

The Nature of Aboriginal Title

BRIAN SLATTERY

Introduction

The concept of aboriginal title is an autonomous concept of Canadian common law that bridges the gulf between aboriginal land systems and imported European land systems.¹ It does not stem from aboriginal customary law, English common law or French civil law. It coordinates the interaction between these systems, without forming part of them.² Aboriginal title is thus a *sui generis* concept—one that does not fit into pre-existing legal categories.³

The unique character of aboriginal title is explained by the distinctive history of aboriginal lands in North America during the formative era extending into the nineteenth century. This history can be divided into four phases:

- (1) the period prior to European contact, when aboriginal peoples were independent political entities with international title to their territories;
- (2) the period of contact, when European states launched exploratory voyages and issued Charters embodying territorial claims;

Notes will be found on pages 27–33.

- (3) the period of initial settlement, when permanent European colonies were established and inter-European treaties were concluded, delimiting the boundaries of exclusive colonial spheres; and
- (4) the period of imperial expansion, during which Crown suzerainty was gradually extended over aboriginal nations and a constitutional framework emerged that embraced both settler communities and aboriginal peoples.

Before Europeans came to North America, the indigenous peoples of the continent were independent entities, holding international title to the lands in their possession.⁴ However, the map of North America, like that of Europe, was far from static. The boundaries between aboriginal groups shifted over time and groups migrated in response to such factors as war, epidemic, famine, dwindling game reserves, altered soil conditions, internal conflict and population pressure. Lands that were vacant at one period were later occupied. The identities of the groups themselves changed, as communities dissolved or coalesced and new ones emerged.⁵

Far from ending this fluidity, the arrival of Europeans often magnified it, as novel technologies, diseases, alliances and trade opportunities upset existing balances of power and stimulated fresh forms of competition and conflict. For example, the well-known wars of the Iroquois against their aboriginal neighbours in the seventeenth century were partly spurred by the European fur trade. The introduction of the horse and firearms to the Western plains gave rise to new and more mobile styles of life among the Western Indians, which ironically are often taken to exemplify traditional Indian culture.⁶

The early territorial claims launched by European powers had little basis in reality and had no impact on the territorial rights of indigenous American peoples. Nor did the advent of Europeans have the legal effect of confining aboriginal peoples to the lands they happened to possess at the time of contact, or prevent them from acquiring new lands in the future. Most of the continent remained an area open to movement and change, where the title of an aboriginal group rested on long-standing possession or agreement with other groups, and territory was gained and lost by appropriation, agreement or abandonment.

Nevertheless, the situation changed gradually as the colonial powers concluded treaties among themselves, sorting out their territorial claims *inter se*. While these treaties could not bind indigenous groups that were not parties, they had the effect of designating exclusive European spheres of influence in America and progressively reduced aboriginal opportunities for wider international contacts. This was particularly true in the period following the *Treaty of Paris* in 1763, when

France and Spain withdrew from the eastern and northern sectors of North America, leaving Britain free to pursue its imperial enterprises there. Henceforth, the British Crown and its successors, the United States and Canada, asserted exclusive rights to maintain relations with the aboriginal peoples occupying the territories in question: in particular to conclude treaties with them, to secure suzerainty over them and to obtain cessions of their lands.

Restrictions on the cession of aboriginal lands arose from another source. The English-style land systems prevailing in the colonies had one common characteristic. They were based on the premise that title to land, so far as the settlers were concerned, could only be secured by grant from the Crown or its deputies. It followed that private settlers could not gain title by simply settling on the land or purchasing it from the indigenous peoples. In theory, at least, this rule ensured that the Crown retained control over the pace and manner in which land was settled and that the Crown benefited from any revenues flowing from land grants. The restriction also helped to abate the fraudulent practices that often tainted private purchases of Indian lands.⁷

In various stages, the Crown made good its claims over the territories now making up Canada and brought aboriginal peoples under its protection. This process had several legal consequences for aboriginal land rights.⁸ First, under British law, the Crown gained the ultimate title to the lands held by aboriginal peoples, as it did to all lands in newly acquired colonial territories. This effect flowed from the feudal character of the British constitution, whereby the Crown was not only sovereign of the realm but also supreme landlord.⁹ Second, the territorial title of an aboriginal group became a communal title at common law that formed a burden on the Crown's ultimate title and gave the aboriginal group the right to the exclusive use and occupation of their lands for a broad range of purposes. Third, aboriginal title could not be transferred or sold to private individuals; it could only be ceded to the Crown. As just noted, this restriction stemmed largely from the feudal systems of tenure imported into the colonies and from a desire to prevent fraudulent land transactions.¹⁰ Finally, under the shelter of aboriginal title, customary land systems remained in force within aboriginal communities and governed the relations of their members among themselves.

Character of Aboriginal Title

The basic attributes of aboriginal title were identified in the leading case of *Delgamuukw v. British Columbia*, decided by the Supreme Court of Canada in 1997.¹¹ The case involved a claim by hereditary chiefs of the Gitksan and Wet'suwet'en peoples to separate portions of a tract

encompassing 58,000 square kilometres in northern British Columbia. Their claim was originally for “ownership” and “jurisdiction”; however by the time the case reached the Supreme Court of Canada, it had become mainly a claim for aboriginal title.¹²

Strikingly different conceptions of aboriginal title were advanced before the Court. The aboriginal parties argued that aboriginal title was equivalent to an inalienable fee simple. By contrast, the governments of Canada and British Columbia maintained that aboriginal title was simply a bundle of particular rights to engage in specific culture-based activities on the land, or alternately the right to exclusive use and occupation of the land in order to engage in such specific activities.¹³ These differing approaches merit closer examination.

According to the aboriginal parties, aboriginal title was similar to a fee simple, which is the largest possible form of land title known to English common law.¹⁴ Most lands held by private parties in Canada (outside Quebec) are held in fee simple. A person who holds a fee simple on land is for all practical purposes the absolute owner of the land, or at least as close to being absolute owner as English common law permits. In theory, under the English doctrine of tenures, all lands owned by private individuals are held of the Crown, which has the underlying and ultimate title to the land. The main practical significance of the Crown’s ultimate title is that the land reverts to the Crown if the owner dies without leaving an heir to the estate (a process known as “escheat”). The aboriginal parties argued that a group holding aboriginal title was the effective “fee simple” owner of its lands, with the right to use them for any purpose it saw fit. However, aboriginal title differed from a fee simple in one major respect: it could not be transferred to private parties but could only be surrendered to the Crown.

The Canadian and British Columbia governments rejected this model and argued that aboriginal title was at best a bundle of particular aboriginal rights. This bundle would allow an aboriginal group to engage in a range of specific activities on the land, and it might also give the group the exclusive right to use and occupy the land for those specific purposes. However, aboriginal title would not enable the group to use the land for any purpose it saw fit. The group would be limited to performing the particular activities forming part of the bundle.¹⁵ Moreover, the group would have to show that each activity in the bundle was itself an aboriginal right—that is, an element of a practice, custom or tradition that was integral to the group’s distinctive society at the time of European contact.¹⁶

So, according to the governmental argument, the content of aboriginal title was *variable*. It differed from aboriginal group to aboriginal group, depending on the group’s cultural practices at the time of Euro-

pean contact. By contrast, the aboriginal parties argued that the content of aboriginal title was *uniform* and did not depend on historical practices. If a group had aboriginal title, it could use the land as it wished, subject only to the rule prohibiting transfers to third parties.

In its judgment, the Supreme Court rejected the governmental argument and adopted a position close to that advocated by the aboriginal parties. The Court begins its analysis with the century-old *St. Catherine's Milling* case,¹⁷ where the Privy Council famously characterized aboriginal title as a "personal and usufructuary right." This perplexing formula had bedeviled the case law ever since, spawning unhelpful analogies with the concept of usufruct in Roman, French and even Scottish law. The Supreme Court takes the opportunity to give the formula a decent burial, observing that the Privy Council's choice of terminology was "not particularly helpful to explain the various dimensions of aboriginal title."¹⁸ So doing, the Court opens the way to a clearer and more accurate characterization of aboriginal title.

Following in the footsteps of Justice Dickson in the *Guerin* case,¹⁹ the Supreme Court points out that aboriginal title is a *sui generis* land right. As such, it is a unique right that does not correspond to the categories known to English common law or French civil law. Neither can it be understood simply in terms of aboriginal legal systems. It has to be viewed from both aboriginal and non-aboriginal perspectives.²⁰

Aboriginal title has three basic features that differentiate it from ordinary titles held under common or civil law. First, aboriginal title is inalienable. It cannot be sold or transferred directly to private third parties. It can only be surrendered to the Crown, which in turn may grant it to third parties. However, the fact that aboriginal title is inalienable (and so "personal" to the holding group) does not mean that it is a non-proprietary interest like a licence to use and occupy the land, which cannot compete on an equal footing with ordinary land rights under English or French law.²¹ Aboriginal title is a true property right. In effect, then, the Court rejects the notion that alienability is a necessary feature of a property right. This notion stems from European property systems and has no application to aboriginal title.

The second distinctive feature of aboriginal title is its source. Under English property law, all lands in the hands of private parties are in principle held of the Crown either mediately or immediately, by virtue of a legal fiction positing that the Crown was the original owner of all lands in the realm.²² Influenced perhaps by this conception, the Privy Council in *St. Catherine's* had suggested that the source of aboriginal title in Canada was the *Royal Proclamation* of 1763, issued following the cession of New France to Great Britain.²³ However, this approach implied that aboriginal land rights did not exist unless recognized by the

Crown. In *Delgamuukw*, the Supreme Court disclaims this approach and holds that, while the *Royal Proclamation* recognizes aboriginal title, it does not bring it into being. In the Court's view, aboriginal title arises from the prior occupation of Canada by aboriginal peoples, and from the interaction between the incoming common law and pre-existing systems of aboriginal law. In effect, aboriginal title stems from possession *before* the advent of the Crown.²⁴

A third distinctive feature of aboriginal title is its communal nature. As Chief Justice Lamer explains:

Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community.²⁵

Although the Chief Justice does not elaborate on this point, it has several important ramifications. First, any decision to surrender aboriginal title to the Crown must be a communal one, made by the aboriginal group as a whole. It is not possible for a single individual or collection of individuals (such as a particular "chief" or "chiefs") to dispose of communal lands apart from group consent. The requirement of group consent is a uniform rule of Canadian common law that does not vary from group to group in accordance with local custom. This inference is supported by the *Royal Proclamation* of 1763, which provides that Indian lands shall be purchased only by the Crown "at some publick Meeting or Assembly of the said Indians." Moreover, as a matter of policy, it would be undesirable for the validity of a land surrender to depend on the vagaries of local customary law, which would often be unknown to the Crown parties and in any case might not contemplate land transfers.

The communal character of aboriginal title has a second ramification. The internal law of the group governs the manner in which group members share the land among themselves, unless this law has been modified by statute or other means. So, in effect, the concept of aboriginal title supplies a protective legal umbrella, in the shelter of which the customary law of an aboriginal group may develop and flourish.

A third ramification may be noted. Since decisions about the use and disposal of aboriginal lands must be made communally, there has to be some internal mechanism for communal decision-making. The need for such a mechanism is one of the cornerstones of the right of self-government. At a minimum, an aboriginal group has the inherent right to make communal decisions about how its lands are to be used and by whom. As the Supreme Court observes:

the common law should develop to recognize aboriginal rights (and title, when necessary) as they were recognized by either *de facto* practice or by the *aboriginal system of governance*.²⁶

In particular, the group has the right to decide how the lands are to be shared among group members; to make grants and other dispositions of the communal property; to lay down laws and regulations governing use of the lands; to impose taxes relating to the land; and to determine how any land taxes and revenues are to be used and distributed.

Scope of Aboriginal Title

In *Delgamuukw*, the Supreme Court holds that the scope of aboriginal title is governed by two basic principles. First, aboriginal title confers a right to the exclusive use and occupation of the land for a broad range of purposes, which are not limited to the practices, customs and traditions of the group at the time of contact or any other historical period.²⁷ Nevertheless, under the second principle, the uses that an aboriginal group makes of its land must not be irreconcilable with the nature of the group's attachment to the land. On this point, aboriginal title differs from a fee simple, which allows the land to be used for any purpose whatsoever. Let us consider these principles more closely.

1. Exclusive use and occupation

Aboriginal title confers the right to the exclusive use and occupation of the land for a broad range of purposes. This explicit holding in *Delgamuukw* is the culmination of a series of observations made in previous Supreme Court rulings. Notably, in *Guerin*, Justice Dickson held that aboriginal title is "a unique interest in land" which encompasses "a legal right to occupy and possess certain lands,"²⁸ which implies a right to use the land for more than traditional or customary purposes. Justice Dickson also held that the interest of an Indian band in a reserve is the same as aboriginal title in traditional tribal lands.²⁹ So, the law governing reserve lands presumptively applies by extension to aboriginal title lands. Under s. 18 of the *Indian Act*,³⁰ reserve lands are held "for the use and benefit" of the band and may be used "for any other purpose for the general welfare of the band." Nothing in this section suggests that the band's "general welfare" should be defined narrowly in terms of aboriginal practices prior to European contact rather than the present-day needs of aboriginal communities.³¹

This conclusion is supported by the *Indian Oil and Gas Act*,³² whose overall purpose is to provide for the exploitation of oil and gas on reserve lands that have been surrendered to the Crown.³³ In *Delgamuukw*, the Court holds that this statute presumes that title to reserve lands

includes mineral rights.³⁴ Since aboriginal title is the same as reserve title, aboriginal title must also encompass mineral rights. In effect, lands held pursuant to aboriginal title may be exploited for their oil and gas in the same way as reserves--regardless whether or not this was a traditional use of those lands. The Court also quotes s. 6(2) of the *Indian Oil and Gas Act*, which provides:

Nothing in this Act shall be deemed to abrogate the rights of Indian people or preclude them from negotiating for oil and gas benefits in those areas in which land claims have not been settled.

The Court observes that the areas referred to in this section must include lands held under aboriginal title, since by definition these lands have not been surrendered to the Crown under treaties or land claims settlements. So, s. 6(2) presumes that aboriginal title permits the development of oil and gas reserves.³⁵

This conclusion is significant. It suggests that an aboriginal group may exploit the mineral resources on its lands without necessarily having to surrender the lands to the Crown, so long as the process does not involve the transfer of land to third parties or sever the group's original connection with the land (as discussed below). In other words, although the *Indian Oil and Gas Act* envisages the surrender of reserve lands in order to facilitate their exploitation for oil and gas, there appears to be no reason in principle why such a surrender is necessary under the common law of aboriginal title.

2. The inherent limit on uses

In *Delgamuukw*, the Supreme Court holds that lands held pursuant to aboriginal title cannot be used in a manner that is "irreconcilable with the nature of the attachment to the land that forms the basis of the particular group's aboriginal title."³⁶ If an aboriginal group wants to use its lands in a way that aboriginal title does not permit, it has to surrender the lands to the Crown and convert them into non-title lands.³⁷

The scope of this limitation has to be understood in light of its rationale. Chief Justice Lamer explains that aboriginal peoples have a special bond with the land, as evidenced by the central place that the land typically occupies in their cultures. For most aboriginal groups, the land is more than just a fungible commodity; it has an inherent and unique value quite apart from its economic value. The law of aboriginal title gives effect to that special bond by recognizing the importance of continuity in the relationship between an aboriginal group and its land, and the need for that relationship to endure into the future. As a result, uses of the land that would jeopardize that relationship are ruled out.³⁸

In other words, aboriginal title does not permit uses that would defeat the title's fundamental basis and rationale, which is to preserve the land for future generations. An aboriginal group has the responsibility to ensure that its basic bond with the land is maintained.

How can we determine which uses of the land are legitimate and which are illegitimate? The key lies in the nature of the aboriginal group's historic occupation of the land, as determined by the activities that have taken place on the land and the uses to which the land has been put, as well as by the group's traditional laws governing land.³⁹ The Court does not indicate what precise historical period is relevant in this context. However, since the Court later holds that aboriginal title arises at the time the Crown gains sovereignty, it seems to follow that the basic character of the relationship is established in the period succeeding sovereignty rather than at the time of European contact.⁴⁰ It bears remembering that a snapshot of aboriginal land uses at a single point in time is usually insufficient to capture the full range and depth of a group's ties with its land. A well-rounded account of that relationship will normally have to draw on a relatively lengthy historical period that embraces the full range of climatic, ecological and other conditions with which a group has to cope.

Unfortunately, the concept of an inherent limit on uses is open to misinterpretation. It could be read as reintroducing by the back door the concept of historically-based uses, which the Court has just rejected. The Chief Justice is clearly aware of this danger and goes out of his way to ward it off:

This is not, I must emphasize, a limitation that restricts the use of the land to those activities that have traditionally been carried out on it. That would amount to a legal straitjacket on aboriginal peoples who have a legitimate legal claim to the land. The approach I have outlined above allows for a full range of uses of the land, subject only to an overarching limit, defined by the special nature of the aboriginal title in that land.⁴¹

The Chief Justice gives some concrete examples that help clarify his point. He notes that where an aboriginal group's historical occupation was based on hunting the group cannot now use the land in a way that destroys its value as a hunting-ground, such as by subjecting it to strip-mining. Again, if a group's bond with the land is basically ceremonial or cultural, the group may not use the land in such a way as to sever that bond, as for example by turning the land into a parking lot.⁴² What these examples show is that the inherent limit precludes uses that are completely incompatible with the original

relationship. However, the inherent limit does not rule out uses that are merely unfavourable to the relationship, so long as they do not destroy it. Moreover, the inherent limit does not prevent *part of the lands* from being devoted to inconsistent uses, so long as the original relationship can be maintained on other portions of the land. The inherent limit promotes an appropriate *balance* in the uses of the land rather than a rigid adherence to original uses. This interpretation is supported by the analogy that the Court draws with the English common law doctrine of “equitable waste.” According to that doctrine, persons who hold a life estate in real property cannot commit “wanton or extravagant acts of destruction” or “ruin the property.” The Chief Justice explains that these sorts of limits capture what he has in mind here.⁴³

In effect then, the inherent limit operates only at a very basic level. In most cases, it would not prevent an aboriginal group from putting its lands to a full range of modern uses, so long as these uses do not destroy the land or prevent the group’s elemental bond with the land from continuing. For example, a group that traditionally used its land exclusively for hunting, fishing and gathering might devote the land to a mix of residential, agricultural, dairy, commercial, industrial and resource-based uses, so long as these uses did not rule out the possibility of hunting, fishing and gathering *in some sectors of the territory*. It would not be necessary for hunting, fishing and gathering to be possible throughout the entire territory, for that would preclude most other uses. Nor would it be necessary for these traditional activities to be pursuable at the same level of intensity or with the same freedom as in former years. Clearly, the conversion of land to residential, agricultural or industrial purposes may reduce the opportunity for traditional pursuits, and conservation measures may reduce that opportunity even further. However, so long as an aboriginal group ensures that some reasonable opportunity is afforded for traditional pursuits, the criterion will be satisfied.

One important point emerges from the Court’s two-fold analysis of aboriginal title. Under the first principle, aboriginal title is a *uniform right*, which does not vary from group to group. It gives aboriginal groups the right to the exclusive use and possession of their lands, regardless of differences among groups in their historical patterns of land use. In all cases, aboriginal groups are entitled to use the land for a broad range of contemporary purposes. Nevertheless, the second principle introduces an element of *historical particularity*. An aboriginal group cannot use its land in a way that is fundamentally irreconcilable with its original relationship with the land, a relationship that may differ from group to group.

Aboriginal Custom

What role does aboriginal custom play in this scheme? The answer lies in the fact that, while the doctrine of aboriginal title governs the rights of an aboriginal group considered as a collective unit, it does not regulate the rights of group members among themselves. The latter are governed by rules distinctive to the group, as originally laid down by custom.⁴⁴

The doctrine of aboriginal title recognizes a communal title with certain general features. Apart from the inherent limit on uses, the character of this communal title is not governed by traditional conceptions or practices and so does not vary from group to group. However, the rights of individuals and corporate entities within the group are determined *inter se*, not by the doctrine of aboriginal title, but by internal rules originally grounded in custom. These rules dictate the extent to which any individual, family, lineage, clan or other sub-group has rights to possess and use lands vested in the entire group.⁴⁵ While the rules have a customary base, they are not necessarily static.⁴⁶ They are open to both formal and informal change, in accordance with shifting group attitudes, needs and practices.⁴⁷

These considerations explain why a group may hold aboriginal title at Canadian common law even if traditionally it had no notion of private land ownership. So long as the group satisfies the common law criteria for aboriginal title, it has a communal title to its lands. The fact that group custom does not acknowledge private ownership may be relevant in determining the rights of individual group members, but it does not affect the title of the group as a whole. The same considerations support the conclusion that aboriginal title is not confined to “traditional” uses of land.⁴⁸ The doctrine of aboriginal title attributes to an aboriginal group a sphere of autonomy, whereby it can determine freely how to use its lands, so long as it does not sever its basic relationship with the land. Traditional conceptions may influence the group’s decisions, but current needs and attitudes will likely play as strong a role.

Prior to the Supreme Court’s decision in *Delgamuukw*, some courts had expressed the view that an aboriginal group is permanently limited in its use of aboriginal lands to customary practices followed at a distant historical period, such as the time the Crown first acquired sovereignty.⁴⁹ On this supposition, aboriginal title is like an historical diorama in an old-fashioned museum. Here, a smiling maiden strips birch-bark from a tree; there, a sturdy warrior aims bow and arrow at a mildewed deer; while in the corner, a youngster plucks plastic blueberries from a withered bush. We must, of course, disregard the next display, where a group of hunters plant their first crop of corn under the glassy eye of a black-robed missionary. If an aboriginal group did

not practise agriculture traditionally, it is now forbidden. The difficulty with this conception, of course, is that aboriginal people are not waxen figures on display for tourists but living people who depend on the land for their livelihood. Any rule that would hold them in permanent bondage to outmoded practices must be viewed with skepticism.

The history-bound view apparently drew on English rules under which a party asserting a customary right must show that the custom has existed from “time immemorial” which, for curious reasons, is associated with the year 1189. However, the analogy is inappropriate. As we have seen, the doctrine of aboriginal rights is not based on English common law but arose in response to quite different historical conditions in North America. Indeed, it would have been contrary to imperial interests in America to confine aboriginal land uses to those existing at the time of contact. The European fur trade, which was central to the development of Canada, depended on the activities of aboriginal hunters and trappers whose practices had changed considerably since pre-European times.⁵⁰ When colonial officials, in other contexts, urged certain hunting groups to take up farming, they were not sanctioning an unlawful use of land.

We must guard against the notion that aboriginal societies are essentially static in nature, that the only true aboriginal land uses are those that were practised “aboriginally.” In fact, of course, aboriginal societies have often been characterized by their ability to adapt to shifting circumstances in a highly flexible manner. Without this flexibility, they would often have had little chance of survival.⁵¹ Significant changes in aboriginal life-styles occurred in pre-European times, and further changes took place in response to European contact. Such adaptations did not entail the abandonment of a group’s essential identity, any more than Europeans lost their identity when they adopted federalism, took up lacrosse or started cultivating potatoes, corn and tomatoes.⁵² The better view, then, is that taken by the Supreme Court in the *Delgamuukw* case. Aboriginal title gives a group the right to the exclusive use and occupation of their land and the right “to use it according to their own discretion,”⁵³ subject only to the need to maintain their basic link with the land.

Aboriginal Title as a Property Right

Aboriginal title is a true property right that may be maintained against the whole world, including the Crown. It is not held at the Crown’s pleasure and it cannot be extinguished by a unilateral Crown act under the royal prerogative.⁵⁴ Where aboriginal title has been extinguished by valid legislation, it benefits from the common law rule requiring just compensation.

The royal prerogative consists of certain powers held by the Crown under the common law, which may be exercised apart from Parliament.⁵⁵ Prerogative powers should be distinguished from powers awarded to the Crown by statute. The legal character of a Crown act, such as an order-in-council or letters patent, depends on the source of the power to enact it. If the power stems from the common law, the act is a prerogative instrument. If the power is based on legislation, the act has the character of a statutory instrument.

Where the Crown issues a prerogative grant with respect to land burdened by aboriginal title, the grant does not extinguish aboriginal title. The Crown holds only an underlying title to aboriginal lands and cannot grant more than it possesses. To the extent that the grant purports to extinguish aboriginal title, it is ineffective.⁵⁶ Where the grant is based on statutory authority rather than the royal prerogative, its impact on aboriginal title depends on such factors as the competence of the enacting legislature; the clarity of the legislative provisions; the terms of the grant; and the effect of such constitutional instruments as the *Royal Proclamation* of 1763, s. 91(24) of the *Constitution Act, 1867* and s. 35(1) of the *Constitution Act, 1982*.⁵⁷

At one time, the effect of prerogative acts was less certain than it is today.⁵⁸ In *St. Catherine's Milling and Lumber Co. v. The Queen*, the Privy Council said that Indian title held under the *Royal Proclamation* of 1763 was "dependent upon the good will of the Sovereign."⁵⁹ The statement was not explained and was not necessary to the decision. Nevertheless, it implied that Indian title was akin to a mere licence to use the land, which the Crown could unilaterally revoke at any time by prerogative act.⁶⁰ However, in the *Calder* case,⁶¹ the Supreme Court moved in the direction of recognizing aboriginal title as a full legal right. Although Justice Judson merely repeated the Privy Council's statement,⁶² Justice Hall adopted a well-defined position. He wrote:

when the Nishga people came under British sovereignty ... they were entitled to assert, as a legal right, their Indian title. It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation.⁶³

According to this view, aboriginal title could only be extinguished by a voluntary surrender or by legislation. By implication, it could not be extinguished by a unilateral exercise of the prerogative.

This position was endorsed by the Supreme Court in the *Guerin* case. Justice Dickson stated that in *Calder* "this Court recognized aboriginal title as a *legal right* derived from the Indians' historic occupa-

tion and possession of their tribal lands,” and he noted that “Judson and Hall JJ. were in agreement ... that aboriginal title existed in Canada (at least where it has not been extinguished by *appropriate legislative action*) ...”⁶⁴ Justice Dickson also adopted the view that the Indians were “the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion ...”⁶⁵ In her separate opinion, Justice Wilson explicitly held that the Indian interest “cannot be derogated from or interfered with by the Crown’s utilization of the land for purposes incompatible with the Indian title unless, of course, the Indians agree.”⁶⁶ In an important passage, she observed:

It seems to me that the “political trust” line of authorities is clearly distinguishable from the present case because Indian title has an existence apart altogether from s. 18(1) of the *Indian Act*. It would fly in the face of the clear wording of the section to treat that interest as terminable at will by the Crown without recourse by the Band.⁶⁷

It might be thought obvious that aboriginal title is a property right. Yet this conclusion has sometimes been doubted.⁶⁸ Once again, the confusion stems in part from the *St. Catherine’s* case, where the Privy Council, in an unfortunate phrase, described Indian title as a “personal and usufructuary right.”⁶⁹ This statement could be taken as suggesting that aboriginal title is a right held in some personal capacity against the Crown rather than a property right. However, the Privy Council subsequently disavowed this interpretation in the *Star Chrome* case, where it explained that Indian title is “a personal right in the sense that it is in its nature inalienable except by surrender to the Crown.”⁷⁰ In other words, aboriginal title is a “personal” right only in the sense that it is exclusive to the group that holds it and cannot be transferred to private individuals.⁷¹ Nevertheless, it could be argued that the restriction on the transfer of aboriginal title prevents it from being truly proprietary in nature, since a property right is characteristically alienable. However, the argument is misconceived. While there may be grounds in English law for associating property with alienability, the two are not necessarily linked.⁷² In any case, aboriginal title is not a category of English land law but a *sui generis* right. As seen above, the restriction on alienability stemmed historically from the rule prevailing in settler communities that title to land flows from the Crown. This restriction is only partial, for aboriginal title may be ceded to the Crown and possibly also to other aboriginal groups.

Properly understood, the *St. Catherine’s* case stands for the proposition that aboriginal title is a property right. The Privy Council held

that Indian title is an “Interest other than that of the Province” in lands allotted to a Province by s. 109 of the *Constitution Act, 1867*.⁷³ Thus, the Crown in right of the Province holds only the underlying title to lands affected by aboriginal title until aboriginal title is surrendered to the Crown in right of the Federal Government, at which point the lands become available to the Province as a source of revenue. As the Privy Council later observed, the phrase an “Interest other than that of the Province” in s. 109 denotes “some right or interest in a third party, independent of and capable of being vindicated in competition with the beneficial interest of the old province.”⁷⁴ It follows that Indian title is an interest in land, independent of and opposable to the Crown’s underlying title, which it burdens.

In *Canadian Pacific Ltd. v. Paul*,⁷⁵ the Supreme Court removed any remaining doubts on the question. In a unanimous opinion, the Court stated:

Before turning to the jurisprudence on what must be done in order to extinguish the Indian interest in land, the exact nature of that interest must be considered. Courts have generally taken as their starting point the case of *St. Catherine’s Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), in which Indian title was described at p. 54 as a “personal and usufructuary right.” 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 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.

The Court went on to quote, with approval, Justice Wilson’s statement in the *Guerin* case that the Crown cannot derogate from the Indian interest in land unless the Indians agree.⁷⁶

The fact that aboriginal title is an interest in land means that it benefits from the common law presumption favouring the payment of just compensation upon a compulsory taking. In the absence of clear words to the contrary, statutes that unilaterally extinguish aboriginal land rights should be interpreted as providing for compensation.⁷⁷ The concept that aboriginal title is a compensable right is not a refinement of modern jurisprudence. It is intrinsic to the characterization of aboriginal title in the *Royal Proclamation* of 1763. Indian lands are defined there as “such Parts of Our Dominions and Territories as, *not having been ceded to, or purchased by Us*, are reserved to them....” The Crown

provides that “if, at any Time, any of the said Indians *should be inclined to dispose of* the said Lands, the same *shall be purchased* only for Us, in Our Name, at some publick Meeting or Assembly of the said Indians to be held for that Purpose...” These provisions portray aboriginal title as a valuable interest in land normally acquired by purchase, which involves the payment of a monetary consideration. It follows that, where the Crown does not buy Indian lands for a mutually agreed price but expropriates them, the act will be governed by the normal presumption requiring payment of just compensation.

In *Delgamuukw*, the Supreme Court explicitly confirms this viewpoint. In discussing the Crown’s fiduciary duty under s. 35(1), *Constitution Act, 1982*, the Court holds that aboriginal title has an inescapable economic aspect. As such, fair compensation is normally required when aboriginal title is infringed, depending on such factors as the nature of the aboriginal title in question, the nature and severity of the infringement, and the extent to which aboriginal interests have been accommodated.⁷⁸ Although the Court is discussing the implications of the Crown’s fiduciary duty under s. 35(1), it appears that s. 35(1) merely entrenches a common law duty that predated the enactment of the *Constitution Act, 1982*.⁷⁹

In summary, the concept of aboriginal title is a distinctive concept of Canadian common law that coordinates the interaction between indigenous land systems and European-based land systems. Aboriginal title arises from the occupation of Canada by indigenous peoples prior to the advent of the Crown. It is a communal title and cannot be alienated except to the Crown. It gives a group the right to the exclusive use and occupation of the land for a broad range of purposes, so long as these are not irreconcilable with the group’s original bond with the land. While the concept of aboriginal title is broadly uniform in nature, it allows for differing systems of land use and tenure to operate within aboriginal groups. Aboriginal title is a true property right, maintainable against the whole world, including the Crown. It is not held at the Crown’s pleasure and it cannot be extinguished by a unilateral exercise of the Crown prerogative. Where aboriginal title has been extinguished by the act of a competent legislature, it benefits from the common law presumption ordaining the payment of just compensation.

Notes

- 1 This paper draws on material first published in B. Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 741-53. For a range of theories regarding the origins and character of aboriginal title, see K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989); B. Slattery, "The Legal Basis of Aboriginal Title," in *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*, ed. F. Cassidy (Lantzville, B.C.: Oolichan Books, 1992); J. C. Smith, "The Concept of Native Title" (1974) 24 U.T.L.J. 1.
- 2 The point is elaborated in B. Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Can. Bar Rev. (forthcoming).
- 3 *Guerin v. The Queen* [1984] 2 S.C.R. 335 (S.C.C.) per Dickson J. at 379-82.
- 4 See J. D. Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquoia* (Ph.D. Dissertation, Cambridge University, 1985; reprint, Saskatoon: University of Saskatchewan Native Law Centre, 1985); B. Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L.J. 681.
- 5 See, e.g., D. G. Mandelbaum, *The Plains Cree: An Ethnographic, Historical, and Comparative Study* (Regina: Canadian Plains Research Centre, 1979) at 7-46.
- 6 See C. G. Calloway, *New Worlds for All: Indians, Europeans, and the Remaking of Early America* (Baltimore, Md.: John Hopkins University Press, 1997) at 142-51, 183-87; G. T. Hunt, *The Wars of the Iroquois: A Study in Intertribal Trade Relations* (Madison: University of Wisconsin Press, 1960); F. Jennings, *The Ambiguous Iroquois Empire* (New York: Norton & Co., 1984); D. G. Mandelbaum, *The Plains Cree: An Ethnographic, Historical, and Comparative Study* (Regina: Canadian Plains Research Centre, 1979) at 7-46; R. White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (Cambridge: Cambridge University Press, 1991).
- 7 In *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (S.C.C.), Lamer C.J. observed at 1090: "... the inalienability of aboriginal lands is, at least in part, a function of the common law principle that settlers in colonies must derive their title from Crown grant and, therefore, cannot acquire title through purchase from aboriginal inhabitants. It is also, again only in part, a function of a general policy "to ensure that Indians are not dispossessed of their entitlements": see *Mitchell v. Peguis Indian Band*, [1990] 2 S.C.R. 85, at p. 133."
- 8 Cf. the analysis offered by Chief Justice Marshall in *Johnson v. M'Intosh*, 8 Wheaton 543 (U.S.S.C. 1823) and *Worcester v. Georgia*, 6 Peters 515 (U.S.S.C. 1832).
- 9 See *Johnson v. M'Intosh*, 8 Wheaton 543 (U.S.S.C. 1823); *Amodu Tijani v. Secretary of Southern Nigeria* [1921] 2 A.C. 399 (P.C.) at 407; *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46 (P.C.). For analysis, see K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989); D. P. O'Connell, *International Law*, 2nd ed. (London: Stevens & Son, 1970) vol.1 at 403-05; K. Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens & Sons, 1966) at 625-36; J. Salmond, *Jurisprudence*, 7th ed. (London: Sweet & Maxwell, 1924) Appendix V at 554; B. Slattery, *The Land*

- Rights of Indigenous Canadian Peoples* (D.Phil. Thesis, Oxford University, 1979; reprint, Saskatoon: University of Saskatchewan Native Law Centre, 1979) at 45-62.
- 10 In some aboriginal groups, the sale or transfer of land outside the group may have been unknown or forbidden. To this extent, the restriction on alienation may coincide with traditional concepts.
 - 11 *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (S.C.C.). The majority opinion is written by Chief Justice Lamer, with the concurrence of Cory, McLachlin and Major JJ. Unless otherwise indicated, all references are to the majority opinion. La Forest J. writes a short separate opinion (with L'Heureux-Dubé J. concurring) in which he agrees with the Chief Justice's conclusions but disagrees with various aspects of his reasons. While McLachlin J. concurs with the Chief Justice, she also states at 1135 that she is "in substantial agreement with the comments of Justice La Forest." Since the views of the Chief Justice and La Forest J. are incompatible on some points, it appears that McLachlin J. agrees with La Forest J. only where the latter supplements rather than departs from the views of the Chief Justice.
 - 12 *Ibid.* at 1028-29.
 - 13 *Ibid.* at 1080.
 - 14 See, e.g., B. Ziff, *Principles of Property Law* (Scarborough, Ont.: Carswell, 1993) at 38-39, 45, 118-120.
 - 15 *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (S.C.C.) at 1080-81.
 - 16 Under the test governing specific aboriginal rights laid down in *R. v. Van der Peet* [1996] 2 S.C.R. 507 (S.C.C.) at 549, 554-55.
 - 17 *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46 (P.C.) at 54.
 - 18 *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (S.C.C.) at 1081.
 - 19 *Guerin v. The Queen* [1984] 2 S.C.R. 335 (S.C.C.) *per* Dickson J. at 379-82.
 - 20 *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (S.C.C.) at 1081.
 - 21 *Ibid.* at 1081-82, citing *Canadian Pacific Ltd. v. Paul* [1988] 2 S.C.R. 654 (S.C.C.) at 677.
 - 22 K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 79-93.
 - 23 Royal Proclamation of 7 October 1763, in Clarence S. Brigham, ed., *British Royal Proclamations Relating to America* (Worcester, Mass.: American Anti-quarian Society, 1911), 212.
 - 24 *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (S.C.C.) at 1082, 1098-99, citing *Guerin v. The Queen* [1984] 2 S.C.R. 335 (S.C.C.) at 376, 378; *Roberts v. Canada* [1989] 1 S.C.R. 322 (S.C.C.) at 340; K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 7; K. McNeil, "The Meaning of Aboriginal Title," in *Aboriginal and Treaty Rights in Canada*, ed. M. Asch (Vancouver: University of British Columbia Press, 1997) at 144.
 - 25 *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (S.C.C.) at 1082-83.
 - 26 *Ibid.* at 1106; final emphasis added.
 - 27 *Ibid.* at 1083. For a range of persuasive arguments supporting this conclusion, see K. McNeil, "The Meaning of Aboriginal Title," in *Aboriginal and Treaty Rights in Canada*, ed. M. Asch (Vancouver: University of British Colum-

- bia Press, 1997). Justice La Forest disagrees with the Court on this point, arguing that the content of aboriginal title is determined by the traditional way of life of the specific aboriginal group at the time of Crown sovereignty, that is by the particular practices, customs and traditions that governed the way in which the specific group used the land to live (at 1128). He adds, nevertheless, that these uses, although confined to the aboriginal society's traditional way of life, may be exercised in a contemporary manner. In effect, then, La Forest J. holds that the contours of aboriginal title vary from group to group, depending on the group's traditional mode of life.
- 28 *Guerin v. The Queen* [1984] 2 S.C.R. 335 (S.C.C.) at 382. See also: *Canadian Pacific Ltd. v. Paul* [1988] 2 S.C.R. 654 (S.C.C.) at 677-78.
 - 29 *Guerin v. The Queen* [1984] 2 S.C.R. 335 (S.C.C.) at 379.
 - 30 Indian Act, R.S.C., 1985, c. I-5. For the genesis of this provision, see K. McNeil, "The Meaning of Aboriginal Title," in *Aboriginal and Treaty Rights in Canada*, ed. M. Asch (Vancouver: University of British Columbia Press, 1997) at 148-49.
 - 31 *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (S.C.C.) at 1085-86.
 - 32 Indian Oil and Gas Act, R.S.C., 1985, c. I-7.
 - 33 Section 2 of the Act defines "Indian lands" as "lands reserved for the Indians, including any interests therein, surrendered in accordance with the *Indian Act*"
 - 34 *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (S.C.C.) at 1086-87. The Court invokes its earlier ruling in *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* [1995] 4 S.C.R. 344 (S.C.C.).
 - 35 *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (S.C.C.) at 1087. For an argument to the same effect, see K. McNeil, "The Meaning of Aboriginal Title," in *Aboriginal and Treaty Rights in Canada*, ed. M. Asch (Vancouver: University of British Columbia Press, 1997) at 149-50.
 - 36 *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (S.C.C.) at 1080; see also heading at 1088. It is not clear whether this limit is also meant to apply to reserve lands. On the one hand, as just seen, the Court at 1085 reiterates the view expressed in *Guerin v. The Queen* [1984] 2 S.C.R. 335 (S.C.C.) that aboriginal title and reserve title are presumptively identical. On the other hand, the Court at 1085-86 quotes s. 18, Indian Act, R.S.C., 1985, c. I-5, which contemplates that reserve lands may be used for any purposes whatsoever.
 - 37 *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (S.C.C.) at 1091.
 - 38 *Ibid.* at 1088-90.
 - 39 *Ibid.* at 1088-89, 1099-1100.
 - 40 *Ibid.* at 1097-99.
 - 41 *Ibid.* at 1091.
 - 42 *Ibid.* at 1089.
 - 43 *Ibid.* at 1090-91, citing E. H. Burn, *Cheshire and Burn's Modern Law of Real Property*, 14th ed. (London: Butterworths, 1988) at 264; R. E. Megarry & H. W. R. Wade, *The Law of Real Property*, 4th ed. (London: Stevens, 1975) at 105.

- 44 Subject, as always, to valid legislation.
- 45 The position parallels that described by the Privy Council in *Amodu Tijani v. Secretary of Southern Nigeria* [1921] 2 A.C. 399 (P.C.) at 403-04: "In India, as in Southern Nigeria, there is yet another feature of the fundamental nature of the title to land which must be borne in mind. The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment, and even to a right of transmitting the individual enjoyment as members by assignment inter vivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading." This passage was cited by Hall J. in *Calder v. British Columbia (A.G.)* [1973] S.C.R. 313 (S.C.C.) at 355, and the decision itself was referred to with approval by Dickson J. in *Guerin v. The Queen* [1984] 2 S.C.R. 335 (S.C.C.) at 378.
- 46 On the mutability of aboriginal custom, see the remarks of Sissons J. in *Re Noah Estate* (1961), 32 D.L.R. 185 (N.W.T.T.C.) at 197.
- 47 We are speaking, as always, of the position at common law. The matter is now regulated in part by various statutes.
- 48 This also appears to be the position in United States law; see, e.g., *United States v. Shoshone Tribe of Indians*, 304 U.S. 111 (U.S.S.C. 1938); *United States v. Klamath Indians*, 304 U.S. 119 (U.S.S.C. 1938); F. S. Cohen, "Original Indian Title" (1947-48) 32 Minn. L. Rev. 28; F. S. Cohen, *Handbook of Federal Indian Law*, 1982 ed., ed. R. Strickland and others (Charlottesville, Va.: Michie Bobbs-Merrill, 1982) at 491.
- 49 See *Baker Lake (Hamlet of) v. Minister of Indian Affairs and Northern Development* [1980] 1 F.C. 518 (F.C.T.D.) at 559; *Attorney-General for Ontario v. Bear Island Foundation* (1984), 15 D.L.R. 321 (Ont. H.C.) at 354-61.
- 50 Thus, Mandelbaum writes: "The advent of the Hudson's Bay Company marked the opening of a new phase in tribal fortunes. ... Both the tribal culture and locale changed greatly under the influence of the English. The culture naturally altered with the influx of European goods and with the shift of occupational emphasis from food gathering to fur trapping during certain seasons of the year. The locale was enlarged because the traders sent the natives deeper and deeper into the back country to collect furs from the different tribes and to trap in virgin territory."; D. G. Mandelbaum, *The Plains Cree: An Ethnographic, Historical, and Comparative Study* (Regina: Canadian Plains Research Centre, 1979) at 20.
- 51 See H. Brody, *Maps and Dreams: Indians and the British Columbia Frontier* (Harmondsworth, Eng.: Penguin Books, 1983) at 21-30, 85-86, 247.
- 52 On the range of aboriginal contributions to modern European and North American cultures, see C. G. Calloway, *New Worlds for All: Indians, Europeans, and the Remaking of Early America* (Baltimore, Md.: Johns Hopkins University Press, 1997); J. Weatherford, *Indian Givers: How the Indians of America Transformed the World* (New York: Fawcett Columbine, 1988); J.

- Weatherford, *Native Roots: How the Indians Enriched America* (New York: Fawcett Columbine, 1991).
- 53 *Guerin v. The Queen* [1984] 2 S.C.R. 335 (S.C.C.) per Dickson J. at 378, quoting a passage from *Johnson v. M'Intosh*, 8 Wheaton 543 (U.S.S.C. 1823) at 573-74. The same passage is quoted with approval by Hall J. in *Calder v. British Columbia (A.G.)* [1973] S.C.R. 313 (S.C.C.) at 381-82, who reiterates that "the aborigines of newly-found lands were conceded to be the rightful occupants of the soil with a legal as well as a just claim to retain possession of it and to use it according to their own discretion ..." (at 383). See also *Simon v. The Queen* [1985] 2 S.C.R. 387 (S.C.C.) at 402-03, where the Supreme Court of Canada rejected the argument that a right to hunt "as usual" embodied in an Indian treaty was limited to hunting for purposes and by methods usual in 1752, the date the treaty was concluded. Dickson C.J. stated that "the inclusion of the phrase 'as usual' appears to reflect a concern that the right to hunt be interpreted in a flexible way that is sensitive to the evolution of changes in normal hunting practices."
- 54 This rule holds true except in certain very unusual situations, such as in a conquered or ceded colony, where the Crown has the power to legislate under the royal prerogative prior to the summoning of a local assembly; see *Campbell v. Hall* (1774), Lofft 655 (K.B.); P. W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Scarborough, Ont.: Carswell, 1992) at 14, 33; B. Slattery, *The Land Rights of Indigenous Canadian Peoples*, (D.Phil. Thesis, Oxford University, 1979; reprint, Saskatoon: University of Saskatchewan Native Law Centre, 1979) at 30-44. Of course, the Crown has the prerogative power to extinguish aboriginal title *bilaterally*, by accepting a voluntary cession from the relevant aboriginal group.
- 55 See P. W. Hogg, *Constitutional Law of Canada*, 3rd ed. (Scarborough, Ont.: Carswell, 1992) at 13-17.
- 56 The grant may not be entirely invalid but may give the grantee the right to possess the land once aboriginal title is extinguished.
- 57 The effect of statutory grants on Indian title was considered in *Canadian Pacific Ltd. v. Paul* [1988] 2 S.C.R. 654 (S.C.C.), with inconclusive results.
- 58 See, e.g., *R. v. Isaac* (1975), 13 N.S.R. 460 (N.S.S.C., App. Div.) per MacKeigan C.J. at 476, 479; G. V. La Forest, *Natural Resources and Public Property under the Canadian Constitution* (Toronto: University of Toronto Press, 1969) at 159-60.
- 59 *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46 (P.C.) at 54.
- 60 Other interpretations of the Privy Council's words have been adopted, notably that the Crown could express its will concerning aboriginal title only through legislation: see *Mathias v. Findlay* [1978] 4 W.W.R. 653 (B.C.S.C.). For discussion of the question whether the Proclamation of 1763 can be amended by the Crown under the royal prerogative, see B. Slattery, *The Land Rights of Indigenous Canadian Peoples* (D.Phil. Thesis, Oxford University, 1979; reprint, Saskatoon: University of Saskatchewan Native Law Centre, 1979) at 319-28.
- 61 *Calder v. British Columbia (A.G.)* [1973] S.C.R. 313 (S.C.C.).

- 62 *Ibid.* at 328, Martland and Ritchie JJ. concurring.
- 63 *Ibid.* at 402, Spence and Laskin JJ. concurring.
- 64 *Guerin v. The Queen* [1984] 2 S.C.R. 335 (S.C.C.) at 376-77 (emphasis added). It may be noted that this statement apparently does not take account of Justice Judson's ambiguity on the question of extinguishment.
- 65 *Ibid.* at 378, quoting from the judgment of Marshall C.J. in *Johnson v. M'Intosh*, 8 Wheaton 543 (U.S.S.C. 1823) at 573-74. The first portion of the quotation is italicized in Dickson J.'s judgment. At several other points, Dickson J. emphasizes that aboriginal title is "an independent legal right"; see, e.g., at 378.
- 66 *Guerin v. The Queen* [1984] 2 S.C.R. 335 (S.C.C.) at 349.
- 67 *Ibid.* at 352 (emphasis added).
- 68 See *Baker Lake (Hamlet of) v. Minister of Indian Affairs and Northern Development* [1980] 1 F.C. 518 (F.C.T.D.) at 577.
- 69 *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46 (P.C.) at 54. The usefulness of this phrase was doubted by Justice Judson in the *Calder* case, where he remarked with reference to the question of Indian title that "it does not help one in the solution of this problem to call it a 'personal or usufructuary right': *Calder v. British Columbia* (A.G.) [1973] S.C.R. 313 (S.C.C.) at 328. Likewise, in *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (S.C.C.) at 1081, the Supreme Court stated that "the Privy Council's choice of terminology is not particularly helpful to explain the various dimensions of aboriginal title." Significantly, the Privy Council itself disclaimed any intention of giving a comprehensive definition of Indian title (at 55): "There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point."
- 70 *Attorney-General for Quebec v. Attorney-General for Canada (The Star Chrome Case)* [1921] 1 A.C. 401 (P.C.) at 408.
- 71 In *Guerin v. The Queen* [1984] 2 S.C.R. 335 (S.C.C.) at 382, Dickson J. states: "the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee...." The Supreme Court confirms this view in *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (S.C.C.) at 1081-82.
- 72 As noted in K. Lysyk, "The Indian Title Question in Canada: An Appraisal in the Light of *Calder*" (1973) 51 Can. Bar. Rev. 450 at 471: "restrictions on alienation are familiar to recognized interests in land at common law, for example, in leases or in estates in fee tail. As one writer has observed, at English common law there were times when most of the land in England could not be sold to anyone" (footnotes omitted).
- 73 *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46 (P.C.) at 58.
- 74 *Attorney-General for Canada v. Attorney-General for Ontario* [1897] A.C. 199 (P.C.) at 210-11.
- 75 *Canadian Pacific Ltd. v. Paul* [1988] 2 S.C.R. 654 (S.C.C.) at 677.
- 76 *Ibid.* at 677, quoting *Guerin v. The Queen* [1984] 2 S.C.R. 335 (S.C.C.) at 349. See also *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (S.C.C.)

- at 1081-82, citing *Canadian Pacific Ltd. v. Paul* [1988] 2 S.C.R. 654 (S.C.C.) at 677.
- 77 In *Paul v. Canadian Pacific Ltd.* (1983), 2 D.L.R. 22 (N.B.C.A.), La Forest, J.A. states at 34: "When a taking is, in fact, authorized by statute, it is presumed that compensation will be paid This, like the presumption against taking, must apply with additional force to the taking of Indian lands because this affects the honour and good faith of the Crown." For discussion, see B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982-83) 8 Queen's L.J. 232 at 270-73.
- 78 *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (S.C.C.) at 1113-14.
- 79 In his separate opinion, Justice La Forest notes that the treatment of aboriginal title as a compensable right is evident in the Royal Proclamation of 1763; *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 (S.C.C.) at 1133-34.

