jurisdictional act, Act of June 19, 1935, 49 Stat. 388, ch. 275. This Act gave the Court of Claims power to hear, examine, adjudicate and enter judgment on all claims which the Indians may have against the United States for lands taken from them by the United States without compensation, or for the failure or refusal of the United States to protect the interest of the Indians in their lands or other property and for the loss of the same at the time of the purchase of Alaska in 1867 or at a later date.

An earlier trial ascertained that the claimants had Indian title at the time of the Alaska purchase by United States from Russia, and the extent and nature of such rights. The following is an extract from *Tlingit and Haida Indians*:

> The special jurisdictional act now before us authorizes these Indians to bring suit against the United States on all claims, legal or equitable, which they may have for lands or other tribal or community property rights "taken from them by the United States without compensation therefor," and that the loss to the Indians of their right, title, or interest, "arising from occupancy and use,' in such lands or other tribal or community property without just compensation therefor, shall be held by this court to be sufficient ground for relief under the act. The act also authorizes the claimant Indians to bring suit on all claims which they may have arising out of the failure or refusal of the United States to protect their interests in land or other tribal or community property in Alaska and for the loss of the use of such property.
> [8] The events described above as taking place between 1884 and 1900 do not, except for the setting apart of the reservation on the Annette Islands, represent any outright takings by the United States of Tlingit and Haida land or property rights. However, the manner in which the Government officials administered the Organic Act of 1884, and the actual provisions of subsequent legislation relative to land in Alaska, made it possible for white settlers, miners, traders and businessmen, to legally deprive the Tlingit and Haida Indians of their use of the fishing areas, their hunting and gathering grounds and their timber lands and that is precisely what was done. These Indians protested to the Government and their protests went unheeded. They had no weapons with which to combat Navy gunboats which had burned their villages when they attempted to take the law into their own hands. . . Whenever white settlers and businessmen entered their lands for the purpose of settlement or exploitation, the Indians were forced to move out. . . Thus it seems clear that the United States both failed and refused to protect the interests of these Indians in their lands and other property in southeastern Alaska within the meaning of section 2 of the special jurisdictional act and that the United States is liable under such act to compensate the Indians for the losses so sustained. . .
> In none of the acts authorizing the setting apart of these lands as public reservations was there any recognition of the Tlingit or Haida rights of use and occupancy although the rights of white settlers in the areas were protected. These acts on the part of the Government represent takings of land and water aboriginally used and occupied by the Tlingit and Haida Indians for which they are entitled to compensation under the terms of the jurisdictional act. **[at 467-8].**

Note that the finding in this case rests upon the particular statute conferring jurisdiction on the Court of Claims to consider compensation for aboriginal title and does not rely on compensation being available at common law.

The Indian Claims Commission

> *Otoe & Missouria Tribe v. United States* 131 F Supp 265 593 (1955).

Following World War II there was a strong movement in the United States for a fairer treatment of Native American peoples. The previous process where Indian nations had to rely primarily on special jurisdictional acts to receive compensation had produced a limited and inequitable distribution of compensation to Indian peoples.[7] In 1946 the Indian Claims Commission [ICC], which was a more comprehensive method to settle all claims, was introduced. Despite its limitations, the ICC became the main legal forum in which Indians could bring an action against the Federal government. The legislation which established the Commission provided a catch all phrase to allow claims to be brought on the basis of 'fair and honourable dealings that are not recognised by any existing rule of law or equity'.

The legislative history of the *Indian Claims Commission Act* indicates that Congress intended the ICC to serve several purposes. One of these aims was to settle all Indian grievances with finality. Newton argues that the ICC did provide a viable legal forum for Indian groups, but it denied individual Indians any opportunity to present claims. Furthermore, the ICC's group representation standard for claimants, and its reluctance to permit intervention by other interested Indian groups, severely restricted the ICC's effectiveness.

In *Otoe & Missouria Tribe* the Court of Claims, in a review of the *Indian Claims Commission Act* found that the ICC had the power to award compensation for the extinguishment of aboriginal title. The court distinguished *Tee-Hit-Ton v. United States* 348 US 272 (1954) which found that such claims did not constitute takings under the Fifth Amendment.

Statutory Compensation provided for in settlements

Another important statutory basis for granting compensation has been specific packages such as the *Alaska Native Claims Settlement Act* of 1971, 43 U.S.C. @ 1601 - 1628, and *Puyallup Tribe of Indians Settlement Act* of 1989 25 U.S.C. @ 1773. Since 1970 there have also been instances where traditional territories held as public domain land have been returned to Indian Tribes, such as the

7 *Ibid,* at 467.

return of the Blue Lake to the Taos Pueblo in New Mexico.[8]

Compensation and the payment of interest

> *United States v. Klamath Indians*, 304 U.S. 119, 123 (1938).
> *United States v. Alcea Band of Tillamooks*, No 2 341 U.S. 48, 49 (1951) (*Tillamooks No. 2*).
> *United States v Sioux Nation of Indians*, 448 U.S. 371 (1980).

In *United States v. Alcea Band of Tillamooks*, the court found that with respect to compensation and interest to be paid thereon that the 'traditional rule' is that interest is not to be awarded on claims against the United States without an express statutory provision. The 'only exception arises when the taking entitles the claimant to just compensation under the Fifth Amendment' (at 49).

In *United States v. Klamath Indians*, in a dispute over the ownership of timber in a reservation, the Court stated: 'The established rule is that the taking of property by the United States in the exertion of its power of eminent domain implies a promise to pay just compensation, i.e., value at the time of the taking plus an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking'.(at 124)

The issue of whether interest is payable arose again in *Sioux Nation of Indians*. This case was part of a long series of litigation and lobbying by the Sioux Nation relating to an 1877 Act which the Indians claimed had effected a taking of tribal property which had been set aside by the Fort Laramie Treaty. The history of the claims pursued by the Sioux nation is illustrative of the many obstacles Indian tribes faced in bringing actions for compensation. The right to compensation relied upon a treaty. Further, for the Sioux to bring the action required a special statute.

A statute in 1978, authorized the Court of Claims to review the merits of the Sioux Indians' Black Hills claim for compensation and interest payable. Pursuant to this statute, the Court of Claims affirmed a finding by the Indian Claims Commission that the Congressional Act of 1877 was a taking of Indian property, compensable by the value at the date of taking plus interest. To arrive at this conclusion the court applied the 'Fort Berthold test' deriving from *Fort Berthold Reservation v United States* 390 F. 2d 686 Ct Cl. (1968) to distinguish between a taking for which interest is owed and a mere breach of trust for which

8 *Ibid*, at 476.

no interest is owed. The court found that the United States government had not acted like a guardian of Indian interests but as a sovereign power. The court also considered whether the US Government in dispensing its obligations under the treaty had given 'adequate consideration' for the property acquired under the treaty.

Valuation

> *Otoe & Missouria Tribe v. United States* 131 F Supp 265 593 (1955), cert den 350 US 848.
>
> *Tlingit & Haida Indians v. United States*177 F. Supp. 452 (1959).

If a right to compensation for extinguishment of aboriginal title can be established because of statutory authorisation, the question of valuation of the aboriginal title arises. An example of one form of statutory authorisation is *Alaska Native Claims Settlement Act* (Claims Settlement Act), 43 U.S.C. § 1601-1628 where there was the extinguishment of Native claims based on aboriginal right in return for a grant of $962 500 000 and 40 000 000 acres of land. See *United States v. Atlantic Richfield*, 612 F.2d 1132, 1134 (9th Cir. 1980).

However, in more general terms, market valuations for compensation purposes have proved problematic. Valuation can be according to fair market value, but most courts have recognised that effectively there is no market by which to measure valuation as aboriginal title can only be alienated to the United States Government. Essentially the courts have to estimate a fair market value of the land in the absence of such a market.

In *Otoe & Missouria Tribe v. United States* the court rejected the notion that the value of Indian lands must be based on market value alone. The Court stated that factors to be taken into account in determining compensation included:

- sales and valuation of neighbouring lands;
- natural resources of the land, including its climate, vegetation, timber, game and wildlife;
- mineral resources, including the question of whether they were of economic value at the time of extinguishment, or whether they were merely of potential value; and
- markets and transportation for the above.

The valuation of the land is that of land held in fee simple, not the value of

subsistence rights. On this point see *Tlingit and Haida Indians v. United States*. (There is a useful discussion of the process of valuation at 783-786.) This valuation is adopted even though aboriginal title is only a right of occupancy. The courts have stated in this context that the right of perpetual and exclusive occupancy of land is not less valuable than full title in fee simple. This principle derives from *United States v. Shoshone Tribe of Indians.* Although this case concerned a taking of recognised title (in this case treaty-title) the courts have held that Indian title should be valued in the same way, regardless of whether it is 'mere' aboriginal title or held under fee simple title. On this point also include *Miami Tribe of Oklahoma v United States*, 146 Ct Cl 421, 175 F Supp 926 (1959) and *Tlingit & Haida Indians* (at 782).

Valuation and mineral rights

> *Tlingit and Haida Indians v. United States* 182 Ct. Cl. 130, 389 F.2d 778 (1968).
>
> *The United States v. Fort Sill Apache Tribe of Okalahoma and the Chiricahua Apache Tribe, et al*, 480 F.2d 819 202 Ct.Cl. 134 (1973).

In *Fort Sill Apache Tribe*, the Apache Tribes claimed compensation for extinguishment of their aboriginal title to lands in the Arizona/New Mexico area. At issue was the date of the taking, see below, and the method of valuation of the aboriginal lands for which compensation was payable. The United States government specifically challenged the method for calculating the mineral interests of the claimants. Rights to minerals may be included in a claim for aboriginal title in the United States.

With respect to valuing the mineral interests (the lands contained significant mineral wealth, principally oil) the Court adopted a method based upon the *Tlingit and Haida* case. The Indian Claims Commission valued the mineral interest based on capitalised anticipated net profits from mining enterprises rather than on the basis of capitalised hypothetical royalty payments. The Court of Claims confirmed the acceptability of this method.

In the *Tlingit* case, the Native Alaskan people argued under a special jurisdictional act (see above) that the claim for compensation included a claim for certain gold mines and mineral rich lands. In relation to valuing this interest the Court stated:

> [26] The value of the land includes the fair market value of its mineral content. . . Mineral value is established by adequate proof of a fair market value indicating that the removal of the

> deposit would be a profitable venture and would not involve exorbitant expense.(at 790)

The date for valuation

> *Turtle Mountain Band of Chippewa Indians v United States* 203 Ct. Cl. 426: 490 F.2d 935 (1974*).*
>
> *Simon Plamondon, On Relation of Cowlitz Tribe of Indians v. United States* 467 F.2d 935: 199 Ct. Cl.523 (1972).
>
> *Gila River Pima- Maricopa Indian Community, et al v. The United States*, 494 F. 2d 1386: 204 Ct. Lc. 137 (1974).
>
> *Pawnee Indian Tribe v. United States* 301 F2d 667 (1962).

There is considerable case law on the manner of determining when a 'taking' occurred, on this point see the *Turtle Mountain case*. As much of the relevant case law largely resolves to factual issues based on specific treaties or reservations, no extensive discussion is included here. With respect to aboriginal/Indian title, compensation appears to be calculated from the date of the taking or extinguishment, and interest is not payable absent statutory authorisation. For a discussion of the date of taking/extinguishment issues see *Pawnee Indian Tribe v. United States.*

For a discussion of the context dependent nature of fixing a taking date see the discussion in *Gila River Pima- Maricopa Indian Community.* In that case the Court of Claims stated:

> But there is no "legal" or mechanical or guaranteed method for fixing an exact date . . . The determination of the precise point is a matter of judgment, selection, and evaluation, resting on an overall appraisal of several facts and factors . . . nor is there any dispositive judge created rule of decision.(at 1393)

Interestingly, the Court was undecided whether the determination of a taking date was a question of law, fact or a mixed law/fact question. (at 1393). Using this method the Court confirmed the 1883 date chosen by the Indian Claims Commission when the Indians' reservation was enlarged, as the taking date for compensation purposes.

In the *Cowlitz* case the Tribe claimed compensation in the Indian Claims Commission for the extinguishment of their aboriginal title to their traditional lands west of the Cascade Mountains. Initially the Commission determined the date of taking (i.e., extinguishment) to be March 1855 but after a re-hearing this

was moved to 1863. Upon an appeal where the effect of an Act of Congress and a presidential proclamation were considered, it was held that the appropriate date was 1863. The Court of Claims held that, 'the United States deprived the Cowlitz Tribe of its aboriginal Indian title as of March 20, 1863, without payment of any consideration therefor'. Accordingly, the Cowlitz could recover and the claim was returned to the Indian Claims Commission for final determination based on this finding.

For a discussion of the inter-relation of setting a date of taking and whether interest is payable see, above, *United States v. Sioux Nation of Indians* 448 U.S. 371 (1980). Note in that instance the interest related to compensation for recognised title.

Applicability to Australia

- It is clearly established that at common law in the United States there is no compensation for extinguishment of 'unrecognised' Indian title. However, given trends in more recent decisions it is unclear whether the *Tee-Hit-Ton case* would be decided in a similar manner should it again arise for consideration. Nevertheless, the *Tee-Hit-Ton* view accords with the majority finding in *Mabo (No. 2)* that compensation is not available for extinguishment of native title.
- Thus, because aboriginal Indian title is not a 'property' interest it does not come within general constitutional takings/property compensation regimes without a statutory basis directing payment of compensation. On this point see the discussion of the characterisation of aboriginal title in early Canadian cases and the more recent designation of aboriginal title as a *sui generis* interest. Consistent with this view, native title in Australia is also understood as a *sui generis* interest. However the protection for native title interests via the operation of the *Racial Discrimination Act* in Australia, and in Canada through constitutional protection, afford more protection for aboriginal title than in the US, absent any specific statutory compensation obligation. This greater degree of protection has particular implications for compensation regimes. In US cases where there is a statutory basis of compensation, the basis for compensation does have parallels with the similar compensable interest test currently included within the *Native Title Act 1993* (Cth).
- If in Australia it is accepted that the *Native Title Act* includes a statutory direction to pay compensation arising in set situations where native title (presuming a determination of title is made) is extinguished, then the US case law on compensation for both Aboriginal and recognised title is relevant on questions such as the 'right to compensation', the elements of the title which are to be valued, to whom compensation is payable, and the payment of interest, etc. Note, however, that much of the extensive US law on date of

extinguishment is of limited relevance given that the date for compensation is specified under the NTA. Nevertheless, these cases do provide rich factual material on the type of compensation claims that have been made. It should be noted that the statutory frameworks for compensation are specific to each jurisdiction so there cannot be direct equivalence between US cases and the Australian situation.

- Further, the determinations on compensation for extinguishment of aboriginal title based on a statutory direction to pay such as that arising under the special jurisdictional acts, in the Indian Claims Commission and in the Court of Claims can offer valuable guidance on issues of methods of valuation of aboriginal title and the time for calculation of value. Notably, there appears little discussion of any special value based on the Indian relationship with traditional territories.

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New Zealand

Overview

In New Zealand there is comparatively little case law on compensation for aboriginal title and rights. The dearth of case law derives from factors, some of which find parallels in Canada and the United States, but most of which relate specifically to the particular circumstances existing in New Zealand. These factors are outlined briefly below as most have been considered in detail in the context section on New Zealand.

- The existence of the Treaty of Waitangi is an important point of departure from the situation in other common law jurisdictions. Recent judicial and political trends have acknowledged that the Treaty gives rise to a partnership between Maori and Pakeha. It is increasingly being acknowledged that under the terms of the Treaty, Maori retained control over their traditional territories and waters. Thus 'rights to compensation' where there has been an appropriation of aboriginal title need to be understood in the context of

Maori claims for redress in relation to breaches of the Treaty. The existence of the Waitangi Tribunal which was established in 1975 with its specific objective of hearing and reporting on claims by Maori that they have been or may be 'prejudicially affected' by laws, actions and policies of the Crown contrary to the principles of the Treaty of Waitangi also needs to be considered.

- Moreover, the existence of the Treaty of Waitangi is significant as a manifestation of the Imperial policy to recognize the fact that the indigenous inhabitants were in possession of their lands and that land was to be acquired by purchase. In view of this early policy, many claims to compensation were obviated unless related to subsequent breaches of Treaty rights. Such transactions have traditionally been held to be non-justiciable (not able to be tried by a court) by the New Zealand courts.

- Following the Maori Land Wars there was the confiscation of large amounts of Maori land following the passage of the *New Zealand Settlements Act* 1863. A recent case, *Faulkner v. Tauranga District Council* [1996] 1 N.Z.L.R. 357 considered the questions of extinguishment of customary title by an Order in Council pursuant to the *Settlement Act*. The court found that customary title had been validly extinguished and that the land in question was now held as Maori freehold land. Indirectly, the court considered the compensation made to Maori in terms of reserved lands under the New Zealand *Settlement Act* and associated regulation.

- Under the jurisdiction of the Native Land Court, established in 1865, the amount of land held under customary title was significantly reduced following the transfer of much customary aboriginal title land to freehold title. As noted in the context section, only 4.5% of New Zealand remains under customary Maori title.

- Following the recognition of aboriginal rights in the offshore in *Te Weehi* the New Zealand government embarked on a process of claims settlement and the inclusion of Maori interests in resource ownership and allocation.[9] Many compensation issues were thereby included in the claims settlement process rather than being pressed through litigation.

Having outlined the major reasons for the paucity of cases examining the right to compensation, the following discussion makes some general points about how compensation issues have been considered by the courts.

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[9] See the *State Owned Enterprises Act* and the Sealord's Deal, which are discussed in Chapter One 'Context'.

Extinguishment of 'aboriginal' Maori rights

> *Wanganui District Council v Tangaroa High Court, Wanganui* [1995] 2 N.Z.L.R. 706.

In *Wanganui District Council*, the Council sought a declaration as to title to a site in dispute and an injunction directing people to leave the site and to be able to remove the buildings. The site in question it was argued had been part of an original area of land purchased by the New Zealand Company from Maori Chiefs. The defendants alleged that Moutoa Gardens was at one time a Maori pah containing a marae, that there had been no initial purchase from Maori of that area and that the native customary title was not extinguished. Further, Maori people asserted that a trust had been created for Maori occupation.

In relation to the customary title it was found that the occupation of the land by Maori had been sporadic and shared with others. There had not been occupation adverse to the plaintiff's rights in terms of s 27 of the *Land Transfer Act 1952*. The Court also held that the evidence did not disclose that a trust for Maori occupation had been created.

This case is significant, from the point of view of compensation, because it is a fairly recent example of a claim based in customary title. Moreover, unless the Court finds that such title can exist and was not extinguished by valid purchase, then the compensation question simply will not arise.

Compensation and regulation

> *Haddon v Auckland Regional Council* (1994) N.Z.R.M.A. 49.

In *Haddon* the interplay of Maori stewardship over resources and the operation of the *Resources Management Act* 1991 was at issue. Ownership of sand and surrounding waters on a customary basis was claimed by the plaintiff under the Treaty of Waitangi. There was a claim pending before the Waitangi Tribunal. Permits had been granted under the *Resource Management Act 1991* for work that could potentially affect this area. The question then arose as to whether the grant of permits should await determination of a claim by Waitangi Tribunal as to whether Maori customary rights extended to this area.

In relation to the questions of ownership and compensation, the court was of the view that it did not have jurisdiction to decide questions of ownership of the resource and compensation by the Crown. Compensation here was potentially

through provision of royalties for any possible breach, by its purported expropriation of the hapu's coastal resources. The Court determined that such issues concerning the Crown in its Executive capacity and Maori people should be decided in other forums, i.e., the Waitangi Tribunal. While the court in this instance declined to decide both compensation and ownership questions, it highlights the emerging issues for possible joint management of resources and for compensation where government activity impinges upon customarily held areas. Similar trends in the management of resources and the role of native title holders are apparent in Australia.

Valuation

> *West Coast Settlement Reserve Lessees Association Inc v Valuation Appeal Committee for the West Coast Settlement Reserves* [1997] 1 N.Z.L.R. 413.
>
> *Proprietors of Rotoma No. 1 Block Inc v Valuer-General* [1996] 3 N.Z.L.R. 75.
>
> *Mangatu Incorporation v Valuer-General* [1996] 2 N.Z.L.R. 683.

There appear to be few cases that directly address the value of aboriginal title or aboriginal rights when such title or rights are extinguished or impaired. The following cases are not and exhaustive list but are illustrative of the manner in which Maori customary title, and Maori freehold land has been valued.

In *West Coast Settlement*, the valuation concerned was in relation to the rental of Maori land. As part of this process there had to be a determination of the unimproved value of the land. The central issue was whether the valuation must allow for the present-day value of timber already removed and how any expenses involved in its removal are to be taken into account. The case also considered the *Maori Reserved Land Act 1955*, ss 64, 65, 70 and 74 and the *Valuation of Land Act 1951*, ss 2 and 65. Essentially the unimproved land value was to be as given under the *Valuation of Land Act.*

In *Proprietors of Rotoma No 1 Block Inc*, the issue was the legal test for determining the unimproved value of certain Maori land at Lake Rotoma. There was a special government valuation according to section 249 of the *Maori Affairs Act 1953*. The Maori corporation brought an objection in relation to this valuation with the central issue being whether a market value applied.

In *Mangatu Incorporation* again the issue of the definition of 'land value' in the *Valuation of Land Act 1951* was at issue in relation to Maori land. The central

question argued was whether Maori land held under the *Te Ture Whenua Maori Act 1993* diminished the normal valuation of the owner's estate or interest in the land.

Mangatu Incorporation owned rural land which was 'Maori freehold land' under the *Te Ture Whenua Maori Act 1993*.[10] That Act places restrictions on the sale of Maori freehold land, although it also included a mechanism for lifting the restrictions and converting the land to general land. Under the *Valuation of Land Act 1951* (VLA), the Valuer-General valued the land for rating purposes on the standard applicable to non-Maori freehold land available for sale on the open market, without making any deduction for the effect of the 1993 Act.

This valuation was challenged on the basis that Maori land could not be freely alienated and thus the 'standard' non Maori valuation should not apply. The Court agreed that the *Te Ture Whenua Maori Act* did affect the ability to sell the land on the open market and this factor should be taken into account in the valuation method. However the Court was careful to suggest that the valuer should proceed on a case by case basis and take into account individual circumstances. In respect of valuation method the Court stated:

> [In] practical terms it would very likely mean starting with a valuation as if the land could be bought on the open market, and then allowing a deduction for the alienation restrictions. The deduction would vary in amount depending on the extent of the restrictions, the likelihood of Maori Land Court approval to the sale, and the nature of the property (at 695)

Later the Court commented that:

> What the valuer must do in each case is to assess the precise effect of the 1993 Act on the particular piece of land. For example, an undivided interest in Maori freehold land cannot be alienated at all, except to those within the preferred class of alienee. Such land must obviously be treated differently from land which can at least in theory be alienated. . . The deduction will vary in amount depending on the extent of the restrictions, the likelihood of MLC approval to the sale, and the nature of the property.(at 695)

With respect to 'special value' of the land the court noted, '[s]ome land, such as the Awapuni land, which is part of the present appeal may have great spiritual significance to Maori and therefore should be far less likely ever to be alienated out of Maori ownership. In other cases, it could be in the best long-term interests of the particular iwi for land to be alienated'.(at 695). While the effect

[10] See the discussion on the Maori Land Court in Chapter One 'Context'.

of the valuation method described above would be to depress the value of the land which was beneficial to Maori interests so long as the land remained under customary title. However as the Court noted in relation to compensation in respect of compulsory acquisitions.

> The decision to reduce government valuations of bare Maori freehold land, whilst reducing rate liability, may have other consequences which may not be quite so beneficial to the Maori owners. For example, if land were to be acquired compulsorily, the "willing buyer/willing seller" formula could be affected downwards as could determination of rentals based on government valuation. (at 696).

Applicability

Many of these cases on valuation touch in an indirect way on whether customary title land has a special value and thus must be valued in accordance with this status. Given that currently in Australia under the *NTA* the similar compensable interest test applies, it is unclear whether valuation methods should be in accordance with standard, i.e., non native title, valuations or can take into account any special value to the owner.

The other point of significance from these cases is that Maori land is to be treated on a special basis for valuation purposes due to restrictions on its alienability. There exist similar constraints on the ability of Australian native title holders to sell native title interests in the open market. In more general terms, decisions on the value of Maori land may provide a useful guide to the valuation of native title interests. Further clarification of the exact method to be adopted in valuing the special relationship of indigenous people to their land is required.

Further information about the valuation of Maori land can be obtained from the Te Kooti Whenua Maori, Maori Land Court decisions, which are available since 1993 in the *Maori Law Review*.

Conclusion

Perhaps more than other areas it is difficult with compensation questions to discern a common thread in the case law which can be applied to the Australian situation. However some broad concepts can be ascertained.

- In most jurisdictions at common law there is a right in the Crown/sovereign government to extinguish aboriginal title/rights without the need for compensation. In many instances this arises as the aboriginal title/right is characterised as other than a traditional property right.
- The basis for compensation in most instances rests upon a statutory scheme. The features of the relevant schemes vary according to the specific history and policy adopted in that jurisdiction.
- Valuation of the aboriginal title/ rights has received a considerable amount of judicial consideration in the United States but very little in Canada and New Zealand, where an alternative claims settlement process seems to have absorbed many of the compensation issues. This difference may also result from the relative recency of the recognition of aboriginal title/rights in these countries as compared to the US.
- Without further judicial determination in Australia on questions such as the extent to which valuation methods can depart from market standards, the applicability of much of the case law remains unclear.

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