

## "EXTINGUISHMENT OF ABORIGINAL TITLE IN CANADA: TREATIES, LEGISLATION, AND JUDICIAL DISCRETION"

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Canadian courts have held that Aboriginal title is extinguishable consensually by means of a treaty with the Aboriginal nation concerned. Legislative extinguishment was also possible prior to recognition of Aboriginal title in the Constitution of Canada in 1982. These methods of extinguishment are discussed in Parts 1 and 2 of this article. It is suggested that extinguishment by treaty could occur only if that were permissible by the law of the Aboriginal nation. Extinguishment by legislation would have depended on the legislative body having the constitutional authority to extinguish the title. In addition, the legislative intention to extinguish would have had to be clear and plain. Finally, Part 3 of the article discusses the recent emergence in the Ontario Court of Appeal's decision in the *Chippewas of Sarnia* case of what appears to be a third method of extinguishment of Aboriginal title, namely extinguishment through the exercise of judicial discretion. This aspect of the Court of Appeal's decision is criticized as a disturbing departure from established judicial precedent and legal principle.

Les tribunaux canadiens ont statué que le titre autochtone peut être éteint par consensus au moyen d'un traité avec la nation autochtone concernée. L'extinction au moyen d'une loi était également possible avant la reconnaissance du titre autochtone dans la Constitution canadienne en 1982. Ces méthodes d'extinction sont discutées dans les parties 1 et 2 de cet article. Il est suggéré que l'extinction par voie d'un traité n'était possible que si cela était prévu dans la loi de la nation autochtone. L'extinction au moyen d'une loi était possible si l'entité législative avait l'autorité constitutionnelle d'éteindre le titre. En outre, l'intention législative d'éteindre le titre devrait être exprimée dans un langage clair et simple. Enfin, la partie 3 de cet article traite de l'émergence récente, dans la décision *Chippewas of Sarnia*, de ce qui semble être une troisième méthode d'extinction du titre autochtone, c'est-à-dire l'extinction par voie de la discrétion judiciaire. Cet aspect de la décision de la Cour d'appel est critiquée comme un écart inquiétant du précédent judiciaire et de la règle de droit établie.

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## I. INTRODUCTION

In *Delgamuukw v. British Columbia*<sup>1</sup> the Supreme Court of Canada affirmed that Aboriginal title is a proprietary interest in land,<sup>2</sup> and held that it includes both surface and subsurface resources, regardless of whether the Aboriginal title holders used those resources traditionally.<sup>3</sup> Moreover, since the enactment of section 35(1) of the *Constitution Act, 1982*,<sup>4</sup> which recognized and affirmed Aboriginal and treaty rights, Aboriginal title has been constitutionally protected.<sup>5</sup> This means that it can be infringed only by or pursuant to constitutionally valid legislation that meets the justification test that was laid down in *R. v. Sparrow*,<sup>6</sup> and held to be applicable to Aboriginal title in *Delgamuukw*.<sup>7</sup> However, the constitutional entrenchment of Aboriginal title and other Aboriginal and treaty rights in 1982 has meant that they are no longer subject to legislative extinguishment, even by Parliament.<sup>8</sup> Since then, Aboriginal title should be extinguishable only by voluntary surrender of that title to the Crown, or by means of constitutional amendment of section 35. We shall see, however, that the recent decision of the Ontario Court of Appeal in *Chippewas of Sarnia Band v. Canada (Attorney-General)*<sup>9</sup> subjected legal actions for declaration of Aboriginal title to judicial discretion, thereby creating what may be a new form of extinguishment.

Given that the Supreme Court has held that legislative authority to extinguish Aboriginal rights was taken away by section 35, we can confine our discussion of that

<sup>1</sup> [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193 [hereinafter *Delgamuukw* cited to S.C.R.].

<sup>2</sup> *Ibid.*, see especially paras. 113, 138, 140, Lamer C.J. See also *Canadian Pacific Ltd. v. Paul*, [1988] 2 S.C.R. 654 at 677, 53 D.L.R. (4th) 487 at 504 [hereinafter *Canadian Pacific* cited to S.C.R.].

<sup>3</sup> *Delgamuukw*, *supra* note 1, see especially paras. 116-24, Lamer C.J.

<sup>4</sup> Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Constitution Act, 1982*].

<sup>5</sup> For discussion, see K. McNeil, "Aboriginal Title as a Constitutionally Protected Property Right" [hereinafter "Constitutionally Protected Property Right"] in K. McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) 292 [hereinafter *Emerging Justice?*].

<sup>6</sup> [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 [hereinafter *Sparrow* cited to S.C.R.]. Briefly, the test is that the government must justify the infringement by showing a substantial and compelling legislative objective, and proving that the Crown's fiduciary obligations to the Aboriginal people in question have been respected. See also *R. v. Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648 [hereinafter *Gladstone* cited to S.C.R.].

<sup>7</sup> *Supra* note 1 at paras. 160-69, Lamer C.J. In *Delgamuukw*, Lamer C.J. suggested that provincial legislatures (as well as the Canadian Parliament) can infringe Aboriginal title, but that conclusion is questionable on division of powers grounds: see K. McNeil, "Aboriginal Title and the Division of Powers: Rethinking Federal and Provincial Jurisdiction" in *Emerging Justice?*, *supra* note 5 at 249; N. Banks, "Delgamuukw, Division of Powers and Provincial Land and Resource Laws: Some Implications for Provincial Resource Rights" (1998) 32 U.B.C. L. Rev. 317; K. Wilkins, "Of Provinces and Section 35 Rights" (1999) 22 Dal. L.J. 185.

<sup>8</sup> See *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 28, 137 D.L.R. (4th) 289 at para. 28, Lamer C.J. [hereinafter *Van der Peet* cited to S.C.R.]; *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911 at para. 11, [2001] 3 C.N.L.R. 122 at para. 11, McLachlin C.J. [hereinafter cited to S.C.R.].

<sup>9</sup> (2001), 51 O.R. (3d) 641, [2001] 1 C.N.L.R. 56 (C.A.), leave to appeal to S.C.C. refused [2001] 4 C.N.L.R. iv. [hereinafter *Chippewas of Sarnia* (C.A.) cited to O.R.]

means of extinguishment to the period before section 35 was enacted. The reason why this is still important today is that the Supreme Court in *Sparrow* decided that constitutionally protected Aboriginal rights are those rights that were in existence when section 35 came into force on April 17, 1982. Rights that had been validly extinguished prior to that time were no longer in existence, and so were not recognized and affirmed.<sup>10</sup> Parts One and Two of this article will therefore focus on the ways in which Aboriginal title might have been extinguished prior to the enactment of section 35. The first of these was through voluntary surrender of the title to the Crown by means of an agreement in the form of a treaty or modern land claims settlement.<sup>11</sup> As already mentioned, Aboriginal title could also have been extinguished unilaterally by or pursuant to legislation. As the legal issues raised by legislative extinguishment are numerous and complex, we will spend the most time on this second means of extinguishment.<sup>12</sup> Finally, Part Three will be devoted to a critical examination of the *Chippewas of Sarnia* case and the application of judicial discretion to Aboriginal title claims in the courts.

## II. EXTINGUISHMENT OF ABORIGINAL TITLE BY AGREEMENT

There does not seem to be any doubt that, from the perspective of Canadian law, Aboriginal title has been and continues to be extinguishable by voluntary surrender of that title to the Crown. The Royal Proclamation of 1763<sup>13</sup> envisaged just such a procedure for acquisition of Indian lands when it provided that, if any of the Indian nations or tribes were inclined to dispose of their lands in the Crown's North American colonies, those lands could be purchased only by the Crown or a proprietary government<sup>14</sup> "at some public Meeting or Assembly of the said Indians, to be held for

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<sup>10</sup> *Sparrow*, *supra* note 6 at 1091-93. Lamer C.J. said the same thing about Aboriginal title in *Delgamuukw*, *supra* note 1 at para. 172.

<sup>11</sup> As stated above, this is still possible today. Note too that land claims agreements are really treaties by another name. This is acknowledged by s. 35(3) of the *Constitution Act, 1982*, which provides: "For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired." See also the *Nisga'a Final Agreement*, initialled August 4, 1998, ch. 2, para. 1: "This Agreement is a treaty and a land claims agreement within the meaning of sections 25 and 35 of the *Constitution Act, 1982*."

<sup>12</sup> See also P. Joffe and M. E. Turpel, *Extinguishment of the Rights of Aboriginal Peoples: Problems and Alternatives*, 3 vols., June 1995, CD-ROM: *For Seven Generations: An Information Legacy of the Royal Commission on Aboriginal Peoples* (Ottawa: Royal Commission on Aboriginal Peoples, 1997) see especially vol. 1, 233-50.

<sup>13</sup> *Royal Proclamation (1763)*, reprinted in R.S.C. 1985, App. II, No. 1.

<sup>14</sup> At the time the Proclamation was issued, the only proprietary government in what is now Canada was the Hudson's Bay Company, and it surrendered its governmental authority to the Crown in 1870: see Deed of Surrender, Schedule C to the *Rupert's Land and North-Western Territory Order*, 23 June 1870, reprinted in R.S.C. 1985, App. II, No. 9. In 1817, the Earl of Selkirk, acting under an indenture from the Company, purported to purchase lands in the name of the Crown from the Saulteaux and Cree Nations for his Red River Settlement: see A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories* (Toronto: Belfords, Clarke & Co., 1880) at 13-15 (the treaty of purchase and the indenture are reproduced at 299-302). The validity of this treaty is doubtful. In any case, the same lands were included in Treaty 1, entered into by the Crown in 1871 (reproduced *ibid.* at 313-16). Note too that James Douglas, while he was still chief factor of the Hudson's Bay Company at Fort Victoria, purchased lands in the 1850s from some of the Indian nations on Vancouver Island: see P. Tennant,

that Purpose".<sup>15</sup> At the same time, the Proclamation forbid private acquisition of Indian lands, affirming a policy that is also part of the common law of Aboriginal title.<sup>16</sup> The inalienability of Aboriginal title other than by surrender to the Crown means that it cannot be extinguished by transfer to anyone else.

Although *Canadian* law allows for the surrender of Aboriginal title to the Crown, this does not mean that it is surrenderable under *Aboriginal* law. Leroy Little Bear has explained that Aboriginal peoples generally did not have a concept of land ownership that would have included authority to transfer absolute title to the Crown. They received their land from the Creator, subject to certain conditions, including an obligation to share it with plants and animals. Moreover, the land belongs not just to living Aboriginal persons, but to past and future generations as well.<sup>17</sup> He concluded:

In summary, the standard or norm of the aboriginal peoples' law is that land is not transferable and therefore is inalienable. Land and benefits therefrom may be shared with others, and when Indian nations entered into treaties with European nations, the subject of the treaty, from the Indians' viewpoint, was not the alienation of the land but the sharing of the land.<sup>18</sup>

Little Bear's point that, under Aboriginal law, the treaties could not have amounted to a transfer of land to the Crown but instead involved a sharing of it, has been affirmed by many others.<sup>19</sup> The Royal Commission on Aboriginal Peoples, after examining

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*Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1990) at 18-20.

<sup>15</sup> *Royal Proclamation (1763)*, *supra* note 13 at 6. For detailed discussion of the Proclamation's Indian provisions see B. Slaterry, *The Land Rights of Indigenous Canadian Peoples as Affected by the Crown's Acquisition of their Territories* (D. Phil. Thesis, University of Oxford 1979), reprinted (Saskatoon: University of Saskatchewan Native Law Centre, 1979) [hereinafter *Land Rights*].

<sup>16</sup> See *Delgamuukw*, *supra* note 1 at paras. 113 and 129, Lamer C.J.C.; *Osoyoos Indian Band v. Oliver (Town)* (2001), 206 D.L.R. (4th) 385 at para. 46, [2002] 1 W.W.R. 23 at para. 46 (S.C.C.), Iacobucci J. [hereinafter *Osoyoos Indian Band* cited to D.L.R.]. For discussion, see K. McNeil, "Self-Government and the Inalienability of Aboriginal Title" 47 McGill L.J. [forthcoming in 2002].

<sup>17</sup> For an indication that communal rights in England cannot be surrendered for the same reason, see *Wyld v. Silver*, [1963] 1 Ch. 243 at 255-56, 1 Q.B. 169 at 180-81 (C.A.). Lord Denning M.R. there stated that the present inhabitants of a parish could not waive or abandon a right to hold a fair because that would take the right away from future generations.

<sup>18</sup> L. Little Bear, "Aboriginal Rights and the Canadian 'Grundnorm'" in J. R. Ponting, ed., *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland & Stewart, 1986) 243 at 247.

<sup>19</sup> See Treaty 7 Elders et al., *The True Spirit and Original Intent of Treaty 7* (Montreal & Kingston: McGill-Queen's University Press, 1996), see especially 113-23, 144-45 [hereinafter *True Spirit*]; H. Cardinal & W. Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our Peoples Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000), see especially 34-47. At 31, Cardinal and Hildebrandt quote Elder Peter Waskahat of the Frog Lake First Nation: "The sacred earth could never be sold or given away, according to the principles of the First Nations, but it could be shared." See also the statement of Chief Harold Turner, Swampy Cree Tribal Council, at a public hearing of the Royal Commission on Aboriginal Peoples, The Pas, Manitoba, 20 May 1992, quoted in N. Zlotkin, "Interpretation of the Prairie

Aboriginal conceptions of property and tenure, said this about the bundle of rights and obligations contained therein:

Excluded was the right to alienate or sell land to outsiders, to destroy or diminish lands or resources, or to appropriate lands or resources for private gain without regard to reciprocal obligations.<sup>20</sup>

This means that, in situations where the law of an Aboriginal nation prohibits an absolute transfer of that nation's title, voluntary extinguishment by treaty or land claims agreement would not be possible. However, the written texts of many Indian treaties do contain a provision that purports to be an outright surrender of Aboriginal title to the Crown. Treaty 6, for example, entered into in 1876 and relating to a large area in what is now central Saskatchewan and Alberta, contains a clause that is standard in the numbered treaties:

The Plain and Wood Cree Tribes of Indians, and all other the Indians inhabiting the district hereinafter described and defined, do hereby cede, release, surrender and yield up to the Government of the Dominion of Canada for Her Majesty the Queen and her successors forever, all their rights, titles and privileges whatsoever, to the lands included within the following limits....<sup>21</sup>

Given that the law of the Cree and other nations who entered into this treaty apparently did not permit an absolute surrender of their Aboriginal title,<sup>22</sup> does this mean that the treaty is invalid because there was a fundamental misunderstanding between the parties? According to Harold Cardinal and Walter Hildebrandt, this is not the position of the First Nation Elders in Saskatchewan. As the Elders think that substantial agreement was reached at the treaty negotiations, for them "what is at issue is not whether or not treaties exist, but whether a mutually acceptable record of them can now be agreed upon and

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Treaties" in O. Lippert, ed., *Beyond the Nass Valley: National Implications of the Supreme Court's Delgamuukw Decision* (Vancouver: Fraser Institute, 2000) 183 at 186: "Our ancestors did not sign a real estate deal as you cannot give away something you do not own. No, the treaties were signed as our symbol of good faith to share the land."

<sup>20</sup> Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Supply and Services Canada, 1996) at 459 [hereinafter *RCAP Report*].

<sup>21</sup> Morris, *supra* note 14 at 352. For discussion, see J. L. Taylor, "Two Views on the Meaning of Treaties Six and Seven" in R. Price, ed., *The Spirit of the Alberta Indian Treaties* (Toronto: Butterworth Press, 1987) 9 at 39-45.

<sup>22</sup> Cardinal & Hildebrandt, *supra* note 19 at 58, stated: "At the focus sessions [that the authors held with Elders], when the 'extinguishment clauses' of the written treaty texts were read, translated, and explained, the Elders reacted with incredulity and disbelief. They found it hard to believe that anyone, much less the Crown, could seriously believe that First Nations would ever have agreed to 'extinguish' their God-given rights." See also S. Venne, "Understanding Treaty 6: An Indigenous Perspective" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: University of British Columbia Press, 1997) 173, see especially 192-93: "The Chiefs and Elders could not have sold the lands to the settlers as they could only share the lands according to the Cree, Saulteau, Assiniboine, and Dene laws."

implemented.”<sup>23</sup> This involves interpreting the written terms in light of First Nations’ oral traditions, the records of the negotiations, and the historical context,<sup>24</sup> which is an approach that has been endorsed and applied by the Supreme Court of Canada.<sup>25</sup>

It is not my intention to assess the validity or proper interpretation of any particular treaty. Rather, I want to make the general point that voluntary extinguishment of Aboriginal title, while permissible in Canadian law, may not be permissible in Aboriginal law. The Supreme Court has said repeatedly that the treaties have to be interpreted as the parties, especially the Aboriginal parties, would have understood them at the time.<sup>26</sup> As the Aboriginal parties to the treaties would presumably have acted in accordance with their own laws, they cannot have intended to surrender their entire interest to the Crown if that would have violated those laws. Aboriginal understandings of the treaties therefore need to be assessed in light of relevant Aboriginal laws.

But even if the law of an Aboriginal treaty nation did permit it to surrender its entire interest to the Crown (which may never have been the case), this does not mean that the surrender provision can be taken at face value. One still has to examine the oral traditions of that nation as well as evidence of the treaty negotiations and surrounding circumstances to determine what was actually intended by the Aboriginal parties.<sup>27</sup> This is particularly so in treaties like the last nine numbered treaties where certain rights in relation to land use, specifically hunting and fishing rights, were expressly preserved in the written versions.<sup>28</sup> As Patrick Macklem has pointed out in his analysis of Treaty 9 (1905-6), the preservation of those traditional uses of the land was consistent with the Aboriginal parties’ intention to retain land rights that were essential to their ways of life.<sup>29</sup> So even the written terms contemplated some sharing of the lands,<sup>30</sup> though not

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<sup>23</sup> Cardinal & Hildebrandt, *ibid.* at 59.

<sup>24</sup> *Ibid.* at 48-52.

<sup>25</sup> See e.g. *R. v. Sioui*, [1990] 1 S.C.R. 1025, 70 D.L.R. (4th) 427; *R. v. Badger*, [1996] 1 S.C.R. 771, 133 D.L.R. (4th) 324; *R. v. Sundown*, [1999] 1 S.C.R. 393, 170 D.L.R. (4th) 385; *R. v. Marshall [No. 1]*, [1999] 3 S.C.R. 456, 177 D.L.R. (4th) 513.

<sup>26</sup> In addition to the cases cited in note 25 above, see *Simon v. The Queen*, [1985] 2 S.C.R. 387, 24 D.L.R. (4th) 390; *R. v. Horseman*, [1990] 1 S.C.R. 901, 4 W.W.R. 97 per Wilson J. (dissenting on the interpretation of the Natural Resources Transfer Agreement); *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, 71 D.L.R. (4th) 193 [hereinafter *Mitchell* cited to S.C.R.].

<sup>27</sup> See *Re Paulette and Registrar of Titles [No. 2]* (1973), 42 D.L.R. (3d) 8, 9 C.N.L.C. 307 (N.W.T.S.C.) [hereinafter *Re Paulette* (N.W.T.S.C.) cited to D.L.R.], rev’d on other grounds (1975), 63 D.L.R. (3d) 1, 9 C.N.L.C. 342 (N.W.T.C.A.), aff’d [1977] 2 S.C.R. 628, 72 D.L.R. (3d) 161. In regard to Treaty 8 (1899) and Treaty 11 (1921), Morrow J. found that, on the evidence, there was “doubt as to whether the full aboriginal title had been extinguished, certainly in the minds of the Indians”: *Re Paulette* (N.W.T.S.C.) *ibid.* at 35.

<sup>28</sup> Although the written versions of Treaties 1 and 2, signed in 1871, do not contain a clause relating to hunting and fishing rights, oral promises made by the Treaty Commissioners reveal that those rights were to continue: see K. McNeil, *Indian Hunting, Trapping and Fishing Rights in the Prairie Provinces of Canada* (Saskatoon: University of Saskatchewan Native Law Centre, 1983) at 4-7.

<sup>29</sup> P. Macklem, “The Impact of Treaty 9 on Natural Resource Development in Northern Ontario” in Asch, *supra* note 22 at 97, see especially 119-20. See also S. Imai, “Treaty Lands and Crown Obligations: The ‘Tracts Taken Up’ Provision” (2001) 27 Queen’s L.J. 1; K. McNeil, “The High Cost of Accepting Benefits from the Crown: A Comment on the Temagami Indian Land Case” in *Emerging Justice?*, *supra* note 5, 25 at 49-56 [hereinafter “High Cost of Accepting

necessarily to the degree that the Aboriginal parties had in mind.<sup>31</sup>

### III. LEGISLATIVE EXTINGUISHMENT OF ABORIGINAL TITLE

#### A. *Distinguishing Between Legislative and Executive Authority*

In Euro-Canadian political theory and practice, governmental authority (apart from judicial functions) can be either legislative or executive. Unfortunately, this distinction has all too often been ignored where Aboriginal title is concerned, causing misunderstanding of how that title could be extinguished unilaterally prior to April 17, 1982. It is therefore essential to begin our discussion of unilateral extinguishment by distinguishing between these two kinds of governmental authority and by clarifying the common law extent of each in relation to property rights.

Legislative authority generally involves law-making, whereas executive authority, which is derived either from the royal prerogative or from statute, does not. Executive functions include such things as policy-making and carrying out laws that legislative bodies have enacted. Executive authority therefore tends to be either political or administrative, and can "range from the determination and implementation of matters of high policy to an extensive array of individual acts and decisions, such as placing government contracts, making grants, loans and compulsory purchase orders, and issuing permits and licences."<sup>32</sup> In our parliamentary system, legislative authority is exercised either by elected legislatures, or by persons or bodies that have received it by delegation from a legislature. Executive authority, on the other hand, is exercised on behalf of the Crown by cabinet ministers and other governmental officials. Leaving aside the Aboriginal peoples' inherent right of self-government for present purposes,<sup>33</sup> the

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Benefits"] (regarding the Robinson-Huron Treaty, 1850). In *Halfway River First Nation v. British Columbia (Ministry of Forests)* Finch J.A. observed in reference to Treaty 8 (1899) that the Crown's right to take up surrendered lands "for settlement, mining, lumbering, trading or other purposes" was not unrestricted, as it had to be read in light of the Indians' right to hunt on those lands, and should not be interpreted in a way that "would render the right to hunt meaningless": (1999), 178 D.L.R. (4th) 666 at para. 134, [1999] 4 C.N.L.R. 1 at para. 134 (B.C.C.A.). Compare *R. v. Catarat*, [1999] 4 C.N.L.R. 139 at paras. 31-34, 191 Sask.R. 223 at paras. 31-34 (Sask. Q.B.), aff'd [2001] 2 C.N.L.R. 158, 207 Sask.R. 57 (Sask. C.A.).

<sup>30</sup> See Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol.1 (Winnipeg: Queen's Printer, 1991) at 149.

<sup>31</sup> See *True Spirit*, *supra* note 19, see especially 144-45; *RCAP Report*, *supra* note 20, vol. 2 at 44-47; Venne, *supra* note 22, see especially 192-93; Cardinal & Hildebrandt, *supra* note 19, see especially 62-67. Compare L.Hickey, R.L. Lighting & G. Lee, "T.A.R.R. Interview with Elders Program" in Price, *supra* note 21 at 105, where Lynn Hickey stated in reference to Treaty 7: "Not one elder mentions that the treaty had anything to do with giving up land or sharing it with white people. Rather, Treaty Seven is an agreement that was made to establish peace, to stop the Indians from killing each other, and to put an end to the disruptions caused by liquor."

<sup>32</sup> *Halsbury's Laws of England*, vol. 1(1), 4th ed. reissue (London: Butterworths, 2001) at para. 18.

<sup>33</sup> As our discussion involves the authority of *other* governments in Canada to extinguish Aboriginal title, we are not concerned here with the governmental authority of the Aboriginal peoples themselves. On the inherent right of self-government, see Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the*



Canadian Constitution has distributed law-making authority between Parliament and the provincial legislatures.<sup>34</sup> Executive authority follows the same division of powers.<sup>35</sup>

It is fundamental to the parliamentary system of government that Canada received from Britain that legal rights can only be infringed or taken away by or pursuant to unequivocal legislation.<sup>36</sup> This is particularly so where property rights are concerned, as they have always enjoyed special protection in the common law.<sup>37</sup> Regarding land, the rule against "executive taking" dates from at least 1215, when chapter 29 of the *Magna Carta* specified that "[n]o Freeman shall ... be disseised [i.e., dispossessed of his land] ... but by [the] lawful Judgment of his Peers, or by the Law of the Land."<sup>38</sup> This restraint on the authority of the executive branch of government is basic to the rule of law,<sup>39</sup> as it protects property against government confiscation except in accordance with law.<sup>40</sup> Simply put, it means that there is no prerogative power to confiscate or extinguish

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*Constitution* (Ottawa: Canada Communications Group, 1993); K. McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" in *Emerging Justice?*, *supra* note 5 at 58; *Campbell v. British Columbia (Attorney General)* (2000), 189 D.L.R. (4th) 333, [2000] 4 C.N.L.R. 1 (B.C.S.C.); *Mitchell v. M.N.R.*, *supra* note 8, Binnie J.

<sup>34</sup> *Constitution Act, 1867*, 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5, see especially ss. 91, 92. See *Attorney-General for Ontario v. Attorney-General for Canada*, [1912] A.C. 571 at 581, 584, 3 D.L.R. 509 at 511, 513 (P.C.); *Murphy v. C.P.R.*, [1958] S.C.R. 626 at 643, 15 D.L.R. (2d) 145 at 154; *Jones v. Attorney-General of New Brunswick*, [1975] 2 S.C.R. 182 at 195, 45 D.L.R. (3d) 583 at 593.

<sup>35</sup> See *Attorney-General of Canada v. Attorney-General of Quebec*, *sub nom. Mowat v. Casgrain* (1897), 6 Que. Q.B. 12 at 22-24 (Que. C.A.); *Bonanza Creek Gold Mining v. The King*, [1916] A.C. 566 at 579-80, 26 D.L.R. 273 at 279-80 (P.C.); *The Queen v. Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*, [1981] 4 C.N.L.R. 86 at 93, [1982] Q.B. 892 at 913 (Eng. C.A.) [hereinafter *Indian Association of Alberta* cited to C.N.L.R.], Lord Denning M.R.

<sup>36</sup> For more detailed discussion, see K. McNeil, "Racial Discrimination and Unilateral Extinguishment of Native Title" in *Emerging Justice?*, *supra* note 5, 357 at 359-69 [hereinafter "Racial Discrimination"].

<sup>37</sup> See W. Blackstone, *Commentaries on the Laws of England*, vol.1 (Oxford: Clarendon Press, 1765-69) at 134-41; H. Broom, *Constitutional Law Viewed in Relation to Common Law and Exemplified by Cases*, 2d ed. by G. L. Denman (London: W. Maxwell & Son, 1885) at 225-45; *Harrison v. Carswell*, [1976] 2 S.C.R. 200 at 219, 62 D.L.R. (3d) 68 at 83, Dickson J.; *Leiriao v. Val-Bélair (Town)*, [1991] 3 S.C.R. 349 at 356-57, 129 N.R. 188 at 214-15, L'Heureux-Dubé J. (dissenting). For further discussion, see "Constitutionally Protected Property Right", *supra* note 5, especially at 293-95.

<sup>38</sup> *Magna Carta*, 17 John. In *Attorney-General v. De Keyser's Royal Hotel*, Lord Parmoor said that "[s]ince Magna Carta the estate of a subject in lands or buildings has been protected against the prerogative of the Crown": [1920] A.C. 508 at 569, 89 L.J. Ch. 417 at 443 [hereinafter *De Keyser's Royal Hotel* cited to A.C.].

<sup>39</sup> See *Entick v. Carrington* (1765), 19 St. Tr. 1030, 95 E.R. 807 (C.P.) [hereinafter *Entick* cited to St. Tr.].

<sup>40</sup> In *Eshugbayi Eleko v. Government of Nigeria*, Lord Atkin said that "no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice": [1931] A.C. 662 at 670, 100 L.J.P.C. 152 at 157 (P.C.) [hereinafter *Eshugbayi Eleko*]. See also J.W. Ely Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights*, 2d ed. (New York: Oxford University Press, 1998) at 13-14, 54-55.

property rights in time of peace.<sup>41</sup> Any executive authority to take or extinguish property rights must, therefore, be created by legislation because only legislatures have the constitutional authority to interfere with property rights.<sup>42</sup>

In the British and Canadian constitutional tradition, there is no general restraint on the legislative power to take private property.<sup>43</sup> Instead, the courts have used principles of statutory interpretation to protect property rights in the absence of clear legislative intention to infringe them. This is done in two ways. First, for the legislation itself to operate as a statutory taking, the intention to take the property has to be unequivocally expressed.<sup>44</sup> Second, a delegation from the legislature to the executive or some other body, authorizing it to take private property, has to be clearly expressed as well.<sup>45</sup> In either case, any ambiguity will be construed in favour of the property owner. Moreover, the courts will find that there is an obligation to pay compensation for any confiscated property unless the right to compensation is unequivocally precluded by the legislation.<sup>46</sup>

To sum up, fundamental principles of Anglo-Canadian constitutional law

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<sup>41</sup> In wartime the Crown can take private property for defence purposes, but only if compensation is paid: see *De Keyser's Royal Hotel*, *supra* note 38; *Commercial and Estates Co. of Egypt v. Board of Trade*, [1925] 1 K.B. 271 at 294-97, 19 Ll. L. Rep. 275 at 281-84 (C.A.), Atkin L.J.; *Burmah Oil Co. v. Lord Advocate*, [1965] A.C. 75, [1964] 2 All. E.R. 348 (H.L.).

<sup>42</sup> See Broom, *supra* note 37 at 231: "no man's property can legally be taken from him or invaded by the direct act or command of the sovereign, without the consent of the subject, given expressly or impliedly through parliament." Where land is concerned, modern expropriation statutes are the main source of this kind of executive authority: see K. Davies, *Law of Compulsory Purchase and Compensation*, 3d ed. (London: Butterworths, 1978), see especially 9-10; E.C.E. Todd, *The Law of Expropriation and Compensation in Canada*, 2d ed. (Toronto: Carswell, 1992), see especially 26-29. In *Rugby Water Board v. Shaw Fox*, Lord Pearson said that "compulsory acquisition and compensation for it are entirely creations of statute": [1973] A.C. 202 at 214, [1972] 2 W.L.R. 757 at 763 (H.L.).

<sup>43</sup> Regarding Britain, see T.R.S. Allan, "Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism" (1985) 44 Cambridge L.J. 111. On the decision not to include protection for property rights in the *Canadian Charter of Rights and Freedoms*, see J. McBean, "The Implications of Entrenching Property Rights in Section 7 of the Charter of Rights" (1988) 26 Alta. L. Rev. 548.

<sup>44</sup> See *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, [1933] S.C.R. 629 at 638, 4 D.L.R. 545 at 552, Duff C.J.; *Colet v. R.*, [1981] 1 S.C.R. 2 at 10, 119 D.L.R. (3d) 521 at 528; R. Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994) at 370-76.

<sup>45</sup> See *Simpson v. South Staffordshire Water Works Co.* (1865), 34 L.J. Ch. 380 at 387, 46 E.R. 1082 at 1084, Westbury L.J.; *Thomson v. Halifax Power Co.* (1914), 16 D.L.R. 424 at 432, 47 N.S.R. 536 at 550-51, Graham J.; *Newcastle Breweries Ltd. v. The King*, [1920] 1 K.B. 854 at 866, 123 L.T. 58 at 61, Slater J.; *Attorney-General for Canada v. Hallet & Carey Ltd.*, [1952] A.C. 427 at 450 (P.C.), (*sub. nom. Canada (Canadian Wheat Board) v. Manitoba Pool Elevators*) [1952] 3 D.L.R. 433 at 446-47, Radcliffe L.J.; *Leiriao v. Val-Bélair (Town)*, *supra* note 37 at 356-57, L'Heureux-Dubé J. (dissenting); and discussion in Todd, *supra* note 42 at 27-29.

<sup>46</sup> See *Western Counties Railway Co. v. Windsor and Annapolis Railway Co.* (1882), 7 A.C. 178 at 188 (P.C.); *Commissioner of Public Works (Cape Colony) v. Logan*, [1903] A.C. 355 at 363-64 (P.C.); *Central Control Board (Liquor Traffic) v. Cannon Brewery Co. Ltd.*, [1919] A.C. 744 at 752 (H.L.), Atkinson L.J.; *De Keyser's Royal Hotel*, *supra* note 38 at 542 (Atkinson L.J.), 576 and 579 (Parke L.J.); *Manitoba Fisheries Ltd. v. R.*, [1979] 1 S.C.R. 101, 88 D.L.R. (3d) 462.

prevent the executive branch from extinguishing anyone's property rights without clear and plain statutory authority. Moreover, even legislative taking will be subjected to careful judicial scrutiny by construing statutes so as to preserve property rights, and if that is not possible by presuming that the right to compensation has not been taken away. As we have seen, the Supreme Court held in *Delgamuukw* that Aboriginal title is a proprietary interest in land. So even before receiving constitutional recognition in 1982, it should have enjoyed the same common law protection as other property rights.<sup>47</sup> We will now examine Canadian case law to determine whether this protection has in fact been accorded to Aboriginal title.

### B. *Executive Extinguishment of Aboriginal Title in Canadian Jurisprudence*

Most of the confusion over the authority of the Crown to extinguish Aboriginal title by executive action arises from the decision of the Privy Council in *St. Catherine's Milling and Lumber Company v. The Queen*.<sup>48</sup> In that case, Lord Watson regarded Aboriginal or Indian title as having arisen from the Royal Proclamation of 1763.<sup>49</sup> Interpreting that document, he said it shows that "the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign."<sup>50</sup> Some Canadian judges have taken this to mean that Aboriginal title is subject to the will of the Crown, and so is extinguishable by the executive without legislative authorization. For example, in *Attorney General for Ontario v. Bear Island Foundation*, Steele J. said this:

In a previous section on the nature of aboriginal rights, I determined that *St. Catherine's Milling* case stood for the proposition that aboriginal rights exist at the pleasure of the Sovereign. An obvious corollary to this proposition is that aboriginal rights may be unilaterally extinguished by the Crown.<sup>51</sup>

This aspect of his judgment was affirmed by the Ontario Court of Appeal, where it was explicitly held that the Crown by means of a treaty could extinguish the Aboriginal rights even of Indian bands or tribes that were not parties to it.<sup>52</sup> As the treaty in question (the Robinson-Huron Treaty of 1850) had been entered into by the Crown in its executive capacity,<sup>53</sup> the Court of Appeal clearly accepted the concept of unilateral executive

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<sup>47</sup> See "Constitutionally Protected Property Right", *supra* note 5.

<sup>48</sup> (1889) 14 App.Cas. 46 (P.C.) [hereinafter *St. Catherine's*].

<sup>49</sup> See *Delgamuukw*, *supra* note 1 at para. 114, Lamer C.J.

<sup>50</sup> *St. Catherine's*, *supra* note 48 at 54.

<sup>51</sup> (1985), 49 O.R. (2d) 353 at 436, [1985] 1 C.N.L.R. 1 at 77-78 (Ont. S.C.) [hereinafter *Bear Island* (Ont. S.C.) cited to C.N.L.R.]. See also *Delgamuukw v. British Columbia* (1991), 79 D.L.R. (4th) 185 at 415-16, [1991] 3 W.W.R. 97 at 345-46 (B.C.S.C.) [hereinafter *Delgamuukw* (B.C.S.C.) cited to D.L.R.]. Note, however, that in *Bear Island*, Steele J. moved from executive extinguishment to legislative extinguishment without clearly distinguishing between the two (*ibid.* at 78-80).

<sup>52</sup> *Ontario (Attorney General) v. Bear Island Foundation*, [1989] 2 C.N.L.R. 73 at 85-88, 68 O.R. (2d) 394 at 410-13 [hereinafter *Bear Island Foundation* (C.A.) cited to C.N.L.R.].

<sup>53</sup> Ratification by the Governor General in Council (not the legislature) was, in the Court of Appeal's opinion, "a plain and unambiguous declaration by the Sovereign that the aboriginal title was extinguished" (*ibid.* at 88).

extinguishment of Aboriginal title.<sup>54</sup>

Starting with *Calder v. Attorney-General of British Columbia*,<sup>55</sup> the Supreme Court has gradually been deconstructing the concept of Aboriginal title formulated by Lord Watson in the *St. Catherine's* case. In *Calder*, Judson J. (Martland and Ritchie JJ. concurring) held that the Royal Proclamation, though taken to be the source of Aboriginal title by the Privy Council, is not the sole source.<sup>56</sup> In an oft-quoted passage, he said:

Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right".<sup>57</sup>

This passage also reveals that he did not find Lord Watson's description of Indian title as a "personal and usufructuary right" to be particularly useful. He nonetheless said that there could be no question that Aboriginal title was "dependent on the goodwill of the Sovereign",<sup>58</sup> and went on to express the view that Aboriginal title had been generally extinguished in British Columbia by a series of proclamations and ordinances that were clearly legislative in nature.<sup>59</sup> On this issue of extinguishment the Supreme Court split evenly,<sup>60</sup> as Hall J. (dissenting, with the concurrence of Laskin and Spence JJ.) was of the view that Aboriginal title could not "be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation."<sup>61</sup> For him, the onus of proving unilateral extinguishment is on the Crown and requires "clear

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<sup>54</sup> The Court said: "It is also clear (at least prior to the enactment of the *Canadian Charter of Rights and Freedoms* in 1982) that the sovereign power can unilaterally extinguish aboriginal rights" (*ibid.* at 87). For critical commentary, see K. McNeil, "The Temagami Indian Land Claim: Loosening the Judicial Strait-jacket" in M. Bray and A. Thomson, eds., *Temagami: A Debate on Wilderness* (Toronto: Dundurn Press, 1990) 185 at 200-207 [hereinafter "Temagami Indian Land Claim"]. Note that the Supreme Court of Canada affirmed the decisions of Steele J. and the Court of Appeal that the claimed Aboriginal rights had been extinguished, but on the narrower ground that the Temagami Indians had adhered to the Robinson-Huron Treaty: *Ontario (Attorney General) v. Bear Island Foundation*, [1991] 2 S.C.R. 570, [1991] 3 C.N.L.R. 79, commented on in "High Cost of Accepting Benefits", *supra* note 29.

<sup>55</sup> [1973] S.C.R. 313, 34 D.L.R. (3d) 145 [hereinafter *Calder* cited to S.C.R.].

<sup>56</sup> *Ibid.* at 322.

<sup>57</sup> *Ibid.* at 328.

<sup>58</sup> *Ibid.*

<sup>59</sup> Acting pursuant to Acts of Parliament (21 & 22 Vict., c.99; 29 & 30 Vict, c.67), the British Crown had delegated authority to legislate in the Colony of British Columbia, first to Governor James Douglas who issued the Proclamations, and then to the Governor and Legislative Council, which made the Ordinances (*ibid.* at 406-14, Hall J. (dissenting)).

<sup>60</sup> The Nisga'a were unsuccessful nonetheless because a majority of the Court held that they could not bring an action for declaration of their Aboriginal title without a fiat from the Lieutenant-Governor of British Columbia giving them permission to sue the Crown in right of the Province, see *infra* notes 219-21 and accompanying text.

<sup>61</sup> *Calder*, *supra* note 55 at 402.

and plain” legislative intent.<sup>62</sup> As the Nisga’a (spelled Nishga in the judgments) had not surrendered their title, and as it had not been extinguished by specific legislation, in Hall J.’s opinion the Court should have declared it to exist.<sup>63</sup>

The Supreme Court returned to the matter of Aboriginal title in *Guerin v. The Queen*.<sup>64</sup> As that case involved a surrender of reserve land for the purpose of leasing, unilateral extinguishment was not an issue. Dickson J. (as he then was) nonetheless accepted the Court’s holding in *Calder* that “aboriginal title existed in Canada (at least where it had not been extinguished by appropriate legislative action) independently of the Royal Proclamation.”<sup>65</sup> In *Calder*, he said, “this Court recognized aboriginal title as a legal right derived from the Indians’ historic occupation and possession of their tribal lands.”<sup>66</sup> Moreover, in his discussion of the nature of Aboriginal title, Dickson J. said that the Privy Council’s emphasis in the *St. Catherine’s* case “on the personal nature of aboriginal title stemmed in part from constitutional arrangements peculiar to Canada.”<sup>67</sup> So when the land in question in *St. Catherine’s* was surrendered to the Crown by Treaty 3 in 1873, “the entire beneficial interest was held to have passed, because of the personal and usufructuary nature of the Indian’s right, to the Province of Ontario under s. 109 [of the *Constitution Act, 1867*] rather than to Canada.”<sup>68</sup> Dickson J. went on to say that, although the characterization of Aboriginal title as “a personal and usufructuary right” has been questioned in cases such as *Calder*, there is a “core of truth” to that description which, like the words “beneficial interest” that are sometimes used, attempts to describe the *sui generis* interest which the Indians have in their land by “applying a somewhat inappropriate terminology drawn from general property law.”<sup>69</sup> In a key phrase, he then said 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.”<sup>70</sup> This meaning of “personal” has since been confirmed by a unanimous Supreme Court in *Canadian Pacific Ltd. v. Paul*.<sup>71</sup> In reference to the description of Aboriginal title in *St Catherine’s* as a “personal and usufructuary right”, the Court said:

This has at times been interpreted as meaning that Indian title is merely a personal right which cannot be elevated to the status of a proprietary interest

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<sup>62</sup> *Ibid.* at 404. Note that both Hall J.’s opinion that “clear and plain” legislative intent must be shown for Aboriginal title to be extinguished, and his view that the Proclamations and Ordinances did not extinguish the Nisga’a’s title, have been accepted by the Supreme Court of Canada, see *infra* notes 83-93 and accompanying text.

<sup>63</sup> In Hall J.’s view, even if the Proclamations and Ordinances relied upon by Judson J. had exhibited the requisite intent (which he found they did not), they still would have been ineffective because the Governor and Legislative Council lacked the authority to extinguish Aboriginal title (*ibid.* at 413).

<sup>64</sup> [1984] 2 S.C.R. 335, 13 D.L.R. (4th) 321 [hereinafter *Guerin* cited to S.C.R.].

<sup>65</sup> *Ibid.* at 377 [emphasis added].

<sup>66</sup> *Ibid.* at 376.

<sup>67</sup> *Ibid.* at 380.

<sup>68</sup> *Ibid.* at 380-81.

<sup>69</sup> *Ibid.* at 381-82.

<sup>70</sup> *Ibid.* at 382. This explanation of the meaning of “personal” had already been given by Duff J. in *Attorney-General for Quebec v. Attorney-General for Canada*, [1921] 1 A.C. 401 at 408, 56 D.L.R. 373 at 377 (Québec P.C.).

<sup>71</sup> *Supra* note 2.

so as to compete on an equal footing with other proprietary interests. However, we are of the opinion that the right was characterized as purely personal for the sole purpose of emphasizing its generally inalienable nature; it could not be transferred, sold or surrendered to anyone other than the Crown.<sup>72</sup>

In *Delgamuukw*, Chief Justice Lamer followed the usual pattern of beginning his discussion of Aboriginal title with the *St. Catherine's* case. He acknowledged that subsequent cases have demonstrated that the words "personal and usufructuary" are

... not particularly helpful to explain the various dimensions of aboriginal title. What the Privy Council sought to capture is that aboriginal title is a *sui generis* interest in land. Aboriginal title has been described as *sui generis* in order to distinguish it from "normal" proprietary interests, such as fee simple.<sup>73</sup>

He then confirmed the essential point made in *Guerin* and *Canadian Pacific* that Aboriginal title is only "personal" in the sense of being inalienable other than by surrender to the Crown. As "[t]his Court has taken pains to clarify", he said, this is the sense in which the word "personal" has been used; it "does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a licence to use and occupy the land and cannot compete on an equal footing with other proprietary interests".<sup>74</sup>

The Supreme Court has therefore modified the position of the Privy Council in *St. Catherine's* in two important respects. First, it has decided that Aboriginal title does not depend on the Royal Proclamation of 1763. Instead, its source is "the prior occupation of Canada by aboriginal peoples."<sup>75</sup> Second, the Court has rejected any implication that the description of Aboriginal title as a "personal and usufructuary right" means that it is non-proprietary. While *sui generis* in certain respects, Aboriginal title is a proprietary interest in land that stands on an equal footing and is entitled to the same respect as common law interests such as fee simple estates. Both of these modifications have significant implications for extinguishment, in particular in regard to Lord Watson's statement in *St. Catherine's* that Aboriginal title is "dependent upon the good will of the Sovereign."<sup>76</sup> Even if his Lordship meant by those words that Aboriginal title can be extinguished by the Crown acting executively,<sup>77</sup> that position is no longer tenable in light

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<sup>72</sup> *Ibid.* at 677.

<sup>73</sup> *Delgamuukw*, *supra* note 1 at para. 112.

<sup>74</sup> *Ibid.* at para. 113. For discussion, see "Constitutionally Protected Property Right", *supra* note 5 at 295-301.

<sup>75</sup> *Delgamuukw*, *supra* note 1 at para. 114, confirming the view expressed by Dickson J. in *Guerin*, *supra* note 64 at 376-79. For discussion, see K. McNeil, "The Post-*Delgamuukw* Nature and Content of Aboriginal Title" in *Emerging Justice?*, *supra* note 5, 102 at 104-8.

<sup>76</sup> See *supra* note 50 and accompanying text.

<sup>77</sup> As we have seen, that was the interpretation given to those words by the lower courts in the *Bear Island* case: see *supra* notes 51-54 and accompanying text. However, it is not at all clear that by "Sovereign" Watson L.J. meant the Crown in its executive capacity, as he could just as well have meant the Crown in Parliament: see *Mathias v. Findlay*, [1978] 4 W.W.R. 653 at 656, 87 D.L.R. (3d) 239 at 241 (B.C.S.C.), where Berger J. said that the words "dependent upon the good will of the Sovereign" simply asserted "what was never in dispute, that is, that Indian

of what we now know about the source and nature of Aboriginal title.

In *St. Catherine's*, Lord Watson said that the terms of the Royal Proclamation show that the "tenure of the Indians was ... dependent upon the good will of the Sovereign."<sup>78</sup> He then pointed out that "it is declared [by the Proclamation] to be the will and pleasure of the sovereign that, 'for the present', they [unceded Indian lands] shall be reserved for the use of the Indians."<sup>79</sup> Evidently he thought that, as Aboriginal title depended on the Royal Proclamation, the sovereign could change its mind and revoke the interest that it had conferred on the Indian nations.<sup>80</sup> However, given that we now know that the source of Aboriginal title is *not* the Royal Proclamation, any power that the Crown may have had to revoke the Proclamation's reservation of lands could not be used to extinguish the Aboriginal title that is recognized by the common law.

Even more importantly, because the Supreme Court has said that Aboriginal title is a legal interest in land that is proprietary in nature, it must enjoy the same protection as other property against executive extinguishment by the Crown. Aboriginal title would only be subject to the pleasure of the Crown if it were a bare licence to occupy Crown land.<sup>81</sup> As we have seen, in *Delgamuukw* Chief Justice Lamer explicitly rejected the notion that Aboriginal title is a non-proprietary licence.<sup>82</sup> It follows that Aboriginal title, like other property rights,<sup>83</sup> could only be unilaterally extinguished by or pursuant to clear and plain legislation. This is exactly what Hall J. said in his dissenting opinion in *Calder*.<sup>84</sup> Since that case was decided, Hall J.'s opinion has been accepted by the Supreme Court. In both *Sparrow*<sup>85</sup> and *Delgamuukw*,<sup>86</sup> the Court affirmed that any extinguishment of Aboriginal rights, including title, requires clear and plain legislative intent.

In one respect, however, the Supreme Court seems to have modified the

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title could be extinguished by competent *legislative* authority" [emphasis added]. Berger J.'s interpretation is, in fact, more consistent with the Privy Council's decision that Aboriginal title is "an interest other than that of the Province" in the land, within the meaning of s. 109 of the *Constitution Act, 1867: St. Catherine's*, *supra* note 48 at 58. See also H. Foster, "Aboriginal Title and the Provincial Obligation to Respect It: Is *Delgamuukw v. British Columbia* 'Invented Law'?" (1998) 56 *The Advocate* 221.

<sup>78</sup> *St. Catherine's*, *supra* note 48 at 54.

<sup>79</sup> *Ibid.* at 54-55.

<sup>80</sup> Whether Watson L.J. thought this could be done by the Crown rather than Parliament is doubtful, however, as Lord Mansfield had held in *Campbell v. Hall* (1774), Lofft 655, 98 E.R. 1045 (K.B.), that the Crown lost its authority to legislate in the conquered colonies to which the Proclamation applied because it promised to create legislative assemblies there: for further discussion, see "Temagami Indian Land Claim", *supra* note 54 at 200-203.

<sup>81</sup> "A bare licence, one unsupported by a contract, is fully revocable": B. Ziff, *Principles of Property Law*, 3d ed. (Scarborough: Carswell, 2000) at 282.

<sup>82</sup> *Supra* note 74 and accompanying text.

<sup>83</sup> *Supra* notes 36-47 and accompanying text.

<sup>84</sup> *Supra* notes 61-62 and accompanying text.

<sup>85</sup> *Supra* note 6 at 1099.

<sup>86</sup> *Supra* note 1 at para. 180. See also *Osoyoos Indian Band*, *supra* note 16 at paras. 40, 56, 67, 84 where Iacobucci J. applied the "clear and plain" test to reserve lands; compare paras. 172-74, Gonthier J. (dissenting). For further discussion of this test, see S. Dorsett, "'Clear and Plain Intention': Extinguishment of Native Title in Australia and Canada post-*Wik*" (1997) 6 *Griffith L. Rev.* 96.

position of Hall J. in *Calder*. As we have seen, Hall J. said that "specific legislation" would be required to extinguish Aboriginal title.<sup>87</sup> In *Delgamuukw*, Chief Justice Lamer reiterated the view he had expressed in *R. v. Gladstone*<sup>88</sup> that "the requirement of clear and plain intent does not, perhaps, require that the Crown 'use language which refers expressly to its extinguishment of aboriginal rights'".<sup>89</sup> He added that "the standard is still quite high."<sup>90</sup> The Court in *Delgamuukw* must have agreed nonetheless with Hall J. that the pre-Confederation Proclamations and Ordinances relied on by Judson J. did not have the effect of extinguishing Aboriginal title generally in British Columbia.<sup>91</sup> Although the Court did not deal with this issue directly, its acceptance of Hall J.'s position is revealed by Lamer C.J.'s statement that, 'given the existence of aboriginal title in British Columbia,' the Court had to determine whether the Province had jurisdiction to extinguish Aboriginal title 'from the time it joined Confederation in 1871' until Aboriginal rights were entrenched in section 35 of the *Constitution Act, 1982*.<sup>92</sup> It would obviously have been unnecessary for the Court to address this issue if it thought that Aboriginal title had been generally extinguished prior to British Columbia joining Canada.<sup>93</sup>

In conclusion, Aboriginal title is a proprietary right that, prior to April 17, 1982, could have been unilaterally extinguished only by or pursuant to constitutionally valid legislation. We now have to consider what legislative bodies would have had the authority to enact legislation that could either extinguish or authorize the extinguishment of Aboriginal title in Canada. We need to consider this matter first in the pre-Confederation colonial period, and then in the period after Confederation.

### C. *Legislative Authority to Extinguish Aboriginal Title Before Confederation*

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<sup>87</sup> *Supra* note 61 and accompanying text.

<sup>88</sup> *Supra* note 6 at para. 34.

<sup>89</sup> *Delgamuukw*, *supra* note 1 at para. 180. Lamer C.J.'s reference to "the Crown" in this passage is unfortunate, as it perpetuates the untenable belief that the Crown acting executively could extinguish Aboriginal rights, including title. He may, however, have used the term in *Gladstone* because the accused in that case had been charged with a violation of fishery regulations that were in fact made by the Governor in Council, acting under delegated legislative authority conferred on it by the *Fisheries Act*, R.S.C. 1985, c.F-14, s. 43. In any case, it is clear from the context of his discussion on this matter in *Delgamuukw* that he was referring to legislative rather than executive acts, as the issue addressed by him was whether provincial "laws" could exhibit a sufficiently clear and plain intention to extinguish Aboriginal title without being *ultra vires*. (As discussed below, he held that they could not, *infra* notes 133-42 and accompanying text).

<sup>90</sup> *Delgamuukw*, *supra* note 1 at para. 180.

<sup>91</sup> *Supra* notes 58-63 and accompanying text.

<sup>92</sup> *Delgamuukw*, *supra* note 1 at para. 4.

<sup>93</sup> The issue of pre-Confederation extinguishment, on which the Supreme Court had split evenly in *Calder*, *supra* note 55, was addressed both at trial and in the Court of Appeal in *Delgamuukw*: see *Delgamuukw* (B.C.S.C.), *supra* note 51 McEachern C.J., holding that extinguishment had occurred, rev'd (1993), 104 D.L.R. (4th) 470 at 525-31, 595, 673-79, 753-54, [1993] 5 W.W.R. 97 at 158-64, 227-28, 305-11, 386-87 (B.C.C.A.), Macfarlane, Wallace, Lambert, and Hutcheon JJ.A. respectively, unanimously rejecting the view that the Proclamations and Ordinances referred to in *Calder* had extinguished Aboriginal title.



### 1. *The Imperial Parliament*

Once the Crown acquired sovereignty over territory in North America, there seems to be little doubt that, from the perspective of British Imperial law, the Parliament at Westminster would have had authority to legislate there.<sup>94</sup> There are many examples of this in Canada, including the *Quebec Act*, 1774,<sup>95</sup> the *Constitution Act*, 1867,<sup>96</sup> and most recently the *Canada Act* 1982.<sup>97</sup> While some Aboriginal people would no doubt dispute this,<sup>98</sup> from the perspective of Imperial law the legislative authority of Parliament would have included authority to legislate in relation to the rights of the Aboriginal peoples, including their land rights.<sup>99</sup> It follows that, at least until enactment of the *Statute of Westminster*, 1931,<sup>100</sup> the Imperial Parliament could have extinguished Aboriginal title in Canada.

As the Imperial Parliament's authority to legislate for a territory must depend upon that territory being part of the Crown's dominions,<sup>101</sup> it would of course be necessary to determine the date of Crown acquisition of sovereignty in order to know when Parliament acquired its legislative authority. While the issue of acquisition of sovereignty cannot be discussed here, it should be noted that courts in Canada have tended to accept Crown assertions of sovereignty without examining the substantive basis

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<sup>94</sup> See *Campbell v. Hall*, *supra* note 80 at 741; Sir K. Roberts-Wray, *Commonwealth and Colonial Law* (New York: Frederick A. Praeger, 1966) at 139-40; B. Slattery, "The Independence of Canada" (1983) 5 Supreme Court L.R. 369 at 384-90 [hereinafter "Independence"]. Note, however, that this was hotly disputed in the American Colonies, where the assertion of legislative authority by Parliament was one of the causes of the Revolution: see C.H. McIlwain, *The American Revolution: A Constitutional Interpretation*, rev. ed. (Ithaca, N.Y.: Cornell University Press, 1958). Note as well that, in the parts of North America acquired from France by the 1763 Treaty of Paris, the British Crown had legislative authority concurrent with that of Parliament for a few months, but that authority was lost when it issued the Royal Proclamation of 1763: see *supra* note 80 and *infra* note 115.

<sup>95</sup> (U.K.), 14 Geo. III, c.83.

<sup>96</sup> (U.K.), 30 & 31 Vict., c.3.

<sup>97</sup> 1982 (U.K.), c.11. By this legislation, the Imperial Parliament effectively renounced any further authority over Canada: see *Indian Association of Alberta*, *supra* note 35 at 98; "Independence", *supra* note 94.

<sup>98</sup> See e.g. T. Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills: Oxford University Press, 1999); P.A. Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood Publishing, 1999).

<sup>99</sup> Section 35 of the *Constitution Act*, 1982 is an obvious example of this. Its validity is at least implicit in the decision of the Court of Appeal of England in *Indian Association of Alberta*, *supra* note 35 at 99. For the political context surrounding this important case, see D.E. Sanders, "The Indian Lobby" in K. Banting & R. Simeon, eds., *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983) 301. As s. 35 provides positive constitutional protection to Aboriginal rights, it is probably not in the interests of Aboriginal peoples to challenge its validity.

<sup>100</sup> (U.K.), 22 Geo. V, c.4. In s. 4 of this statute, the Imperial Parliament renounced authority to legislate for the Dominions, including the Dominion of Canada, with certain exceptions that included repeal and amendment of the *British North America Acts* (now the *Constitution Acts*), 1867 to 1930. On the impact of this statute, see "Independence", *supra* note 94 at 390-92.

<sup>101</sup> See "Independence", *ibid.* at 385-89.

for the Crown's claims. To give just one example, the Crown has been held to have acquired sovereignty over Rupert's Land either before or at the time of the Royal Charter granted to the Hudson's Bay Company by Charles II in 1670, even though English occupation and control of that vast territory was almost entirely lacking at the time;<sup>102</sup> indeed, apart from what they learned from a few voyages of "discovery" into Hudson Bay, in 1670 the English did not have any knowledge of the geography or even the extent of the claimed territory.<sup>103</sup> In virtually all of Canada, Crown assertions of sovereignty therefore need to be re-evaluated by examining both the legal and the factual basis for the Crown's claims.<sup>104</sup>

While the Imperial Parliament's authority to extinguish Aboriginal title after Crown acquisition of sovereignty must be acknowledged, exercise of that authority is another matter. In the absence of Imperial legislation that would have had that effect,<sup>105</sup> the existence of the authority would have no impact on Aboriginal title. And given that the Imperial Parliament renounced legislative authority over Canada in 1931 and 1982,<sup>106</sup> the matter may be of more interest today to constitutional historians than to persons concerned with the existence of Aboriginal title.

## 2. Colonial Legislative Bodies

As the Imperial Parliament was generally unfamiliar with the conditions in the colonies and could not concern itself with the details of local colonial law, the usual practice was for Parliament to delegate legislative authority to colonial governors and other bodies such as legislative councils and elected assemblies. For example, the *Quebec Act* of 1774 provided for the appointment of a council that was given the "Power and Authority to make Ordinances for the Peace, Welfare, and good Government, of the said Province, with the Consent of his Majesty's Governor".<sup>107</sup> In 1791, the *Constitutional Act* provided for the division of Quebec into Upper and Lower Canada, and for the creation of an appointed legislative council and an elected assembly in each "to make Laws for the Peace, Welfare, and good Government".<sup>108</sup>

In regard to each colony, the first question that has to be asked is whether the legislative authority that was delegated to the local legislative body included authority

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<sup>102</sup> See *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development*, [1979] 3 C.N.L.R. 17, [1980] 5 W.W.R. 193 (F.C.T.D.) [hereinafter *Hamlet of Baker Lake* cited to C.N.L.R.], where Mahoney J. held that the 1670 Charter granted the Company "ownership of the entire colony" (*ibid.* at 63) including the area around Baker Lake, even though the facts revealed that the first English penetration into that area did not occur until 1762 (*ibid.* at 26).

<sup>103</sup> See K. McNeil, *Native Rights and the Boundaries of Rupert's Land and the North-Western Territory* (Saskatoon: University of Saskatchewan Native Law Centre, 1982) especially at 6-7.

<sup>104</sup> See e.g. K. McNeil, "Aboriginal Nations and Quebec's Boundaries: Canada Couldn't Give What It Didn't Have" in *Emerging Justice?*, *supra* note 5 at 1; K. McNeil, "Sovereignty and the Aboriginal Nations of Rupert's Land" (1999) 37(1) *Manitoba History* 2.

<sup>105</sup> In *Chippewas of Sarnia* (C.A.), it was argued without success that the *Nullum Tempus Act* (U.K.), 9 Geo. III, c.16, had the effect of extinguishing the Chippewas' title: *supra* note 9, see *infra* notes 153-156 and accompanying text. See also *infra* note 161.

<sup>106</sup> *Supra* notes 97, 100.

<sup>107</sup> (U.K.), 14 Geo. III, c.83, s. 12.

<sup>108</sup> (U.K.), 31 Geo. III, c.31, s. 2.

to extinguish Aboriginal title within the territorial limits of the colony. In *Calder*, the Supreme Court of Canada split evenly on this question in relation to the Colony of British Columbia.<sup>109</sup> Without addressing the question directly, Judson J. was obviously of the view that the Governor and Legislative Council had this authority because, as previously noted, he agreed with the conclusion of the lower courts that a series of Proclamations and Ordinances in relation to land had extinguished Aboriginal title prior to the entry of British Columbia into Confederation.<sup>110</sup> Hall J. disagreed. In his opinion, as neither the Governor's Commission nor his instructions contained

any power or authorization to extinguish the Indian title, then it follows logically that if any attempt was made to extinguish the title it was beyond the power of the Governor or of the Council to do so and, therefore, *ultra vires*.<sup>111</sup>

The issue was not dealt with in the *Delgamuukw* case, as the Court of Appeal held that the Proclamations and Ordinances did not extinguish Aboriginal title, and the Supreme Court apparently accepted that conclusion.<sup>112</sup> For this reason, it is probably no longer necessary to determine whether the Governor and Council had the authority to extinguish Aboriginal title in British Columbia.

In Eastern Canada, where pre-Confederation colonial bodies had legislative authority for much longer periods of time than in British Columbia, the matter is complicated by the Royal Proclamation of 1763.<sup>113</sup> Among other things, that instrument prohibited governors of the Crown's North American colonies from granting warrants of survey or issuing patents for unceded Indian lands and specified a procedure for purchase of Indian lands by the Crown. In the parts of Canada that were acquired from

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<sup>109</sup> Pigeon J., who with the concurrence of Judson, Martland, and Ritchie JJ. dismissed the action because the Nisga'a did not get the Lieutenant-Governor's permission to bring the action, mentioned but did not deal with the issue of legislative authority to extinguish Aboriginal title: *Calder*, *supra* note 55 at 426.

<sup>110</sup> *Ibid.* at 331-34. In the British Columbia Court of Appeal, Tysoe J.A. (Davey C.J. concurred with him on the extinguishment issue) dismissed the argument that the Proclamations were invalid because they were beyond the Governor's authority: *Calder v. Attorney-General of British Columbia* (1971), 13 D.L.R. (3d) 64 at 98, 74 W.W.R. 481 at 522 (B.C.C.A.) [hereinafter *Calder* (B.C.C.A.) cited to D.L.R.]. MacFarlane J.A. said that "[i]t is not disputed that the old Colony of British Columbia had complete legislative jurisdiction to extinguish the so-called 'Indian title'": *ibid.* at 109.

<sup>111</sup> *Calder*, *supra* note 55 at 413.

<sup>112</sup> See *supra* notes 91-93 and accompanying text. In the Court of Appeal, MacFarlane J.A. said that he was proceeding on the premise that the Governor and Council had the authority to extinguish Aboriginal rights: (1993), 104 D.L.R. (4th) 470 at 526, [1993] 5 W.W.R. 97 at 159 (B.C.C.A.) [hereinafter *Delgamuukw* (B.C.C.A.) cited to D.L.R.]. Lambert J.A., dissenting in part, recognized the importance of the issue, but said he did not have to deal with it, given his conclusion that the Proclamations and Ordinances did not extinguish Aboriginal title: *ibid.* at 677-78.

<sup>113</sup> In *Calder*, Judson and Hall JJ. disagreed over the application of the Proclamation in British Columbia, but did not discuss its relevance to the conferral of legislative authority on the Governor and Council: *supra* note 55.

France by the *Treaty of Paris* of 1763,<sup>114</sup> the Proclamation has the status of Imperial legislation.<sup>115</sup> This should mean that it could have been amended or repealed only by an Act of the Imperial Parliament, or by a legislative body empowered to do so by an Imperial statute.<sup>116</sup> In the territory acquired from France in 1763, it appears that authority to amend or repeal the Royal Proclamation was not delegated to the governors or the legislative councils and assemblies of Quebec, Upper and Lower Canada, and the Province of Canada, at least prior to 1860 because the Imperial government in London retained control over Indian affairs in those colonies until that time.<sup>117</sup>

The Royal Proclamation was, however, partially repealed by the Imperial Parliament when it enacted the *Quebec Act* in 1774. In the *Chippewas of Sarnia* case,<sup>118</sup> the Ontario Court of Appeal, in a 'by the Court' judgment, followed its own decision in the *Bear Island* case<sup>119</sup> where it had held that the provisions of the Proclamation relating to the surrender of Indian lands had been repealed by the *Quebec Act*. This is doubtful, as the *Quebec Act* was designed to address the grievances of the French Canadians, not to modify the protections accorded to Indian lands by the Proclamation.<sup>120</sup> But even if the Court of Appeal's opinion on this point is correct,<sup>121</sup> the fact that the Imperial government retained control over Indian affairs in the province of Canada until 1860 probably would have prevented the legislative assembly in the province from enacting statutes prior to that time that extinguished or authorized the extinguishment of Aboriginal title.

In the *Chippewas of Sarnia* case, it was argued that the Aboriginal title of the

<sup>114</sup> C. Parry, ed., *Consolidated Treaty Series* (New York: Oceana Publications, 1969) at 279.

<sup>115</sup> This is because it was issued by George III pursuant to the legislative authority that the Crown had in a conquered or ceded colony before provision was made for a local legislative assembly or English law was introduced: see *Campbell v. Hall*, *supra* note 80. See also *R. v. McMaster*, [1926] Ex. C.R. 68 at 72; *Easterbrook v. The King*, [1931] S.C.R. 210 at 217-18, 1 D.L.R. 628 at 634; *Calder*, *supra* note 55 at 394-95, Hall J. (dissenting); *R. v. Isaac* (1976), 13 N.S.R. (2d) 460 at paras. 50 and 130, (1975) 8 C.N.L.C. 493 at paras. 50, 130 (N.S.S.C. (A.D.)) MacKeigan, C.J. and Cooper J.A. respectively; *Indian Association of Alberta*, *supra* note 35 at 91-92.

<sup>116</sup> This must be what Lord Denning M.R. meant when he said in *Indian Association of Alberta* that "the Royal Proclamation of 1763 was equivalent to an entrenched provision in the Constitution of the colonies in North America" (*supra* note 35 at 91). Compare *Land Rights*, *supra* note 15 at 315-19.

<sup>117</sup> *Chippewas of Sarnia Band v. Canada (Attorney General)* (1999), 40 R.P.R. (3d) 49 at paras. 344-50, 356-58, 393, 101 O.T.C. 1 at paras. 344-50, 356-58, 393 (Ont. Sup. Ct.) [hereinafter *Chippewas of Sarnia* (Sup. Ct.) cited to R.P.R.].

<sup>118</sup> *Supra* note 9 at paras. 185-219.

<sup>119</sup> *Bear Island Foundation (C.A.)*, *supra* note 52, *aff'd* on other grounds by the S.C.C., *supra* note 54.

<sup>120</sup> For authority supporting the continuing application of the Proclamation's Indian provisions, see cases cited *supra* note 115. See also "Temagami Indian Land Claim", *supra* note 54 at 196-97.

<sup>121</sup> The Court clearly regarded this aspect of its judgment as *obiter dicta*, as it held that, regardless of whether the surrender provisions of the Proclamation were still in force after 1774, there had been no surrender of the lands in question: *Chippewas of Sarnia* (C.A.), *supra* note 9 at para. 219. However, it expressly rejected the contention that this aspect of its decision in the *Bear Island* case had been *obiter* (*ibid.* at para. 208).

Chippewas had been extinguished by, among other things, adverse possession of their lands for statutory limitation periods created by legislation enacted in Canada in 1834 and 1859. Campbell J., the motions judge in the case, held that these statutes could not apply to Indian lands because Indian rights were "within the exclusive imperial authority and beyond colonial legislative power."<sup>122</sup> He also held that, even if the colonial legislatures had the power to provide for the extinguishment of Aboriginal title by adverse possession, the 1834 and 1859 statutes did not evince the clear and plain intent required for them to apply to Indian lands.<sup>123</sup> While the Court of Appeal did not deal with the issue of the legislative authority of the colonial assemblies, it nonetheless affirmed this aspect of Campbell J.'s decision by agreeing with him that the requisite intent was lacking. The Court said that Chief Justice Lamer's comments on the clear and plain test in the *Delgamuukw* case<sup>124</sup> suggested that "a mere inconsistency between a statute and an Aboriginal right will not suffice to evidence a clear and plain intention to extinguish the right."<sup>125</sup> The Court also found the following comments of McLachlin J. (as she then was) in the *Van der Peet* case to be "helpful to understand what is required to meet the 'clear and plain' test":

For legislation or regulation to extinguish an aboriginal right, the intention to extinguish must be "clear and plain": *Sparrow*, *supra* [note 6] 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: "[w]hat 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.<sup>126</sup>

In summary, to determine whether legislative bodies had the power to extinguish Aboriginal title in each of the British colonies that were eventually unified to form the Dominion of Canada, the Imperial statutes and other instruments that delegated authority to the legislative body in question must be examined. As we have seen in regard to pre-Confederation Quebec and Canada, this examination must also take into account Imperial policy in relation to Indian affairs and documents like the Royal Proclamation of 1763. If one concludes that a local legislative body was accorded the authority to extinguish Aboriginal title, the next question would be whether that authority was actually exercised.<sup>127</sup> As the burden of proving extinguishment of Aboriginal title is on the party so alleging,<sup>128</sup> it would be up to that party to identify extinguishing

<sup>122</sup> *Chippewas of Sarnia* (Sup. Ct.), *supra* note 117 at para. 597.

<sup>123</sup> *Ibid.* at paras. 594-96. On the clear and plain intent requirement, see *supra* notes 62, 83-90 and accompanying text.

<sup>124</sup> *Supra* notes 86-90 and accompanying text.

<sup>125</sup> *Chippewas of Sarnia* (C.A.), *supra* note 9 at para. 240.

<sup>126</sup> *Van der Peet*, *supra* note 8 at para. 286 (McLachlin J. was dissenting, but not on this point), quoted in *Chippewas of Sarnia* (C.A.), *supra* note 9 at para. 240.

<sup>127</sup> In fact, in both *Delgamuukw* and *Chippewas of Sarnia* the Courts of Appeal went straight to this second question, and by answering it in the negative were able to avoid the first question: see *supra* notes 93, 112. See also *supra* notes 122-126 and accompanying text.

<sup>128</sup> See *Calder*, *supra* note 55 at 404, Hall J. (dissenting), adopted in *Sparrow*, *supra* note 6 at 1099.

legislation and convince the court that it exhibits the requisite clear and plain intent to extinguish the title. As we have seen, the pre-Confederation legislation in British Columbia and the Province of Canada that was relied upon in the *Delgamuukw* and *Chippewas of Sarnia* cases was held not to meet the clear and plain test. It is therefore apparent that it is not going to be easy to establish extinguishment of Aboriginal title in this way.

D. *Legislative Authority to Extinguish Aboriginal Title from Confederation until 1982*

1. *The Imperial Parliament*

There can be little doubt that the Imperial Parliament's authority to extinguish Aboriginal title prior to Confederation would have continued thereafter, since the Parliament at Westminster retained authority to legislate for Canada when it enacted the *Constitution Act, 1867*.<sup>129</sup> Although the Imperial Parliament renounced this authority in part when it enacted the *Statute of Westminster, 1931*,<sup>130</sup> it retained the power to amend Canada's Constitution until it enacted the *Canada Act 1982*.<sup>131</sup> However, instead of utilizing this legislative authority to extinguish Aboriginal title, the Imperial Parliament (on Canada's instructions) used it to entrench Aboriginal and treaty rights in the Constitution of Canada.<sup>132</sup> As a result, we need not concern ourselves further with the power of the Imperial Parliament to extinguish Aboriginal title.

2. *Provincial Legislatures*

When the *Constitution Act, 1867*, divided legislative powers between the Parliament of Canada and the provincial legislatures, section 91(24) gave the Canadian Parliament exclusive jurisdiction over "Indians, and Lands reserved for the Indians". In the *Delgamuukw* case, the Supreme Court of Canada considered the impact of this conferral of jurisdiction on Canada, and concluded that it meant that the provinces have never had the power to extinguish Aboriginal title. Chief Justice Lamer discussed the matter by posing three specific questions, each of which he answered in the negative.

First, the Chief Justice asked whether British Columbia, and thus the other provinces, had *primary* jurisdiction to extinguish Aboriginal title by enacting laws for that purpose. He concluded that they did not, as Aboriginal title lands are "Lands reserved for the Indians", over which Parliament received exclusive authority at the time of Confederation. He based this conclusion on the *St. Catherine's* decision, where Lord Watson had said that the words of section 91(24) were, "... according to their natural meaning, sufficient to include all lands reserved, upon any terms or conditions, for Indian

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<sup>129</sup> *Supra* note 96. See "Independence", *supra* note 94 at 384-90; P.W. Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Carswell, 2002) at §3.1.

<sup>130</sup> (U.K.), 22 Geo. V, c.4.

<sup>131</sup> *Supra* note 97.

<sup>132</sup> *Constitution Act, 1982*, *supra* note 4 at s. 35: see text accompanying *supra* notes 4-5.

occupation.”<sup>133</sup> Moreover, Lamer C.J. agreed with the British Columbia Court of Appeal that “... separating federal jurisdiction over Indians from jurisdiction over their lands would have a most unfortunate result - the government vested with primary constitutional responsibility for securing the welfare of Canada’s aboriginal peoples would find itself unable to safeguard one of the most central of native interests - their interest in their lands.”<sup>134</sup>

Second, Lamer C.J. asked whether British Columbia had the power to extinguish Aboriginal title by laws of general application that “... were not in pith and substance aimed at the extinguishment of Aboriginal rights”.<sup>135</sup> Although he said that provincial laws of general application can apply to Indians and Indian lands,<sup>136</sup> they cannot have the effect of extinguishing Aboriginal rights for two reasons. First of all, to extinguish Aboriginal rights, provincial laws would have to exhibit a clear and plain intention to do so. In Lamer’s view,

... the only laws with the 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.<sup>137</sup>

The Chief Justice’s second reason fortified this by placing Aboriginal rights within the core of federal jurisdiction over Indians and Indian lands, where they are protected against provincial extinguishment by the doctrine of interjurisdictional immunity.<sup>138</sup> As a result, he said that, even prior to being recognized and affirmed by section 35 of the *Constitution Act, 1982*, “... they could not be extinguished by provincial laws of general application.”<sup>139</sup>

Third, Lamer C.J. questioned “whether a provincial law, which could otherwise not extinguish aboriginal rights, [could] be given that effect through referential incorporation by s. 88 of the *Indian Act*.”<sup>140</sup> Again, he held that it could not because

... s. 88 does not evince the requisite clear and plain intent to extinguish

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<sup>133</sup> St. Catherine’s, *supra* note 48 at 59; quoted in Delgamuukw, *supra* note 1 at para. 174.

<sup>134</sup> Delgamuukw, *supra* note 1 at para. 172.

<sup>135</sup> *Ibid.*

<sup>136</sup> See articles cited in *supra* note 7 for a critical commentary on the application of provincial laws to Aboriginal title lands.

<sup>137</sup> Delgamuukw, *supra* note 1 at para. 180.

<sup>138</sup> Where this doctrine applies, provincial laws have to be read down to protect the core of federal jurisdiction, regardless of whether Parliament has occupied the field: see Hogg, *supra* note 129 at §§15.8, 27.2(c).

<sup>139</sup> Delgamuukw, *supra* note 1 at para. 181.

<sup>140</sup> *Ibid.* at para. 172. S. 88 of the *Indian Act*, R.S.C. 1985, c.I-5, provides: “Subject to the terms of any treaty and any other Act of Parliament, 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 this Act.”

aboriginal rights.... I see nothing in the language of the provision which even suggests the intention to extinguish aboriginal rights. Indeed, the explicit reference to treaty rights in s. 88 suggests that the provision was clearly not intended to undermine aboriginal rights.<sup>141</sup>

The *Delgamuukw* decision is, therefore, conclusive authority that, since Confederation, provincial legislatures have had no jurisdiction to extinguish Aboriginal title. Moreover, the referential incorporation by Parliament of certain provincial laws of general application, by section 88 of the *Indian Act*, does not include laws that could extinguish Aboriginal title.<sup>142</sup>

### 3. The Canadian Parliament

As we have seen, section 91(24) of the *Constitution Act, 1867*, gave the Parliament of Canada exclusive jurisdiction over "Indians, and Lands reserved for the Indians". It could be argued that, prior to the *Statute of Westminster, 1931*, this jurisdiction was subject to the Indian provisions of the Royal Proclamation of 1763.<sup>143</sup> Be that as it may, it seems clear as a matter of Canadian constitutional law that, from at least 1931 until 1982, the Canadian Parliament had the power to extinguish or authorize the extinguishment of Aboriginal title by legislation. In a number of cases decided by the Supreme Court before the enactment of section 35 of the *Constitution Act, 1982*, it

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<sup>141</sup> *Delgamuukw*, *ibid.* at para. 183. For recent commentary on s. 88, especially regarding its non-application to Aboriginal title lands, see K. Wilkins, "'Still Crazy After All These Years': Section 88 of the *Indian Act* at Fifty" (2000) 38 Alta. L. Rev. 458; K. McNeil, "Aboriginal Title and Section 88 of the *Indian Act*" (2000) 34 U.B.C. L. Rev. 159.

<sup>142</sup> The Supreme Court was unanimous on these points, as La Forest J., in his concurring judgment, agreed expressly with the Chief Justice's treatment of the extinguishment issue: *Delgamuukw*, *supra* note 1 at para. 206. Consistent with this, the motions judge in *Chippewas of Sarnia* (Sup. Ct.), held that provincial statutes of limitation cannot apply to Aboriginal title land that has become an Indian reserve, either of their own force or by virtue of s. 88 of the *Indian Act*: *supra* note 117 at paras. 476-95. There was no appeal from this aspect of his decision: *Chippewas of Sarnia* (C.A.), *supra* note 9 at paras. 222-23. See also *Stoney Creek Indian Band v. British Columbia*, [1999] 8 W.W.R. 709, [1999] 1 C.N.L.R. 192 (B.C.S.C.) [hereinafter *Stoney Creek Indian Band* (S.C.)], where Lysyk J. came to the same conclusion (this decision was overturned on appeal for procedural rather than substantive reasons: *Stoney Creek Indian Band v. Alcan Aluminum Ltd.* (1999), 179 D.L.R. (4<sup>th</sup>) 57, [2000] 2 C.N.L.R. 345 (B.C.C.A.) [hereinafter *Stoney Creek Indian Band* (C.A.)], leave to appeal to S.C.C. refused [2000] 3 C.N.L.R. iv, [1999] S.C.C.A. No. 539, online: QL (SCJ). A similar issue was also present in *Skeetchestn Indian Band v. British Columbia (Registrar of Land Titles)*, where the Court upheld the decision of the Registrar of Land Titles not to register a certificate of pending litigation, because the litigation involved Aboriginal title, which the Court held not to be a registrable estate or interest under the *Land Titles Act*, R.S.B.C. 1996, c.250: [2000] 10 W.W.R. 22, [2001] 1 C.N.L.R. 310 (B.C.C.A.). However, the Court took the position that an appeal from a decision of the Registrar was not the place to decide the broader constitutional issues arising where land subject to an Aboriginal title claim had been granted in fee simple by the provincial Crown and respecting which a certificate of indefeasible title had been issued under provincial legislation.

<sup>143</sup> See B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 774-75. Of course this depends in part on whether the Proclamation's surrender provisions were repealed by the *Quebec Act*: see *supra* notes 118-21 and accompanying text.



was held that both treaty and Aboriginal rights can be infringed or extinguished by federal legislation.<sup>144</sup> This was confirmed by *Delgamuukw*, where Lamer C.J. held that section 91(24) "... encompasses within it the exclusive power to extinguish aboriginal rights, including aboriginal title."<sup>145</sup>

Any federal legislative extinguishment of Aboriginal title would have to meet the clear and plain intent test.<sup>146</sup> As we have seen, in *Delgamuukw* Lamer C.J., while affirming his observation in *Gladstone* that express reference to extinguishment of Aboriginal rights is perhaps not required, said that "... the standard is still quite high."<sup>147</sup> We have also seen that the pre-Confederation legislation alleged to have extinguished Aboriginal title in British Columbia was held in *Delgamuukw* not to have done so.<sup>148</sup> Moreover, section 88 of the *Indian Act* was held not to have authorized extinguishment of Aboriginal title by referential incorporation of provincial laws.<sup>149</sup> Evidently, establishing extinguishment by federal legislation is no easy task.<sup>150</sup> As McLachlin J. (as she then was) suggested in her judgment in *Van der Peet*,<sup>151</sup> Parliament must have at least considered the impact on Aboriginal rights for its legislation to have the effect of extinguishing them.<sup>152</sup>

Apart from legislation implementing land claims agreements, I am not aware of any federal statutes that were expressly intended to extinguish Aboriginal title. It has been alleged, however, that statutes of limitation that operate as federal legislation can have that effect. Two categories of statutes have been relied upon in this context: limitation Acts enacted either by the British Parliament or by pre-Confederation colonial assemblies that continued to apply in Canada after Confederation; and federal statutes that have adopted provincial limitation periods. Each of these will be considered in turn.

The *Nullum Tempus Act*,<sup>153</sup> enacted by the British Parliament in 1769, barred claims by the Crown and conferred a statutory title on adverse possessors of Crown lands

<sup>144</sup> See *Sikyea v. The Queen*, [1964] S.C.R. 642, 50 D.L.R. (2d) 80; *R. v. George*, [1966] S.C.R. 267, 55 D.L.R. (2d) 386; *Daniels v. White and the Queen*, [1968] S.C.R. 517, 2 D.L.R. (3d) 1; *R. v. Derriksan* (1976), 71 D.L.R. (3d) 159, [1976] 6 W.W.R. 480 (S.C.C.); *Kruger et al. v. The Queen*, [1978] 1 S.C.R. 104 at 116, 75 D.L.R. (3d) 434 at 442-43. However, it may be that none of these cases involved extinguishment: see *Chippewas of Sarnia* (Sup. Ct.), *supra* note 117 at para. 603, where *Sikyea* and *George* were both described as "cases of infringement rather than extinguishment". As we have seen, the distinction between these has become especially important since s. 35 was enacted: see text accompanying *supra* notes 4-10.

<sup>145</sup> *Supra* note 1 at para. 173. See also *Calder*, *supra* note 55; *Van der Peet*, *supra* note 8 at para. 28; *Mitchell v. M.N.R.*, *supra* note 8; *Chippewas of Sarnia* (Sup. Ct.), *supra* note 117 at paras. 539-45. Of course, this power was curtailed by s. 35 of the *Constitution Act, 1982*: see *supra* note 8 and accompanying text; *Chippewas of Sarnia* (C.A.), *supra* note 9 at para. 238.

<sup>146</sup> See *supra* notes 62, 83-90, 123-26, and accompanying text.

<sup>147</sup> *Supra* note 1 at para. 180: see text accompanying *supra* notes 88-90.

<sup>148</sup> See *supra* notes 91-93 and accompanying text.

<sup>149</sup> See text accompanying *supra* notes 140-41. See also *Stoney Creek Indian Band* (S.C.), *supra* note 142 at paras. 27-47; *Chippewas of Sarnia* (Sup. Ct.), *supra* note 117 at paras. 482-95.

<sup>150</sup> Recall too that the burden of proving the requisite clear and plain intent is on the party alleging extinguishment: see text accompanying *supra* notes 62, 128.

<sup>151</sup> *Supra* note 8 at para. 286 (dissenting on other grounds).

<sup>152</sup> See text accompanying *supra* note 126.

<sup>153</sup> *Supra* note 105.

after 60 years.<sup>154</sup> In the *Chippewas of Sarnia* case, it was argued that this statute applied to bar the claim by the Chippewas of Sarnia First Nation for a declaration of their Aboriginal title to lands that had been in the possession of private persons for about 140 years. Although it has been held that this statute applies in Canada to the extent that it has not been superseded by local legislation,<sup>155</sup> the Ontario Court of Appeal in *Chippewas of Sarnia* decided that it can have no application to an action brought by a First Nation rather than the Crown.<sup>156</sup>

In the *Chippewas of Sarnia* case, it was also argued that statutes of limitation enacted by colonial assemblies in Canada prior to Confederation were continued as federal law by section 129 of the *Constitution Act, 1867*,<sup>157</sup> to the extent that they related to matters under federal jurisdiction, which includes "Indians, and Lands reserved for the Indians". Campbell J. accepted that section 129 had the effect of continuing the relevant statutes of limitation,<sup>158</sup> which had been enacted by the legislatures of Upper Canada and the Province of Canada in 1834 and 1859,<sup>159</sup> but rejected the assertion that these statutes applied to Indian lands. In his opinion, the statutes did not meet the clear and plain intent requirement, because they did not evince "... the specific intent necessary or indeed any intent whatsoever to affect or to extinguish the aboriginal title or treaty rights of the plaintiffs in the disputed land."<sup>160</sup> The Court of Appeal agreed.<sup>161</sup>

The second group of statutes that have been alleged to cause extinguishment of Aboriginal title, through the exercise of federal jurisdiction, are statutes that referentially incorporate provincial limitation periods. For example, section 39(1) of the *Federal Court Act*<sup>162</sup> provides:

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<sup>154</sup> See K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 88-89.

<sup>155</sup> See *Hamilton v. The King* (1917), 54 S.C.R. 331, 35 D.L.R. 226.

<sup>156</sup> *Chippewas of Sarnia* (C.A.), *supra* note 9 at para. 235. For the same reason, the Court found the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, as am. by S.C. 1990, c.8, to be inapplicable: *Chippewas of Sarnia* (C.A.), *ibid.* at paras. 230-32.

<sup>157</sup> S. 129 provides that the laws and courts in existence in the provinces at the time of Confederation were to continue, subject "to be repealed, abolished, or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the Authority of the Parliament or of that Legislature under this Act": *supra* note 34.

<sup>158</sup> He relied upon *Mastini v. Bell Telephone* (1971), 18 D.L.R. (3d) 215, 1 C.P.R. (2d) 1 (Ex. Ct.).

<sup>159</sup> *An Act to amend the Law respecting Real Property, and to render the proceedings for recovering possession thereof in certain cases, less difficult and expensive*, 4 Will. IV, c.1; *An Act respecting the limitation of Actions and Suits relating to Real Property, and the time of prescription in certain cases*, C.S.U.C. 1859, c.88.

<sup>160</sup> *Chippewas of Sarnia* (Sup. Ct.), *supra* note 117 at para. 596.

<sup>161</sup> *Chippewas of Sarnia* (C.A.), *supra* note 9 at para. 241. See also *Stoney Creek Indian Band* (C.A.), where Southin J.A. suggested that the English *Limitation Act*, 21 Jac. 1, c.16, might apply to an action for trespass on Indian reserve lands in British Columbia: *supra* note 142 at para. 15. However, if statutes of limitation enacted in Canada in 1834 and 1859 did not exhibit the requisite clear and plain intent to extinguish Aboriginal rights, one may wonder how an English statute enacted long before British Columbia became a Crown colony could do so (assuming that there were Aboriginal rights to the reserve in question in the *Stoney Creek* case, as there were in *Chippewas of Sarnia*).

<sup>162</sup> R.S.C. 1985, c. F-7.

Except as expressly provided by any other Act, the laws relating to prescription and the limitation of actions in force in any province between subject and subject apply to any proceedings in the Court in respect of any cause of action arising in that province.<sup>163</sup>

In the *Chippewas of Sarnia* case, Campbell J. held that this provision applies only to proceedings in the Federal Court, not to actions commenced in provincial courts.<sup>164</sup> That ruling is so obviously correct that it was not disputed on appeal.<sup>165</sup> However, even if the action had been in the Federal Court, one would have to ask whether section 39(1) displays the requisite clear and plain intent to apply to an Aboriginal title claim. Although the section was applied in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*,<sup>166</sup> that case involved a breach of the Crown's fiduciary obligations, not an extinguishment of Aboriginal title. As the Ontario Court of Appeal said in *Chippewas of Sarnia*, when referring to the *Blueberry River* case, "different considerations apply where it is contended that the statute itself extinguished the Aboriginal or treaty right."<sup>167</sup> As we have seen, the Court applied the clear and plain intent test to the limitation statutes under consideration in the *Chippewas of Sarnia* case, and found that they did not meet the test.<sup>168</sup>

#### IV. JUDICIAL EXTINGUISHMENT OF ABORIGINAL TITLE? - THE *CHIPPEWAS OF SARNIA* CASE

Our discussion to this point has revealed that it is very difficult to establish legislative extinguishment of Aboriginal title. No Imperial statutes appear to have done so, as Imperial policy in North America, from at least the time of the Royal Proclamation of 1763, was aimed at protecting rather than undermining Aboriginal rights. English statutes that were received in Canada could not have extinguished Aboriginal title, because the requisite clear and plain intent was obviously lacking. Colonial assemblies in British North America, prior to Confederation, probably did not have the authority to extinguish Aboriginal title, but even if they did, the clear and plain intent test presents a barrier that parties relying on these statutes have so far been unable to surmount. Since Confederation, provincial legislatures have been unable to extinguish Aboriginal title, because it is within the core of exclusive federal jurisdiction over "Indians, and Lands reserved for the Indians". Finally, while federal legislation has infringed Aboriginal rights to hunt and fish,<sup>169</sup> and referential incorporation of provincial limitation periods

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<sup>163</sup> Another example is the *Crown Liability and Proceedings Act*, which contains a similar provision in s. 32: *supra* note 156. As we have seen, in *Chippewas of Sarnia* (C.A.) the Court of Appeal found this statute to be applicable only to actions involving the federal Crown: *supra* notes 9 and 156. In addition, Campbell J. had found that there was no clear and plain legislative intent for this section to permit the extinguishment of Aboriginal title: *Chippewas of Sarnia* (Sup. Ct.), *supra* note 117 at paras. 501-2.

<sup>164</sup> *Chippewas of Sarnia* (Sup. Ct.), *ibid.* at paras. 497-500. See also *Canadian Pacific*, *supra* note 2 at 673; *Stoney Creek Indian Band* (S.C.), *supra* note 142 at para. 50.

<sup>165</sup> *Chippewas of Sarnia* (C.A.), *supra* note 9 at para. 223.

<sup>166</sup> [1995] 4 S.C.R. 344 at para. 107, 130 D.L.R. (4<sup>th</sup>) 193 at para. 107, McLachlin J.

<sup>167</sup> *Chippewas of Sarnia* (C.A.), *supra* note 9 at para. 241.

<sup>168</sup> See text accompanying *supra* notes 158-61.

<sup>169</sup> See cases cited in *supra* note 144.

has barred some claims by Aboriginal peoples,<sup>170</sup> there do not appear to be any federal statutes outside the context of land claims agreements that have been clearly and plainly intended to extinguish Aboriginal title. This consistent absence of legislative intent to extinguish Aboriginal title is entirely consistent with what La Forest J. in *Mitchell v. Peguis Indian Band* described as

... an obligation to native peoples which the Crown has recognized at least since the signing of the Royal Proclamation in 1763. From that time on, the Crown has always acknowledged that it is honour-bound to shield Indians from any efforts by non-natives to dispossess Indians of the property which they hold *qua* Indians, i.e., their land base and their chattels on that land base.<sup>171</sup>

In the *Chippewas of Sarnia* case, Campbell J. and the Court of Appeal both accepted that the Chippewas' Aboriginal title, which had been confirmed by Treaty 29 in 1827, had not been extinguished by voluntary surrender or by statute, the two accepted means by which Aboriginal title could be legally extinguished prior to 1982. The judges were, nonetheless, faced with the fact that non-Aboriginal persons, who were the successors in title of the person to whom the claimed lands had been granted by the Crown in 1853, had been in peaceful and innocent possession for about 140 years.<sup>172</sup> Campbell J. and the Court of Appeal both resolved this dilemma by upholding the titles of the non-Aboriginal possessors, and relegating the claims of the Chippewas to potential damages claims against the Crown. However, the routes they took to arrive at this result were not the same.

After determining that the Chippewas had not surrendered the disputed lands,<sup>173</sup> Campbell J. considered the validity of the 1853 patent by which Lord Elgin, the Governor General of Canada, had purported to grant the lands to Malcolm Cameron, a politician and land speculator. Campbell J. summarized his conclusions regarding the validity of the 1853 patent in these terms:

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<sup>170</sup> See text accompanying *supra* notes 162-67.

<sup>171</sup> *Supra* note 26 at 131. The *Mitchell* case involved property on reserves, but in so far as real property is concerned the Indian interest in Aboriginal title and reserve lands has been held to be the same: *Guerin*, *supra* note 64 at 379, Dickson J.; *Delgamuukw*, *supra* note 1 at para. 120, Lamer C.J. In his recent decision in *Osoyoos Indian Band*, Iacobucci J. said in reference to this holding that "[a]lthough the two interests are not identical, they are fundamentally similar": *supra* note 16 at para. 41. Gonthier J., dissenting, offered a different opinion (*ibid.* at paras. 158-70).

<sup>172</sup> The lands consist of 2,540 acres, most of which are now within the City of Sarnia. According to the Court of Appeal, "[t]here are over 2000 residences, five schools, five churches and a number of commercial and industrial properties located on the disputed lands": *Chippewas of Sarnia* (C.A.), *supra* note 9 at para. 45.

<sup>173</sup> Note that Campbell J. also held that two orders-in-council authorized by the Lieutenant-Governor of Upper Canada in 1840 that purported to approve a sale of the lands by three Chippewa chiefs to Malcolm Cameron did not extinguish the Chippewas' title: *Chippewas of Sarnia* (Sup. Ct.), *supra* note 117 at para. 432. The Court of Appeal agreed expressly with Campbell J. that "the language of the order-in-council was consistent with the Crown's intention to obtain a surrender at some point in the future", which the Crown failed to do: *Chippewas of Sarnia* (C.A.), *supra* note 9 at paras. 121, 185.

Because he had no statutory authority to patent the disputed lands, because he had no delegated prerogative authority to grant the patent, because he was prohibited from doing so by the Royal Proclamation, by the common law of aboriginal title, by the binding surrender procedures embedded by Crown practice into the common law, and by Treaty 29, Lord Elgin's patent to Cameron of the disputed lands was void *ab initio* and of no force and effect.<sup>174</sup>

Campbell J.'s conclusion regarding the effect of Lord Elgin's lack of authority to grant unsurrendered Aboriginal title lands is consistent with the principles discussed earlier in relation to executive authority to interfere with property rights. As we have seen, in the absence of clear and plain statutory authority, the Crown in its executive capacity cannot extinguish property rights, whether by grant or other means.<sup>175</sup> As the Chippewas' interest in their unsurrendered Aboriginal title lands was proprietary,<sup>176</sup> the Governor General could not have extinguished their Aboriginal title by granting the lands to Cameron. This is so fundamental that it should be unquestionable.<sup>177</sup>

Although Campbell J.'s conclusion that the 1853 patent was void *ab initio* meant that Cameron's possession of the disputed lands had been wrongful, Campbell J. was unwilling to correct this wrong by returning the land to the Chippewas, because this would have meant dispossessing the innocent persons who traced their titles back to the patent. He rationalized this outcome by resorting to equitable principles and applying the good faith purchaser for value without notice rule, combined with a 60-year equitable limitation period.

The good faith purchaser rule applies where a trustee transfers trust property to a third party who pays market value without notice, either actual or constructive, of the existence of the trust.<sup>178</sup> When that happens, the purchaser receives good title, and the equitable interest of the trust beneficiary is destroyed. As the property cannot be recovered from the good faith purchaser, the beneficiary's only remedy is against the trustee for breach of trust. This is a specific equitable rule created by the Court of Chancery to protect innocent purchasers of trust property, who may have no way of knowing that the trustee's legal title is not a beneficial title. It is in stark contrast to the common law rule respecting transfers of property, namely *nemo dat quod non habet* (no

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<sup>174</sup> *Chippewas of Sarnia* (Sup. Ct.), *supra* note 117 at para. 431. See also *ibid.* at para. 400, where Campbell J. observed that "[t]he patent was a pure act of the royal prerogative, unsupported by any legislation or purported legislative authority."

<sup>175</sup> See text accompanying *supra* notes 36-47. However, on the basis of the principles outlined there, I respectfully think Campbell J. was wrong if he meant to suggest that the Governor General's commission and instructions could have delegated *prerogative* authority to him to grant unsurrendered Indian lands (see *ibid.* at paras. 413-18), as Lord Elgin could have received authority to do so only by an Act of Parliament.

<sup>176</sup> See *Delgamuukw*, *supra* note 1, and discussion in "Constitutionally Protected Property Right", *supra* note 5.

<sup>177</sup> For extensive judicial authority supporting this principle, and detailed discussion of its application in Australia, see "Racial Discrimination", *supra* note 36.

<sup>178</sup> See D.W.M. Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984) at 983, 1043; P.V. Baker & P. St. J. Langan, *Snell's Principles of Equity*, 28th ed. (London: Sweet & Maxwell, 1982) at 23-24; J. E. Martin, *Hanbury and Martin Modern Equity*, 15th ed. (London: Sweet & Maxwell, 1997) at 18-19, 21, 32-33.

one can give what he or she does not have).<sup>179</sup> At common law, a good faith purchaser for value without notice from a seller whose title is defective only acquires what the seller has, *i.e.* a defective title.<sup>180</sup> Statutory limitation periods aside, there is no bar preventing the true owner of the property from recovering it from the innocent purchaser in that situation.<sup>181</sup>

In *Chippewas of Sarnia*, Campbell J. glossed over this fundamental distinction between the treatment accorded to good faith purchasers by equity and the common law. He said that the defence of the good faith purchaser is “[d]eeply embedded in the principles of *common law and equity*”.<sup>182</sup> Referring to what he called the “highly technical argument” of counsel for the Chippewas that the good faith purchaser rule “demonstrates a fundamental distinction between legal estates and equitable interests”,<sup>183</sup> he said:

Nothing is gained, so many years after the merger of the administration of law and equity in one single supreme court of judicature in 1873, in debating whether equity and law are fused or whether a particular defence, like the defence of good faith purchaser for value without notice, is a legal or equitable defence. Nor is it helpful to reach into technical distinctions between legal estates and equitable interests when applying, to innocent owners who hold their title in fee simple based on a chain of title over a hundred and forty years old, the defence of good faith purchaser for value without notice. It is a valid defence to a claim against land, and a fundamental principle of our law of real property, whether one calls it a rule of law or a rule of equity.<sup>184</sup>

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<sup>179</sup> See Ziff, *supra* note 81 at 412-14; V. Di Castri, *The Law of Vendor and Purchaser*, vol. 2, looseleaf (Toronto: Carswell, 1989) at §522. Note, however, that where land is concerned the application of the *nemo dat* rule has been altered in some jurisdictions by land registry and torrens system legislation: see Ziff, *ibid.* at 423-24; R. Megarry & W. Wade, *The Law of Real Property*, 6th ed. by C. Harpum (London: Sweet & Maxwell, 2000) at 87. As this legislation is provincial in Canada, it cannot apply to extinguish Aboriginal title: see *Chippewas of Sarnia* (Sup. Ct.), *supra* note 117 at paras. 465-81. The Court of Appeal agreed with this aspect of Campbell J.'s decision: *Chippewas of Sarnia* (C.A.), *supra* note 9 at para. 220.

<sup>180</sup> There are exceptions to the *nemo dat* rule, but they are not relevant to the present discussion, as they relate mainly to personal property: see Ziff, *ibid.* at 412; H. Broom, *A Selection of Legal Maxims*, 8th ed. by J. G. Pease & H. Chitty (London: Sweet & Maxwell, 1911) at 624-32; E.L.G. Tyler & N.E. Palmer, *Crossley Vaines' Personal Property*, 5th ed. (London: Butterworths, 1973) at 159-207.

<sup>181</sup> This distinction between the equitable good faith purchaser rule and the common law *nemo dat* rule is illustrated further by the difference between *tracing* trust property in equity and *following* property in law. See A.H. Oosterhoff & E.E. Gillese, *Text, Commentary and Cases on Trusts*, 5th ed. (Scarborough, Ont.: Carswell, 1998) at 754-57, especially at 756: “Nor is the legal remedy [of following] barred by a transfer of the property to a *bona fide* purchaser of the legal estate for value and without notice, as the equitable remedy [of tracing] is.” See also A.H. Oosterhoff & W.B. Rayner, *Anger and Honsberger's Real Property*, 2nd ed., vol. 1 (Aurora, Ont.: Canada Law Book, 1985) at 670-71.

<sup>182</sup> *Chippewas of Sarnia* (Sup. Ct.), *supra* note 117 at para. 689 (emphasis added).

<sup>183</sup> *Ibid.* at para. 737. Compare A.W.B. Simpson, *A History of the Land Law*, 2nd ed. (Oxford: Clarendon Press, 1986) at 181; J. Williams, *Principles of the Law of Real Property*, 17th ed. by T. C. Williams (London: Sweet & Maxwell, 1894) at 210-11.

<sup>184</sup> *Chippewas of Sarnia* (Sup. Ct.), *supra* note 117 at para. 738.

He concluded by saying:

The distinction between legal and equitable interests in land is not relevant in modern times to the defence of innocent purchaser for value without notice. The defence extinguishes any ordinary legal or equitable interest in land.<sup>185</sup>

So “[t]he defence of good faith purchaser for value without notice would extinguish immediately on purchase in 1861 any *ordinary* legal or equitable interest in the disputed lands.”<sup>186</sup>

Because Aboriginal title is *not* an ordinary interest, but rather “a unique form of ownership which does not fit the traditional property rights pigeonholes”, Campbell J. said that “[o]rdinary property doctrines such as [the] good faith purchaser defence should not be applied to extinguish aboriginal title unless they can meet the stringent tests used to measure laws which purport to extinguish aboriginal or treaty rights.”<sup>187</sup> Given the unique nature of Aboriginal title and the special protections accorded to it by Canadian law, he decided that the application of the good faith purchaser rule should be tempered by combining it with an equitable limitation period, which he said should be 60 years, by analogy to the statutory limitation period on actions by the Crown to recover land. That 60-year period began on August 26, 1861, when Cameron alienated the last parcel of the disputed lands to an innocent purchaser, and so the Aboriginal title of the Chippewas was extinguished on August 26, 1921. In Campbell J.’s view, this approach achieved an appropriate balance between the interests of the Chippewas and the innocent purchasers, and so was in keeping with Supreme Court jurisprudence on the need to promote reconciliation between the Aboriginal peoples and other Canadians.<sup>188</sup>

With all due respect, Campbell J.’s application of the good faith purchaser defence and his invention of a 60-year equitable limitation period were remarkable departures from legal principle and precedent. The good faith purchaser rule did not apply to extinguish *legal* interests in land in 1861, nor does it do so today. Referring to the period before the *Judicature Act* of 1873,<sup>189</sup> a leading English text on real property states in emphasized print “the cardinal maxim in which is expressed the true difference between legal and equitable rights”:

*Legal rights are good against all the world; equitable rights are good against all persons except a bona fide purchaser of a legal estate for value without notice, and those claiming under such a purchaser.*<sup>190</sup>

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<sup>185</sup> *Ibid.* at para. 739.

<sup>186</sup> *Ibid.* at para. 740 [emphasis added] (1861 was the date by which Cameron had transferred all of the disputed lands to innocent purchasers). This statement reveals that Campbell J. thought the good faith purchaser rule applied to legal interests even before the *Judicature Acts* of the 1870s.

<sup>187</sup> *Ibid.* at para. 739.

<sup>188</sup> *Ibid.* at paras. 741-69.

<sup>189</sup> 36 & 37 Vict., c. 66.

<sup>190</sup> Megarry & Wade, *supra* note 179 at 99, relying on F.W. Maitland, *Equity: A Course of Lectures*, ed. by A. H. Chaytor & W. J. Whittaker, rev. by J. Brunyate (Cambridge: Cambridge University Press, 1936) at 114-15.

The same authors go on to affirm that this fundamental distinction between law and equity did not change in 1873: "A legal right is still enforceable against a purchaser of a legal estate without notice, while an equitable right is not."<sup>191</sup>

As for equitable limitation periods, a court of equity can adopt a statutory limitation period by analogy and apply it to an equitable claim that is not actually governed by the statute, but only if there is a close resemblance between the equitable action and a common law action that is governed by the limitation period.<sup>192</sup> That vital requirement does not appear to have been met here, as the Chippewas' actions for possession and for damages for trespass were not equitable, nor were there other comparable common law actions that would have been governed by the 60-year limitation period against Crown actions. Moreover, it seems as well that equitable limitation periods are applied in combination with the doctrine of laches,<sup>193</sup> which Campbell J. found to be inapplicable on the facts.<sup>194</sup>

As mentioned earlier, the Court of Appeal came to the same conclusion as Campbell J. on the inability of the Chippewas to challenge the titles of the current possessors of the disputed lands, but for somewhat different reasons. First of all, the Court of Appeal disagreed with Campbell J.'s conclusion that the patent granted to Cameron by the Crown in 1853 had been void *ab initio*. In the Court's view, "a patent that suffers from a defect that renders it subject to attack will continue to exist and to have legal effect unless and until a court decides to set it aside."<sup>195</sup> Moreover, in deciding whether to set a patent aside, the Court said it has discretion, the exercise of which depends in part on the conduct of the party seeking to have the patent declared invalid. It found that this was an appropriate case for it to exercise its discretion not to set the patent aside, because the Chippewas had accepted and acquiesced for so long in the invalid sale of the lands to Cameron by three of their chiefs in 1839; the purchase price had been paid to the Crown in trust for the Chippewas; the patent had been issued as a result of an inadvertent error, made by a dysfunctional bureaucracy that mistakenly thought a formal surrender had been obtained; and the patent had been relied on by innocent third parties for almost 150 years.<sup>196</sup>

<sup>191</sup> *Ibid.* at 103. See also E.H. Burn, *Cheshire and Burn's Modern Law of Real Property*, 15th ed. (London: Butterworths, 1994) at 58.

<sup>192</sup> See *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, 96 D.L.R. (4<sup>th</sup>) 289 [hereinafter *M. (K.)*] cited to S.C.R.; J. M. Lightwood, *The Time Limit on Actions* (London: Butterworths, 1909) at 251-52; G.H. Newsom & L. Abel-Smith, *Preston and Newsom on Limitation of Actions*, 3rd ed. (London: The Solicitors' Law Stationery Society, 1953) at 261-62; J. S. Williams, *Limitation of Actions in Canada*, 2nd ed. (Toronto: Butterworths, 1980) at 38-39.

<sup>193</sup> See J. Brunyate, *Limitation of Actions in Equity* (London: Stevens & Sons, 1932) at 16, quoted with approval by La Forest J. in *M. (K.)*: "Thus the substantial difference between cases where the Court acts in obedience to a Statute of Limitations and cases where it acts by analogy with the statute is that in the former the limitation is peremptory whereas in the latter it is but part of the law of laches." (*M.(K.)*, *ibid.* at 74).

<sup>194</sup> *Chippewas of Sarnia* (Sup. Ct.), *supra* note 117 at paras. 655-78.

<sup>195</sup> *Chippewas of Sarnia* (C.A.), *supra* note 9 at para. 261.

<sup>196</sup> *Ibid.* at paras. 268-75. Later in their judgment, the Court of Appeal disagreed expressly with Campbell J. on the application of the doctrines of laches and acquiescence, which they then used as additional reasons to deny the private law remedies sought by the Chippewas (*ibid.* at paras. 297-302). To the extent that the remedies sought by the Chippewas were legal, however, these equitable doctrines should have had no application: see text accompanying *infra*



The Court of Appeal treated the Chippewas' claim of a right to possession as including an assertion of a public law remedy that "either directly or by necessary implication would set aside the Cameron patent."<sup>197</sup> It said the remedy that was formerly available for this purpose, namely the prerogative writ of *scire facias*, has fallen into disuse and been replaced by an application for judicial review. The modern procedure, nonetheless, continues to be governed by the "foundational principles" applicable to the old prerogative writs, one of which "is the discretionary nature of the inherent power of the superior courts to grant the prerogative writs."<sup>198</sup> The main authority relied upon by the Court to conclude that *scire facias* is discretionary was *The Queen v. Hughes*, where Lord Chelmsford stated:

All Charters or grants of the Crown may be repealed or revoked when they are contrary to law, or uncertain, or injurious to the rights and interests of third persons, and the appropriate process for the purpose is by writ of *Scire facias*. And if the grant or Charter is to the prejudice of any person, he is entitled as of right to the protection of this prerogative remedy.<sup>199</sup>

Commenting on this passage, the Court of Appeal said:

The statement in *Hughes, supra*, that the writ of *scire facias* issues "as of right" must be read together with the statement that the purpose of the remedy of *scire facias* is that grants of letters patent "may be repealed or revoked when they are contrary to law, or uncertain, or injurious to the rights or interests of third persons." If the patent *may* be repealed on *scire facias*, it must equally be the case that it *may not* be repealed or revoked even "when contrary to law".<sup>200</sup>

The Court, thus, disregarded the fact that Lord Chelmsford had listed *three* situations where the writ of *scire facias* is available, and then specified with regard to *one* of them,

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notes 234-43, and *M.(K.)*, *supra* note 192 at 77, La Forest J., quoting with approval from R.P. Meagher, W.M.C. Gummow & J.R.F. Leane, *Equity: Doctrines and Remedies*, 2nd ed. (Sydney: Butterworths, 1984) at para. 3601.

<sup>197</sup> *Chippewas of Sarnia* (C.A.), *supra* note 9 at para. 275.

<sup>198</sup> *Ibid.* at para. 253. The Court placed *scire facias* "in the same category as the more familiar prerogative writs of *certiorari*, *mandamus*, prohibition and *habeas corpus*" (*ibid.* at para. 251). However, while *certiorari* and *mandamus* were held to be discretionary in *Harekin v. University of Regina*, [1979] 2 S.C.R. 561 at 574-76, 96 D.L.R. (3d) 14 at 40-41, Beetz J., this does not mean that the other prerogative writs are. *Habeas corpus*, for example, is so fundamental to the liberty of the subject that "if a probable ground be shown, that the party is imprisoned without just cause, and therefore hath a right to be delivered, the writ of *habeas corpus* is then a writ of right, which 'may not be denied'": Blackstone, *supra* note 37, vol. 3 at 132-33, quoting *Com. Jour.* 1 Apr. 1628. See also Broom, *supra* note 37 at 223; *Eshugbayi Eleko*, *supra* note 40 especially at 670-71. Moreover, s. 10 of the *Canadian Charter of Rights and Freedoms, Constitutional Act, 1982*, Pt. I, *supra* note 4, provides that "[e]veryone has the right on arrest or detention ... to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful."

<sup>199</sup> (1865), 1 L.R. (P.C.) 81 at 87-88, quoted in *Chippewas of Sarnia* (C.A.), *supra* note 9 at para. 250.

<sup>200</sup> *Chippewas of Sarnia* (C.A.), *supra* note 9 at para. 254 (C.A.'s emphasis).

namely where a Crown grant is "to the prejudice of any person", that the writ is obtainable "as of right". What Lord Chelmsford must have had in mind here were situations where Crown grants infringe the rights, especially the *property* rights, of third persons. Whatever the discretion of a court where a grant is contrary to law or uncertain, the special protection accorded to property rights by the common law means that where those rights have been infringed by *executive action in the form of a Crown grant*, the remedy of *scire facias* is not discretionary.<sup>201</sup> If it were, courts could use their discretion to uphold executive taking of property, which is contrary to fundamental common law principles.<sup>202</sup>

More problematic still is the Court of Appeal's holding that a defective Crown patent continues to have legal effect until a court decides to set it aside.<sup>203</sup> This is contrary to long-standing judicial authority.<sup>204</sup> In his report of the *Case of Alton Woods*, Sir Edward Coke described numerous situations where patents would be void, including this example: "if the King be tenant for life, and the King grants the land to another and his heirs, that grant is void, for the King taketh upon him to grant a greater estate than

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<sup>201</sup> See *The Queen v. Eastern Archipelago Company* (1853), 22 L.J.Q.B. (N.S.) 196 (Q.B.), at 213, Lord Campbell C.J.; (1853), 23 L.J.Q.B. (N.S.) 82 (Ex. Ch.) especially at 88-89, Martin B., and at 106, Jervis C.J.; Blackstone, *supra* note 37, vol. 3 at 261. *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326, 78 D.L.R. (4<sup>th</sup>) 175, which was relied on heavily by the Court of Appeal, is not applicable because it involved municipal by-laws passed under legislative authority, not executive action. Moreover, *Immeubles Port Louis Ltée* should be compared with *Tonks v. Reid*, where the Supreme Court found a conveyance of land by a municipality, even though authorized by a by-law, to be void (not voidable) because it was made in violation of statutory provisions: [1967] S.C.R. 81, (1966), 59 D.L.R. (2d) 310. See also *Boddington v. British Transport Police* [1998], 2 W.L.R. 639 at 666, 2 All E.R. 203 at 229, a recent decision of the House of Lords, where Lord Steyn said: "above all, it must be borne in mind that 'there are grave objections to giving the courts discretion to decide whether governmental action is lawful or unlawful'" (quoting from William Wade, *Administrative Law*, 6th ed. (Oxford: Clarendon Press, 1988) at 354).

<sup>202</sup> See text accompanying *supra* notes 36-42. The Court of Appeal also observed that "the courts have for long hesitated to invalidate patents that have created third party reliance": *Chippewas of Sarnia (C.A.)*, *supra* note 9 at para. 259, citing *Boulton v. Jeffrey* (1845), 1 E. & A. 111 (C.A.); *Bailey v. Du Cailland*, [1905] 6 O.W.R. 506 (Div. Ct.) at 508; *Fitzpatrick v. The King* (1926), 59 O.L.R. 331 (C.A.) at 342. However, those cases all involved situations where plaintiffs argued that, because they had been in possession of, or made improvements on, Crown lands, those lands should have been granted to them rather than to the persons who did receive patents. None of the plaintiffs had a pre-existing property right that had been infringed by the Crown grant. The courts accordingly held that, in the absence of evidence that it had been deceived in its grant, the *Crown's discretion* to grant its own lands should not be interfered with by the courts. These cases therefore do not support the existence of *judicial discretion* where property rights have been infringed by Crown grant.

<sup>203</sup> See text accompanying *supra* note 195. For further critical commentary, see M. D. Walters, "The Sanctity of Patents: Some Thoughts on the Validity of Crown Patents for Un-Surrendered Aboriginal Lands" (Pacific Business & Law Institute Conference, Vancouver, 19-20 April 2001).

<sup>204</sup> In addition to the cases referred to in the text and notes following this note, see *McLean Gold Mines Ltd. v. Attorney-General for Ontario* (1925), 58 Ont. L.R. 64, where the Ontario Court of Appeal itself held that grants by the Crown of mining patents were void because the lands were owned by the plaintiff. This decision was reversed on other grounds by the Privy Council: see *infra* note 221.

he lawfully can grant".<sup>205</sup> In *Alcock v. Cooke*,<sup>206</sup> Best C.J. came to the same conclusion with respect to a grant by Charles I in fee simple, which he held to be "altogether void", because the King had attempted to grant an estate in possession which he did not have, the land having been previously granted by James I for a term of years that had not yet expired.<sup>207</sup> Likewise, in the case of *In the matter of Islington Market Bill*, the House of Lords unanimously held that a Crown grant of a market "... within the common law distance of an old market, *primâ facie* is injurious to the old market, and therefore void".<sup>208</sup> Nor has it ever been necessary in these kinds of situations for a patent to be declared void on a writ of *scire facias* in order for it to cease to have legal effect. As was held by Finch C.J. in *Sir Oliver Butler's Case*, and affirmed by the House of Lords, while a 'void patent' could be remedied by *scire facias*, the person wronged would also have private law remedies such as "actions [e.g. trespass] upon the case".<sup>209</sup> An entry upon

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<sup>205</sup> (1600), 1 Co. R. 40b (K.B.) at 44a. See also *Earl of Rutland's Case* (1608), 8 Co. R. 55a (K.B.).

<sup>206</sup> (1829), 5 Bing. 340 (C.P.) at 348. This case also reveals that long user by a grantee of the Crown (over 100 years in this instance) cannot breathe life into an otherwise void patent.

<sup>207</sup> Compare *Chippewas of Sarnia* (C.A.), *supra* note 9 at para. 294, where the Court referred to a distinction Best C.J. had made between a pre-existing interest that had been enrolled and so was of record (as was the case of the leasehold granted by James I), and one that had not been enrolled. In the former situation, Best C.J. said that the second grant was altogether void, because the King had been deceived by the grantee, who had the means of knowing of the existence of the previous grant by examining the rolls. But if the leasehold had been created by a private person and so was not enrolled, or had been created by an enrolled patent that was recited in the second patent, the King would not have been deceived. So the second grant would not necessarily be void. However, it is clear from Best C.J.'s judgment that the fee simple patent, even though not void, would still be *subject to the pre-existing leasehold interest*; as a result, the fee simple would be a remainder until the lease expired. This was affirmed by Lord Mersey in *City of Vancouver v. Vancouver Lumber Company*, [1911] A.C. 711 (P.C.) at 721, where, after referring to *Alcock v. Cooke*, he said:

The rule is a rule of common law by which a grant by the King which is wholly or in part inconsistent with a previous grant is held absolutely void unless the previous grant is recited in it. But the rule is qualified to this extent, that if the subject had no actual or constructive notice of the previous grant, the second grant will be good to the extent to which it may be consistent with the first grant though *void as to the rest*. [Emphasis added]

Moreover, in *Attorney-General for the Isle of Man v. Mylchreest* (1879), 4 App. Cas. 294, the Privy Council decided that the Crown's title, and therefore that of its grantees, to lands on the Isle of Man was subject to customary rights which obviously had not been created by prior grant and so were not enrolled: see discussion in "Racial Discrimination", *supra* note 36 at 376-377. So while the Court of Appeal was correct when it said in *Chippewas of Sarnia* that the "*nemo dat* principle did not automatically invalidate Crown patents", the principle still prevents the Crown from infringing or taking away property rights by means of grant: *ibid.* at para. 295, see also text accompanying *supra* notes 179-81.

<sup>208</sup> (1835), 3 Cl. & F. 513 at 515, Park J.

<sup>209</sup> (1681), 2 Ventr. 344 (Ch.) at 344, Finch C.J., affirmed unanimously (1685), 3 Lev. 220 (H.L.). See also *Bristow v. Cormican* (1878), 3 App. Cas. 641, where the House of Lords found a Crown grant to be ineffective to convey an interest in land without evidence that the land had been the Crown's at the time of the grant. In this regard, Lord Blackburn said that a Crown grant had to be treated in the same way as a grant by a private individual (*ibid.* at 667). The decision therefore affirmed the application of the *nemo dat* rule (see *supra* notes 179-81 and

land by the grantee of an interest that is not the Crown's to give is an actionable civil wrong, because the Crown cannot by patent authorize anyone to enter onto the lands of another.<sup>210</sup> Were this not so, the protections against executive interference with property rights, that have since the *Magna Carta* been so carefully developed by the common law courts,<sup>211</sup> could be circumvented, because the Crown by grant could effectively take privately-owned land, forcing the owner to go to court to ask for what the Court of Appeal in *Chippewas of Sarnia* held to be a discretionary remedy in order to have the Crown patent set aside.<sup>212</sup> It is in fact vital to the rule of law for violations of property rights caused by unlawful acts of the Crown to be remediable, not just by prerogative actions, but also by common law actions brought by the persons wronged.<sup>213</sup>

The Court of Appeal in *Chippewas of Sarnia* was not of the view that private law remedies are unavailable where the Crown wrongfully grants land that is subject to Aboriginal title. However, it held that, apart from their damage claims against the governments of Canada and Ontario, the remedies requested by the Chippewas were equitable, and therefore discretionary as well.<sup>214</sup> In particular, the Court held that their requests for a declaration of their entitlement to possession and a vesting order against some of the current possessors of the disputed lands involved "remedies that are discretionary in nature and subject to equitable defences."<sup>215</sup> Regarding declaratory judgments, the Court said that "[i]t is well established, and not disputed before us, that the remedy of a declaratory judgment is equitable in origin and that its award is subject to the discretion of the court".<sup>216</sup> But, even if this is generally so,<sup>217</sup> apparently it is not

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accompanying text) to Crown patents.

<sup>210</sup> See W. Staunford, *An Exposition of the Kinges Prerogative* (London: Richard Trottell, 1567; reprinted New York: Garland, 1979) at 74a, citing Y.B. 4 Edw. IV, f.25, 24 Edw. III, f.34.

<sup>211</sup> See text accompanying *supra* notes 36-46.

<sup>212</sup> If the patent continued to have legal effect until set aside by a court, it seems that the landowner's fundamental right to defend his property by self-help would be barred by executive act: on the use of self-help to defend possession of land and evict trespassers, see F.H. Lawson, *Remedies of English Law* (Harmondsworth: Penguin Books, 1972) at 47-48.

<sup>213</sup> In *Entick*, *supra* note 39, the Court of Common Pleas decisively rejected the argument that state necessity can justify executive interference with private property rights. The Court awarded damages for trespass against the defendants, who were officers of the Crown, because the warrant under which they had entered the plaintiff's house and seized his papers was unlawful. There was no suggestion that the warrant, which had been issued by the Secretary of State, was valid until set aside by a court. D.L. Keir & F.H. Lawson, *Cases in Constitutional Law*, 4th rev. ed. (Oxford: Clarendon Press, 1954) at 170, describe this decision as "perhaps the central case in English constitutional law."

<sup>214</sup> *Chippewas of Sarnia* (C.A.), *supra* note 9 at paras. 278-83.

<sup>215</sup> *Ibid.* at para. 283.

<sup>216</sup> *Ibid.* at para. 279. Among the authorities listed in support of this statement were *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Ltd.*, [1921] 2 A.C. 438 (H.L.); *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 at 481-82, 18 D.L.R. (4th) 481 at 510-12, Wilson J.; *Hong Kong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167 at 189-92, 100 D.L.R. (4th) 40 at 52-55.

<sup>217</sup> In addition to the cases cited in *supra* note 216, see I. Zamir, *The Declaratory Judgment* (London: Stevens & Sons, 1962) especially at 183-244; P.W. Young, *Declaratory Orders* (Sydney: Butterworths, 1975) especially at paras. 801-19; L. Sarna, *The Law of Declaratory Judgments*, 2nd ed. (Toronto: Carswell, 1988) especially at 17-19, 211-13, 215-16.

always the case. Regarding Aboriginal title in particular, the Supreme Court in *Calder* expressly rejected an argument made by counsel for the Nisga'a that their claim for "a declaration that the aboriginal title, otherwise known as the Indian title, of the plaintiffs to their ancestral tribal territory hereinbefore described, has never been lawfully extinguished" involved the "exercise of equitable jurisdiction".<sup>218</sup>

As discussed above, in *Calder* the Supreme Court split three/three on the issue of whether the Aboriginal title of the Nisga'a had been extinguished by pre-Confederation legislation.<sup>219</sup> Pigeon J., the seventh judge whose judgment was actually that of the majority,<sup>220</sup> avoided this issue entirely by deciding that the courts had no jurisdiction to hear the case, because permission to sue the Crown had not been obtained from the Lieutenant-Governor of British Columbia. Regarding the nature of the action, Pigeon J. said this:

Concerning the contention that the making of the declaration prayed for could be considered as *an exercise of equitable jurisdiction*, I must say that I fail to see how it could be so and how this could be reconciled with the decision above referred to. *The substance of the claim is that the Crown's title to the subject land is being questioned*, its assertion of an absolute title in fee being challenged on the basis of an adverse title which is said to be a burden on the fee.<sup>221</sup>

So when the Nisga'a attempted to avoid the common law rule, that the Crown cannot be sued in its own courts without its permission, by asking the Supreme Court to exercise its equitable discretion in their favour, the Court refused because it *did not* regard their request for a declaration of their title as involving the Court's equitable jurisdiction. But when the Chippewas asked for a declaration of their unextinguished Aboriginal title, their request was denied because the Court of Appeal thought that this remedy *did* involve the Court's equitable jurisdiction. As this aspect of the Court of Appeal's decision is difficult to reconcile with the unmentioned majority judgment in *Calder*, it can be regarded as having been made *per incuriam*.<sup>222</sup> Moreover, after Aboriginal rights were recognized and affirmed by s. 35 of the *Constitution Act, 1982*,<sup>223</sup> judicial discretion over Aboriginal title should have become even more objectionable than it was when *Calder* was decided in 1973. As Lord Shaw poignantly observed in *Scott v. Scott*, "[t]o remit the maintenance of constitutional right to the region of judicial discretion is

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<sup>218</sup> *Calder*, *supra* note 55 at 422, 425-26, Pigeon J.

<sup>219</sup> See text accompanying *supra* notes 59-63.

<sup>220</sup> Judson J., Martland and Ritchie JJ. concurring, agreed with Pigeon J.: *Calder*, *supra* note 55 at 345.

<sup>221</sup> *Ibid.* at 425-26 [emphasis added]. The decision Pigeon J. referred to was *Attorney-General for Ontario v. McLean Gold Mines, Ltd.*, where the Privy Council decided that an action for a declaration of the plaintiff's title to the lands in question had to be brought by petition of right, because the Crown's title was being challenged: [1927] A.C. 185, (1926), 59 O.L.R. 415.

<sup>222</sup> The *per incuriam* doctrine allows other courts to disregard a decision that was made in ignorance of a relevant statute, judicial precedent, or legal principle: see *Halsbury's Laws of England*, *supra* note 32, 4th ed., vol. 26 (1979) at para. 578, and the authorities listed there.

<sup>223</sup> See text accompanying *supra* notes 4-5.

to shift the foundations of freedom from the rock to the sand.”<sup>224</sup>

In *Chippewas of Sarnia*, the Court of Appeal used the *sui generis* character of Aboriginal title as an additional justification for applying equitable principles to deny remedies against the present possessors of the disputed lands.<sup>225</sup> Statements by the Supreme Court of Canada respecting the legally enforceable nature of Aboriginal title do not, the Court of Appeal said,

... reflect a rigid classification of Aboriginal title as strictly legal in nature, immune from the principles of equity. Rights of equitable origin are every bit as legally enforceable as rights of common law origin. By insisting that Aboriginal title is legally enforceable, the Supreme Court of Canada did not, in our view, intend to classify Aboriginal title in terms more relevant to the 19th century, pre-Judicature Act, pre-fusion of law and equity phase of our legal development.<sup>226</sup>

Unfortunately, this part of the Court of Appeal's judgment reveals the same kind of confusion over the impact of the *Judicature Acts* as the judgment of Campbell J.<sup>227</sup> The statement that “[r]ights of equitable origin are every bit as legally enforceable as rights of common law origin” ignores the most fundamental distinction between them, namely that the good faith purchaser for value without notice rule applies only to equitable rights - it has never applied to common law rights.<sup>228</sup> This mistake led the Court of Appeal to apply the good faith purchaser rule in much the same way as Campbell J. had done, with this difference: the Court of Appeal did not accept that the application of this rule could be tempered by a 60-year equitable limitation period.<sup>229</sup> Apart from that, the Court's application of the rule to Aboriginal title land is subject to the same criticisms and, with all due respect, is as incorrect as this aspect of Campbell J.'s judgment.<sup>230</sup> In the *Delgamuukw* case, Lamer C.J. affirmed the unanimous holding of the Supreme Court in *Canadian Pacific v. Paul* that Aboriginal title is a proprietary interest in land that can “compete on an equal footing with other proprietary interests”.<sup>231</sup> Clearly this would not be so if claims to Aboriginal title were subject to equitable defences that do not apply to

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<sup>224</sup> [1913] A.C. 417 at 477, [1911-1913] All E.R. 1 at 80 (H.L.) [hereinafter *Scott* cited to A.C.]. See also *Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 740-43, 19 D.L.R. (4<sup>th</sup>) 1 at 16-18, where the Supreme Court held, for the same kind of reasons, that the mandatory/directory distinction does not apply to constitutional provisions (this distinction allows a court to uphold governmental action that did not comply with statutory requirements by finding those requirements to be directory rather than mandatory). On the common law connection between protection of property rights and freedom, see the quotation from *Harrison v. Carswell*, *supra* note 37, in text accompanying *infra* note 240.

<sup>225</sup> *Chippewas of Sarnia* (C.A.), *supra* note 9 at paras. 284-91.

<sup>226</sup> *Ibid.* at para. 285.

<sup>227</sup> See text accompanying *supra* notes 178-86.

<sup>228</sup> See text accompanying *supra* notes 189-91.

<sup>229</sup> *Chippewas of Sarnia* (C.A.), *supra* note 9 at paras. 297-302.

<sup>230</sup> For further support for this conclusion, see J. I. Reynolds, “*The Chippewas of Sarnia Band v. Canada - A Most Inequitable Decision*” 81 Can. Bar. Rev. [forthcoming in 2002].

<sup>231</sup> *Delgamuukw*, *supra* note 1 at para. 113, citing *Canadian Pacific*, *supra* note 2 at 677 [emphasis added].

common law interests in land.<sup>232</sup> As Pigeon J. stated in the passage from *Calder* quoted above, the substance of a claim to Aboriginal title is an interest in land, adverse to that of other claimants (in that case, the Crown), and so a request for a declaration of Aboriginal title involves property rights that are not subject to a court's equitable jurisdiction.<sup>233</sup>

But even if the Court of Appeal was correct in deciding that the Chippewas' requests for declaratory relief and a vesting order did involve discretionary equitable remedies,<sup>234</sup> there is an additional problem with this aspect of their judgment: these were not the only remedies that the Chippewas sought against the current possessors of the disputed lands. They also asked for writs of possession and damages for trespass against three of the corporate defendants, namely the Canadian National Railway Company, Dow Chemical Canada Incorporated, and Imperial Oil Limited.<sup>235</sup> Actions for possession of land and for trespass are common law actions involving common law remedies that are fundamental to the protection of real property rights.<sup>236</sup> Unlike

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<sup>232</sup> Moreover, it has been authoritatively decided that Aboriginal title and reserve lands (the Aboriginal interest in both is the same: see *supra* note 171) are not held in trust. In *St. Catherine's Milling*, Lord Watson held that Indian title is an interest in land within the meaning of s. 109 of the *Constitution Act, 1867*, thereby implicitly deciding that it is not held in trust (s. 109 made provincial title to Crown lands "subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same"): *supra* note 48 at 58. In *Guerin*, the Supreme Court explicitly rejected the notion that reserve lands are held in trust (Wilson J., however, thought a trust would be created when reserve lands are surrendered for the purpose of being leased): *supra* note 64 at 353-55, Wilson J., and at 386, Dickson J. Given that Aboriginal title and reserve lands are not held in trust, the Aboriginal interest in them should not be defeasible by the application of a rule created to protect innocent purchasers of trust property.

<sup>233</sup> See text accompanying *supra* note 221.

<sup>234</sup> In *Cheslatta Carrier Nation v. British Columbia*, Newbury J.A. upheld a decision of Lysyk J. striking a claim for a declaration of an Aboriginal fishing right on the grounds that no allegation of infringement of that right had been made and so there was no dispute for the Court to resolve: [2001] 1 C.N.L.R. 10, (2000), 143 B.C.A.C. 248 (B.C.C.A.), leave to appeal to SCC refused, [2001] 3 C.N.L.R. iv, [2000] S.C.C.A. No. 625, online: QL (SCJ). Apparently, the Court of Appeal treated this as an exercise of judicial discretion not to grant a declaratory order, rather than as a case where the Court lacked jurisdiction: see *ibid.* at paras. 12, 21.

<sup>235</sup> See Amended Fresh Statement of Claim, 23 May 1996, The Chippewas of Sarnia Band (Plaintiff) and Attorney General of Canada et al. (Defendants), Ontario Court (General Division), Court File No. 95-CU-92484 [hereinafter Statement of Claim] at paras. 3-5. See also *ibid.* para. 7, requesting damages for trespass on, *but not seeking possession of*, lands used by other defendants for industrial, utility or commercial/retail purposes, "until satisfactory negotiated agreements are reached with respect to this land".

<sup>236</sup> The assizes of novel disseisin and mort d'ancestor, the writs of entry, and the writ of right were the classic common law actions for the recovery of possession of land: see F. Pollock & F. W. Maitland, *The History of English Law Before the Time of Edward I*, 2nd ed. reissued, vol. 2 (Cambridge: Cambridge University Press, 1968) at 47-77; McNeil, *supra* note 154 at 17-37. These were eventually replaced by the more expedient action of ejectment (now generally known as an action for recovery of land), which evolved out of trespass: see A. G. Sedgwick & F. S. Wait, "The History of the Action of Ejectment in England and the United States" in Association of American Schools, ed., *Select Essays in Anglo-American Legal History*, vol. 3 (Boston: Little Brown & Co., 1909) 611; W. Holdsworth, *A History of English Law*, 2nd ed., vol. 7 (London: Methuen & Co., 1937) at 4-23. Regarding trespass, which is designed to protect possession, see *infra* notes 237-43 and accompanying text.

equitable remedies, they are not subject to judicial discretion.<sup>237</sup> A leading English textbook, *Snell's Principles of Equity*, put it this way:

[E]quitable remedies are in general discretionary. At law, a plaintiff who proved his case was entitled as of right not only to his judgment but also to enforce it by the forms of execution available at law, *however little his conduct appealed to the court, however dilatory he had been, and however unfair the result.*<sup>238</sup>

The fundamental nature of the protection accorded to property by the law of trespass (and hence by the modern action for recovery of land, which developed out of trespass<sup>239</sup>) was recognized by the Supreme Court of Canada in *Harrison v. Carswell*. Speaking for a majority of the Court, Dickson J. (as he then was) said:

Anglo-Canadian jurisprudence has traditionally recognized, as a fundamental freedom, the right of the individual to the enjoyment of property and the right not to be deprived thereof, or of any interest therein, save by due process of law. The legislature of Manitoba has declared in *The Petty Trespasses Act* that any person who trespasses upon land, the property of another, upon or through which he has been requested by the owner not to enter, is guilty of an offence. If there is to be any change in this statute law, if A is to be given the right to enter and remain on the land of B against the will of B, it would seem to me that such a change must be made by the enacting institution, the Legislature, which is representative of the people and designed to manifest the political will, and not by the Court.<sup>240</sup>

While Dickson J.'s opinion respecting the role of the Court in relation to trespass was expressed in the context of the Manitoba statute under which the respondent had been charged, he clearly acknowledged the connection between the statute and the common law action of trespass, both of which were designed to protect property as a fundamental

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<sup>237</sup> Where trespass is concerned, an entitlement to damages arises at law from proof of the trespass: see *Anderson v. Skender* (1993), 84 B.C.L.R. (2d) 135 at 140-141, 17 C.C.L.T. (2d) 160 at 165-166 (B.C.C.A.). As Southin J.A. stated in *Webb v. Attewell*, "a landowner's right to refuse entry upon his land to a neighbour is absolute and it is no part of a court's function to penalize a refusing landowner for what the court perceives to be unneighbourly behavior": (1993), 108 D.L.R. 532 at 551, 18 C.C.L.T. (2d) 299 at 322 (B.C.C.A.). In contrast to this, where the equitable remedy of an injunction is sought for trespass, a court does have discretion: see G.H.L. Fridman, *The Law of Torts in Canada*, vol. 1 (Toronto: Carswell, 1989) at 39-41; *Halsbury's Laws of England*, *supra* note 31, vol. 45(2) at paras. 526-27. However, a court should not deny an injunction for reasons of private or even public inconvenience: see *Lewvest v. Scotia Towers Ltd.* (1981), 126 D.L.R. (3d) 239, 10 C.E.L.R. 139 (Nfld. S.C. (T.D.)). See also Walters, *supra* note 203 at 10.14; Reynolds, *supra* note 230.

<sup>238</sup> Baker & Langan, *supra* note 178 at 565-66 [emphasis added, footnote omitted]. See also G. W. Keeton & L.A. Sheridan, *Equity* (London: Pitman & Sons, 1969) at 29; Meagher, Gummow & Lehane, *supra* note 196 at para. 311.

<sup>239</sup> See *supra* note 236.

<sup>240</sup> *Harrison v. Carswell*, *supra* note 37 at 219.



right.<sup>241</sup> Dickson J.'s statement can therefore be regarded as equivalent to Lord Camden C.J.'s classic pronouncement (made in the context of invasion of private property by officers of the Crown<sup>242</sup>) of the role of the action of trespass in safeguarding property:

By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and [see] if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and *the plaintiff must have judgment*.<sup>243</sup>

How, then, did the Court of Appeal in *Chippewas of Sarnia* avoid the Chippewas' claims to possession and to damages for trespass? Despite the fact that these claims were listed separately from the claims for declaratory relief in the Chippewas' statement of claim, they were not dealt with as such by the Court. The Court summarized the claims as follows:

The Chippewas started this action in 1995. In essence, they seek declaratory relief recognizing their right to the disputed lands and damages for trespass and breach of fiduciary duty. If the Chippewas obtain the declaratory relief claimed, they would be entitled to possession of the land, although they have made it clear that they are ready and willing to negotiate with the federal and provincial governments and do not seek the wholesale eviction of the present occupiers of the property.<sup>244</sup>

Looking again at the statement of claim, the claims for damages for trespass and for writs of possession were made against selected, mainly corporate defendants, whereas damages for breach of fiduciary duty were sought against the Crown in right of Canada and the Crown in right of Ontario.<sup>245</sup> While declaratory relief was sought against the defendants generally, the Chippewas did not ask for damages for trespass or for writs of possession against all of them, apparently because they did not want to dispossess or cause hardship to families, schools, churches and other institutions. In fact, as the above passage from the Court of Appeal's decision indicates, they preferred to settle their claims by negotiation, and sought the Court's assistance in achieving that goal.<sup>246</sup> In this spirit of reconciliation, it seems that counsel for the Chippewas did not press their claims

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<sup>241</sup> See also *Russo v. Ontario Jockey Club*, [1987] 62 O.R. (2d) 731 at 735, 46 D.L.R. (4<sup>th</sup>) 359 at 363 (H.C.J.), where Boland J. stated that "Chief Justice Dickson in *Harrison v. Carswell*, *supra*, has effectively precluded the possibility of judicial development in this area by stating that only the legislature should make changes to the law of trespass".

<sup>242</sup> See *supra* note 213.

<sup>243</sup> *Entick*, *supra* note 39 at 1066 [emphasis added].

<sup>244</sup> *Chippewas of Sarnia* (C.A.), *supra* note 9 at para. 3.

<sup>245</sup> Statement of Claim, *supra* note 235 at paras. 3-7, 66-72 and accompanying text.

<sup>246</sup> See also *ibid.* at paras. 7, 68.

to possession (apart from their request for a vesting order) and to damages for trespass before the Court of Appeal.<sup>247</sup> The Court, in turn, appears to have used this willingness to compromise against them by wrongly limiting their claims against all the defendants, except the federal and provincial Crowns, to discretionary declaratory relief and vesting orders, and then exercising its discretion against them.

There may, however, be more substantive reasons why the Court of Appeal did not find it necessary to deal with the common law claims to possession and to damages for trespass. As we have seen, the Court held that the 1853 Crown patent continued to have legal effect until a court exercised its discretion to set it aside.<sup>248</sup> As the Court found this to be an appropriate case not to set it aside, the patent continued to have legal effect. The Court may, therefore, have concluded that the patent barred the Chippewas from obtaining their common law remedies. Alternatively, because the Court was of the view that the good faith purchaser for value without notice rule can defeat legal as well as equitable interests, it may have thought that the claims to possession and to damages for trespass were barred by the application of that rule. Unfortunately, neither of these explanations is explicit in the judgment. Moreover, we have seen that the Court's views, on the validity of Crown patents and on the application of the good faith purchaser rule to legal interests, are contrary to fundamental legal principles and to long-standing judicial authority.<sup>249</sup>

So has the Chippewas' title to the disputed lands been extinguished, and if it has, how and when did this happen? While the Court of Appeal did not expressly say that extinguishment had occurred, I think this result is implicit in the decision.<sup>250</sup> However, the manner and time of extinguishment are problematic. The Court's application of the good faith purchaser rule would suggest that extinguishment took place when the lands passed into the hands of purchasers who had no knowledge of the

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<sup>247</sup> See *Chippewas of Sarnia (C.A.)*, *supra* note 9 at para. 278: "In oral argument before this court, Mr. Cherniak on behalf of the Chippewas maintained the position that the primary relief sought by the appellants was for a declaratory judgment, accompanied by a claim for an order directing the negotiations. However, Mr. Cherniak also pointed out that the statement of claim contained a claim for an immediate vesting order, and on behalf of his clients, he asserted that claim should this court consider that a declaratory order should not be granted on discretionary grounds." Note that an order for recovery of possession of land and a vesting order, though often combined in one judgment, are distinct remedies: see Lawson, *supra* note 212 at 235-36, 282-84. In their Statement of Claim, the Chippewas requested both as against three corporate defendants: *supra* note 235 at paras. 3-5. Also, as acknowledged by the Court of Appeal (see text accompanying *supra* note 244), but ignored by it in the rest of its judgment, the claim for damages for trespass, while not pressed, was maintained: see Refiled Factum of the Appellant, The Chippewas of Sarnia Band, 17 May 2000, Court of Appeal for Ontario, Court File Nos. C32170, C32188, C32202 at paras. 51-52 [hereinafter Factum].

<sup>248</sup> See text accompanying *supra* note 195.

<sup>249</sup> See text accompanying *supra* notes 197-233.

<sup>250</sup> Otherwise, the absence of *judicial* remedies would not necessarily bar the Chippewas from exercising the *self-help* remedy of entry, which was surely not a possibility envisaged by the Court of Appeal. Moreover, if extinguishment did not occur, then, as Kerry Wilkins has pointed out to me, the disputed lands are probably still "Lands reserved for the Indians" for the purposes of s. 91(24) of the *Constitution Act, 1982*, and thus are within exclusive federal jurisdiction. Again, I doubt that this is what the Court had in mind.

Chippewas' title, a process that was complete by 1861.<sup>251</sup> However, as this was *before* the *Judicature Acts* that, in the Court's opinion, brought about a fusion of law and equity,<sup>252</sup> presumably extinguishment by this means could have occurred only when subsequent good faith purchasers acquired the lands *after* the enactment of those statutes in the 1870s. This raises another issue, as by then section 91(24) of the *Constitution Act, 1867*, had conferred exclusive jurisdiction over "Lands reserved for the Indians" on the Parliament of Canada. As the disputed lands would no doubt have come within the scope of this provision if the Chippewas' title was unextinguished in 1867,<sup>253</sup> application of the good faith purchaser rule after that time would have the effect of moving those lands from federal to provincial jurisdiction. We have seen, however, that provincial statutes of limitation cannot cause this to happen for division of powers reasons.<sup>254</sup> For a court to be able to do it by discretionary application of a private law property rule is just as questionable.<sup>255</sup> At the very least, one would expect a court to take the constitutional implications of this into account, before deciding whether to exercise its discretion. The Court of Appeal's failure to do so suggests to me that they were unaware of the problem.

Another possibility is that extinguishment occurred in 1853, when the Crown issued the patent that granted the disputed lands to Cameron. We have seen that the Court of Appeal held (wrongly, as I have attempted to show) that the patent continued to have legal effect until set aside by a court.<sup>256</sup> So the Court's view appears to have been that, although the patent extinguished the Chippewas' title, the extinguishment could be undone by a court exercising its discretion to set the patent aside. This is the reverse of the situation just discussed, where the exercise of judicial discretion in favour of good faith purchasers had the effect of moving lands from federal to provincial jurisdiction. If a court set aside the patent and restored the lands to the Chippewas, the lands would be moved from provincial to federal jurisdiction, because they would once again become "Lands reserved for the Indians". So whether extinguishment occurred as a result of the good faith purchases or the issuance of the patent, the same problem arises: without even acknowledging that it was doing so, the Court assumed judicial discretion to move lands from the jurisdiction of one government to another, which would have the dual effect of substituting one body of applicable law for another and redistributing constitutional authority over those lands.<sup>257</sup> Given this display of judicial

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<sup>251</sup> See *supra* note 186 and accompanying text.

<sup>252</sup> See *supra* note 226 and accompanying text.

<sup>253</sup> See *Smith v. The Queen*, [1983] 1 S.C.R. 554, 147 D.L.R. (3d) 237; *Canadian Pacific*, *supra* note 2; *St. Mary's Indian Band v. Cranbrook (City)*, [1997] 2 S.C.R. 657, 147 D.L.R. (4th) 385; *Osoyoos Indian Band*, *supra* note 16.

<sup>254</sup> See *supra* note 142.

<sup>255</sup> One would think that federal involvement would be required. In *Delgamuukw*, Lamer C.J. said that, "... although on extinguishment of aboriginal title, the province would take complete title to the land, the jurisdiction to extinguish lies with the federal government": *supra* note 1 at para. 175.

<sup>256</sup> See *supra* notes 195-213 and accompanying text.

<sup>257</sup> While judges often decide division of powers cases that determine applicable law and constitutional authority in relation to various matters, they do not do so on a discretionary basis. Their decisions in these cases are based on interpretation of constitutional provisions, not upon their view of what is fair and equitable in the particular circumstances before them. In these kinds of constitutional cases, the role of the courts is thus to draw jurisdictional lines; unlike the

constitutional wizardry, it is all the more regrettable that the Supreme Court of Canada rejected the Chippewas' application for leave to appeal.<sup>258</sup>

## V. CONCLUSIONS

Ever since Confederation, the provinces have lacked the constitutional authority to extinguish Aboriginal title. From at least the time of the enactment of the *Statute of Westminster, 1931*, the Parliament of Canada had the authority to extinguish Aboriginal title as long as its intent to do so was clearly and plainly expressed, but that authority was taken away when Aboriginal and treaty rights were recognized and affirmed by section 35(1) of the *Constitution Act, 1982*. Constitutional amendment aside, one therefore would have thought that the effect of section 35(1) would have been to make post-1982 extinguishment of Aboriginal title dependent upon the consent of the Aboriginal title holders, which might only be given if their Aboriginal law permitted a complete surrender of their title. According to the Ontario Court of Appeal's decision in the *Chippewas of Sarnia* case, however, this is not entirely correct. Despite the absence of both a valid surrender and legislative extinguishment, the Court held that *present-day judicial discretion* can be exercised in appropriate circumstances to deny a remedy to Aboriginal title holders whose lands were wrongfully taken in the past. This looks very much like a new form of extinguishment by judicial pronouncement.

One might sympathize with the judges in the *Chippewas of Sarnia* case, for they were in a truly difficult position. They were faced with competing claims to lands by innocent parties - the Chippewas and the current possessors - and they had to make a decision. Their solution, however, was to dismiss all the Chippewas' claims against the innocent possessors, while allowing their claims for damages against the not-so-innocent Crown in right of Canada and Ontario to proceed. One problem with this is that it sends a message to Aboriginal people that they cannot depend on the Canadian legal system to uphold their claims to lands that were wrongfully taken from them in the past. The Court of Appeal's decision indicates that, *regardless of the legal validity of their claims*, judges will not necessarily allow those claims to prevail if they conflict with the claims of other Canadians who did not participate in and were not aware of the wrongs that were committed. Decisions like this will undoubtedly undermine the already shaky faith that Aboriginal people have in Canadian courts. This is particularly so when judges disregard or change well-established legal rules in order to deny Aboriginal claims.<sup>259</sup> As this article has attempted to demonstrate, this is precisely what the Court of Appeal did in the *Chippewas of Sarnia* case.

This relates to a second major problem with the Court of Appeal's decision. In Part Two of this article, we saw that property rights have always enjoyed special protection in Anglo-Canadian law. For centuries, the *nemo dat* rule has generally

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Court of Appeal in *Chippewas of Sarnia* (*supra* note 9), they generally do not assume that they can toss subject matter across those lines if they think that will produce what they regard as a just result in a particular case.

<sup>258</sup> Leave to appeal to S.C.C. refused (8 November 2001), *supra* note 9.

<sup>259</sup> For other instances of this, see K. McNeil, "The Vulnerability of Indigenous Land Rights in Australia and Canada" in J. McLaren, N. Wright & A. Buck, eds., *Property Rights in the Colonial Imagination and Experience* (Vancouver: University of British Columbia Press, forthcoming).

prevented common law property rights from being defeated by wrongful transfer, even to innocent third parties. Additional protection against Crown taking has been provided by the fundamental constitutional principle that the executive cannot infringe or destroy anyone's property rights without clear and plain legislative authority. As Dickson J. observed in *Harrison v. Carswell*, any change to the fundamental protections accorded to property rights should be made by legislatures, not courts.<sup>260</sup> And yet, in order to deny recovery against the current possessors of the disputed lands in the *Chippewas of Sarnia* case, the Court of Appeal did make two major changes to the law relating to the protection of property rights: it decided that the good faith purchaser rule applies to legal interests in land, and held that Crown patents that are inconsistent with existing property rights prevail over those rights until set aside by a court. More disturbing still, the Court did not even acknowledge that these aspects of its decision were major deviations from fundamental principles and long-standing precedents. Instead, it acted as though it was simply applying established law. This raises serious questions about the role of the courts in adjudicating Aboriginal claims, and the impact on the law generally of decisions involving Aboriginal rights.<sup>261</sup>

The courts are obviously going to have to achieve some kind of balance between Aboriginal rights and the interests of innocent third parties in these kinds of cases. In my respectful opinion, however, the Court of Appeal failed to achieve any such balance in the *Chippewas of Sarnia* case. The interests of the current possessors of the disputed lands prevailed *entirely* over the rights of the Chippewas, to the detriment of the legal system generally. The willingness of the Chippewas to compromise by not asking for possession or damages against most of the possessors was simply ignored by the Court. Nor was their desire to seek reconciliation through negotiation supported.<sup>262</sup> Where Aboriginal claimants are willing to accept innovative solutions that take into account the interests of others,<sup>263</sup> judicial creativity should be directed towards finding

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<sup>260</sup> See *supra* notes 240-41 and accompanying text.

<sup>261</sup> In *Scott*, Lord Shaw warned of the risks inherent in judicial erosion of fundamental constitutional principles: "The right of the citizen and the working of the Constitution in the sense which I have described have upon the whole since the fall of the Stuart dynasty received from the judiciary - and they appear to me still to demand of it - a constant and most watchful respect. There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of judges themselves" (*supra* note 224 at 477-78).

<sup>262</sup> Compare Chief Justice Lamer's closing words in his judgment in *Delgamuukw*: "Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet*, *supra* [note 8], at para. 31, to be a basic purpose of s. 35(1) [of the *Constitution Act, 1982*] - 'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown'. Let us face it, we are all here to stay" (*supra* note 1 at para. 186). See also K. Roach, *Constitutional Remedies in Canada*, looseleaf (Aurora, Ont.: Canada Law Book, 1994) at §§15.590-688, suggesting that declaratory judgments provide flexibility for achieving negotiated settlements of Aboriginal rights.

<sup>263</sup> The extent to which the Chippewas were willing to compromise is revealed by their Statement of Claim, *supra* note 235 at paras. 7 and 68, and their Factum, *supra* note 247 at paras. 67-75, under the heading "The Appropriate Remedy". Para. 72(e) of the Factum, for example, reads: "The Chippewas have always maintained a willingness to negotiate with the Crown, and in its pleadings has publicly expressed a willingness to consider an 'absolute surrender' of properties used for residential and institutional purposes and a 'conditional surrender' of

solutions that achieve an appropriate balance and at the same time abide by fundamental principles.<sup>264</sup> Unfortunately, the creativity shown by the Court of Appeal in this instance failed to achieve either of these objectives.

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properties used for other purposes" [footnotes omitted]. See also para. 73(c), suggesting as well that the Crown could use its authority under s. 31 of the *Indian Act*, *supra* note 140, "to restore physical possession of surplus [*i.e.* vacant] properties to the Chippewas for their exclusive use, occupation and benefit and compensate the occupants" (s. 31 provides that the Attorney General of Canada may bring an action by way of information against non-Indians for trespass on or unlawful occupation or possession of reserve lands).

<sup>264</sup> For example, in *Re Manitoba Language Rights* the Supreme Court achieved a balance between constitutional French language rights in Manitoba and the need to preserve societal order by relying on the principle of the rule of law to justify delaying its order of invalidity of Manitoba statutes that had been enacted only in English for a reasonable time to enable the government to translate the statutes into French and have the legislature re-enact them: *supra* note 224.