EXECUTIVE SUMMARY

The overall purpose of the study is to explore in-depth the issue of "extinguishment", as applied to Aboriginal peoples, from its first manifestations to present day applications. This would include an appreciation of the impact of land dispossessions and other ancillary matters that most often accompany any purported extinguishment of the rights of Aboriginal peoples.

Another essential objective of this study is to recommend new approaches that would jettison prior extinguishment policies and practices. As this study suggests, any new policy orientations must be consistent with Aboriginal law and values, as well as relevant Canadian constitutional law, international law and human rights norms. The study concludes that extinguishment processes undermine the future of Aboriginal peoples as distinct peoples and societies against their beliefs and aspirations.

In light of Aboriginal peoples' experience of inequality and injustice, arguments are marshalled in the study in favour of Aboriginal peoples and their ongoing struggle to permanently eliminate extinguishment practices. The study is purposefully designed to present a balanced view of all perspectives on extinguishment, while exposing significant deficiencies in the existing literature.

The study is divided into two Parts. As briefly summarized below, Part I (Headings 1 - 10) provides an in-depth legal and political analysis of the diverse issues and problems relating to extinguishment. Alternative approaches are also elaborated. Part II (Heading 11) contains a case study of the *James Bay and Northern Quebec Agreement* (JBNQA), the first "modern" land claims agreement in Canada. The case study describes how the Aboriginal and non-Aboriginal parties, as well as human rights organizations (among others), have responded to the notion of extinguishment purportedly included as an integral part of JBNQA.

The study begins by identifying and defining various notions of extinguishment. This helps to provide a frame of reference for further legal analysis and illustrates the pervasive nature of government extinguishment practices throughout Canada's history. An overriding concern in the study is the apparent double standard concerning extinguishment. In the non-Aboriginal context, there is no particular doctrine of "extinguishment" in Canada. Nor is there any discernable government policy or practice to extinguish the status or rights of citizens. However, in relation to Aboriginal peoples, notions of "extinguishment" have developed through Canadian government policies and practices. This has occurred in a historical, legal and political context where Aboriginal peoples have been largely dispossessed of their traditional or historical lands and resources.

Also, the study portrays how aboriginal rights, as collective and individual *human rights*, are the only human rights in Canada that are subjected to extinguishment. While national or international human rights may in some cases be subjected to certain limits and override, there is no evidence that human rights *per se* are or may be subjected to policies of outright *destruction* or *extinguishment*. What is often absent from analyses or debates on extinguishment is the human rights dimension. A human rights perspective underlines the seriousness of eliminating aboriginal rights through the notion of extinguishment.

Further, the study describes how key constitutional instruments applicable in Canada have been seriously misinterpreted or underestimated in relation to the capacity of non-Aboriginal governments to extinguish Aboriginal peoples' rights. For example, the *Royal Proclamation of 1763* makes no explicit reference to "extinguishment", but speaks of possible "cessions" or "purchases". Based on the study's analysis of the Proclamation, cessions or purchases are not intended to result in land dispossessions that substantially undermine Aboriginal interests or increase the vulnerabilty of the Aboriginal peoples concerned. Similarly, the study finds that other important constitutional instruments, such as the *Rupert's Land and North-Western Territory Order*, 1870 and the *Constitution Act, 1930* (which approved the *Natural Resource Transfer Acts*), have been undervalued or misconstrued in relation to Aboriginal peoples.

Aside from constitutional issues, the study highlights the injustices and shortcomings associated with the judicial determination of Aboriginal peoples' land rights. From at least the time of the *St. Catherine's Milling* case in 1887, Canadian governments have at times litigated critical aboriginal issues in the absence of any Aboriginal parties. This practice has contributed to a common law jurisprudence on aboriginal rights that may be seriously questioned. Common law concepts of Aboriginal rights have for the most part failed to fully take into account the implications of Aboriginal sovereignty, the *Royal Proclamation of 1763* and other constitutional instruments, human rights, and in many instances, the fiduciary responsibility of the Crown.

Moreover, the study illustrates how the courts have relied on inappropriate and discriminatory doctrines that have served to deny Aboriginal peoples their fundamental status and rights. Under English and Canadian law, theories of dispossession evolved based on the "act of state" doctrine and other questionable rationales such as the "recognition" doctrine and *terra nullius*. In many instances, the doctrines or theories on which the diminution or denial of Aboriginal peoples' status and rights were founded were of doubtful validity and are now viewed as anachronistic, discriminatory or otherwise unsupportable. In particular, aboriginal title to territory has been mischaracterized and devalued, with particularly adverse consequences in relation to surrender and extinguishment.

The study depicts how the extinguishment of aboriginal rights is an integral part of the larger historical process of colonialism. Many other discriminatory or assimilative manifestations of colonialism affecting Aboriginal peoples in Canada have now been eliminated. However, the pervasive notion of extinguishment remains as a relic of the colonial era.

In assessing notions of British or Canadian sovereignty, the study finds that there exist "*contending sovereignties*" in Canada that include Aboriginal peoples. Recognition of Aboriginal sovereignty does not signify non-recognition of Canadian sovereignty, but it does reinforce the point that parliamentary sovereignty is a *relative* element in a federal state.

If "contending sovereignties" (federal/provincial/Aboriginal) do exist in Canada, then it is argued that the capacity of non-Aboriginal governments to extinguish aboriginal rights based on the principle of parliamentary sovereignty must be revisited. Further, in formulating alternative strategies to extinguishment of aboriginal status and rights, it is emphasized that the appropriate recognition of Aboriginal sovereignty should be an important element in the overall conceptual framework.

In addition, the fiduciary relationship between Aboriginal peoples and the Crown gives rise to legal and constitutional obligations of a fiduciary nature. As described in the study, these fiduciary duties put further constraints on any capacity of non-Aboriginal governments to extinguish the rights of Aboriginal peoples. The Supreme Court of Canada has determined that recognition and affirmation of aboriginal and treaty rights in s. 35(1) of the *Constitution Act, 1982* gives rise to fiduciary obligations of a constitutional nature. In the view of the study, the same conclusion must be reached in regard to the Crown's obligations in favour of Aboriginal peoples as set out in earlier constitutional instruments. These instruments include the *Royal Proclamation of 1763* and the *Rupert's Land and North-Western Territory Order*, 1870.

The study describes how extinguishment policies and practices in Canada have been extremely widespread. They continue to affect Aboriginal peoples in diverse and adverse ways. For example, in regard to the Metis, early government extinguishment policies of doubtful validity have resulted in the dispossession of an adequate land base for most Metis that remains an important concern today.

More recently, in the case of the *James Bay and Northern Quebec Agreement* (1975), a legislated extinguishment was purportedly used to unilaterally extinguish the rights in and to land of Aboriginal third parties both in and outside Quebec. The extinguishment was effected by legislation approving the land claims agreement, so as to deny Aboriginal third parties the legal capacity to challenge the Agreement and safeguard their fundamental rights. In the view of the study, these actions run directly counter to the Crown's fiduciary and other obligations to protect Aboriginal peoples.

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Rather than simply document past and continuing injustices arising from extinguishment, the study takes the view that it would be beneficial to focus on new and equitable approaches. In proposing an alternative, the primary purpose is to recognize and affirm the aboriginal rights of Aboriginal peoples consistent with the *Constitution Act, 1982* and other constitutional instruments applicable in Canada since the time of the *Royal Proclamation of 1763*.

According to the study, any proposed alternative to extinguishment should take place in a *context* that facilitates and supports the effective exercise of aboriginal rights, as well as the further growth or evolution of Aboriginal land tenure systems. It is not enough to provide for specific alternatives to extinguishment, if the overall legal and political context in Canada is hostile or unaccommodating to the survival and further development of Aboriginal peoples' own rights, perspectives, practices and laws.

In applying any proposed alternative to extinguishment of the rights of Aboriginal peoples, it is suggested that, in principle, restitution of aboriginal rights should be open to all Aboriginal peoples in Canada who have been wrongfully dispossessed of their lands and resources. These include Aboriginal third parties whose rights have been purportedly extinguished in connection with the *James Bay and Northern Quebec Agreement*; Aboriginal peoples who purportedly surrendered their land rights in historic and contemporary treaties; and Aboriginal peoples subjected to supersession by law.

If a new relationship between Aboriginal peoples and non-Aboriginal governments is to be attained, if genuine reconciliation is to be achieved in Canada, and if healing is to take place in Aboriginal communities - then the study concludes that a *uniform policy* must be adopted that includes redress for prior purported extinguishments of the rights of Aboriginal peoples.

June 1995

EXTINGUISHMENT OF THE RIGHTS OF ABORIGINAL PEOPLES: PROBLEMS AND ALTERNATIVES

A STUDY PREPARED FOR THE ROYAL COMMISSION ON ABORIGINAL PEOPLES

INTRODUCTION

"Nous refusons que l'extinction définitive de [nos] droits devienne une condition préalable à toute entente avec les gouvernements de la societé dominante."[1]

Conseil des Atikamekw et des Montagnais, 1979

"Extinguishment has injected a fundamental instability into the relationship between the Crees and the other signatories of the *James Bay and Northern Quebec Agreement*. For aboriginal peoples, extinguishment is brutal conquest with a fountain pen. It is a fundamental wrong, entrenched in provisions and laws that are fundamentally wrong."[2]

Grand Chief Matthew Coon Come, Grand Council of the Crees (of Quebec), 1993

"Canada still has the opportunity to make lasting agreements with aborginal peoples based on the recognition and affirmation of their aboriginal rights and with respect to their unique and enduring place in Canadian society."[3]

Task Force To Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements*, 1985

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[1] Principle 3 of the 11 Principles of the Conseil des Atikamekw et des Montagnais, cited in R. Dupuis, *Historique de la négotiation sur les revendications territoriales du Conseil des Atikemekw et des Montagnais (1978-1992)*, (1993) 23 Recherches amérindiennes au Québec 35 at 40: "We refuse that the final extinguishment of [our] rights is a prior condition to any agreement with the governments of the dominant society." [Unofficial translation.]

[2] Grand Council of the Crees (of Quebec), *Presentation to the Royal Commission on Aboriginal Peoples*, Montreal, November 18, 1993, at 7.

[3] Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy* (Ottawa: Department of Indian Affairs and Northern Development, 1985) at 16.

There is little doubt that extinguishment of the rights of Aboriginal peoples[4] is a subject of growing interest and concern throughout Canada. Virtually all Aboriginal peoples in Canada, whether they be Indian, Inuit or Métis[5], are or have been affected by the question of extinguishment of their fundamental status or rights. Even those who have not signed historic or "modern" treaties, are still being confronted today by government policies of extinguishment.

Historically, extinguishment was part of the large-scale dispossessions of Aboriginal lands and resources. Yet, the impacts of extinguishment have also been profoundly felt in regard to other issues, such as Aboriginal status. Generally, when Aboriginal status is devalued or denied, there is a corresponding diminution or denial of basic rights.

For example, Indians have been denied or have lost status as "Indians" under the *Indian Act* for a variety of prejudicial reasons, and have consequently been refused their rights as Indians. Inuit have at times been treated as Indians and have been subjected to similar *Indian Act* policies. Metis have experienced their own particular forms of injustice relating to a denial of status altogether. As a result, they are still seeking to have their right to an adequate land base[6] recognized and access to federal programs and services.

From the viewpoint of non-Aboriginal governments, extinguishment of aboriginal status and rights has been legitimately carried out in many ways and forms. First, it is said to be the result of legislation, whose provisions are alleged to have eliminated aboriginal peoples' status or rights. This legislative extinguishment, whether or not it be imposed, is said to have been realized by clear intention or by necessary implication.

Second, extinguishment of aboriginal title is claimed to have been effected through purported "land cession provisions" in numerous treaties. In these cases, non-Aboriginal governments claim extinguishments of aboriginal title were arrived at voluntarily through free and informed consent. Third, *de facto* extinguishment can be a further challenge faced by Aboriginal peoples as a consequence of government actions and policies that serve to deny recognition of aboriginal rights.[7]

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[4] In regard to the terminology used in this study, "Aboriginal peoples" is generally used to refer to Indians, Inuit and Metis, in conformance with its usage in the *Constitution Act, 1982*; "indigenous peoples" is generally used when referring to Aboriginal peoples in an international context, in conformance with such usage in international instruments; "non-Aboriginal governments" generally connotes federal/provincial/territorial governments, unless the context necessarily implies otherwise; and "land claims" or "claims" is used in view of its usage in the Constitution, with the understanding that aboriginal rights and titles have a solid legal foundation and are recognized judicially, as well as in national and international human rights fora. See also Assembly of First Nations, "A Critique of the Federal Government's Land Claims Policies" in M. Cassidy, (ed.), *Aboriginal Self-Determination* (B.C./Montreal: Oolichan Books/Institute for Research on Public Policy, 1991) 232 at 244: "The First Nations of Canada do not view their rights in terms of 'claims.' We more properly view the claims process as one of the few mechanisms available for implementing our constitutionally protected rights."

[5] The term "Métis" or "Metis" is generally used throughout this study. This is the term used in the *Constitution Act, 1982* and in the national organization, the Metis National Council. However, see P. Chartrand, *Manitoba's Métis Settlement Scheme of 1870* (Saskatoon: Native Law Centre, Univ. of Saskatchewan, 1991) at 1, n. 3, as to the various terminology in this regard: "Although many people in Canada today happily identify themselves as 'Half-Breeds', the term has a definite pejorative connotation and is generally avoided in the contemporary literature...the word, 'Métif', which reflects a spelling sometimes used around 1870 and which comes closer than 'Métis' to indicate the pronounciation 'Michif' or 'Michiss' used by the people designated by the term, is used to mean 'French Half-Breed'." See also J. Brown, "Metis", *The Canadian Encyclopedia*, vol. 2, (Edmonton: Hurtig, 1985) at 1126, cited by Chartrand, *supra*.

[6] See generally the discussion on government extinguishment policies and the Metis under heading 3 *infra*. See also P. Chartrand, *Manitoba's Métis Settlement Scheme of 1870* (Saskatoon: Native Law Centre, Univ. of Saskatchewan, 1991); J. Sawchuk *et al.*, *Metis Land Rights in Alberta: A Political History* (Edmonton, Metis Assoc. of Alberta, 1981); L. Heinemann, *An Investigation into the Origins and Development of the Metis Nation, the Rights of the Metis as an Aboriginal People, and their Relationship and Dealings with the Government of Canada* (research report prepared for the Association of Metis and Non-Status Indians, March 31, 1984, available from the Metis National Council, Ottawa).

[7] In the United States, a new argument has arisen for justifying extinguishments of aboriginal title. See *Vermont* v. *Elliott*, (1992) 616 A. 2d 210 (Vermont Supr. Ct.)., where it has recently been determined that the weight of history and passage of time had obliterated the rights of the Abenaki in Vermont. This decision is severely criticized in J. Lowndes, *When History Outweighs Law: Extinguishment of Abenaki Aboriginal Title*, (1994) 42 Buffalo L. Rev. 77. In Canada, the "weight of history" rationale in *Elliott* has been categorically rejected by Lambert J.A. (dissenting) in *Delgamuukw* v. *British*

On the other hand, Aboriginal peoples have repeatedly maintained that they have not voluntarily consented to the extinguishment of their aboriginal status and rights. If extinguishments are claimed to exist, they are said to be devoid of any legitimacy. Even where overall consent to a treaty or agreement has been obtained, the Aboriginal peoples affected had no idea of the meaning or implications of the concept of extinguishment.

Extinguishments, Aboriginal peoples avow, cannot have any validity since the non-Aboriginal governments in Canada did not have the constitutional or legal capacity to eliminate their fundamental rights. Moreover, aboriginal rights constitute collective and individual human rights, incapable of wholesale alienation and destruction.

According to Aboriginal peoples, the significance of the historic treaty-making process, as a process of peace, friendship, cooperation, and sharing, is unconscionably undermined when it is viewed as a means for government to validate land dispossessions and erase essential rights. Any purported surrenders or extinguishments that allegedly took place in the treaties are said to have been effected in the absence of free and informed consent. Rather, surrenders or extinguishments were foisted on them through invalid government actions that included undue influence, duress, fraud, or basic misrepresentation. The resulting misunderstandings on the part of the Aboriginal parties are said, from a legal standpoint, to reinforce the conclusion that there was no requisite meeting of the minds.

As both the history of Indian treaties and Metis land rights attest, in most cases, the purported acts of surrender or extinguishment took place many years or decades ago. Yet, what is striking is the growing contingent of voices - both Aboriginal and non-Aboriginal - that are questioning the legitimacy of extinguishment policies and practices. In addition, the ongoing legacy of extinguishment in terms of the wide-ranging impacts on Aboriginal societies simply cannot be ignored.

If culture can be described as the celebration and continuation of a distinct people's identity, heritage and inherent rights, extinguishment is most often associated with a policy of finality and termination. In the wake of extinguishment, aboriginality in all its essential forms is left in a kind of permanently fragmented or amputated state. The Aboriginal peoples affected by extinguishment claims are frequently rendered even more vulnerable as a result. The survival of Aboriginal peoples as distinct, self-determining peoples becomes exceedingly difficult. Continuity with their past, their ancestors and their territories is severed legally when spiritually or culturally this is neither possible nor desirable for Aboriginal peoples.

As J. Antoine, member of the Legislative Assembly of the Northwest Territories and former Chief of the Fort Simpson Dene Band, has stated, extinguishment cuts off Aboriginal peoples from their roots and from their land:

> "We are a real part of the land. Our roots are connected into the land. But if you want to extinguish [our] aboriginal rights and title to it, then *you are cutting off those roots. You are cutting us off from the land, and we are floating.*"[8] [Emphasis added.]

In regard to the Gitksan and Wet-suwet'en in British Columbia, M. Jackson describes their opposition to extinguishment of their aboriginal rights as follows:

> "For the Gitksan to contemplate the extinguishment of the aboriginal rights to their territory is to contemplate the *digging up of their roots* which connect them to their ancestors and the other life forces, the *severing of their ongoing responsibilities to respect the land* and preserve it for future generations, and the *disinheriting of their children's children* from a place in the territory in which their spiritual, cultural and economic well-

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Columbia, [1993] 5 W.W.R. 97 (B.C.C.A.) at 369-371.

[8] Testimony of J. Antoine, Royal Commission on Aboriginal Peoples, Round One, public hearings, 1993.

being resides. For the Gitksan and Wet-suwet'en hereditary chiefs *it is not only unthinkable, it is unpardonable.*"[9] [Emphasis added.]

N. Lyon, Queen's University law professor, confirms the fundamental importance of maintaining the link between Aboriginal peoples and their lands:

> "The land is the centre of their way of life. To separate title from community, in the European manner, is to *make nonsense of the whole tradition that goes back for hundreds of years.*"[10] [Emphasis added.]

In response to the mounting outcries and objections to the elimination of Aboriginal peoples' fundamental rights, various parliamentary committees or government-appointed task forces have studied the question of extinguishment. They have repeatedly concluded that Canada's extinguishment practices cannot be endorsed and must be reformed. For example, in 1983, the Report of the Special Committee on Indian Self-Government (Penner Report) concluded that the federal policy of extinguishment be terminated:

> "The Committee recommends that *the doctrine of extinguishment be eliminated from the settlement of claims*; settlement agreements should be limited to those matters specifically negotiated."[11] [Emphasis added.]

In addition, the Report of the Task Force to Review Comprehensive Claims Policy concluded in 1985 as follows:

> "A *claims policy that requires a surrender and extinguishment of all aboriginal rights can, and must, be abandoned.* It can be abandoned because, as we have shown, there are other methods for clearing title to the land. It must be abandoned because, *if it is not, there will be no possibility of achieving land claims agreements based on common objectives.*
>
> Agreements should *balance the need for certainty* in the orderly development of land and resources *with the need for flexibility* in the evolving relationship between aboriginal groups and governments in Canada. In keeping with section 35 of the Constitution, *agreements should recognize and affirm aboriginal rights.*"[12] [Emphasis added.]

Similarly, it is a firm recommendation of the 1991 Report of the Aboriginal Justice Inquiry of Manitoba that:

> "The governments of Manitoba and Canada *refrain from requiring Aboriginal groups to consent to extinguish Aboriginal rights* when entering into land claims agreements."[13] [Emphasis added.]

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[9] M. Jackson, *A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements*, Report submitted to the Royal Commission on Aboriginal Peoples, February 1994, at 78.

[10] N. Lyon, *Book Review [:] Native Liberty, Crown Sovereignty*, (1990) 15 Queen's L.J. 361 at 362.

[11] Report of the Special Committee, *Indian Self-Government in Canada* (Ottawa: Queen's Printer, 1983) at 116.

[12] Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy, supra*, note 3, at 43. See also the Task Force statements at 13: "Several factors have contributed to the difficulties in reaching agreements. *One of the most significant obstacles has been the insistence of the federal government on finality and on the blanket extinguishment of all aboriginal rights.*" [Emphasis added.]

[13] Report of the Aboriginal Justice Inquiry of Manitoba, *The Justice System and Aboriginal People* (Winnipeg: Queen's Printer, 1991), vol. 1, at 183. See also p. 137, where it is said that: "There was...literally no basis in international law for the assertion of [the] principle" that the "Europeans had acquired the right to extinguish Indian title however they pleased, and this principle was said to be unquestionable".

Also, the 1991 Report of the British Columbia Claims Task Force maintains:

> "In the past, blanket extinguishment of First Nations' rights, title, and privileges was used to achieve certainty. *The task force rejects that approach...First Nations should not be required to abandon fundamental constitutional rights simply to achieve certainty for others*. Certainty can be achieved without extinguishment."[14] [Emphasis added.]

Most recently, in 1993, the Liberal Party of Canada (currently forming the government of Canada) has made the following commitment:

> "In order to be consistent with the Canadian Constitution which now 'recognizes and affirms' Aboriginal and treaty rights, a Liberal government will not require blanket extinguishment for claims based on Aboriginal title."[15]

In addition, the Parliament of Canada has seen fit to eliminate most non-land-related forms of extinguishment pertaining to Indian status under the *Indian Act*.[16] This may imply that the notion of extinguishment, in relation to Aboriginal peoples, is increasingly viewed as anachronistic and unacceptable.

In order to resolve the problems created by government extinguishment policies and to find suitable, constructive alternatives, it is essential to ensure a conceptual legal and political framework that affirms rather than denies or subordinates the status and rights of Aboriginal peoples. Common principles will be vital, if Aboriginal peoples and non-Aboriginal governments are to forge positive, durable relationships based on mutual respect, honour and trust.

As Lloyd Barber, former Commissioner on Indian Claims, underlined in 1975, differences in Aboriginal and non-Aboriginal perspectives must be accommodated on a mutually acceptable basis if a more productive and harmonious future is to be made possible:

> "...the negotiations on land claims provide an unprecedented opportunity to get at some of the *important, deeply rooted* problems and *differences between Indians and non-Indians*, and work out a basis for a more productive and harmonious future. If the negotiations are...based on criteria which do not really reflect the needs and concerns of the people affected on both sides, they will certainly fail. This is the time for hard thinking, frank dialogue and imaginative approaches. *If the difficult and uncomfortable points are skirted, success will not be achieved.*"[17] [Emphasis added.]

The formulation of beneficial and practical alternatives to extinguishment is a challenging endeavour, since the extinguishment of aboriginal rights has had significant judicial acceptance.[18] However, in *Mabo* v. *The State of Queensland*, Brennan J. of the High Court of Australia declared in 1992 that:

> "[N]o case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights..."[19]

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[14] *Report of the British Columbia Claims Task Force* (Vancouver: June 28, 1991) at 29.

[15] Liberal Party of Canada, *The Aboriginal Peoples of Canada [:] Summary* (Ottawa: Liberal Party of Canada, September 1993) at 12.

[16] *Indian Act*, R.S.C. 1985, (1st Supp.), c. 32.

[17] Lloyd Barber, speech to the Whitehorse Chamber of Commerce, 1975, at 12, cited in Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy*, note 3, *supra*, at 17.

[18] See, for example, majority opinions in *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.).

[19] *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia), at 19, per Brennan J. For commentaries on this significant decision, see R. Bartlett, *The landmark case on Aboriginal title in Australia: Mabo v. State of Queensland*, [1992] 3 C.N.L.R. 4; M. Stephenson & S. Ratnapala, (eds.), *Mabo: A Judicial Revolution* (Australia:

The court added that longstanding legal propositions, if associated with dispossession and injustice, should not enjoy contemporary legitimacy.[20] Moreover, it was indicated that there is a judicial duty to re-examine such propositions.[21]

In carrying out this study, we have noted the firm opposition of Aboriginal peoples to the very notion of extinguishment of their rights.[22] Regardless of what "legal" theories they are confronted with, or what rationales are put forward to justify the position that their aboriginal rights and titles are or should be eliminated, there continues to be an innate and persistent resistance by Aboriginal peoples themselves to such an alien concept.

From the perspective of Aboriginal peoples, their inherent identity with the land and their spirituality, as manifested by their aboriginal rights, is not subject to alienation or eradication. Rather, there is a growing determination that no law or agreement could legitimately procure this result. As L. Little Bear provides:

> "Tribal territory is important because Earth is our Mother (and this is not a metaphor: it is real). The Earth cannot be separated from the actual being of Indians."[23]

It would appear that for at least some observers, Aboriginal peoples' spirituality and relationship with their territories transcend claims of extinguishment of their aboriginal rights. As K. Nerburn comments:

> "*The spirit of the Native people[s], the first people[s] has never died.* It lives in the rocks and the forests, the rivers and the mountains. It murmurs in the brooks and whispers in the trees. *The hearts of these people[s] were formed of the earth that we now walk, and their voice can never be silenced.*"[24] [Emphasis added.]

This study on extinguishment does not fully address this compelling spiritual[25] aspect. However, from a constitutional, human rights, legal and equitable viewpoint, the study explores the validity of past and present extinguishments. What emerges from the study that follows is that constitutional and human rights norms appear to severely restrict the capacity of governments to eliminate aboriginal rights. In this respect, the views of Aboriginal peoples and the fundamental precepts of the Canadian legal system may not be far apart.

University of Queensland Press, 1993).

[20] Id., at 95, per Deane and Gaudron JJ.

[21] Id., at 82-83, per Deane and Gaudron JJ. Although the court was referring specifically to *terra nullius* and not extinguishment, the general principle enunciated is applicable to a variety of circumstances. However, the Australian High Court in *Mabo* chose not to apply this principle to extinguishment.

[22] See, for example, Liberal Party of Canada, *The Aboriginal Peoples of Canada [:] Summary* (Ottawa: Liberal Party of Canada, September 1993) at 11: "Claims negotiations have been difficult in part due to the *strong objections by Aboriginal people to certain aspects of the current policy, in particular extinguishment* and the reluctance of the federal government to negotiate self-government as part of claims." [Emphasis added.]

[23] L. Little Bear, *Relationship of Aboriginal People to the Land and the Aboriginal Perspective on Aboriginal Title*, Report submitted to the Royal Commission on Aboriginal Peoples, 1993, at 48.

[24] K. Nerburn, (ed.), *The Wisdom of the Great Chiefs [:] The Classic Speeches of Chief Red Jacket, Chief Joseph and Chief Seattle* (San Rafael, Calif.: New World Library, 1994) (frontispiece).

[25] See *Huakina* v. *Waikato Valley Authority*, [1987] 2 N.Z.L.R. 188 at 219-220, where Childwell J. cites the Waitangi Tribunal on metaphysical beliefs and the Maori as follows: "Concerning matters metaphysical the Tribunal said...: 'The values of a society, its metaphysical or spiritual beliefs and customary preferences are regularly applied in the assessment of proposals without a thought as to their origin...When Maori values are not applied in our country but western values are, we presume our society is monocultural...'"

Purposes and organization of study

The overall purpose of the study is to explore in-depth the issue of "extinguishment", as applied to Aboriginal peoples, from its first manifestations to present day applications. This would include an appreciation of the impact of land dispossessions and other ancillary matters that most often accompany any purported extinguishment of the rights of Aboriginal peoples.

Another essential objective of this study is to recommend new approaches that would jettison prior extinguishment policies and practices. As this study suggests, any new policy orientations must be consistent with Aboriginal law and values, as well as relevant Canadian constitutional law, international law and human rights norms. Further, it must be consistent with rights of self-determination; extinguishment must not be foisted on Aboriginal peoples. It is our conclusion that extinguishment processes undermine the future of Aboriginal peoples as distinct peoples and societies against their beliefs and aspirations.

The premise of this study is that, in determining whether it is lawful and just to seek the extinguishment of rights of Aboriginal peoples, there are a number of critical issues that have not received adequate consideration to date. These include a fair evaluation of constitutional instruments in Canada which constrain government action vis-à-vis Aboriginal peoples (both now and in the past); the contending sovereignties of the Crown and Aboriginal peoples; and the incompatibility of extinguishment with human rights and other norms.

In view of these considerations, the study adopts a comprehensive approach that includes many relevant and crucial dimensions. Part I (Headings 1 - 10) provides an in-depth legal and political analysis of the diverse issues and problems relating to extinguishment. Alternative approaches are also elaborated. Part II (Heading 11) contains a case study of a land claims agreement that contains provisions relating to extinguishment.

Heading 1 identifies and defines various notions of extinguishment. This helps to provide a frame of reference for further legal analysis and illustrates the pervasive nature of government extinguishment practices throughout Canada's history. Heading 2 examines the significance of the *Royal Proclamation of 1763*, as it relates to extinguishment. The Proclamation is one of the earliest constitutional instruments that expressly limits the actions of non-Aboriginal governments, with a view to ensuring protection for Aboriginal peoples and their lands. Yet, the Proclamation has been consistently underestimated or misconstrued to the detriment of Aboriginal peoples in Canada and elsewhere.

Heading 3 examines how government extinguishment policies in Canada have had devastating effects on the Metis. Metis issues are highlighted early in this study, since the widespread land dispossessions that the Metis experienced began soon after the establishment of the Canadian federation. It is also important to indicate early in this study that the constitutional rights and obligations that exist in favour of Aboriginal peoples also apply to the Metis.

Heading 4 underlines the relative nature of sovereignty in the international and Canadian context. The concept of "contending sovereignties" is also described, as it relates to the Crown and Aboriginal peoples, and how this notion is an important factor in any discourse on extinguishment. The concept of contending sovereignties does not serve to deny the notion of parliamentary sovereignty in Canada. However, the existence of contending sovereignties in Canada would necessarily limit the scope of sovereignty asserted by Parliament.

Heading 5 identifies a number of theories of dispossession that are linked to extinguishment. Throughout history, a wide range of arguments have been used by governments, courts and others to justify extinguishment of aboriginal rights, their diminution or outright denial. These include a panopoly of theories or doctrines, such as acts of state, recognition, *terra nullius*, primitivism and other notions linked to European superiority or domination.

Heading 6 describes the constitutional and legal constraints that challenge assumptions that non-Aboriginal governments and legislatures have the capacity to extinguish Aboriginal peoples' rights. In addition, the countering effect of the Crown's fiduciary duties on any powers to extinguish is explored. At the same time, serious doubts are raised as to the capacity of Aboriginal peoples to agree to wholesale extinguishment of their aboriginal rights. Further, relevant provisions of the *Natural Resources Transfer Agreements* and related constitutional legislation are analysed. The study reaches the conclusion that no partial extinguishments of aboriginal or treaty rights can be said to have taken place.

Heading 7 discusses the constitutionality and validity of unilateral extinguishments of rights purportedly carried out against Aboriginal third parties. This is also a most questionable practice in view of the human rights implications. Heading 8 looks at existing and emerging human rights norms at the international and Canadian level. The study concludes that the wholesale elimination or destruction or extinguishment of aboriginal rights (which are human rights) is not justifiable under a human rights analysis.

Heading 9 provides an extensive list of reasons why notions and practices of extinguishment should be reconsidered. This section is based to a large degree on the conclusions that naturally flow from the diverse analyses and impacts set out in the preceding portions of the study. Heading 10 then addresses another principal purpose of the study, namely the recommendation of new and equitable approaches. In so doing, shortcomings in existing alternatives are examined. Also, in view of the prejudicial effects that extinguishment policies and practices continue to have on Aboriginal peoples, the study elaborates why restitution of the rights of Aboriginal peoples must be an integral part of any new approach.

Under Part II (Heading 11), a Case Study on the *James Bay and Northern Quebec Agreement* (JBNQA) is included to furnish additional insights on the "extinguishment" of fundamental rights of Aboriginal peoples. The Case Study adds an empirical dimension that further informs the analysis and perspectives in the overall study. The JBNQA, signed in 1975, is often characterized as the first "modern" land claims agreement in Canada. Consequently, it is important to determine how the Aboriginal and non-Aboriginal parties, as well as human rights organizations (among others), have responded to the notion of extinguishment purportedly included as an integral part of the JBNQA.

To a large degree, the following study is a treatise on the subject of extinguishment as it relates to Aboriginal peoples. It includes a comprehensive overview of relevant jurisprudence, legal and political literature, and primary source material drawn from interviews with Aboriginal people and the hearings of the Royal Commission on Aboriginal Peoples. This study is thus lengthy, and critiques existing policies, judicial decisions and laws that contribute to a legacy of denying Aboriginal peoples full recognition of their status and rights.

In light of Aboriginal peoples' experience of inequality and injustice, arguments are marshalled in the study in favour of Aboriginal peoples and their ongoing struggle to permanently eliminate extinguishment practices. We purposefully designed this study in order to present a balanced view of all perspectives on extinguishment. It was our impression that much of the literature to date has ignored Aboriginal perspectives and experiences. We thus felt duty bound to present Aboriginal peoples' perspectives and experiences with extinguishment as the theoretical centerpiece of this study. This approach is consistent with social justice and a contemporary perspective on human rights. It is also based on the firm belief that democratic states, such as Canada, must forge a new path away from extinguishment. In this way, genuine co-existence and reconciliation may be achieved for the lasting benefit of present and future generations of all peoples in Canada.

PART I

1. NOTIONS OF "EXTINGUISHMENT"

1.1 Definition

For the purposes of the present study, the term "extinguishment" is used in its ordinary legal sense, which is in essence what *Black's Law Dictionary* describes as:

"the destruction or cancellation of a right"[26].

This harsh definition of "extinguishment", as understood by non-Aboriginal governments, and the finality it entails, makes the concept particularly offensive and unacceptable to Aboriginal peoples.

Generally, under English and Canadian property law, extinguishment of a right, power, contract or estate refers to the *effect* of the law or the *effect* of certain legal transactions between contracting parties.[27] In this non-Aboriginal framework, there is no "doctrine" of extinguishment. Nor is there any discernable government policy or practice to extinguish the status or rights of citizens. For the most part, extinguishment of rights conforms to the intentions of the private parties involved in what are simply commercial or personal transactions.[28]

However, the notion of "extinguishment" in relation to Aboriginal peoples has developed in a different historical, legal and political context. This context includes the following distinctive factors that are wholly distinguishable from any non-Aboriginal circumstances:

i) Aboriginal peoples have a profound relationship with their lands, resources and environment within their historical territories. This relationship is inextricably linked to their identity, spirituality and culture[29] and heightens the potential seriousness of extinguishing Aboriginal rights.

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[26] *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing Co., 1990), at 584.

[27] See *Halsbury's Laws of England*, 4th ed. (London: Butterworth's, 1982), vol. 39, paras. 596-601, where extinguishment of title to real property is said to be accomplished by such means as: forfeiture (e.g. as in bankruptcy); merger at equity and adverse possession. At para. 577, it is said that an easement can be extinguished, among other means, by its holder's voluntary release or surrender.

[28] See, for example, J.C. Smith, *The Concept of Native Title*, (1974) 24 Univ. Tor. L.J. 1 at 14: "...title can disappear because a rule or set of rules of the property institution provides that a title is extinguished on the happening of certain events and those events have in fact taken place."

[29] See, for example, draft *United Nations Declaration on the Rights of Indigenous Peoples*, article 25: "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold thier responsibilities to future generations in this regard"; *Indigenous and Tribal Peoples Convention, 1989* (No. 169), art. 13, para. 1: "...governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship."

See also *Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government*, United Nations Meeting of Experts, Nuuk, Greenland, 24-28 September 1991, U.N. Doc. E/CN.4/1992/42 and Add.1, at para. 4: "Indigenous territory and the resources it contains are essential to the physical, cultural and spiritual existence of indigenous peoples and to the construction and effective exercise of indigenous autonomy and self-government."

ii) In view of the fundamental importance of territory,[30] lands and resources to Aboriginal peoples, there is no evidence of a propensity among Aboriginal peoples, either historically or today, to dispossess themselves of their lands and resources. Rather there are clear indications that the efforts of Aboriginal peoples have consistently been to ensure their liberty, security and ongoing development of their distinct cultures and societies. Aboriginal peoples have sought to achieve this by safeguarding their land and resource base for present and future generations.

iii) There exists a historical and fiduciary relationship between the Crown and Aboriginal peoples. It would be difficult to argue that extinguishment, as conceived by governments in Canada, is consistent with the fiduciary role of the Crown.[31] Aboriginal peoples and cultures in Canada have been and continue to be in a critically vulnerable position.[32] Government policies that purport to extinguish aboriginal status or rights appear to take advantage of, rather than benefit, Aboriginal peoples and exploit their position of inequality or powerlessness.

iv) Aboriginal rights are of a collective, as well as individual, nature. They are of vital importance to the culture and existence of the peoples concerned.[33] Consequently, the Supreme Court of Canada has cautioned against the application of traditional common law concepts of property. It is the view of this study that the application of notions of extinguishment to aboriginal rights has substantially different impacts on Aboriginal peoples than such notions might have in a traditional property law context that deals with non-Aboriginal peoples' individual rights.

v) Federal land claims policies that *insist* on extinguishment of fundamental land rights of Aboriginal peoples (as a pre-condition to reaching agreements) unfairly single out Aboriginal peoples through policies or actions that are not imposed on non-Aboriginal peoples in Canada. As indicated above, non-Aboriginal citizens are not required to extinguish their fundamental land rights. Further, this insistence on extinguishment in federal claims policies appears to be in violation of Canada's Constitution[34] and run counter to the notion of free and

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[30] H. Berman, *The International Labour Organization and Indigenous Peoples: Revision of ILO Convention No. 107 at the 75th Session of the International Labour Conference, 1988*, (1988) 41 Int'l Comm'n of Jurists 48 at 55: "Territoriality best describes the complex interrelationship between indigenous peoples and the land, waters, sea areas and sea ice, plants, animals and other natural resources that in totality form the social, cultural, material, and deeply spiritual nexus of indigenous life."

[31] *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia), at 160, per Toohey J.: "...extinguishment would involve a *breach of the fiduciary obligation owed by the Crown to the [Aboriginal] people.*" [Emphasis added.]

[32] See Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy* (Ottawa: Department of Indian Affairs and Northern Development, 1985), at 103: "If it is to have credibility in promoting the observance of human rights by other countries, Canada will have to demonstrate its willingness to respect the rights of its *most vulnerable peoples.*" [Emphasis added.]

[33] In regard to aboriginal fishing rights, see *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 at 1112: "Fishing rights are not traditional property rights. They are rights held by a *collective* and are in keeping with the *culture and existence* of that group. *Courts must be careful, then, to avoid the application of traditional common law concepts of property* as they develop their understanding of what the reasons for judgement in *Guerin*, *supra*, at p. 382, referred to as the *sui generis nature* of aboriginal rights." [Emphasis added.]

[34] Such insistence of prior surrender or extinguishment by the federal government exploits the vulnerable position of Aboriginal peoples and is inconsistent with both the fiduciary responsibility of the federal government and the "recognition and affirmation" of aboriginal rights under s. 35(1) of the *Constitution Act, 1982*. In addition, the right of Aboriginal people to liberty and security of the person (ss. 7, 25), as well as the equality guarantees (s. 15) under the *Canadian Charter of Rights and Freedoms* may also be violated by the extinguishment requirement.

It is also arguable that the federal government's insistence on extinguishment, as a pre-condition to satisfying Aboriginal land claims, is a violation of such constitutional instruments as the *Royal Proclamation of 1763* and the *Rupert's Land and North-Western Territory Order*, 1870 (and its related terms and conditions). The possible unconstitutionality of the federal government's insistence on surrender or extinguishment of aboriginal rights, as a pre-condition to entering into a land claims agreement, is also discussed under sub-headings 8.3.2 & 8.3.3 *infra*. See also P. Lepage, *Droits autochtones et droits de la personne: Quelques perspectives d'avenir*, (Québec: Commission des droits de la personne du Québec, mai 1987) at

informed consent.[35]

vi) In particular, the federal government places itself in a curious, if not inconsistent, position when addressing aboriginal rights through comprehensive claims negotiations. It refuses to recognize the existence of aboriginal rights, while at the same time seeking to extinguish them through the claims process. This approach has been squarely criticized in the 1985 Report of the Task Force To Review Comprehensive Claims Policy.[36]

vii) Aboriginal rights, as collective and individual *human rights*,[37] are the only human rights in Canada that are targetted for extinguishment. While national or international human rights may in some cases[38] be subjected to certain *limits*[39] and override[40], there is

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45; and Commission des droits de la personne du Québec, *Mémoire de la Commission des droits de la personne présenté à la Commission royale sur les peuples autochtones* (Montréal: novembre 1993) at 14, 43, where the policy of extinguishment as an obligatory pre-condition is unequivocally criticized and said to be unacceptable. See also *Mabo et al.* v. *State of Queensland*, (1988) 83 A.L.R. 14 (High Court of Australia), where legislation that sought to extinguish the aboriginal rights of the Torres Strait Islanders in Australia was held to be invalid since it was inconsistent with the Commonwealth's *Racial Discrimination Act 1975*.

[35] If the federal government insists as a pre-condition that Aboriginal peoples "agree" to a purported surrender or extinguishment in order for the government to enter into a land claims agreement, then a strong argument can be made that there is no free and informed consent. Such insistence exploits the vulnerable position of Aboriginal peoples and their urgent need to make arrangements concerning their rights and jurisdiction over lands, resources and other fundamental matters. In addition, this type of pre-condition is an abuse of and inconsistent with the fiduciary role of the Crown.

Since Aboriginal peoples generally have no other avenue than the comprehensive claims process to satisfy their claims, they really do not have a choice when they "agree" to purported surrenders or extinguishments insisted upon by the government.

Further, adequate essential services are often only provided to Aboriginal peoples through comprehensive claims agreements, if such peoples "agree" to surrender their aboriginal rights. Any such policy that *in effect* requires extinguishment prior to "providing essential public services of reasonable quality" (s. 36(1)(c)) to Aboriginal peoples, "furthering economic development to reduce disparities" facing them (s. 36(1)(b)), or "promoting equal opportunities for [their] well-being" (s. 36(1)(a)) would be contrary to the constitutional commitments of federal and provincial governments and legislatures, as already provided under the *Constitution Act, 1982*, s. 36. Moreover, such "policies" or practices by the federal government appear to also violate international human rights norms: see discussion under sub-heading 8.2.12.

[36] Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy*, note 32, *supra*, at 76: "...it is appropriate for the federal government to approach comprehensive claims negotiations with a general acknowledgement, rather than with a denial, of the existence of aboriginal rights...This position [of denial] has engendered a mistrust of the government among negotiating groups and a cynicism about its commitment to the negotiating process. Moreover, *a refusal to acknowledge that rights are at issue denies both legal and constitutional reality*." [Emphasis added.]

[37] For a discussion of aboriginal rights as human rights, see generally heading 8 *infra*.

[38] See, for example, the *International Covenant on Civil and Political Rights*, article 4, para. 1, which provides for the possibility of State Parties derogating from their obligations in this Covenant, in cases of public emergency that threatens the life of the nation concerned. However, para. 2 provides: "No derogation from articles 6 [inherent right to life], 7 [cruel, inhuman or degrading treatment or punishment], 8 (paragraphs 1 and 2) [slavery and servitude], 11 [imprisonment for failure to fulfil contractual obligations], 15 [prohibition against retroactive criminal laws or penalties], 16 [legal recognition as a person], and 18 [freedom of thought, conscience and religion] may be made under this provision.

[39] See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, art. 1: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such *reasonable limits* prescribed by law as can be demonstrably justified in a free and democratic society." [Emphasis added.] See also *International Covenant on Economic, Social and Cultural Rights*, art. 4: "...the State may subject such rights only to such *limitations* as are determined by law *only in so far as this may be compatible with the nature of these rights* and solely for the purpose of promoting the general welfare in a democratic society." [Emphasis added.] For a discussion of limitation clauses in the Canadian and international context, see W. Tarnopolsky, "The Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights: Domestic Implementation of International Human Rights Norms" in I. Cotler & F.P. Eliadis, (eds.), *International Human Rights Law [:] Theory and Practice* (Montreal: Canadian Human Rights Foundation, 1992) 169, at 187-190.

[40] The *Canadian Charter of Rights and Freedoms*, s. 33, enables legislatures to specifically enact a "notwithstanding" clause in order to override certain fundamental rights and freedoms. In addition, the *Canadian Bill of Rights*, s. 2 and human rights charters in Alberta, Saskatchewan and Quebec allow for the use of notwithstanding clauses in legislation. See generally W. Tarnopolsky, "The Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political

no evidence that human rights *per se* are or may be subject[ed] to p[ro]cesses of extinguishment *destruction* or *extinguishment*.[41]

As the above factors suggest, extinguishment of status or rights generally gives rise to a number of far-reaching implications for Aboriginal peoples. Moreover, these fundamental considerations pertaining to Aboriginal peoples highlight that, in relation to extinguishment, there are some basic differences in government policies and practices between Aboriginal and non-Aboriginal people that may be difficult to justify.

In practice, the extinguishment of aboriginal status and rights has been used extensively by governments in Canada. Whether governments have such a constitutional and legal capacity,[42] and whether extinguishments of aboriginal status and rights have been validly carried out, are related questions that are examined later in this study.[43]

The notion of "extinguishment" of aboriginal [rights] is said to find its roots in British policy as reflected in the *Royal Proclamation of 1763*.[44] In fact, the term "extinguishment" is not explicitly used in the Proclamation. Moreover, to our knowledge, no other Imperial legislation employs the term.

[Prior to 1867][45], it would appear that the only Canadian legislative provisions expressly contemplating (though not actually legislating) the "extinguishment" of "Indian title" were found in the *Manitoba Act, 1870*[46] and the *Dominion Lands Act*[47] in regard to the Metis. Whether the governments concerned have conformed to their constitutional obligations in regard to the Metis is explored later in this study.

Since the term "extinguishment" (as it pertains to aboriginal rights) was not used in the Royal Proclamation of 1763 or in Imperial legislation applicable to what is now Canada, it cannot simply be assumed that other legal expressions that were used connote the same meaning, scope and intent as possibly included in a dictionary definition of "extinguishment".

The meaning of other legal expressions, such as "cessions", "purchases", or "surrenders"

Rights: Domestic Implementation of International Human Rights Norms", note 39, *supra*, at 190-192.

[41] See discussion under sub-headings 8.2.1.4 & 8.2.1.5 *infra*.

[42] See generally heading 6 *infra*.

[43] In regard to the Metis, see discussion under heading 3 *infra*.

[44] The Royal Proclamation prohibited all alienations of Indian title, except to the Crown and in accordance with specified procedures: *R.* v. *Lady McMaster*, [1926] Ex. C.R. 68; *Easterbrook* v. *The King*, [1931] S.C.R. 210 (Exch. Ct.). In these cases, the court held that if Indian lands were not validly surrendered, any 99-year lease (with right of renewal) of such lands would be invalid.

[45] In addition to the surrender provisions in the James Bay and Northern Quebec Agreement, the extinguishment of rights, titles, etc. was explicitly provided in the *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32, s. 3(3).

[46] See Item 2 of the Schedule of the *Constitution Act, 1982*. Section 31 of the *Manitoba Act* provides: "And whereas, it is expedient, *towards the extinguishment of the Indian Title to the lands in the Province*, to appropriate a portion of such ungranted lands..." [Emphasis added.] See also s. 32 of the Act.

[47] There were various *Dominion Lands Acts* which made explicit reference to the Metis ("Half-breeds"). See, for example, *An Act to Amend and Consolidate the Several Acts Respecting the Public Lands of the Dominion*, 1879, 42 Victoria, c. 31, s. 125: "The following powers are hereby delegated to the Governor in Council:- e. *To satisfy any claims existing in connection with the extinguishment of the Indian title preferred by half-breeds* resident in the North-West Territories outside of the limits of Manitoba, on the fifteenth day of July, one thousand eight hundred and seventy, by granting lands to such persons, to such extent and on such terms and conditions, as may be deemed expedient". [Emphasis added.] See also *An Act to Amend and Consolidate the Several Acts Respecting the Public Lands of the Dominion*, 1883, 46 Victoria, c. 17, s. 81, where s. 125 was amended to read "previous to the fifteenth day of July" rather than "on the fifteenth day of July".

must be considered in the precise legal and factual[48] *context* in which such terms are found. In addition, depending upon the period of history in which notions of extinguishment are considered and the process or legal instruments relied upon, the *capacity* of the Crown or Parliament unilaterally to extinguish aboriginal rights is (as described in this study[49]) subject to significant doubt.[50]

"Extinguishments" as practised by governments in Canada, however, are much more widespread than what was ever provided in legislation. In order to assess the full impact of extinguishment on the status and rights of Aboriginal peoples, various forms of extinguishment are examined in this study.

Included in this study are the purported voluntary extinguishments, generally referred to as "surrenders". However, as noted below, the legal requirements for "free and informed consent" to the extinguishment of aboriginal or treaty rights, and the assumption that the written versions of the historical and modern treaties signify the meeting of those requirements, are issues that necessitate close scrutiny and assessment.[51]

The study also makes reference to extinguishments that do not relate directly to lands and resources, but pertain to Aboriginal identity.[52] Further, *de facto* extinguishments based on the policies or actions of government are also addressed, particularly in cases where their impacts have been far-reaching.

1.2 Comparisons with "Cession" and "Purchase"

Black's Law Dictionary defines "cession" as:

> "The act of ceding; a yielding or giving up; surrender; relinquishment of property or rights."[53]

In addition, "purchase" is defined as:

> "Transmission of property from one person to another by voluntary act and agreement, founded on a valuable consideration."[54]

However, as noted above, it would be insufficient and incomplete to rely solely on a legal dictionary definition of these concepts when applying them to Aboriginal peoples, without

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[48] "It is impossible for this Court to consider the doctrine of extinguishment 'in the air'; the respondent must anchor that argument in the bedrock of specific lands.": *R.* v. *Simon*,[1985] 2 S.C.R. 387 at 406.

[49] See generally heading 6 *infra*.

[50] For example, even if it is assumed that in the early years of Canadian history the Imperial Parliament had the capacity to extinguish aboriginal rights, this did not mean that the Crown in right of Canada or the Canadian Parliament possessed a similar capacity, in the absence of specific and valid legal authority.

[51] The possibility of serious defects in Aboriginal consent to existing treaties is also raised in S. Grammond, *Les traités entre l'État canadien et les peuples autochtones* (Cowansville, Québec: Les Éditions Yvon Blais, 1994), at 102-103.

[52] Most non-land-related extinguishments are linked to questions of Aboriginal identity, such as Indian status under the federal *Indian Act* or the denial of fundamental status and rights to the Metis, despite s. 91(24) of the *Constitution Act, 1867*.

[53] *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing Co., 1990), at 228.

[54] Id. at 1234.

examining carefully the context in which these terms were used.[55]

Rules for dealing with Aboriginal peoples were first set out in the *Royal Proclamation of 1763*, where references to "cessions" and "purchases" were made. This imperial instrument has been described by the Supreme Court as a "fundamental document upon which any just determination of original rights rests"[56], and has continuing application in Canada.[57] In examining government extinguishment practices, it is important to begin with the Proclamation since it sets out the rules for "all future dealings" with Aboriginal peoples. Such rules were clearly intended to be protective of Aboriginal peoples, having been "begotten of prudence, humanity and justice". As provided in *Province of Ontario* v. *Dominion of Canada*, per Idington J.:

> "A line of policy begotten of *prudence, humanity and justice* adopted by the British Crown *to be observed in all future dealings with the Indians* in respect of such rights as they suppose themselves to possess was outlined in the Royal Proclamation of 1763..."[58] [Emphasis added.]

The Royal Proclamation did refer to "cessions" or "purchases", but such concepts must be placed in an overall context of confirming and safeguarding the rights and interests of Aboriginal peoples.[59] Cessions or purchases referred to in the Proclamation were to be protected from "great Frauds and Abuses" by only permitting alienations by Aboriginal peoples to or via the Crown ("if at any Time any of the Said Indians should be inclined to dispose of the said Lands").[60]

In other words, cessions or purchases were not intended to result in land dispossessions that undermined Aboriginal interests. Nor did the Proclamation require cessions or purchases to take place, in order for colonial or Dominion governments to recognize the land rights of Aboriginal peoples (as the Proclamation commanded). Yet treaties entered into between the Crown and Aboriginal peoples included "land cession provisions" that are still being challenged as to their scope and validity by Aboriginal peoples to the present day.[61]

Moreover, as already indicated, surrender and extinguishment clauses continue to be insisted upon by the federal government, in order for Aboriginal peoples to enter into land claims agreements. These government extinguishment policies do not seek to "purchase" the aboriginal title to lands and resources of Aboriginal peoples. Instead, federal land claims policies largely take the approach of insisting on cessions of aboriginal title, while at the same time refusing to concede the existence of such title. This questionable approach in federal land claims policies is not consistent with what is contemplated by the Royal Proclamation. Nor would the wholesale purchase of aboriginal lands and resources conform to the intention of the Proclamation, if

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[55] See I. Brownlie, *Principles of Public International Law*, 4th ed. (Oxford: Clarendon Press, 1990), at 133, n. 36: "The term 'cession' is used to cover a variety of types of transaction, and it is important to seek the legal realities behind the term in each case."

[56] *Calder* v. *A.G. British Columbia*, [1973] S.C.R. 313 at 395 per Hall J.

[57] See discussion under sub-headings 2.2 - 2.4 *infra*.

[58] *Province of Ontario* v. *Dominion of Canada*, (1909) 42 S.C.R. 1 at 103-104. This view of the Royal Proclamation is cited with approval by Hall J. in *Calder* v. *A.G. British Columbia*, [1973] S.C.R. 313 at 395.

[59] For example, if cessions or purchases did take place in a manner that defrauded Aboriginal peoples or otherwise jeopardized their means of subsistence, security or continued exercise of their aboriginal rights, it cannot be said that the instructions or obligations in the Proclamation were in fact carried out.

[60] The phrases in quotations are from the *Royal Proclamation of 1763*.

[61] For a brief discussion of whether there was valid consent to such land cession clauses in the historic and contemporary treaties, see sub-heading 10.4.5 *infra*. See also P. Hogg, *Constitutional Law of Canada*, (Toronto: Carswell, 1992), vol. 1, at 27-23: "[The *Simon* and *Sioui*] cases make clear that the surrender of aboriginal rights is not a requirement of a valid treaty. Nor does a treaty have to be concerned with territory"; *Simon* v. *The Queen*, [1985] 2 S.C.R. 387; *R.* v. *Sioui*, [1990] 1 S.C.R. 1025.

Aboriginal peoples were left without an adequate land base and vulnerable as a result.

It can be strongly argued that "cessions" and "purchases" are used in the Royal Proclamation to a large degree synonymously, although conceivably "cessions" could also refer to other dispositions by Aboriginal peoples such as gifts or even surrenders of territory in times of war.[62] In *The Queen* v. *Symonds*, Chapman J. emphasizes the essential requirement of Aboriginal consent to extinguishments of land titles but intimates that cessions might arise in other circumstances:

> "...it cannot be too solemnly asserted that [Native title] is to be respected, that it cannot be extinguished *(at least in times of peace)* otherwise than by the free consent of the Native occupiers. But for their protection, and for the sake of humanity, the Government is bound to maintain and the Courts to assert, the Queen's exclusive right to extinguish it."[63] [Emphasis added.]

In regard to "purchases", the Proclamation's terms are examined in further detail under the following sub-heading.[64]

1.2.1 Private and Crown purchases of Aboriginal lands

> "...no Government, whether provincial or central, has failed to acknowledge that the original title to the land existed in the Indian tribes and the communities that hunted or wandered over them. *Before we touch an acre we make a treaty with the chiefs* representing the bands we are dealing with, and having agreed upon and paid the stipulated price,...we enter into possession, *but not until then do we consider that we are entitled to deal with a single acre.*"[65]
>
> Lord Dufferin, Government House, Victoria, 1876

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[62] In *Worcester* v. *State of Georgia*, 31 U.S. (6 Pet.) at 545-547, Chief Justice Marshall indicates that the power to extinguish Aboriginal title by conquest is limited to situations where Indians had been aggressors in actual confrontations. At 546, the Chief Justice states that "[t]he power of war is given only for defense, not for conquest." See H. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, (1978) 27 Buffalo L.R. 637 at 662: "The charters, as specific delegations of royal authority, did not empower the colonies to engage in wars of conquest. The power to make war was included in the grants 'but *defensive* war alone seems to have been contemplated.' The right to invade the natives and other enemies was dependent on 'just cause'." See also N. Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, (1980) 31 Hastings L. J. 1215 at 1224-1225. At 1228, the author emphasizes the U.S. rule of obtaining voluntary cessions through treaties: "Indeed, extinguishment by voluntary cession for consideration had been the rule in acquisition of Indian title. Before *Tee-Hit-Ton* [348 U.S. 272 (1955)] virtually all cases finding Indian title extinguished involved voluntary cession."

Newton questions the use of the term "conquest" in *Tee-Hit-Ton* by Reed J. At 1243, Newton provides: "Both at the time of *Johnson* [v. *M'Intosh*] and today, conquest has been a narrow concept with clearly defined effects on the conquered people. For example, conquest generally requires some sort of physical possession by force of arms. Thus, the conclusion [in *Tee-Hit-Ton*] that all Indian land has been conquered was as illogical as it was unprecedented." In support of his characterization of conquest, the author cites L. Oppenheim, *International Law* (8th ed., H. Lauterpacht ed., 1955). Additional authorities are cited to indicate that "[m]odern international law has disapproved conquest as a valid method of acquiring territory."

[63] *The Queen* v. *Symonds*, (1847) N.Z. P.C.C. 387 at 390.

[64] Further discussion of the Proclamation's terms in relation to purchases of Aboriginal lands is also included under sub-heading 2.1 *infra*.

[65] H. Walton, (ed.), *Speeches and Addresses of Lord Dufferin* (1882) at 209, cited in K. Lysyk, *The Indian Title Question in Canada: An Appraisal in the Light of Calder*, (1973) 51 Can. Bar Rev. 450 at 466.

The essential requirement of fair purchase of any lands of Aboriginal peoples is central to the objectives and purposes of the Royal Proclamation of 1763. With a view to safeguarding Aboriginal peoples from "great Frauds and Abuses...and prevent[ing] such Irregularities in the future", the Royal Proclamation limits alienations of Aboriginal lands within British colonies[66] in North America in the following manner:

> "...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 public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie; and in case they shall lie within the limits of any Proprietary Government[67], they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose".

It is clear from the above excerpt of the Royal Proclamation that several conditions must be complied with, in order for valid purchases of Aboriginal lands within the colonies to be made. First, alienations of aboriginal lands may be made solely to the Crown,[68] or to proprietary governments in cases where the lands are located in a proprietary colony. Second, the lands must be purchased at some public meeting or assembly of the Aboriginal people concerned to be held for that purpose.[69] Third, the alienations must be made with the free consent of the Aboriginal people affected ("if at any Time any of the said Indians should be inclined to dispose of the said Lands").[70]

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[66] Both proprietary and non-proprietary colonies are explicitly covered by this provision of the Proclamation (see discussion under heading 2.1 *infra*). Although Rupert's Land was a proprietary colony to the extent that it was included in the Charter of the Hudson's Bay Company, it appears that the North-Western Territory was not covered by the same Charter. See generally K. McNeil, *Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations* (Saskatoon: University of Saskatchewan Native Law Centre, 1982).

The North-Western Territory would have been subject to a different provision of the Proclamation that applied to the vast area known as "Indian Country" and which did not specify that alienations must be to the Crown: "And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of *any of the Lands above reserved*, without our especial leave and Licence for that Purpose first obtained." [Emphasis added.] However, in any event, both Rupert's Land and the North-Western Territory became a part of the Dominion of Canada in 1870 and would have then been subject to the more onerous provision in the Proclamation dealing with purchases of aboriginal lands within British colonies.

[67] In J. Beaulieu *et al.*, *La Proclamation royale de 1763: le droit refait l'histoire*, (1989) 49 R. du B. 317, at 334-335, it is said that there were only three proprietary colonies in existence in 1763 (including Pennsylvania) and the new colony of Quebec that was specifically referred to in the Proclamation was not a proprietary government. However, Rupert's Land was established as a proprietary colony: see B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories* (Saskatoon: Univ. of Saskatchewan Native Law Centre, 1979), at 209, 309. See also *Rupert's Land and North-Western Territory Order*, R.S.C. 1985, App. II, No. 7, Schedule (C), (1st preamble), where the Hudson's Bay Company Deed of Surrender describes Rupert's Land in the following terms: "...the said land should be from thenceforth reckoned and reputed as *one of His Majesty's Plantations or Colonies in America, called Rupert's Land*; and whereby His said Majesty made and constituted the said Governor and Company and their successors the absolute lords and *proprietors* of the same territory,..." [Emphasis added.] See also P. Cumming & N. Mickenberg, (eds.), *Native Rights in Canada* (Toronto: Indian-Eskimo Association of Canada, 1972) at 167-169, where it is concluded that the "Royal Proclamation fully recognizes aboriginal rights in both the colonies and *the territories of the proprietary governments, including those of the Hudson's Bay Company*." [Emphasis added.]

[68] Reference is being made here solely to transactions between Aboriginal and non-Aboriginal people and not those between Aboriginal people themselves.

[69] These first two conditions are specifically referred to by Dickson J. in *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 at 340. The Proclamation's requirement of a meeting or assembly for the purpose of considering a proposed cession or purchase is referred to in *Mitchel* v. *U.S.*, 9 Pet. 717 (U.S. Fla., 1835) at 747; *R.* v. *Koonungnak*, (1963), 45 W.W.R. 282 at 302 (N.W.T. Terr. Ct.); *Doherty* v. *Giroux*, (1915) Que. K.B. 433 at 435. In *R.* v. *Baby*, (1855), 12 U.C.Q.B. 346 at 360, Robinson C.J. for the Court provides: "...the proposal to purchase should be opened and *discussed at a council fairly representing the tribe*, and in the presence of some public officer, who might see that *everything was duly considered and understood, and fully agreed to*". [Emphasis added.] The requirement of a meeting or assembly for the above-stated purpose incorporates the essential notion of informed consent.

[70] See also *R.* v. *Symonds*, [1847] N.Z.P.C.C. 387 at 390 (per Chapman J.): "...whatever may be [the Aboriginal peoples'] present clearer and still growing conception of their own dominion over land, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the *free consent*

It is clear that the above provision in the Proclamation is aimed at regulating private purchases of Aboriginal lands. As B. Slattery explains:

> "...the Proclamation characterizes the Indian title as inalienable, except to the Crown or its delegates, so that purchases of Indian land by private parties are invalid."[71]

Furthermore, it could be argued that while the above provision in the Proclamation is not entirely clear on this point, the restrictions apply to the purchases of Aboriginal lands by the Crown. B. Slattery refers to the same qualifications as just described,[72] but he also emphasizes that the Proclamation infers additional conditions for a valid purchase to be effected:

> "One may infer that a number of other conditions are imported by the use of the term 'purchase'...and by the allusions to cessions elsewhere in Part IV [of the Proclamation]...*It cannot be presumed that the Crown, having stated the aim of avoiding the "Frauds and Abuses" of past eras, intended to benefit from cessions or purchases tainted by irregularities*. Cessions of Indian lands which fail to satisfy the *fundamental rules of common law governing the formation of such contracts, or which are affected by the recognized causes of nullity* -- misrepresentation, duress and so on -- would appear void or voidable, in the same manner as normal contracts."[73] [Emphasis added.]

In addition to the above conditions, it has already been stated in this study that the "purchases" or "cessions"[74], contemplated in the Royal Proclamation, to the Crown must be carried out in a manner that does not undermine the Aboriginal peoples concerned. Rather, such alienations must be to their benefit and in their "best interests".

As concluded by Dickson J. in *Guerin* v. *The Queen*:

> "The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, *so as to prevent the Indians from being exploited*. This is made clear in the Royal Proclamation itself, which prefaces the provision making the Crown an intermediary with a declaration that 'great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interest and to the great Dissatisfaction of the said Indians...'.[75] [Emphasis added.]

In the same paragraph, Mr. Justice Dickson adds:

> "Through the confirmation in the *Indian Act* of the *historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties*, Parliament has conferred upon the Crown a discretion to decide for itself where the *Indians' best interests* really lie." [Emphasis added.]

Although the Supreme Court of Canada in the *Guerin* case referred to transactions with "third parties", the historic and statutory duty of the Crown to protect Aboriginal interests in

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of the Native occupiers." [Emphasis added.] Cited by Hall J. in *Calder* v. *A.G. British Columbia*, [1973] S.C.R. 313 at 403-404. In addition, in S. Grammond, *Les traités entre l'État canadien et les peuples autochtones* (Cowansville, Québec: Les Éditions Yvon Blais, 1994), at 119, it is said that the equitable principles in the Royal Proclamation require that the principle of Aboriginal consent be respected.

[71] B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 67, *supra*, at 311.

[72] Id. at 312.

[73] Id., at 313.

[74] Reference here is made to voluntary "cessions" during peacetime, since there has not been any lands acquired by conquest of Aboriginal peoples in Canada.

[75] *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 at 340.

regard to land alienations applies equally to transactions directly related to the Crown. Moreover, the Supreme Court has confirmed that these rules in the Royal Proclamation apply and have always applied throughout Canada's history:

> "*[T]his policy with respect to the sale or transfer of the Indians' interest in land has been continuously maintained by the British Crown*, by the governments of the colonies when they became responsible for the adminstration of Indian affairs, *and, after 1867, by the federal government of Canada*. Successive federal statutes, predecessors to the present *Indian Act*, have all provided for the general inalienability of Indian reserve land except upon surrender to the Crown, the relevant provisions in the present Act being ss. 37-41."[76] [Emphasis added.]

From all of the above, it is clear that the rule in the Royal Proclamation against alienation of Aboriginal lands except to the Crown[77] is intimately tied to the duty to protect Aboriginal peoples and to act in their best interests. Further, the Supreme Court in *Guerin* has indicated that, whether the "Indian interest" is related to a reserve or to aboriginal title in traditional tribal lands, "[t]he Indian interest in the land is the same in both cases".[78]

It is also essential to note that the inalienability of Aboriginal lands except to the Crown gives rise to a "distinct fiduciary obligation" on the part of the Crown to act in the Aboriginal peoples' best interests.[79] As Dickson J. indicates in *Guerin*:

> "...the [Indian] interest gives rise upon surrender to a *distinctive fiduciary obligation* on the part of the Crown to deal with the land *for the benefit* of the surrendering Indians. These two aspects of Indian title go together, since the Crown's original purpose in declaring the Indians' interest to be inalienable otherwise than to the Crown was to *facilitate the Crown's ability to represent the Indians in dealings with third parties*."[80] [Emphasis added.]

In conclusion, consent by Aboriginal peoples to alienate land to the Crown can lead to a "purchase" or "cession" that has the effect of eliminating the Aboriginal interest in such land. However, the Royal Proclamation, as confirmed by the common law, requires that such purchases be protective, and in the "best interests", of the Aboriginal peoples concerned.[81] In this regard, the government has a duty as fiduciary to ensure that it is "acting for the benefit of" such peoples when it acts on their behalf in regard to alienations to the Crown.

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[76] *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 at 340 per Dickson J.

[77] It is important to highlight here that any restrictions on alienation in the Proclamation do not apply to transactions between or among Aboriginal peoples themselves. See sub-heading 2.1 *infra*.

[78] *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 at 337, where Dickson J. cites in support *A.-G. Quebec* v. *A.-G. Canada*, (1920), 56 D.L.R. 373 at 378-79, [1921] A.C. 401 at 410-411. While the fiduciary obligation of the Crown would apply to both reserve and traditional Aboriginal lands, there is considerable doubt that the "Indian interest" in these two types of land can be assumed to be the same for all purposes: see R. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon, Sask.: University of Saskatchewan Native Law Centre, 1990), at 65 *et seq.*; *A.G. Canada* v. *Giroux*, (1916), 4 C.N.L.C. 147 (S.C.C.), where it was held that a reserve set apart by order in council in Quebec amounted to "beneficial ownership". On the other hand, it could be well argued that the "personal and usufructuary" characterization of Indian title in *St. Catherine's Milling and Lumber* was erroneous and should have been a *sui generis* form of "ownership" and jurisdiction.

[79] See *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 and sub-heading 6.4 *infra* in this study, where it is made clear that a fiduciary obligation does not only arise under the Royal Proclamation in the case where a surrender of Aboriginal land is concerned.

[80] *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 at 339 per Dickson J.

[81] See also *R.* v. *Symonds*, [1847] N.Z.P.C.C. 387 at 390 (per Chapman J.): "The practice of extinguishing Native titles *by fair purchases* is certainly more than two centuries old...But for their *protection*, and for the sake of *humanity*, the Government is bound to maintain, and the Courts to assert, the Queen's exclusive right to extinguish [Native title]." [Emphasis added.] Cited by Hall J. in *Calder* v. *A.G. British Columbia*, [1973] S.C.R. 313 at 403-404.

It has already been indicated that the Royal Proclamation requires that purchases, whether they be for non-Aboriginal private persons or for the Crown, must be made to the Crown.[82] Despite early judicial rulings to the contrary,[83] it is the view of this study that the Proclamation does not require that interests less than permanent alienation or conveyance of title (e.g. leases) be subject to purchase or cession to the Crown.[84]

However, it is worth noting that the federal government has required "surrenders" from Indians under the *Indian Act* in order to lease their lands to private persons. The potential pitfalls or risks of using "surrenders" in a broad and indiscriminate manner is described briefly under the following subheading.

1.3 Mandatory Use of "Surrenders" Under the Indian Act

"Surrenders" can have different consequences in regard to Aboriginal interests depending on the wording of the instrument and the legal history of the land concerned.[85] In view of the interpretation various transactions involving surrenders (of Aboriginal interests) have been given by the courts, the use of surrenders hardly appears to be in the interests of Aboriginal peoples. Yet, through the *Indian Act*,[86] the federal government has continued to insist upon surrenders in carrying out leasing and other economic arrangements pertaining to Aboriginal lands.

In the 1921 *Star Chrome Mining* case, the Privy Council treated Indian reserve lands under federal administration in the same manner as traditional lands and held that a surrender

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[82] In this regard, the Proclamation provides: "...that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians...; but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be purchased only for Us, in our Name, at some public Meeting or Assembly..."

[83] *R.* v. *Lady McMaster*, [1926] Ex.C.R. 68 at 73; *Easterbrook* v. *The King*, [1931] S.C.R. 210 at 217-218; aff'g [1929] Ex.C.R. 28. These cases dealt with 99-year leases, subject to a right of renewal.

[84] An argument could arise that the term "dispose" as used in the Proclamation is sufficiently broad as to include leasing of land. According to such an interpretation, the Proclamation would require the Crown to first purchase aboriginal lands prior to leasing them to the Crown or to a third party:

> "*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 public Meeting or Assembly of the said Indians*, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie;..." [Emphasis added.]

However, the following reasons strongly militate against such an interpretation: i) the paragraph in which the term "dispose" is used in the Proclamation, only addresses purchases from "Indians" and not leases; ii) there are no indications that the practice of leasing lands was even contemplated at the time of the Proclamation; iii) it would be a contradiction in terms to impose a requirement to sell aboriginal lands in order to lease the same lands to the Crown or a third party; iv) as already indicated, a primary purpose of the Proclamation was to safeguard the rights and interests of Aboriginal peoples, and the above interpretation would be to the severe prejudice of the peoples concerned; and v) judicial rules of interpretation require that laws pertaining to Aboriginal peoples be construed liberally and that all ambiguities be resolved in favour of Aboriginal peoples (*Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29 at 36). Moreover, if such an interpretation were to gain acceptance, even conditional surrenders under the *Indian Act* (ss. 37(2), 38(2)) would not conform to these requirements under the Proclamation. The issue of whether the Proclamation requires leases of Aboriginal lands to be the preceded by a surrender of aboriginal title is discussed also in the text accompanying note 267 *infra*.

[85] In regard to the various impacts on reserve lands from the use of surrenders, see generally R. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland*, note 78, *supra*.

[86] *Indian Act*, R.S.C. 1985, c. I-5, ss. 37(1), 38(1) (absolute surrenders required for sale of lands or conveyance of title); ss. 37(2), 38(2) (non-absolute surrenders or "designations" required for granting of leases and other interests). Prior to 1988, the Act did not expressly provide for "designations" under s. 38(2). See also *St. Ann's Shooting & Fishing Club Ltd.* v. *The King*, [1950] S.C.R. 211 at 219, per Rand J., where he states: "Under the *Indian Act* of 1880, a surrender of the Indian interest was required before an effective lease could be made." On the other hand, it is provided in ss. 20 and 58 of the *Indian Act* that leases can take place without surrenders if the land is in the possession of an individual Indian. However, in such case, it is has been decided by the Federal Court of Appeal that the fiduciary obligations of the Crown *towards the band* do not extend to such individually possessed land: *Boyer* v. *Canada*, [1986] 2 F.C. 393, leave to appeal to Supreme Court of Canada refused 72 N.R. 365n, cited in J. Woodward, *Native Law* (Toronto: Carswell, 1989), at 284.

of the "Indian interest" vested the Crown in right of the province with full ownership.[87] As R. Bartlett indicates, the consequences of the Privy Council's analysis had far-reaching and detrimental consequences for the Aboriginal peoples so affected:

> "The application of the analogy of traditional lands to Indian reserves had the effect of seeming to *limit the Indian interest to less than that necessary to fulfill the objects for which the reserves were set apart* and *of construing section 91(24) so as to deny title and power to the Dominion so as to fully protect the Indian interest, thereby defeating the object for which the Dominion was given jurisdiction.*"[88] [Emphasis added.]

No argument had been put forward in *Star Chrome Mining* by the federal government that the Aboriginal peoples concerned had "beneficial ownership", as had been decided by the Supreme Court in the earlier case of *A.G. Canada* v. *Giroux*[89]. As was often the case, the Indians directly affected by the case were not parties to the litigation.[90]

In order to counter the negative effects of *Star Chrome Mining* and to continue the widespread practice of "surrenders", federal-provincial[91] agreements have been entered into in some provinces[92]. However, all such agreements are laden with a variety of different problems. The purpose of these agreements is to enable federal authorities to carry out the objectives of reserves through exercise of federal powers under s. 91(24). As R. Bartlett points out, these agreements "have not, however, been obtained without the accommodation of provincial interests, to the detriment of Indian interests".[93]

Moreover, as the 1983 decision in *Smith* v. *The Queen*[94] demonstrates, federal-provincial agreements are no guarantee that Aboriginal interests are completely safeguarded. In the *Smith* case, the Supreme Court of Canada decided that upon surrender of Aboriginal land, the full ownership is vested in the province. Upon surrender, the federal Crown could no longer act in conformance with its powers under s. 91(24).

The federal government was held in *Smith* to have no authority to claim possession of such land for purposes of sale, the proceeds of which had been intended to be invested for the benefit of Indian band members and their descendants. An existing federal-provincial agreement was said not to apply to the land in question. Nor could a related instrument ("habendum") affect the surrender, even though it indicated that the surrender was conditional on the Indians receiving the proceeds from the sale.

While it is possible to draft "conditional" surrenders[95] that would enable Aboriginal

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[87] *A.-G. Quebec* v. *A.G. Canada* (Star Chrome Mining), [1921] 1 A.C. 401 (P.C.) at 410.

[88] R. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland*, note 78, *supra*, at 70.

[89] *A.G. Canada* v. *Giroux*, (1916), 4 C.N.L.C. 147 (S.C.C.) at 158, 165.

[90] The legitimacy and fairness of the practice of not including aboriginal peoples in court cases that directly affected their fundamental status and rights are examined under sub-heading 1.5.1 of this study.

[91] Aboriginal peoples directly affected by such federal-provincial agreements have no direct participatory role in negotiating the agreements' terms.

[92] For example, federal-provincial agreements exist in British Columbia, Ontario, New Brunswick, and Nova Scotia.

[93] R. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland*, note 78, *supra*, at 70.

[94] *Smith* v. *The Queen*, (1984) 147 D.L.R. (3d) 237 (S.C.C.). The implications and correctness of the ruling in this case by the Supreme Court of Canada is examined in some detail under sub-heading 1.5.1 *infra*.

[95] *Indian Act*, R.S.C. 1985, c. I-5, s. 38(2). The Act was amended in 1988, so as to expressly provide for non-absolute surrenders or "designations". Cases involving conditional surrenders include: *West. Int'l Contr. Ltd.* v. *Sarcee Dev. Ltd.*, [1979] 3 W.W.R. 631 (Alta. C.A.); *Kinookimaw Beach Assn.* v. *The Queen in right of Sask.*, [1979] 6 W.W.R. 84, 102 D.L.R. (3d) 333 (Sask. C.A.), cited in D. Hawley, *The Annotated Indian Act 1994* (Toronto: Carswell, 1993) at 41. See also *Surrey (Corpn.)* v. *Peace Arch Enterprises Ltd.*, (1970), 74 W.W.R. 380 (B.C.C.A.), where a surrender "in trust

peoples to regain possession of their reserve property after a lease or other third party use has terminated, there does not appear to be any reason for "surrenders" to be imposed on Indians in such instances. Should there be inadequate or careless drafting of a surrender instrument or a misconstruance of Aboriginal intentions by federal authorities, Indians subject to the *Indian Act* could lose all rights to their lands.[96] For example, a situation of misconstrued intentions seems to have arisen in *Gitanmaax Indian Band* v. *British Columbia Hydro & Power Authority*,[97] where it was held that land did not revert back to an Indian band after a power station had been dismantled, since a reference in the relevant Order in Council authorizing the sale of lands "for power purposes" was deemed to be descriptive and not a condition of the sale.[98]

It would appear that excessive, mandatory use of surrenders under the *Indian Act* is difficult to justify, discriminatory, and subject to legal challenge.[99] No other people in Canada are compelled to confer leases or other interests (less than full alienation of title) through the mechanism of surrender.[100] In view of the experience with surrenders to date, the mechanism is fraught with potential problems and is not in the interests of the Indian people concerned. Nor is the use of such a mechanism either appropriate for all purposes or consistent with the federal fiduciary role.

The Royal Proclamation of 1763 provides a statutory policy to safeguard Aboriginal peoples and their lands. However, the Proclamation does not require surrenders by Aboriginal peoples to the Crown in order to lease their lands.[101] Excessive use of surrenders under the *Indian Act* brings added risks to those Indians compelled to use such mechanism in connection with their economic interests. Depending on the particular facts in each case, this may be especially true in regions where no federal-provincial agreement currently exists, such as the

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to lease the same" was held not to extinguish Indians' reversionary interest.

[96] The *Indian Act* contains no express provision for revoking a surrender. Moreover, according to the *Smith* case, *supra*, at 250, once an absolute surrender is made, the Aboriginal interest forever disappears. The problem with surrenders has manifested itself as early as 1773, in the landmark case of *Mohegan Indians* v. *Connecticut*, (1773), reported upon in J.H. Smith, *Appeals to the Privy Council from the American Plantations* (New York: Columbia University Press, 1950), at 442 and cited in B. Clark, *Native Liberty, Crown Sovereignty [:] The Existing Aboriginal Right to Self-Government in Canada* (Montreal: McGill-Queen's University Press, 1990), at 28, n. 52. As B. Clark, *supra*, at 41, indicates, the Mohegans had argued that lands were given to the colony to hold as a "trustee" for the Indians, but the colony regarded the conveyance as an outright surrender.

[97] *Gitanmaax Indian Band* v. *British Columbia Hydro & Power Authority*, (1991) 84 D.L.R. (4th) 562 (B.C.S.C.).

[98] See also *Apsassin* v. *Canada (Dept. of Indian Affairs & Northern Development)*, [1993] 2 C.N.L.R. 20 (Fed. C.A.), at 69, where Marceau J.A. indicated that "it does not appear that a surrender 'for sale or lease' is one that leaves intact some of the Band's interest in the land; the extent of the renunciation implied by a surrender is determined by the more comprehensive of the possibilities contemplated."

[99] Legal challenges could arise based on equality guarantees under the *Canadian Charter of Rights and Freedoms*; and under s. 35(1) of the *Constitution Act, 1982* (if the rights on reserve lands under the *Indian Act* are aboriginal or treaty rights). In addition, the requirement under the *Indian Act* to surrender Aboriginal lands to the Crown in order to engage in leasing activities would appear to be contrary to the protective regime recognized in favour of Aboriginal peoples under the Royal Proclamation of 1763 (see generally heading 2 *infra*). If Aboriginal peoples are or were compelled under the *Indian Act* to "surrender" their lands in order to engage in leasing or other such economic transactions with third parties, it does not appear that these surrenders are fully voluntary in nature.

[100] Even those Aboriginal peoples not subject to the *Indian Act* are not required to surrender their rights to the Crown in order to lease their lands to third parties. See, for example, the *Inuvialuit Final Agreement* (1984) in the Western Arctic, s. 7(44) which provides in part: "For greater certainty, leases and other rights to use or occupy Inuvialuit lands for any purpose and dispositions of rights to explore, develop and produce resources owned by the Inuvialuit may be made by the Inuvialuit to persons or corporations in accordance with this Agreement and laws of general application." For similar rights to lease, in respect to Cree lands and Inuit lands, see the *James Bay and Northern Quebec Agreement* (1975), ss. 5.1.13 and 7.1.5 respectively.

[101] See discussion in text accompanying notes 84 & 267. It is also worth noting that surrenders are not required from the Aboriginal peoples concerned in engaging in leasing arrangements in either the *Cree-Naskapi (of Quebec) Act*, S.C. 1984, c. 18 or the *Sechelt Indian Band Self-Government Act*, S.C. 1986, c. 27. Nor are Inuit or Metis required to surrender their lands to the Crown in order to lease their lands to any third parties.

province of Quebec.[102]

A further problem in regard to surrenders under the *Indian Act* is that it remains somewhat uncertain whether absolute[103] or relative[104] majorities of electors of an Indian band are required. Although courts have favoured the relative majority rule, it would appear that either interpretation is possible. In this regard, J.P. Salembier explains:

> "This question of judicial interpretation was judicially considered twice in the past ten years, in *Cardinal* v. *The Queen*[105] and in *Fred King* v. *The Queen*[106]. In each case, the court opted for the relative majority interpretation. In examining the reasoning applied by the courts in these cases, however, it becomes apparent that the decision in each case was not an inevitable product of the application of established rules of statutory interpretation. *The surrender sections in question were drafted in such a manner that they were capable of either an absolute or relative majority interpretation.* The reasons adopted by the courts, and the principles which they did not address, are instructive in analyzing the weaknesses of the surrender sections as they are presently drafted."[107] [Emphasis added.]

In conclusion, in view of the potentially serious consequences for Aboriginal peoples in the event of a surrender of their lands, it is submitted that the issue of surrender under the *Indian Act* should not be left in its present state of confusion[108], inadequacy[109] and ineffectiveness[110]. In particular, surrenders of Indian lands should conform to the intention and provisions of the Royal Proclamation[111] and not be applied to the leasing of Indian lands.

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[102] In view of the clear dangers of using surrenders in the province of Quebec, federal authorities authorize leases under s. 58(3) of the *Indian Act*, which enables the Minister of Indian Affairs to lease land for the benefit of an *individual* Indian, who is in lawful possession of such land, without requiring a non-absolute surrender under s. 38(2). However, this procedure does not appear to be equally available in other provinces, where there exist federal-provincial agreements concerning reserve lands.

[103] An "absolute" majority would signify a majority of *all* of the electors of an Indian band.

[104] A "relative" majority would entail a majority solely of those electors who are present at a meeting called for purposes of a proposed surrender. However, under s. 39 of the *Indian Act*, it is possible that a majority of the band's electors may be required to have attended the meeting or the Minister of Indian Affairs has the discretion to call another meeting or referendum.

[105] *Cardinal* v. *The Queen*, [1982] 3 W.W.R. 673, [1982] 3 C.N.L.R. 3 (S.C.C.). In this case, the Chief Cardinal and the Enoch Band argued for the need for an absolute majority and the Crown argued that a relative majority was sufficient.

[106] *Fred King* v. *The Queen*, [1986] 4 C.N.L.R. 74. In the *King* case, Chief King and the New Credit Band argued that a relative majority was all that was necessary and the Crown argued for the need for an absolute majority.

[107] J.P. Salembier, *How Many Sheep Make a Flock? An Analysis of the Surrender Provisions of the Indian Act*, [1992] 1 C.N.L.R. 14 at 16.

[108] Confusion results if Indians cannot be certain if a relative or absolute majority of electors of the band is required for approval of proposed surrenders of their lands.

[109] It would appear to be inadequate, if it is possible under s. 39 of the *Indian Act* for less than a majority of the total number of band electors to attend a meeting called to consider a proposed surrender and only a majority of those attending approve the surrender. Even if a majority of electors attended the meeting and a majority of those present voted, there is no assurance that the resulting numbers are in any way sufficient. In this regard, see J.P. Salembier, *How Many Sheep Make a Flock? An Analysis of the Surrender Provisions of the Indian Act*, note 107, *supra*, at 37-38: "Does a relative majority interpretation which allows band lands to be alienated with the assent of as little as 26 percent of the band membership accord with the Act's protective regime?"

[110] As already indicated, it is highly questionable for the federal government to use surrenders in relation to leases of Indian reserve lands.

[111] In relation to the issue of Aboriginal consent to land transfers, the terms of the Proclamation do not call for the Crown to determine the procedure or the required degree of consent. See Royal Commission on Aboriginal Peoples, *Partners in Confederation[:] Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services, 1993), at 17: "When a nation is disposed to transfer any of its lands to the Crown, it should meet in assembly to deal with

It appears that excessive application of surrenders under the *Indian Act* has unnecessarily impeded economic development activities among Indian nations affected. It has also served to perpetuate uncertainty[112] and insecurity in relation to Aboriginal title. Basic Aboriginal objectives and interests are being undermined. The continued use of surrenders under the *Indian Act* for inappropriate purposes is contrary to the interests of Aboriginal peoples. It is therefore recommended that Parliament eliminate this discriminatory and harmful practice.

1.4 Extinguishment of Aboriginal Rights by Land Claims Legislation

In regard to land claims agreements, it is important to distinguish between i) **surrender[113] provisions**, whose *legal effect* may if valid be to eliminate the aboriginal land rights of those people who freely consented; and ii) the additional step of **extinguishment of aboriginal rights by act of Parliament.**

In 1977, for the first time in Canada's history, legislation was adopted pursuant to a land claims agreement (i.e. the *James Bay and Northern Quebec Agreement*[114] (JBNQA)) that specifically provided for the extinguishment of "all native...rights, title and interests" in and to the ancestral territory of Aboriginal peoples. In the *James Bay and Northern Quebec Native Claims Settlement Act*, s. 3 provides in part:

> "3. (1) The Agreement is hereby approved, given effect and declared valid.
>
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>
> (3) *All native claims, rights, title and interests, whatever they may be, in and to the Territory, of* ***all Indians and all Inuit, wherever they may be****, are hereby extinguished*, but nothing in this Act prejudices the rights of such persons as Canadian citizens and they shall continue to be entitled to all of the rights and benefits of all other citizens as well as to those resulting from the *Indian Act*, where applicable, and from other legislation

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the governor or commander in chief of the colony concerned. The land transfer is effected by mutual agreement or treaty...However, *the Proclamation does not lay down the precise procedure to be followed or the degree of consent required, presumably leaving that to be governed by the law of the Aboriginal nation concerned or to the inter-societal practice developed in the course of British-Aboriginal relations.*" [Emphasis added.]

[112] Uncertainty has also been generated in regard to which level of government (federal, provincial or Aboriginal) has jurisdiction in the case of conditional surrenders, where the use of the land is by non-Indians. In *Surrey* v. *Peace Arch Ent. Ltd.*, (1970), 74 W.W.R. 380 (B.C.C.A.), it was held that Parliament retained legislative jurisdiction under s. 91(24) in respect to the non-Indian interest in designated lands. For a similar ruling, see also *Palm Dairies Ltd.* v. *The Queen*, [1979] 1 F.C. 531 (T.D.). However, the Alberta Court of Appeal has indicated "having some difficulty with the expressed conclusion" in the *Peace Arch* case: *Re Stony Plain Indian Reserve No. 135*, [1982] 1 W.W.R. 302 at 320. This constitutional matter, and the above-cited cases are discussed in J. Woodward, *Native Law* (Toronto: Carswell, 1989), at 268-9.

In addition, uncertainty remains as to whether an absolute or relative majority of electors of an Indian band is required in relation to proposed surrenders of reserve lands under s. 39 of the *Indian Act*. See J.P. Salembier, *How Many Sheep Make a Flock? An Analysis of the Surrender Provisions of the Indian Act*, note 107, *supra*, at 16.

[113] Note that nothing in the Royal Proclamation necessitates that surrenders of aboriginal rights take place in order that Aboriginal peoples have their territorial rights recognized. The inclusion of purported surrenders of a far-reaching nature in historic or modern treaties has the effect of making it highly difficult for Aboriginal peoples to terminate treaties. The right to terminate treaties or agreements, based on certain fundamental grounds, exists under both international and Canadian law and should not be denied to Aboriginal peoples. See, for example, *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, art. 60 (material breach), art. 62 (fundamental change of circumstances); G.H.L. Fridman, *The Law of Contract in Canada*, 2nd ed. (Toronto: Carswell, 1986), at 529 *et seq* (fundamental breach). The right to terminate treaties is discussed under sub-heading 10.2 *infra*.

[114] *The James Bay and Northern Quebec Agreement* (Québec: Éditeur officiel du Québec, 1976), s. 2.6 contemplates the extinguishment of such rights by federal legislation approving the Agreement.

applicable to them from time to time."[115] [Emphasis added.]

First, it should be mentioned that the effects of the above provision are not all negative. Section 3(1) of the *James Bay and Northern Quebec Native Claims Settlement Act* not only approves the JBNQA, but also serves to give the Agreement or treaty the force of a federal statute.[116] Therefore, even if portions of the JBNQA are not implemented through specific legislation, the Federal Court of Appeal has decided that a *mandamus* can be issued against federal government officials for not carrying out their legal duties under the Agreement.[117] This positive effect in regard to enforcement could and should have been attained, without jeopardizing the rights and recourses of the Aboriginal peoples affected.

However, there are other legal consequences, of a prejudicial nature, in section 3 that pertain to the question of extinguishment. The far-reaching impacts of such a legislated extinguishment (over and above those emanating from a surrender *per se*) appear to include the following:

i) It purports to unilaterally extinguish the aboriginal rights of all other Indians and Inuit who were not party to the JBNQA.[118]

ii) By also "declaring valid" the JBNQA, the above federal provision has the potential effect of eliminating any legal (i.e. non-constitutional) challenges to the Agreement that may have existed.[119] People whose legal recourses are likely unilaterally eliminated, barring a successful constitutional challenge, include:

- Cree or Inuit, who are beneficiaries under the Agreement and who may feel that the surrender provisions were never adequately explained, or that the procedures

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[115] *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32, s. 3. The same wor[illegible] found in the *Western Arctic (Inuvialuit) Claims Settlement Act*, S.C. 1984, c. 24, s. 3. While the *Inuvialuit Final Ag[illegible]* also contemplates such legislative extinguishment, s. 3(6) of the latter Agreement provides: "Nothing in this Agreement o[illegible] in the Settlement Legislation shall remove from the Inuvialuit their identity as an aboriginal people of Canada nor prejudice their ability to participate in or benefit from any future constitutional rights for aboriginal peoples that may be applicable to them."

[116] See *Cree Regional Authority* v. *Canada*, (1991) 81 D.L.R. [illegible]) 659 (Fed. C.A.) per McGuigan J.A. at 672-675. See also *A.G. British Columbia* v. *A.G. Canada*, (1994) 91 B.C.L.R [illegible] C) at 68-72, where Lamer C.J. considers the effects of a legislative approval of an agreement. In this regard, the Ch[illegible]e states: "There is no fixed formula for legislative approval of contracts. Sometimes, words such as 'ratified', 'confirmed', 'validated', 'given effect to' are used...[new para.]...*Differentiating between 'mere validation' and 'incorporation into the statute' should not be done by simply looking at the words of the legislative provision which refers to the contract. The overall context and the aims pursued by Parliament may, and indeed must, be taken into account when one seeks to ascertain the meaning of a particular ratifying provision*. This was the approach of the Federal Court of Appeal in *Cree Regional Authority* v. *Canada (Federal Administrator)*, [1991] 3 F.C. 533." [Emphasis added.]

Lamer C.J. adds: "*When a statutorily approved contract contains duties of...a public nature, in the sense they are owed to the public in general and not only to the other party to the contract, it may be inferred that Parliament intended to give statutory force to these promises by incorporating the agreement into the statute, and not that it intended merely to validate the contract*...[new para]...Similarly, the James Bay Agreement, which was held to have been incorporated in federal and provincial statutes in *Cree Regional Authority*, *supra*, contains many public duties which are not necessarily owed to the signatories of the Agreement, but are owed to members of the Aboriginal communities or the public at large. The public nature of the duties is surely an indication of an intent to incorporate the Agreement into the Act and thus, to give it statutory force." [Emphasis added.]

[117] See *Cree Regional Authority* v. *Canada*, (1991) 81 D.L.R. (4th) 65[illegible]ed. C.A.).

[118] The *James Bay and Northern Quebec Agreement*, s. 2.14, only provides for an undertaking by Quebec to negotiate with other Indians or Inuit. The same provision stipulates that s. 2.14 "shall not be enacted into law". Such third party extinguishment is discussed in greater detail in the Case Study entitled "[illegible]es Bay and Northern Quebec Agreement" in Part II of this study; see also sub-headings 7, 7.1 & 10.4.4 *infra*.

[119] It may be argued that a legislated extinguishment, *per se*, of the rights of Aboriginal peoples eliminates the possibility of non-constitutional legal recourses for such peoples - even in the absence of a statutory provision that "gives effect" and "declares valid" a particular agreement. However, this would depend on how broad a scope the purported extinguishment clause in the legislation were interpreted to have. Depending on the meaning of the extinguishment clause, it could be that Aboriginal peoples possess other rights on which some legal remedy might be founded.

for obtaining consent to the surrender were legally deficient;

- Inuit from three communities[120] in northern Quebec who had expressly revoked their mandates from the Inuit organization negotiating the Agreement and whose wishes not to be affected by the land claims agreement were effectively ignored by all parties concerned;

- Other Aboriginal peoples both *in* and *outside* the northern Quebec territory but residing in Québec,[121] who were not party to JBNQA and who asserted rights or claims in and to the same territory;

- Other Aboriginal peoples from *outside* the province of Quebec,[122] who were not party to JBNQA and who asserted rights or claims in and to the same territory.

As this study will demonstrate, unilateral extinguishment of the rights of Aboriginal third parties constitutes a most serious violation of the collective and individual human rights of the Aboriginal peoples concerned.[123] In particular, such legislative measures appear to contravene the *Universal Declaration of Human Rights* that provides for the right to an effective remedy. Article 8 of the Universal Declaration stipulates:

> "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him [or her] by the constitution or by law."[124]

Aside from violating human rights, these legislative extinguishments by government serve to avoid legal challenges to possibly invalid surrenders. Such actions run directly counter to the Crown's fiduciary and other obligations to protect Aboriginal peoples under the *Rupert's Land and North-Western Territory Order*, 1870[125] and the equitable principles in the *Royal*

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[120] The three Inuit communities in northern Quebec that are referred to are: Povungnituk, Ivujivik and Salluit. In the case of Salluit, the community was somewhat divided in regard to whether or not they should support the efforts of the Inuit organization that was negotiating a land claims agreement in northern Quebec.

[121] Examples include the Montagnais, Atikamekw, Algonquins and Naskapis. The Naskapis in Québec signed the *Northeastern Quebec Agreement* in 1978.

[122] Examples include the Labrador Inuit, Labrador Innu, and the Mo Cree Bec (of Quebec) who currently reside in Ontario.

[123] See discussion under heading 7 *infra*. Human rights violations arising from unilateral extinguishment would likely include: right to liberty and security of person; right to equality before the law and equal protection under the law, without discrimination; right in full equality to fair and public hearing by an independent and impartial tribunal, in the determination of one's rights and obligations; right to own and enjoy property; right not to be arbitrarily deprived of one's property; right not to be deprived of one's means of subsistence; right to enjoyment of culture.

[124] In regard to the right to an effective remedy, see also the *International Covenant on Civil and Political Rights*, art. 2, para. 3.

[125] In regard to the James Bay and Northern Quebec Agreement which deals with territory that was a part of Rupert's Land, there are other applicable provisions of a constitutional nature in the joint Addresses of Parliament in 1867 and 1869 which constitute terms and conditions of the *Rupert's Land and North-Western Territory Order*, R.S.C. 1985, App. II, No. 7, confirmed as part of the Constitution of Canada in Item 3 of the Schedule to the *Constitution Act, 1982*. See note 341 *infra*).

> The nature of the constitutional obligations in the joint Addresses of Parliament are:
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> "...*upon the transference of the territories in question* to the Canadian government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled *in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines*...[December 1867 Address]
>
> That *upon the transference of the territories in question* to the Canadian Government *it will be our duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the*

Proclamation of 1763.[126] Canadian courts and the Privy Council have generally required that any such surrenders or cessions of rights conform to the mandatory substantive and procedural safeguards in the Proclamation.[127]

It is interesting to note that in recent land claims legislation, the *Nunavut Land Claims Agreement Act*[128], there is no legislated extinguishment provision (although surrender of Inuit aboriginal rights is still provided for in their land claims agreement).[129] This would suggest that, in the land claims context, legislated extinguishment provisions are not currently seen as necessary or constructive by the federal government.[130]

However, any purported extinguishment of rights is a most serious matter for Aboriginal peoples. In particular, those Aboriginal peoples who have been subjected to *legislated* extinguishments of their land rights in the past should have access to appropriate remedies. They should not be denied appropriate redress, simply because the land claims agreements that affect them took place in an earlier period.

1.5 *De Facto* Extinguishment Through Government Policies and Practices

Legal extinguishments have especially been practised against Indian people by denying or eliminating "Indian" status under the *Indian Act* to individual Indians for a variety of reasons[131]. In this way, the federal government has generally been able to deny constitutional

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transfer..." [May 1869 Address] [Emphasis added.]

[126] Even if one takes the position that the Royal Proclamation does not apply directly to the northern areas of Canada known as Rupert's Land, the "equitable principles" in the Proclamation were constitutionally incorporated into the terms and conditions of the *Rupert's Land and North-Western Territory Order*: see discussion under sub-heading 2.3 *infra*.

[127] *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 at 340 per Dickson J.

[128] *Nunavut Land Claims Agreement Act*, S.C. 1993, c. 29, assented to June 10, 1993.

[129] *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada* (Ottawa: Indian and Northern Affairs Canada, 1993). Signed on May 25, 1993.

[130] See also S. Grammond, *Les traités entre l'État canadien et les peuples autochtones* (Cowansville, Québec: Les Éditions Yvon Blais, 1994), at 153, where the author expresses the view that the legislative extinguishment clauses (pertaining to the James Bay and Northern Quebec Agreement and the Inuvialuit Final Agreement) were not necessary to extinguish ancestral title.

[131] Examples of persons who lost their status under past *Indian Acts* include: women who married non-Indians; "illegitimate" children who were subjects of paternity protests; children of women who married non-Indians; persons who applied to be franchised; families of Indian men who were enfranchised; Indians who had a foreign residence (e.g. United States); and enfranchised persons who practised certain professions or who held university degrees. These and other examples are discussed in J. Woodward, *Native Law* (Toronto: Carswell, 1989), at 20-30.

Status provisions under the *Indian Act* were substantially amended in 1985. See S.C. 1985, c. 27; P. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1992), vol. 1, at 27-3, n. 6. The details of the reinstatement of Indian status, however, remain controversial: see D. Opekokew, *Self-identification and Cultural Preservation: a Commentary on Recent Indian Act Amendments*, [1986] 2 C.N.L.R. 1; P. Kirby, *Marrying Out and Loss of Status: The Charter and the New Indian Act Legislation*, (1985) 1 J.L. & Soc. Pol'y 77; C. Jones, *Towards Equal Rights and Amendment of Section 12(1)(b) of the Indian Act: A Post-Script to Lovelace v. Canada*, (1985) 8 Harv. Women's L.J. 195; and M. MacDonald, *Indian Status: Colonialism or Sexism*, (1986) 9 Can. Community L.J. 23. For an historical account prior to the 1985 amendments, see D. Sanders, *Indian Status: A Women's Issue or an Indian Issue?*, [1984] 3 C.N.L.R. 30.

In the United States, see *U.S.* v. *Joseph*, (1876) 94 U.S. 614 at 616-617, where Pueblos were held not to be Indians for purposes of the Trade and Nonintercourse Act, since they were "peaceable, industrious, intelligent, honest, and virtuous people" and so were "Indians only in feature, complexion, and a few of their habits". Cited in D. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, (1991) 38 U.C.L.A. L. Rev. 759 at 806, n. 172.

responsibility for these persons, as well as deny them their aboriginal rights.[132] Inuit have suffered similar treatment, although it was not clear prior to 1951[133] whether Inuit were considered by the federal government to be "Indians" under the *Indian Act*.[134] As Dickson C.J. comments in *Sparrow* v. *The Queen*:

> "Our history has shown, unfortunately all too well, that Canada's aboriginal peoples are justified in worrying about government objectives that may be superficially neutral but which constitute *de facto* threats to the existence of aboriginal rights and interests."[135]

However, the extinguishment of aboriginal rights is not always pursued by government through legislation or other measures *in law*. In many instances, governments have simply acted in a *de facto* manner that suggests such rights do not exist and need not be taken into account.

For example, in regard to the Metis, governments have treated them, in practice, as "having the same rights as all other Canadians...Present federal policy denies responsibility for the Metis except north of the 60th parallel, where the Metis are involved with Indian people in land claims negotiations."[136] This situation has led to a *de facto* denial of aboriginal rights.

Also, in relation to federal land claims policies, the practice has been and continues to be (to a large degree[137]) not to recognize the land and resource rights of Aboriginal peoples. Such *de facto* denial of aboriginal rights persists, despite the recognition and affirmation of aboriginal rights in s. 35(1) of the *Constitution Act, 1982*. Moreover, in order for the federal government to enter into a land claims treaty, there is the pre-condition that Aboriginal peoples agree to surrender their aboriginal rights (which the government does not officially recognize as existing).

In addition, it has been presumed in federal and provincial legislation that aboriginal rights do not exist or else have such little meaning or scope that they are not affected by government action. Consequently, non-Aboriginal governments feel free to legislate in areas that adversely affect aboriginal rights. This practice is especially widespread concerning matters

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[132] "Federal Aboriginal policy treated non-status Indian people and their descendants as having the same individual rights accorded to all other Canadians, but having no group or collective rights.": R. Milen, "Aboriginal Constitutional and Electoral Reform" in R. Milen, (ed.), *Aboriginal Peoples and Electoral Reform in Canada* (Toronto: Dundurn Press, 1991), vol.9, (research program of the Royal Commission on Electoral Reform and Party Financing), at 5.

[133] In 1951, s. 4(1) was added to the *Indian Act* as follows: "A reference in this Act to an Indian does not include any person of the race of aborigines commonly referred to as Inuit."

[134] In 1924, an amendment (14-15 Geo. V, c. 47) to the *Indian Act*, R.S.C. 1906, c. 81 added the following subsection to s. 4: "(2) The Superintendant General of Indian Affairs shall have charge of Eskimo affairs." However, the Supreme Court of Canada (Kerwin J.) indicated in *Re Eskimo*, [1939] S.C.R. 104, at 122 that "no argument could be adduced from the provisions of the amending statute". This latter case involved no direct participation by the Inuit in northern Québec who were impacted by the Supreme Court's decision: see P. Kulchyski, (ed.), *Unjust Relations: Aboriginal Rights in Canadian Courts* (Toronto: Oxford University Press, 1994) at 2, 33.

In relation to the right to vote, Inuit were treated similarly to "status" Indians. As indicated in R. Milen, "Aboriginal Constitutional and Electoral Reform" in R. Milen, (ed.), *Aboriginal Peoples and Electoral Reform in Canada*, *supra*, at 5: "...federal legislation was passed denying the right of the Inuit to vote from 1934 to 1950. It was only in the 1962 federal election that ballot boxes were finally placed in all Inuit communities in the eastern Arctic, thus permitting the full exercise of the franchise."

[135] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 (S.C.C.) at 1110.

[136] R. Milen, "Aboriginal Constitutional and Electoral Reform" in R. Milen, (ed.), *Aboriginal Peoples and Electoral Reform in Canada*, *supra*, at 5.

[137] Since 1986, the federal claims policy provides a limited option for aboriginal rights to be retainable on whatever portion of land Aboriginal people held following a "settlement". It is then stipulated that the aboriginal rights retained would in effect be "frozen" according to the meaning they are given in a land claims agreement: see Indian and Northern Affairs Canada, *Federal Policy for the Settlement of Native Claims* (Ottawa: Indian Affairs and Northern Development, 1993), at 9. In Indian and Northern Affairs Canada, *Comprehensive Land Claims Policy* (Ottawa: Indian Affairs and Northern Development, 1987), at 12, the availability of such option appears to be further qualified: "In those cases where provincial lands are involved, the province must play a major part in determining the approach to be followed."

pertaining to land and resource use and management, as well as environment. There is still little respect demonstrated for the rights of Aboriginal peoples in relation to land, resource and self-government matters. Further, forced relocations may be yet another means by which Aboriginal peoples have been deprived in practice of the enjoyment of their aboriginal rights.[138]

It is not within the scope of this study to identify the countless ways in which *de facto* extinguishment of rights may have been promoted throughout Canada's history (despite the significant adverse impacts suffered by Aboriginal peoples). However, it is important to underscore certain government policies and laws that are most relevant to this extinguishment study, and that have had far-reaching effects in denying or diminishing[139] aboriginal rights. These are highlighted in the sub-headings below.

1.5.1 *Ex parte* court cases

In considering the overall question of extinguishment and the impact such action may have, it is first necessary to ensure a fair and balanced appreciation of the status and rights of Aboriginal peoples. Generally, an important source of such critical information is found in the decisions of the courts.

Yet, in the case of Aboriginal peoples, landmark cases determined their fundamental rights in their absence. This practice by governments enabled both the status and rights of Aboriginal peoples to be unjustly devalued and diminished.

In the *Report of the Canadian Bar Association Committee on Aboriginal Rights in Canada: An Agenda for Action*, it is provided:

> "Even prior to 1927 aboriginal people were often not represented in cases which affected their rights. One astonishing example is the landmark case of *St. Catherine's Milling and Lumber Co.* v. *The Queen. Here was a case involving the land rights of Indian people - yet they were not parties to the litigation and, accordingly, were not represented.*[140] *Further, the decision was arrived at in a total vaccuum.* No evidence was led by any party as to the ways in which the Ojibway has in fact used their lands, or as to the purposes to which they were put over the hundreds of years in which they occupied them. Surely, such evidence is vital..."[141] [Emphasis added.]

O.P. Dickason is critical of the federal government's failure to include Indian testimony as to the nature of their land rights:

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[138] Aboriginal peoples relocated outside their traditional territories may have increased difficulty claiming aboriginal rights. For example, if one accepts the criterion that "the occupation was an established fact at the time sovereignty was asserted by England", then it would be most difficult to establish aboriginal rights following relocation to a new region. In regard to proof of aboriginal title, see the elements required by Mahoney J. in *Hamlet of Baker Lake* v. *Minister of Indian Affairs*, (1979) 107 D.L.R. (3d) 513 at 542. In regard to the denial of aboriginal rights of the Innu of Davis Inlet in the context of a relocation without their free and informed consent, see Assembly of First Nations, *Violations of Law and Human Rights by the Government of Canada and Newfoundland in Regard to the Mushuau Innu [:] A Documentation of Injustice in Utshimasits (Davis Inlet)*, Submission to the Canadian Human Rights Commission, May 1993, at 89-100.

[139] "Diminution" of aboriginal rights is also relevant to this Study, since such effects might also be described as "partial" extinguishments.

[140] The same point is made in L. Mandell, *Indian Nations: Not Minorities*, (1986) 27 Les Cahiers de Droit 101, at 110; and in P. Macklem & R. Townsend, "Resorting to Court: Can the Judiciary Deliver Justice for First Nations?" in D. Engelstad & J. Bird, *Nation to Nation [:] Aboriginal Sovereignty and the Future of Canada* (Concord, Ontario: House of Anansi Press, 1992) at 79.

[141] Canadian Bar Association Special Committee, *Report of the Canadian Bar Association Committee on Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: Canadian Bar Association, 1988) at 10-11.

> "Ottawa had not called an Amerindian witness from the Treaty Three area to stand as evidence of the Ojibwa's own conception of their land rights, *even though it was on record in Morris' account of the treaty negotiations.*[142] According to one chief, 'We have a rich country, it is the Great Spirit who gave us this; where we stand is the Indians' property, and belongs to them.' *There was plenty of other such evidence available...*"[143] [Emphasis added.]

G. Lester describes the absence of Aboriginal parties in key litigation as follows:

> "...in two of the leading cases which establish important principles in this area of law, *Johnson* v. *M'Intosh*, 8 Wheaton 543, and *St. Catherine's Milling and Lumber Company* v. *The Queen*, 14 App. Cas. 46, the Indians were not party to the litigation, nor were their views urged on the court. *One way of putting it would be to say that they were stripped of their rights in their absence.*"[144] [Emphasis added.]

B. Richardson indicates that the *St. Catherine's Milling and Lumber Co.* case "has cast a shadow over all legal judgments since 1888":

> "It is typical of the law's relationship with aboriginal people that when one particular case was argued which has *cast a shadow over all legal judgments about aboriginal land since 1888*, the Indians were not even present in court, much less represented in any way."[145] [Emphasis added.]

The "personal and usufructuary" portrayal of aboriginal rights in the *St. Catherine's Milling*[146] case continues to have far-reaching consequences for Aboriginal peoples. Not only are aboriginal rights interpreted as less than beneficial ownership[147], but also the notion of "surrender" of such rights has been affected by the view that aboriginal rights are "personal".

In 1984, the Supreme Court of Canada acknowledged in *Guerin* v. *The Queen*[148] that the appropriateness of "the characterization of Indian title as 'a personal and usufructuary right'[149] has sometimes been questioned" in court decisions.[150] However, the Court still

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[142] A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, including the Negotiations on which they were based* (Toronto: Belfords, Clarke & Co., 1880) (reprint Saskatoon, Saskatchewan: Fifth House Publishers, 1991) at 44-76.

[143] O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: MacLelland & Stewart, 1992) at 342.

[144] G. Lester, "Primitivism versus Civilisation: A Basic Question in the Law of Aboriginal Rights to Land" in C. Brice-Bennett, *Our Footprints Are Everywhere: Inuit Land Use and Occupancy in Labrador* (Ottawa: Labrador Inuit Association, 1977) at 373, n. 122.

[145] B. Richardson, *People of Terra Nullius [:] Betrayal and Rebirth in Aboriginal Canada* (Vancouver: Douglas & McIntyre, 1993) at 289.

[146] *St. Catherine's Milling and Lumber* v. *The Queen*, (1988) 14 A.C. 46.

[147] Aboriginal rights do not only entail questions of beneficial ownership, but also include jurisdictional aspects pertaining to an inherent right of self-government. In regard to the self-government aspects, see generally Royal Commission on Aboriginal Peoples, *Partners in Confederation[:] Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services, 1993); R. Dussault, "Autochtones: le droit inhérent à l'autonomie existe déjà", *La Presse*, September 8, 1993, at B3.

[148] *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321.

[149] The inconsistency and inappropriateness of characterizing aboriginal rights as "usufructuary" rights is illustrated by the general notion of "usufruct" as provided under the *Quebec Civil Code*: "Usufruct is the right of use and enjoyment, *for a certain time*, of property owned by another as one's own..." (art. 1120); and "*No usufruct may last longer than one hundred years* even if the act granting it provides a longer term or creates a successive usufruct." (art. 1123). [Emphasis added.] See also A. Bissonnette, "Droits autochtones et droit civil: opposition ou complémentarité? Le cas de la propriété foncière" in *Droit civil et droit autochtones: Confrontation ou complémentarité?* (Montreal: Association Henri-Capitant, 1992).

relied on the "*personal*" depiction of aboriginal rights in *St. Catherine's Milling* to affirm its 1983 decision in *Smith* v. *The Queen*[151] in relation to the "surrender" of land rights:

> "...the Indian right in a reserve, being personal, could not be transferred to a grantee, whether an individual or the Crown. Upon surrender the right disappeared[152] 'in the process of release'."[153]

This ruling in *Smith*, though subsequently referred to by the Supreme Court in *Guerin* v. *The Queen*,[154] appears to be erroneous and highly prejudicial to Aboriginal peoples. First, it is questionable for the Supreme Court to rely on *St. Catherine's Milling and Lumber* v. *The Queen*,[155] when the Privy Council itself "disclaimed any intention of giving a comprehensive definition of Indian title".[156]

Second, the characterization of aboriginal rights as "personal" does not appear to be in keeping with even conventional concepts of property law that would view such land rights as "real" rights[157] despite some restrictions on alienation.[158] In particular, it is inconsistent with the Court's subsequent statement in *Canadian Pacific Ltd.* v. *Paul*,[159] where the Supreme Court did not accept the interpretation that *St. Catherine's Milling* decided that "Indian title is

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[150] Id., at 338, per Dickson J.

[151] *Smith* v. *The Queen*, (1984) 147 D.L.R. (3d) 237 (S.C.C.). In *Smith*, the Aboriginal people affected were not a party to the proceedings and did not intervene to put forward their legal position before the Supreme Court.

[152] As described under sub-heading 1.3 *supra*, the consequences of inadequate or careless drafting of a surrender instrument or a misconstruance of Aboriginal intentions by federal authorities, could result (according to the ruling in *Smith*) in the irreversible loss of all rights of an Aboriginal people to their lands.

[153] *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321, at 338, per Dickson J. See also *Umbrella Final Agreement [:] Council for Yukon Indians* (Ottawa: Minister of Supply and Services, 1993), s. 5.12.1, where the notion of aboriginal rights disappearing forever is applied to the settlement lands of the Yukon Indians. In particular, where the Indians have disposed of their entire interest in any portion of such lands, it is specified that aboriginal rights are not restored upon the reacquisition of these same lands.

[154] *Guerin* v. *The Queen*, [1984] 13 D.L.R. (4th) 321 at 338 per Dickson J. At 339, Dickson J. characterizes aboriginal title as "personal" only insofar as it is inalienable except to the Crown. If that is the only meaning of "personal", then aboriginal title retains its proprietary nature in all other ways and the conclusion in *Smith* is not justifiable that, upon surrender, aboriginal title disappears irreversibly. In light of the breaches of fiduciary responsibility throughout Canadian history by the Crown in securing purported surrenders from Aboriginal peoples, it would not be consistent with equitable doctrines for the common law to adopt a position that would favour the Crown in this regard.

[155] *St. Catherine's Milling and Lumber* v. *The Queen*, (1988) 14 A.C. 46 (P.C.).

[156] B. Slattery, *Understanding Aboriginal Rights*, (1987) 66 Can. Bar Rev. 727 at 750, n. 81, where the Privy Council in *St. Catherine's Milling* is quoted 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 this point.*" [Emphasis added.]

[157] D. Mendes da Costa, R. Balfour & E. Gillese, *Property Law [:] Cases, Text and Materials*, 2nd ed. (Toronto: Emond Montgomery Publications, 1990) at 1:42: "The most fundamental distinction in Anglo-Canadian property law is between real and personal property. In general, interests in land are real property and any other interests...are personal property." See also B. Ziff, *Principles of Property Law* (Toronto: Carswell, 1993) at 50: "In the case of property disputes, the system recognized two main forms of action. The real action gave to the successful plaintiff an order for the return of property..., while in the case of personalty, compensation in damages was payable. The only property that could be pursued through a real action was land or rights relating to land." [Note: these categorical distinctions in the early common law have now been significantly modified.]

Under the *Quebec Civil Code* (1994), art. 921 characterizes "possession" solely as a real right: "Possession is the exercise in fact, by a person himself or by another person having detention of the property, *of a real right*, with the intention of acting as the holder of that right." [Emphasis added.] In regard to notions of real and personal rights under Quebec civil law, see D.-C. Lamontagne, *Biens et propriété* (Cowansville, Québec: Éditions Yvon Blais, 1993) at 39-50.

[158] For a discussion of aboriginal rights as real property rights and these particular aspects, see sub-heading 1.5.2.1 *infra*.

[159] *Canadian Pacific Ltd.* v. *Paul*, [1988] 2 S.C.R. 654.

merely a personal right which cannot be elevated to the status of a proprietary interest[160] so as to compete on an equal footing with other proprietary interests."[161]

As J. Singer cautions, an unfair determination of Aboriginal peoples' property rights can perpetuate their vulnerability, as well as fundamental injustice:

> "*Seemingly neutral definitions of property rights by the courts distribute power and vulnerability in ways that construct illegitimate hierarchies based on race*, sex, class, disability and sexual orientation. If we do not become conscious of the assumptions underlying traditional conceptions of property and sovereignty, we will be condemned to *perpetuate these forms of injustice*."[162] [Emphasis added.]

Third, s. 109 of the *Constitution Act, 1867* provides that any beneficial interest the provinces have in lands or resources within their boundaries shall be "subject to any [existing] Trusts...and to *any* Interest other than that of the province in the same". Assuming that *St. Catherine's Milling* was correct[163] in characterizing Aboriginal title as an "Interest" within the meaning of s. 109,[164] there is no reason why such an interest, as a "real" right, could not be validly transferred to the Crown in right of Canada for a specified purpose, without disappearing.

Fourth, the "disappearance" theory serves to deny Aboriginal peoples restitutional claims and proprietary remedies which they might ordinarily have under Canadian law.[165] For example, Aboriginal peoples should have access to proprietary remedies against any third party who cannot avail itself of the equitable defence of being a *bona fide* purchaser for value. However, this defence is only available if it can be established that a third party committed no wrongdoing,[166] gave consideration for the transfer of property, and had no notice of another party's equitable interest in the property.[167]

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[160] See K. McNeil, *The High Cost of Accepting Benefits From the Crown: A Comment on the Temagami Indian Land Case*, [1992] 1 C.N.L.R. 40 at 64-65, where a highly cogent argument (with authoritative references) is made as to why aboriginal fishing rights constitute proprietary rights recognizable under the common law.

[161] *Canadian Pacific Ltd.* v. *Paul*, [1988] 2 S.C.R. 654, at 677. This point is made in K. McNeil, *The High Cost of Accepting Benefits From the Crown: A Comment on the Temagami Indian Land Case*, [1992] 1 C.N.L.R. 40 at 59-60.

[162] J. Singer, *Sovereignty and Property*, (1991) 86 Nw. U. L. Rev. 1 at 8.

[163] It is arguable that the inherent sovereignty and aboriginal rights of Aboriginal peoples include full rights of ownership, as well as jurisdiction, over their lands and resources. In this context, s. 109 of the *Constitution Act, 1867* only confirms the beneficial interest of "[a]ll Lands, Mines, Minerals, and Royalties *belonging* to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union". This would not include those lands and resources "belonging" to Aboriginal peoples. However, in-depth analysis of this particular issue is outside the scope of this study. The jurisdictional aspect of collective rights to lands and resources is described in A. Buchanan, *The Role of Collective Rights in the Theory of Indigenous Peoples' Rights*, (1993) 3 Transnat'l L. & Contemp. Probs. 89 at 96-99.

A further dimension that should be considered is in relation to the phrase in s. 109 that provides that provincial lands are "subject to any *Trusts* existing in respect thereof, and to any other Interest other than that of the Province in the same". In *A.G. Canada* v. *A.G. Ontario*, [1897] A.C. 199 at 210, indicated that the term "Trusts" in s. 109 was not limited to "such proper trusts as a court of equity would undertake to administer". In this regard, see B. Slattery, *First Nations and the Constitution: A Question of Trust*, (1992) 71 Can. Bar Rev. 261 at 292.

[164] *St. Catherine's Milling and Lumber* v. *The Queen*, (1888) 14 A.C. 46 (P.C.) at 58. See also *Guerin* v. *The Queen*, [1984] 13 D.L.R. (4th) 321 at 337-338 per Dickson J.

[165] In the event of a valid surrender, an "aboriginal" right in property would forever disappear, according to the *Smith* case. Yet, according to *Int'l Corona Resources Ltd.* v. *Lac Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.) at 676 per Laforest J., a court could "create" a "non-aboriginal" property right through imposition of a constructive trust: "...it is not in all cases that a pre-existing right of property will exist when a constructive trust is ordered. *The imposition of a constructive trust can both recognize and create a right of property.*" This disparity in treatment appears both arbitrary and discriminatory against Aboriginal peoples.

[166] P. Maddaugh & J. McCamus, *The Law of Restitution* (Aurora, Ontario: Canada Law Book, 1990) at 57-58 and 127.

[167] Id. at 58.

In relation to Aboriginal peoples, it seems patently unfair that aboriginal rights in property would be deemed to forever disappear in cases where the Crown in right of Canada violated its fiduciary responsibility in carrying out a land surrender. In such instances, the Crown in right of a province generally has notice or is fully aware of the impending transaction.[168] Therefore, the provincial Crown should not be deemed to acquire full beneficial title, especially when it is not required to have paid any consideration and the property in question remains identifiable.

Fifth, the Supreme Court's ruling in *Smith* seems highly inconsistent with the spirit and intention of the Royal Proclamation of 1763. The Proclamation's restriction on alienations by Aboriginal peoples to the Crown was introduced solely for protective purposes. It should not now be interpreted in a manner that substantially diminishes the nature of aboriginal title and, as a result, seriously increases the vulnerability of Aboriginal peoples and limits their legal recourses.[169] As Toohey J. states in *Mabo et al.* v. *State of Queensland*:

> "...the general inalienability of title...itself constituted a means of protecting aboriginal people from exploitation from settlers. That traditional title is generally inalienable may itself be open to debate. But, in any event, a principle of protection is hardly a basis for a unilateral power in the Crown, exercisable without consent. Moreover, *inalienability of the title says nothing of the Crown's power or the nature of the title.*"[170] [Emphasis added.]

Sixth, the suggested notion in *Smith* that the aboriginal titles of Aboriginal peoples do not entail concepts of ownership and real property rights appear to contravene existing and emerging international standards.[171] As H. Berman points out, the devalued view of aboriginal rights that has evolved through Anglo-American legal systems is an indication of cultural bias:

> "The reality of a nation or community inhabiting territory cooperatively, with land usage rooted in principles other than exclusivity, was apparently beyond the scope of 17th century English thought. *The result is an Anglo-American legal system with an inherent bias that attributes an anomalous and inferior status to non-European forms of land tenure.*"[172] [Emphasis added.]

Seventh, it does not seem fair that the Supreme Court would arrive at such far-reaching conclusions concerning the nature of aboriginal title, without Aboriginal peoples being parties to such litigation.

As already described,[173] adverse consequences also occurred when the Aboriginal

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[168] Since 1891, the governments of Ontario and Canada have had an agreement pertaining to management and title of Indian reserves in Ontario. Under this arrangement, any land surrenders would require the concurrence of the government of Ontario. See S. Aronson, *The Authority of the Crown to Make Treaties With Indians*, [1993] 2 C.N.L.R. 1 at 12. The Ontario-Canada agreement was approved by legislation: see *An Act for the Settlement of Certain Questions Between the Governments of Canada and Ontario respecting Indian Lands*, S.O. 1891, c. 3; and S.C. 1891, c. 5. In regard to other provinces, a number of federal-provincial agreements exist that have generally ensured provincial input and accommodation of provincial concerns.

[169] The importance of property rights, in the context of people protecting themselves against intrusion or interference, was highlighted by Lord Camden in *Entick* v. *Carrington*, (1765), 19 St. Tr. 1029, 1 Wils. K.B. 275 at 291: "...our law holds the property of every man so sacred, that no man can set his foot upon his neighbour's close without his leave: if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law." Cited by Dickson J. in *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145 at 158.

[170] *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia) at 151-152.

[171] In regard to property rights as human rights, see discussion under sub-heading 8.2.8 *infra*.

[172] H. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, (1978) 27 Buffalo L.R. 637 at 644, n. 31.

[173] See sub-heading 1.3 *supra*.

people directly affected were not a party to the litigation in 1921 in *Star Chrome Mining*.[174] In this landmark case, the legal precedents and arguments most favourable to the Aboriginal people concerned were never raised by the federal authorities before the Privy Council.[175]

It appears that the right of Aboriginal peoples to be heard in cases directly affecting their rights and interests was also not respected in earlier years (and in more recent times[176]) in the United States. In regard to the "first important case involving Indian land rights to reach the [U.S.] Supreme Court...*Fletcher* v. *Peck*,[177] decided in 1810", K. McNeil comments:

> "As so often happened, no Indians were parties to that early action, *although the nature of their rights was a vital issue in the case*."[178]

Such *ex parte* court cases, as described above, serve to unfairly reduce the nature, scope and significance of aboriginal rights. If the rights themselves are so diminished, it is highly conceivable that their extinguishment would be perceived in less consequential terms.

The absence of interested Aboriginal peoples from litigation in which their rights were directly affected has other serious implications that run counter to the most fundamental principles known to Canadian law. First, it is discriminatory for the government parties and the courts to determine the basic rights of Aboriginal peoples in the absence of those people directly concerned. While one would have expected that such court decisions would have been accorded less stature in later years, this has not been the case. Rather, decisions such as *St. Catherine's Milling* and *Star Chrome Mining* are still viewed and relied upon today as landmark cases and legal precedents.

Second, it is not in keeping with the Crown's fiduciary duty to engage in litigation in the absence of interested Aboriginal parties. This situation is further exacerbated when the Crown does not put forward the legal arguments most favourable to the Aboriginal principals concerned.

Third, it is against the rules of natural justice to effectively deny the right of Aboriginal peoples to be heard. As R. Dussault & L. Borgeat provide:

> "...the concept of natural justice does contain two fundamental universally recognized principles: first, that no man be condemned unheard (*audi alteram partem*), and second,

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[174] *A.G. Quebec* v. *A.G. Canada*, [1921] 1 A.C. 401 (P.C.).

[175] This issue is discussed in detail in R. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon, Sask.: University of Saskatchewan Native Law Centre, 1990), at 70.

[176] N. Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, (1980) 31 Hastings L. J. 1215 at 1255: "Before 1946, Indian tribes were barred from suing the United States for damages unless they were able to secure the passage of a special jurisdictional act waiving sovereign immunity and granting jurisdiction to the Court of Claims. This expensive, cumbersome, and often unfair procedure ended with the passage of the Indian Claims Commission Act (Claims Act) in 1946."

At 1255, n. 223, the author further explains: "Tribes could not sue the Government because when Congress created the Court of Claims in 1863, it expressly removed from its jurisdiction claims for money damages 'growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes.' Act of Mar. 3, 1863, ch. 92, § 9, 12 Stat. 765, 767. As a result, a tribe wishing to redress a grievance was forced to petition Congress." See also C. Wilkinson, *Indian Tribal Claims Before the Court of Claims*, (1966) 55 Geo. L.J. 511 at 512.

[177] *Fletcher* v. *Peck*, (1810) 6 Cranch 87.

[178] K. McNeil, *Common Aboriginal Title* (Oxford: Clarendon Press, 1989), at 250-251. See also H. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, (1978) 27 Buffalo L.R. 637, at 638, where it is indicated that Aboriginal peoples were also not parties to the litigation in the landmark case of *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). In *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Cherokee Nation devised a strategy to have their rights confirmed by the U.S. Supreme Court but the state of Georgia refused to appear before the Court: see J. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, (1969) 21 Stanford L. Rev. 500, at 521.

that no man be judge in his own cause (*nemo judex in sua causa*[179])."[180]

Based on the above, a particularly prejudicial practice by non-Aboriginal governments has been the litigation of key issues pertaining to aboriginal rights, without the Aboriginal peoples affected being direct parties to these court cases. It is outrageous that, in the case of Aboriginal peoples, landmark cases have determined their fundamental rights in their absence. This practice by governments has enabled both the status and rights of Aboriginal peoples to be unjustly devalued and diminished.

In addition to issues of discrimination, it is not in keeping with the Crown's fiduciary duty to engage in litigation in the absence of interested Aboriginal parties. This situation is further exacerbated when the Crown does not put forward the legal arguments most favourable to the Aboriginal principals concerned. In addition, it is against the rules of natural justice to effectively deny, through *ex parte* litigation, the right of Aboriginal peoples to be heard.

1.5.2 Denial or severe diminution of aboriginal rights

Further, between 1927 and 1951, the Canadian government ensured that it would be the judge in its own cause in matters that related to the Aboriginal rights of "Indians".

When the Nisga'a and other tribes pressed for the resolution of their land rights, the Canadian Parliament decided to make it a criminal offence for an "Indian" to raise funds or retain a lawyer[181] for the advancement and prosecution of land claims (among other matters).[182] Section 141 of the *Indian Act* provided as follows:

> "Every person who, without the consent of the Superintendant General...receives, obtains, solicits or requests from any Indian any payment or contribution...for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs...has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band, shall be guilty of an offence..."[183]

The validity of s. 141 of the *Indian Act* might have been challenged on constitutional grounds.[184] However, Indians in Canada were apparently not in any position to contest this

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[179] In R. Dussault and L. Borgeat, *Administrative Law [:] A Treatise*, 2nd ed. (Toronto: Carswell, 1985), vol. 2, at 171, it is indicated that the rule of *nemo judex in sua causa* applies equally to agency decisions of either a judicial or administrative nature. The authors add that this rule of impartiality has given rise to very few decisions by the courts.

[180] R. Dussault and L. Borgeat, *Administrative Law [:] A Treatise*, 2nd ed. (Toronto: Carswell, 1985), vol. 4, at 245. The authors indicate on the same page: "The concept [of natural justice] was first afforded legal protection in England by the *Magna Carta*" in 1215. See also P. Garant, *Droit administratif*, 2nd ed. (Montréal: Éditions Yvon Blais, 1985), at 705, where the author cites in support of the essential nature of these two rules of natural justice: *Kanda* v. *Government of the Federation of Malaya*, [1962] A.C. 322, at 337; and *R.* v. *Law Society of Alberta*, (1967) 64 D.L.R. (2d) 140, at 151.

[181] For a similar interpretation of the prohibition in s. 141, see J. Merritt & T. Fenge, *The Nunavut Land Claims Settlement: Emerging Issues in Law and Public Administration*, (1990) 15 Queen's L. J. 255, at 275, n. 12.

[182] T.R. Berger, *A Long and Terrible Shadow [:] White Values, Native Rights in the Americas 1492-1992* (Toronto/Vancouver: Douglas & McIntyre, 1992), at 148; *Report of the British Columbia Claims Task Force* (Vancouver: June 28, 1991) at 11-12.

[183] *Indian Act*, c. 98, s. 141. Section 141 is cited in Canadian Bar Association Special Committee, *Report of the Canadian Bar Association Committee on Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: Canadian Bar Association, 1988), at 10; see also W. Moss, *History of Federal and Provincial Laws Discriminating Against Aboriginal People* (Ottawa: Library of Parliament, 1987), at 24.

[184] For example, it could be argued that, in 1927 when s. 141 was adopted by the Parliament of Canada, Parliament did not have the competence to pass laws inconsistent with the Royal Proclamation of 1763. See sub-heading 2.5 *infra* for an analysis of the Proclamation as a consitutional instrument. Moreover, s. 141 was contrary to the fiduciary obligations owed by the Crown to Aboriginal peoples. Further, by preventing Indians from litigating their land rights, s. 141 appears

law. The effect of the 1927 "outlawing of claims" is described by P. Tennant in terms of Aboriginal peoples in British Columbia:

> "The outlawing of claims activity in 1927 provoked no protest. After 1927 political activity disappeared entirely in the interior; it continued on the north coast, but in disguise. Political activity reappeared in the 1950s and 1960s among both coastal and interior Indians after the prohibition was lifted, but it did not attain widespread, active Indian support until the 1970s, when the Indian schools[185] had been closed and the new generation of young Indian leaders had emerged."[186]

In *Sparrow* v. *The Queen*, Dickson C.J. of the Supreme Court of Canada comments on how governments ignored aboriginal rights in Canada during a fifty-year period:

> "For many years, the rights of the Indians to their aboriginal lands - certainly as legal rights - were virtually ignored...For fifty years after the publication of Clement's *The Law of the Constitution* (3rd ed. 1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960s, aboriginal claims were not even recognized by the federal government as having any legal status."[187]

In regard to Metis land claims, a "conspiracy" and extortion racket on a very large scale was uncovered in 1886 in Manitoba, involving government officials.[188] When Metis demanded that the government prosecute those involved, government Ministers refused arguing that the "conspiracies were directed not against the Government or the public but against private persons" and it was up to the victims to "put the law in motion".[189]

However, when one Metis veteran in Alberta did bring charges against Richard Secord, an Edmonton lawyer, for forgery of documents pertaining to Metis lands, the case never did get to trial. The Criminal Code was subsequently amended to provide that no prosecutions were permitted for an offence after the expiration of three years from the time of its commission if it be:

> "Any offence relating to or arising out of the location of land which was paid for in whole or in part by scrip or was granted upon certificates issued to half-breeds in

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to violate the legal maxim *nemo judex in sua causa*. The federal government could not be the "impartial arbiter" necessary to determine the constitutional and other fundamental rights of Aboriginal peoples in regard to their lands and resources. For a discussion of the *nemo judex* rule and the need for a "truly neutral and detached arbiter", see *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145 at 164-165.

Today, s. 141 would also be in clear violation of the right to "equality before the law", provided both in the *Canadian Charter of Rights and Freedoms* and in the *Canadian Bill of Rights*. See *R.* v. *Turpin*, [1989] 1 S.C.R. 1296, where the Supreme Court of Canada indicates: "...an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed an offence or having been made subject to any penalty."

[185] For a brief description of the repression of Aboriginal culture, sexual abuse, and beatings of children in residential schools, see P. Tennant, *Aboriginal Peoples and Politics* (Vancouver: University of British Columbia Press, 1990), at 79-82. In relation to residential schools, see also J.R. Miller, *Skyscrapers Hide the Heavens [:] A History of Indian-White Relations in Canada*, revised edition (Toronto: University of Toronto Press, 1989), at 102-108.

[186] P. Tennant, *Aboriginal Peoples and Politics* (Vancouver: University of British Columbia Press, 1990), at 82.

[187] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1103.

[188] D. Sprague, *Government Lawlessness in the Administration of Manitoba Land Claims, 1870-1887*, (1980) 10 Man. L. J. 415, at 432; see also P. Chartrand, *Aboriginal Rights: The Dispossession of the Métis*, (1991) 29 Osgoode Hall L. J. 457, at 476.

[189] Id., at 433, where government documents are cited.

connection with the extinguishment of Indian title."[190]

This amendment to the Criminal Code was then applied retroactively to the Secord case so as to have the charges dropped, despite the ensuing public outcry.[191]

Through these legislative and government actions, Aboriginal peoples were discriminated against and their aboriginal rights undermined, regardless of any forgery, fraud or other improper dealings. Deprived of any effective legal recourse over a period of several decades, Aboriginal peoples had little choice but to suffer in many instances what amounted to land dispossession or *de facto* extinguishment of their land rights.

Although recourse to the courts cannot provide a complete solution to aboriginal rights matters, there can be a significant difference in result when aboriginal peoples are permitted to litigate their territorial rights. This is perhaps most poignantly illustrated by the *Calder*[192] case. When the Supreme Court of Canada made a clear statement of the existence of aboriginal title, it resulted in a significant reevaluation of federal land claims policy. As the Task Force to Review Comprehensive Claims describes:

> "The Calder decision in 1973 precipitated a reassessment of the federal government's policy on claims and of its position on aboriginal rights...
>
> ...The federal government could no longer ignore claims based on aboriginal rights."[193]

The direct impact of judicial decisions on Aboriginal rights, *where Aboriginal peoples were permitted to be parties to such litigation*, is also acknowledged by the federal government. In the March 1993 *Federal Policy for the Settlement of Native Claims*, it is stated that such decisions beginning with *Calder* have resulted in the development and further modification of federal claims policy:

> "The evolution and development of the federal government's land claims policy has been closely linked to court decisions, particularly decisions of the Supreme Court of Canada. The initial policy claims statement of August 1973 was prompted by the *Calder* decision of that year."[194]

In view of the history of repression, discrimination and exclusion described above, the notion of aboriginal title should be reconsidered by both governments and courts in Canada. To avoid unjust extinguishments and devaluations of rights, aboriginal rights need to be accorded their full and proper recognition, consistent with principles of equal rights and self-determination of peoples and other contemporary standards. In this context, any practices contributing to *de facto* extinguishments or devaluations of aboriginal rights should be expressly repudiated.

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[190] *An Act to Amend the Criminal Code*, S.C. 1921, c. 25, s. 20, amending the *Criminal Code*, R.S.C. 1906, c. 146, s. 1140. The amendment is reproduced in P. Chartrand, *Aboriginal Rights: The Dispossession of the Métis*, (1991) 29 Osgoode Hall L. J. 457, at 476, n. 78.

[191] J. Sawchuk et al., *Metis Land Rights in Alberta: A Political History* (Edmonton: Metis Association of Alberta, 1981), at 148-151.

[192] *Calder* v. *A.G. British Columbia*, [1973] S.C.R. 313.

[193] Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy* (Ottawa: Department of Indian Affairs and Northern Development, 1985), at 12.

[194] Indian and Northern Affairs, *Federal Policy for the Settlement of Native Claims* (Ottawa: Indian and Northern Affairs, March 1993) at 2.

1.5.2.1 Denial of "real" property aspects of Aboriginal title

It has already been suggested that the Supreme Court of Canada in *Smith* v. *The Queen*[195] mischaracterized the land rights of Aboriginal peoples as "personal" rights (i.e not "real" property rights).[196] Consequently, the Court comes to the conclusion that such rights, upon valid surrender to the Crown, disappear forever. However, the resistance of governments[197] and courts to recognize aboriginal land rights as having as one of its legal components[198] real property rights can be seriously challenged.[199] As J. Singer describes:

> "...the law continues to confer - and withhold - property rights in a way that *provides less protection for property rights of American Indian nations* in crucial instances than is provided for non-Indian individuals and entities...
>
> ...Unless it is rectified...the distribution of real property is inherently suspect. The history of United States law, from the beginning of the nation to the present, is premised on the *use of sovereign power to allocate property rights in ways that discriminated - and continue to discriminate - against the original inhabitants of the land.*"[200] [Emphasis added.]

Although Singer is describing the situation in the United States, similar conclusions of inequitable and discriminatory treatment of Aboriginal peoples' property rights can basically be reached in regard to the Canadian context. As concluded by P. Macklem, "[t]he myth that the Crown possesses underlying title to native lands ought to be abolished."[201] In this regard, Macklem explains:

> "The common law of aborginal title represses the fact that native people were the original inhabitants of North America. *Founded on a fatal misreading of the doctrine of discovery, the common law of aboriginal title assumes that the Crown holds underlying title to native land.* Anglo-Canadian property law extended the 'English law fiction...that all lands in the realms were originally possessed, and accordingly owned by the Crown,'[202] to the Canadian context by reference to and reliance on the doctrine of discovery. *Yet, as*

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[195] *Smith* v. *The Queen*, (1984) 147 D.L.R. (3d) 237 (S.C.C.).

[196] See sub-heading 1.5.1 *supra*.

[197] Despite their fiduciary responsibility, non-Aboriginal governments have consistently taken positions in court cases on aboriginal rights that devalue and diminish their legal significance. The judicial precedents that have resulted were often established in the absence of the Aboriginal peoples affected by such rulings. See generally sub-heading 1.5 *supra*.

[198] Another key element of aboriginal rights is the jurisdictional aspect or right to self-government. See, for example, M. Jackson, *A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements*, Report submitted to the Royal Commission on Aboriginal Peoples, February 1994, at 94-95: "For most First Nations, their relationship to their territories is defined principally in terms of the *responsibilities* which flow from that relationship and which is best captured by the concept of stewardship... To the extent that First Nations have always had this ethic of conservation and concern for future generations built into their relationship with their territories and wish to retain that relationship in relation to certain parts of their territories, it is not an accurate statement of that Aboriginal title to define it by reference to equivalency to fee simple."

[199] For example, even in countries (such as Guatemala) with some of the worst human rights violations against indigenous peoples, the "real" property aspects of their land rights are beginning to be recognized. See *Agreement on Identity and Rights of Indigenous Peoples*, in *Letter dated 5 April 1995 from the Secretary-General to the President of the General Assembly and to the President of the Security Council*, U.N. Doc. A/49/882, S/1995/256, 10 April 1995, Annex, Section F, para. 1: "The rights relating to land of the indigenous peoples include both the communal or collective and the individual tenure of land, *rights of ownership and possession and other real rights*..." [Emphasis added.]

[200] J. Singer, *Sovereignty and Property*, (1991) 86 Nw. U. L. Rev. 1 at 44.

[201] P. Macklem, *First Nations Self-Government and the Borders of the Canadian Legal Imagination*, (1991), 36 McGill L. R. 382 at 414.

[202] K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 11.

> *originally formulated, the doctrine of discovery vests in the discovering country territorial sovereignty and a right of acquisition as against subsequent arrivals."*[203] [Emphasis added.]

Aboriginal peoples in Canada often relate to their lands and territories in ways that depart significantly from notions of individual "ownership", as described in conventional terms in property law.[204] As M.E. Turpel describes, the traditional perspectives of Aboriginal peoples are very different:

> "To try to explain to an [aboriginal] Elder that under Canadian law there are carefully worked-out doctrines pertaining to who has *proprietary interests* in every centimeter of the territory sky, ocean, ideas and various other relationships would provoke disbelief and profound skepticism."[205] (Emphasis added.)

However, there exists no rule in international law or Canadian law that universally recognized rights, such as property rights, are only available on an equal basis to those peoples whose own legal systems include the same or similar legal concepts or notions. In other words, it cannot be concluded that the aboriginal rights of Aboriginal peoples must be something less than fee simple property rights, since concepts of ownership, as understood in the dominant legal system, are not apparent in their traditional legal systems. To reach such a conclusion would be to apply a discriminatory and unjustifiable standard. That is, Aboriginal peoples, as peoples inferior to Euro-Canadians, could not possibly "own" their traditional lands - unless fee simple rights were specifically granted to them.

Moreover, it is not a contradiction for Aboriginal peoples to assert property rights against other peoples, while at the same time relating to their lands in a very different way within their own societies. In *Delgamuukw* v. *British Columbia*,[206] anthropologist Dr. Richard Daly explained this issue in the following terms:

> "The Gitksan and the Wet-suwet'en say that the land belongs to them, and also, that they themselves belong to the land[207]...

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[203] P. Macklem, *First Nations Self-Government and the Borders of the Canadian Legal Imagination*, (1991), 36 McGill L. R. 382 at 412-413. See also P. Macklem, "Ethnonationalism, Aboriginal Identities, and the Law" in M. Levin, (ed.), *Ethnicity and Aboriginality: Case Studies in Ethnonationalism* (Toronto: University of Toronto Press, 1993) 9 at 23: "The importation of the fiction of Crown title into the Canadian context, instead of working to legitimate then-current landholdings as in England, worked to severely disrupt then-current aboriginal landholdings in Canada."

[204] However, Aboriginal perceptions and systems of land tenure may vary among different Aboriginal peoples. See, for example, L. Littlefield, "Women Traders in the Maritime Fur Trade" in B. Cox, (ed.), *Native People, Native Lands [:] Canadian Indians, Inuit and Metis* (Ottawa: Carleton University Press, 1992) 173 at 178-179: "The concept of property ownership was well developed on the [Northwest] coast and was all encompassing...There were two recognizable types of property: communal and private. Communal property included food producing areas such as beaches, fishing streams, halibut and codfish banks, hunting territories, berry grounds, as well as smoke houses, and dwelling areas. It also included intangible property such as songs, dances, rituals, and supernatural powers. This property was not owned by any one individual, but was managed and administered by a chief or elder of a household...[new para.] Private property, on the other hand, was owned and distributed by individuals."

[205] M.E. Turpel, *Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences*, (1989-1990) Can. H. Rts. Ybk. 3 at 30. See also D. Delâge, *Epidemics, Colonization, Alliances: Natives and Europeans in the Seventeenth and Eighteenth Centuries*, Draft report submitted to the Royal Commission on Aboriginal Peoples, August 18, 1994, at 25, where it is said that despite territorial boundaries being drawn in recognition of one another's rights of management and sovereignty: "...in North American [Aboriginal] societies...the land, inherited from one's ancestors and considered the source of all life, was inalienable. No one could appropriate exclusively its resources of wildlife, plants or minerals."

[206] *Delgamuukw* v. *B.C.*, [1991] 3 W.W.R. 97 (B.C. S.C.), per McEachern C.J.

[207] See also F. Berkes, *Co-Management: Bridging the Two Solitudes*, (1994) 22 Northern Perspectives 18 at 19, where the author provides: "...*Canadian northern native people are not alone in considering themselves as belonging to the land.* [new para.] Many peoples, as far apart as India, West Africa, and the Pacific Islands, have traditions that identify social groups with a particular place... *Increasingly, many environmentalists...are learning this sense of place, as opposed to the ideological bias of the dominant economic thought that land is not land but rather real estate.*" [Emphasis added.]

> The relationship between the land and its owners is that of reciprocal interaction...
>
> The House group's proprietary representative, its leader or chief, exercises a reciprocal stewardship vis-a-vis the claims of other groups or nations. *On the one hand, the land is dealt with as a property object between two potentially competitive groups. As such it is subject to ownership...At the same time, ownership in such societies entails a responsibility to care for that which is owned.* Management and stewardship in such societies require a blend of ownership and tenantship, aggressive control and careful respect."[208] [Emphasis added.]

Yet, in view of the misconceptions of, and prevailing attitudes towards, Aboriginal peoples' land rights, basic legal texts on property law often ignore the property rights of Aboriginal peoples. As J. Singer indicates:

> "*Traditional property law casebooks and treatises generally ignore American Indian property law.* The rules of non-Indian property law are developed in depth, but American Indian property law is either not mentioned at all, or is addressed only through discussion of Chief Justice John Marshall's opinion in the venerable case of *Johnson* v. *M'Intosh.* This case is often read (incorrectly)..."[209] [Emphasis added.]

In the case of Aboriginal peoples' title to land, it is clear that we are dealing with real property rights. The rights are certainly not "personal" in the sense of existing for the life of the person(s) involved, since aboriginal land rights are transferred to future generations of Aboriginal peoples. As K. McNeil confirms:

> "But though the distinctions between indigenous people and the British settlers are significant, this does not mean that the former would not have *real property rights which the Crown would be obliged to respect.*"[210] [Emphasis added.]

Also, in *Mabo et al.* v. *State of Queensland*, Toohey J. applies the principle that possession of traditional lands by indigenous peoples is presumed to be a fee simple estate until shown otherwise:

> "In sum, *English land law, in 1879 and now, conferred an estate in fee simple on a person in possession of land enforceable against all the world except a person with a better claim.* Therefore, since the Meriam people became British subjects immediately upon annexation, they would seem to have then acquired an estate in fee simple...The question then arises - does the Crown have a better title?"[211] [Emphasis added.]

In *Guerin* v. *The Queen*, it is said by Dickson J. 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".[212] This statement does not appear totally accurate for a number of reasons. First, Aboriginal peoples do in fact have the right to alienate their lands, but it has been said to be restricted to

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[208] Opinion report of Dr. Richard Daly, "Their Box was Full", vol. 1, at 245-249, cited in M. Jackson, *A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements*, Report submitted to the Royal Commission on Aboriginal Peoples, February 1994, at 76.

[209] J. Singer, *Sovereignty and Property*, (1991) 86 Nw. U. L. Rev. 1 at 42. See also J. Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, (1994) 28 Georgia L. Rev. 481 at 485-486.

[210] See K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 160. At 208, McNeil adds that, from the moment that a territory was acquired by settlement, the presumptive "common law aboriginal title" would be that of a fee simple estate (ownership): "It would entitle the indigenous possessors to fee simple estates, for possession is prima-facie evidence of seisin in fee simple, rebuttable only by proof that the possessor in fact holds a lesser estate. *Since no other estate could have existed at the time the Crown acquired sovereignty, the estate which vested in the indigenous possessors would have to be the fee.*" [Emphasis added.] See also p. 221.

[211] *Mabo et al.* v. *State of Queensland*, (1988) 83 A.L.R. 14 (High Court of Australia) at 165.

[212] *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 at 339.

the Crown. However, restrictions on alienation have long existed in property law and do not warrant transforming a real right into a "personal" one.[213] It is also worth noting that the restriction on alienation of aboriginal lands is not always perceived as an incapacity of Aboriginal peoples to sell, but rather in non-Aboriginal peoples to buy. In *The Queen* v. *Symonds*, Chapman J. provides:

> "...the exclusive right of the Queen to extinguish the Native title...operates only as a restraint upon the purchasing capacity of the Queen's European subjects, leaving the Natives to deal among themselves, as freely as before".[214]

Second, in the event that Aboriginal peoples desire to alienate their property to a private person or grantee, this can still be accomplished by first alienating the lands in question to the Crown for this specific purpose. In other words, Aboriginal lands can be transferred to a private grantee if the Crown acts as a mediary consistent with its role as a fiduciary.

Third, it would appear that the restriction on alienation to the Crown does not apply to transactions involving Aboriginal grantees.[215] This underscores the point that it is important to distinguish between a "restriction" to alienate solely to certain persons, i.e. the Crown, and

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[213] See 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...[A]t English common law there were times when most of the land in England could not be sold to anyone." Cited in B. Slattery, *Understanding Aboriginal Rights*, (1987) 66 Can. Bar Rev. 727 at 750, n. 84. On the same page, Slattery provides: "The restrictions on...transfer [of aboriginal title] stemmed historically from the need to accommodate the rule, binding on settlers, that title to land flows from the Crown. *These restrictions are only partial, for aboriginal title may in fact be alienated to the Crown, and possibly to other native groups.*" [Emphasis added.] On this latter point, Slattery, *supra*, at 742 elaborates: "...the inalienability of native title applied only to dealings between Indians and non-Indians; it did not reflect any inherent infirmity in native title. The doctrine of inalienability was more the product of the derivative systems of title governing the settlers than of any characteristics of native tenure." Similarly, in K. McNeil, *Common Aboriginal Title* (Oxford: Clarendon Press, 1989), at 235: "...[The rule against alienation] would not affect the capacity of indigenous people to acquire lands from one another. Thus, although it may be seen as a limitation on their interests (like a condition restricting alienation of a fee simple), the better view seems to be that it would not affect their interests as such, but simply make them less marketable by excluding (like the rule incapacitating aliens) a large class of potential purchasers."

See also K. McNeil, *supra*, at 233: "...the Crown apparently can grant land in fee with a condition prohibiting alienation...Inalienable fees simple can, therefore be held of the Crown". Among other authorities, McNeil cites (at 233, n. 151) *Pierce Bell Ltd.* v. *Frazer*, (1972-3) 130 C.L.R. 575, at 584, where Barwick C.J. concludes that a fee simple estate of a grantee is not reduced or rendered conditional by a statutory restraint on alienation of lands granted by the Crown. In addition, see B. Ziff, *Principles of Property Law* (Toronto: Carswell, 1993) at 4, where it is said that it is not invariably accepted or universally true that, for a right to count as property, it must be assignable to others. At 40-42, Ziff describes the extensive restrictions against alienation of land that existed in feudal times in England, until the adoption of the *Statute of Tenures, 1660*, 12 Cha. 2, c. 24. At 46, Ziff indicates that similarly restrictive measures existed in regard to property in Lower Canada even in the mid-nineteenth century. At 186, Ziff describes the prohibition initiated in 1944 in Alberta of alienating land to Hutterites (*An Act to Prohibit the Sale of Land to any Hutterites for the Duration of the War*, S.A. 1944, c. 15; replaced after the war by the "slightly less disgraceful" *Communal Property Act*, S.A. 1947, c. 16, as amended by S.A. 1955, .c. 42), which restrictions were not entirely lifted until 1972 (S.A. 1972, c. 103, s. 1). Such restrictions did not mean that the rights involved were not property rights. Why then would Aboriginal rights to land be treated as less than property rights? Even under conventional common law principles of property (which should not necessarily apply to aboriginal land rights), the capacity to alienate is not an essential criterion for a right to count as property. In any event, aboriginal rights are not subject to an absolute prohibition against alienation. Rather, they are said to be subject to a protective regime that requires alienations to (or via) the Crown.

[214] *The Queen* v. *Symonds*, [1840-1932] N.Z.P.C.C. 387 at 391. For a discussion of this point, see K. McNeil, *Common Aboriginal Title* (Oxford: Clarendon Press, 1989), at 230-231; and *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia) at 151-152, per Toohey J.: "That traditional title is generally inalienable may itself be open to debate...Moreover, inalienability of the title says nothing of the Crown's power or the nature of the title. *Rather, it describes rights, or restrictions on rights, of settlers or other potential purchasers.*" [Emphasis added.] See also M. Jackson, *A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements*, Report submitted to the Royal Commission on Aboriginal Peoples, February 1994, at 115: "It is clear from the historical circumstances which gave rise to the restriction on alienation of Indian land to third parties that *this did not flow from any inherent limitation on the nature of Aboriginal title but was a measure to protect Indian interests.*" [Emphasis added.] As indicated in *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 at 340: "The purpose of this surrender requirement is clearly to interpose the Crown between the Indians and prospective purchasers or lessees of their land, so as to prevent the Indians from being exploited. This is made clear in the Royal Proclamation itself..."

[215] See, for example, B. Slattery, *Understanding Aboriginal Rights*, (1987) 66 Can. Bar Rev. 727 at 752.

an absolute "prohibition" to alienate. In addition, the Royal Proclamation of 1763, which is still in force in Canada (at least its aboriginal provisions), provides for different restrictions on alienations of Aboriginal lands, when such lands were within the boundaries of any Proprietary Government.[216]

Fourth, if the Supreme Court has made it clear in *Guerin* that the nature of the aboriginal "interest" is not "completely exhausted by the concept of a personal right", then it is grossly unfair to legally depict the property rights of Aboriginal peoples in a manner that increases their vulnerability. As Brennan J. indicates in *Mabo et al.* v. *State of Queensland*:

> "Whether or not land is owned by individual members of a community, a community which asserts and asserts effectively that none but its members has any right to occupy or use the land has an interest in the land that must be proprietary in nature: there is no other proprietor. *It would be wrong, in my opinion, to point to the inalienability of land by that community and, by importing definitions of 'property' which require alienability under the municipal laws of our society, to deny that the indigenous people owned their land.* The ownership of land within a territory in the exclusive occupation of a people must be vested in that people; land is susceptible of ownership, and there are no other owners."[217] [Emphasis added.]

In addition, it is worth noting that "modern" land claims agreements do in fact recognize the ownership or fee simple rights of Aboriginal peoples, even though restrictions on alienation are specifically provided. For example, the *James Bay and Northern Quebec Agreement* (1975) provides in regard to the Crees:

> "The *ownership* of such lands, under provincial jurisdiction, will vest in such Cree corporations outright, *provided that the lands can only be sold or ceded to Québec* and this shall constitute a prohibition to sell or cede other than to Québec."[218] [Emphasis added.]

Also, the *Inuvialuit Final Agreement* (1984) in the Western Arctic includes restrictions on alienations of Inuvialuit lands,[219] but title "in fee simple absolute" to such lands is explicitly vested in the Inuvialuit.[220] In light of these and other[221] examples, it would be difficult to conclude that restrictions on alienation are incompatible with the holding of real property rights under either the Common Law or Civil Law systems in Canada.

For the above reasons, the use of the term "personal" to characterize aboriginal title is inaccurate, highly prejudicial and unnecessary. This remains true, despite the explanation by the Supreme Court of Canada in *Guerin* that the term is only intended to describe the existing restriction upon alienation to the Crown.

The *sui generis* characterization of aboriginal title by the Supreme Court in cases such as *Guerin* can prove useful. But this particular characterization is only of benefit, if it is used to equitably distinguish conventional notions of English property law, so as to allow for greater

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[216] In this regard, the Proclamation provided for purchases "only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as [the British Crown] or they shall think proper to give for such Purpose."

[217] *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia) at 36.

[218] S. 5.1.3 of the Agreement. For a similar provision in regard to the Inuit, see s. 7.1.5 of the Agreement.

[219] See ss. 7(43) and 7(44) of the Agreement.

[220] Section 7(1).

[221] See *Gwich'in Comprehensive Land Claim Agreement* (Ottawa: Minister of Supply and Services, 1992). Agreement between Her Majesty the Queen in right of Canada and the Gwich'in as represented by the Gwich'in Tribal Council, signed April 22, 1992, where Gwich'in receive lands in fee simple (s. 18.1.2), but "[s]ettlement lands may not be conveyed to any person except to government in exchange for other lands or to a designated Gwich'in organization" (s. 18.1.5).

flexibility and accommodation of the laws and perspectives of Aboriginal peoples concerning their land and resource rights. In other words, *sui generis* characterizations should not be used to deny Aboriginal peoples full recognition of their property rights, based on such reasons as those pertaining to a different relationship with the land and different land-tenure systems.

The issue of inalienability as a criterion of property rights raises a question of fundamental importance. Aboriginal peoples and cultures embrace values, perspectives and land tenure systems that favour "inalienability" of their lands and resources, but which are open to "sharing" with others. Does this mean that it is culturally impossible for Aboriginal peoples to possess real property rights under Canadian law? Surely, any such conclusion would endorse the worst brand of ethnocentrism and would be contrary to existing national and international human rights standards.

A more positive and egalitarian ruling has been made recently by the Supreme Court of Canada in *Canadian Pacific Ltd.* v. *Paul*.[222] Of particular importance is the Court's refusal to accept the interpretation that *St. Catherine's Milling* decided 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."[223] However, a more comprehensive reconsideration by the courts of the nature of aboriginal title would still be of great benefit.

Generally, the failure of governments and courts in Canada to adequately and consistently recognize aboriginal rights as real property rights contributes to the devaluation of aboriginal title. Equally important, the characterization of aboriginal rights as "personal" rights has been unfairly and erroneously used by the Supreme Court of Canada in the *Smith* case to conclude that aboriginal rights disappear upon valid surrender. This ruling renders it difficult for Aboriginal peoples to obtain restitution in cases that would merit such an essential remedy.[224]

Economic or commercial activities of Aboriginal peoples are still often impeded in Canada. However, from an Aboriginal viewpoint, it is not the concept of aboriginal rights that imposes inherent limitations on commercial or other activity by Aboriginal peoples. Surely no society in the world can be defined in such a manner as to inherently incapacitate itself in economic matters.

Rather, such constraints would appear to arise from inequitable and often Eurocentric interpretation by others of Aboriginal peoples' rights. The resulting clarifications appear to be both restrictive and ultimately self-serving. Excessive and narrow interpretations of aboriginal rights continue to impede the natural development of Aboriginal peoples and their societies. In certain cases, these interpretations are inconsistent with or in violation of fundamental human rights norms.[225] As F. Berkes concludes in relation to northern Aboriginal communities:

> "*The legal protection of communal property rights becomes rather important* because the traditional economy based on land and animals is still at the core of the social and economic health of northern aboriginal communities...Thus, property rights are more than

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[222] *Canadian Pacific Ltd.* v. *Paul*, [1988] 2 S.C.R. 654. See also *A.G. Quebec* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1055 per Lamer J. (on behalf of the Supreme Court): "The British Crown recognized that the Indians had certain *ownership rights over their land*, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. It also allowed them autonomy in their internal affairs, intervening in this area as little as possible." [Emphasis added.]; and *Benoanie* v. *Canada (Minister of Indian and Northern Affairs)*, [1993] 2 C.N.L.R. 97 (F.C.T.D.) at 100 per Rouleau J.: "*Traditionally, English common law has always recognized that Canada's Indigenous peoples were the sole original owners and occupants of what is now known as Canada* and that Aboriginal title had to be purchased by the Crown through treaties or land surrender agreements. Aboriginal title can be asserted throughout the vast majority of the Northwest Territories..." [Emphasis added.]

[223] Id. at 677.

[224] See discussion under sub-heading 10.4.3 *infra*.

[225] The human rights standards being referred to here include: the principle of non-discrimination (see sub-heading 8.2.2 & 8.3.3 *infra*); right not to be deprived of own means of subsistence (see sub-heading 8.2.7 *infra*); right to enjoyment of culture (see sub-heading 8.2.4 *infra*); and right to development (sub-heading 8.2.10 *infra*).

merely the question of access to wildlife: *They are central to social and economic health, resource conservation, and self-government in these communities.*"[226] [Emphasis added.]

In order to safeguard aboriginal rights under Canada's legal system, non-Aboriginal governments should reassess their positions, with a view to endorsing the land and resource rights of Aboriginal peoples as real property rights (in addition to inherent jurisdictional dimensions). Such a position would be consistent with the federal government's constitutional role as fiduciary, the principles of equality and non-discrimination,[227] and with the spirit and letter of the *Royal Proclamation of 1763*.

2. THE ROYAL PROCLAMATION OF 1763[228]

In order to comprehend the legal nature of the Crown-Aboriginal relationship, the nature of Crown duties flowing from this historical relationship, and the role that "cessions" or "extinguishments" had and continue to have in the context of aboriginal land rights, it is essential to examine the Royal Proclamation of 1763. Specifically, it is important to address: a purposive analysis of the Proclamation; the universal application of Proclamation policies in Canada; the binding nature of the Proclamation; its constitutional status; and whether the Aboriginal provisions in the Proclamation apply in "settled" areas of Canada.

2.1 Nature and Scope of Rights Recognized[229]

While it is beyond the scope of this study to thoroughly examine all relevant aspects of the Royal Proclamation, it is vital to acquire a basic understanding of its terms. Much of the history of extinguishment has been purportedly built on the terms of the Proclamation, which in regard to extinguishment has been seriously misinterpreted.

The Proclamation addresses a number of different subject matters and the provisions themselves may vary in geographical scope. As B. Slattery provides:

> "Certain provisions are concerned only with the newly ceded territories, others with the old American colonies, and others with both alike. They range in coverage from a single colony to the entirety of British territories in America. *It cannot be assumed that the*

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[226] F. Berkes, *Co-Management: Bridging the Two Solitudes*, (1994) 22 Northern Perspectives 18 at 19. See also A. Rosas, "Property Rights" in A. Rosas & J. Helgesen, (eds.), *The Strength of Diversity [:] Human Rights and Pluralist Democracy* (Dordrecht: Martinus Nijhoff Publishers, 1992) 133 at 133: "...property rights first of all *are* specific human rights, secondly may enhance the enjoyment of *other* human rights, and thirdly may, in more generic terms, support a democratic *system* of government." [Emphasis in original.]

[227] See discussion under sub-headings 8.2.2 & 8.3.3 *infra*.

[228] *Royal Proclamation of 1763*, R.S.C. 1985, App. II, No. 1. There is some question as to the accuracy of the version in the Revised Statutes of Canada. It is said that the most accurate printed text of the Proclamation is provided in C.S. Brigham, (ed.), *British Royal Proclamations Relating to America*, vol. 12, Transactions and Collections of the American Antiquarian Society (Worcester, Mass.: American Antiquarian Society, 1911), pp. 212-218: see Royal Commission on Aboriginal Peoples, *Partners in Confederation[:] Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services, 1993) at 56, n. 58.

[229] For a useful historical account, see C.W. Alvord, *The Genesis of the Proclamation of 1763*, (1908) 36 Michigan Pioneer & Historical Society Collections 20.

scope of one provision is identical with that of another; each requires separate examination."[230] [Emphasis added.]

Of particular importance are the "Aboriginal"[231] provisions of the Proclamation. These provisions will be briefly analysed under this sub-heading.

As described below, the Proclamation recognizes and affirms the inherent and pre-existing rights of Aboriginal peoples, as well as granting additional rights in an expansive area sometimes referred to as "Indian Country". These categories of aboriginal lands, referred to in the Proclamation, are overlapping.[232]

Preamble - Part IV[233]: General recognition of aboriginal rights

The Proclamation is made up of a number of preambles and substantive provisions; each preamble is followed by several substantive paragraphs. The aboriginal provisions begin with the fourth "whereas" in the Proclamation:

> "And whereas *it is just and reasonable, and essential to our Interest, and the Security of our Colonies*, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, *should not be molested or disturbed in the Possession* of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds." [Emphasis added.]

The above preamble is critical to the understanding of the aboriginal provisions in the Proclamation and to the corresponding limitations on colonial governments and private persons in regard to Aboriginal peoples and their lands and territories.

The preamble is useful for interpretation purposes as to the overall intention of the aboriginal provisions in the Proclamation. In particular, this preamble provides explicit evidence of the following intentions:

i) The safeguarding of Aboriginal peoples and their lands and territories, through the Proclamation's provisions, was[234] a central priority to the British Crown (i.e. "essential to our Interest, and the Security of our Colonies"). Such legal protections were also viewed by the Crown as being based on a "just and reasonable" foundation.

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[230] B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories* (Saskatoon: Univ. of Saskatchewan Native Law Centre, 1979) at 204.

[231] The Proclamation does not refer to these provisions as "Aboriginal". It is simply a descriptive term used in this study, in making reference to those paragraphs in the Proclamation that make reference to Aboriginal peoples or their lands and territories.

[232] B. Slattery, *Understanding Aboriginal Rights*, (1983) 66 Can. Bar Rev. 727 at 772.

[233] Note that the numbering used for the preamble and substantive provisions pertaining to Aboriginal peoples are not in the Proclamation, but are inserted for easier reference to and identification of the various relevant paragraphs. The numbering (except for paras. 2a & 4c) reflects that used in B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 230, *supra*, at 362, Appendix A, where the terms of the Royal Proclamation are reproduced.

At 208, Slattery describes the Proclamation's fourth part, which contains the aboriginal provisions, as follows: "The fourth and final part of the Proclamation deals with a variety of matters relating to Indians. It is longer than any other part and more complex, comprising of six distinct provisions, which vary significantly in content and coverage."

[234] The past tense is used here solely because the British Crown no longer plays a dominant constitutional and legislative role in Canada. However, the intentions of the Crown are still relevant and applicable since the Proclamation continues to have force and effect in Canada.

ii) The overall intention of the aboriginal provisions was to safeguard Aboriginal nations as "autonomous political units"[235] with the right of non-interference and self-government[236] (i.e. "not be molested or disturbed").[237]

iii) The inherent and other pre-existing[238] rights of Aboriginal peoples to their lands and territories is generally recognized and affirmed in the preamble.[239] This affirmation of existing aboriginal rights applies to all British colonies and territories, without exception, in North America ("Possession of such Parts of Our Dominions and Territories, as not having been ceded or purchased by Us, are reserved to them").[240]

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[235] Royal Commission on Aboriginal Peoples, *Partners in Confederation[:] Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services, 1993) at 16: "[The above preamble] portrays Indian nations as *autonomous political units* living under the Crown's protection and *retaining their internal political authority and their territories*. These territories should not be granted or appropriated without Indian consent." [Emphasis added.] And at 17: "In summary, the Proclamation portrays Aboriginal nations as autonomous political units living under the Crown's protection, holding *inherent authority over their internal affairs and the power to deal with the Crown by way of treaty and agreement*. It views the links between Aboriginal peoples and the Crown as broadly confederal." [Emphasis added.]

[236] In regard to the Royal Proclamation recognizing and affirming the self-government of Aboriginal peoples, see D. Johnston, "First Nations and Canadian Citizenship" in W. Kaplan, (ed.), *Belonging: The Meaning and Future of Canadian Citizenship* (Montreal: McGill-Queen's University Press, 1993) 349 at 353; and B. Clark, *Indian Title in Canada* (Toronto: Carswell, 1987) at 98-99. At 99, Clark states: "The background to the issue of native self-government thus has two opening premises: that historically the Indians were promised *liberty in an instrument of constitutional weight* [i.e. Royal Proclamation]; and that sovereignty is theoretically divisible under the rule of law applicable to constitutional government in Canada." [Emphasis added.]

See also R. Clinton, *The Royal Proclamation of 1763: Colonial Prelude to Two Centuries of Federal-State Conflict Over the Management of Indian Affairs*, (1989) 69 Boston Univ. L. Rev. 329, at 381: "[The Proclamation] established the British model for the management of Indian affairs in the American colonies, emphasizing three key elements: (1) centralization of trade, diplomatic, *land-cession*, and other relations with Indian tribes...; (2) long-term, effective *guarantees of Indian tribal land and resources*, including hunting and fishing rights; and (3) *protection of Indian autonomy and sovereignty* separated from local colonial authority." [Emphasis added.]

[237] The preamble literally reserves existing Aboriginal lands, "not having been ceded or purchased by Us...*as their Hunting Grounds*". However, it is submitted that the words "as their Hunting Grounds" is solely intended to be descriptive of Aboriginal peoples' lands, since hunting was a major occupation of such peoples at that time. A reading of all of the aboriginal provisions in the Proclamation makes clear that the words "as their Hunting Grounds" are not intended to limit disturbances from or interference by settlers to solely the hunting rights of Aboriginal peoples. Otherwise, the Proclamation would not have ordered "all Persons whatever...forthwith to remove themselves from such Settlements" without exception that have been established on any unceded or purchased lands reserved for Aboriginal peoples.

In any event, the Proclamation legally could not have derogated from or extinguished pre-existing aboriginal rights. Further, the doctrine of progressive interpretation (see note 332 *infra*) enables constitutional instruments to be interpreted in a flexible manner that takes into account changing conditions that were not foreseen at the time of the adoption of the Proclamation. See also *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145 at 155, where Dickson J. provides: "[A Constitution] must...be *capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers*. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind." [Emphasis added.] Therefore, uses of aboriginal lands, even if not foreseen in 1763, may be protected under this doctrine.

Similarly, judicial rules of interpretation concerning statutes relating to Aboriginal peoples also call for a broad and liberal construction, and that ambiguous or doubtful provisions be interpreted in favour of Aboriginal peoples (see note 304 *infra*).

[238] For a slightly different view, see B. Slattery, *Understanding Aboriginal Rights*, note 232, *supra*, at 770: "The description [in the preamble] is broad enough to cover both the Indian Territories and Aboriginal Reserves. However, strictly interpreted, it might not include certain Granted Reserves: those created out of Indian lands that had already been ceded to the Crown." However, it is not clear under the applicable rules of interpretation why a "strict" or narrow interpretation would be used as opposed to a broad and liberal one that maintains the rights of Aboriginal peoples.

[239] As will be indicated below, the pre-existing rights of Aboriginal peoples are recognized and affirmed in the first and third substantive provisions (i.e. paras. 1 & 3) following the preamble. See also B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 230, *supra*, at 230: "We may conclude that the recognition of Indian title expressed in the preamble and embodied in paragraphs 1 and 3 is valid and binding..."

[240] B. Slattery, *Understanding Aboriginal Rights*, note 232, *supra*, at 770: "This passage treats as reserved for the Indians *all those parts of the Crown's dominions in America that the Indians have not ceded or sold to the Crown.*"

Para. 1: general recognition of aboriginal rights and some limitations on Colonies or Plantations

The first substantive paragraph following the preamble provides:

> "We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of *our Colonies of Quebec*[241], *East Florida, or West Florida*, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also that no Governor or Commander in Chief in *any of our other Colonies or Plantations in America* do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or *upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.*" [Emphasis added.]

The above paragraph stipulates the following:

i) The governors of Quebec, and East and West Florida are prohibited from granting survey warrants or patents for lands beyond the limits of their colonies. Grants within these colonies are by implication possible. However, in relation to aboriginal lands or land rights within these colonies, any grant made could not derogate from the rights of Aboriginal peoples. This follows from the legal principle that the Crown cannot give what it does not have.[242]

ii) The governors in any of the "other Colonies or Plantations in America" similarly are prohibited from granting survey warrants or patents for lands west of the Atlantic watershed. It is suggested that this legal arrangement might be altered in the future (i.e. "for the present, and until our further Pleasure be known").[243]

iii) Any unceded lands of Aboriginal peoples are arguably safeguarded from grants of survey warrants or patents. The phrase "upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians" would strongly suggest that all such lands in North America are protected in this paragraph. This interpretation of "any Lands whatever" is reinforced by the fact that "as aforesaid" refers back to the fourth preamble that affirmed aboriginal land rights in all British territories and colonies on the continent without exception. Moreover, it is fully consistent with para. 3 (discussed below) which provides for the removal of settlers in respect to all unceded lands reserved for Aboriginal peoples.

On the other hand, the punctuation in the above paragraph could be argued to limit the last-mentioned phrase to all colonies and territories save for the colonies of Quebec[244] and the

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[241] At the time of the Proclamation, the boundaries of Quebec are defined to be very limited. See B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 230, *supra*, at 205: "The boundaries of Quebec are defined so as to take in only a limited portion of the St. Lawrence valley, from the St. John River and Gaspé on the east to the Ottawa valley and Lake Nipissing on the West. They exclude the Great Lakes and indeed most of the territory claimed by France as Canada..."

[242] See authorities cited in note 1731 *infra*.

[243] Any alteration would require an appropriate Imperial statute.

[244] It is worth noting here that the size of the colony of Quebec at the time of the Proclamation was extremely limited (see note 241 *supra*). Although Quebec's boundaries became enlarged in subsequent years, any lands added to Quebec would be subject to the rights of Aboriginal peoples.

two Floridas.[245] However, constitutional and statutory rules of interpretation would support the former interpretation over the latter, if a broad and liberal interpretation in favour of Aboriginal peoples is to prevail.

iv) The phrase "our Royal Will and Pleasure" does not diminish in any way the legal protections of unceded aboriginal lands provided in the above paragraph.[246]

There has been some controversy as to the meaning of "our Royal Will and Pleasure". In *Delgamuukw* v. *British Columbia*, McEachern C.J. states in an *obiter dictum* that "the Proclamation, at most, created a right determinable at the pleasure of the Crown to use Proclamation lands as 'hunting grounds'."[247] Such a minimized view, however, is not in keeping with the priority and commitments expressed in the Proclamation to safeguard Aboriginal peoples and their territories. Moreover, if the Proclamation is a constitutional instrument (as this study concludes), McEachern C.J.'s interpretation is at odds with the doctrine of progressive interpretation which calls for a generous, broad and liberal interpretation of constitutionally protected rights and is on appeal.

Further, from a legal viewpoint, the Crown prerogative cannot be used to derogate from or abrogate aboriginal title to land.[248] If it were the "Royal Will and Pleasure" to alter in some way aboriginal title to land, it would have had to be effected through an appropriate Imperial statute.[249]

Para. 2: Establishment of "Indian Country"

The second substantive paragraph provides:

> "And We do *further declare* it to be Our Royal Will and Pleasure, for the present as aforesaid, to *reserve* under our Sovereignty, Protection, and Dominion, *for the use* of the said Indians, *all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company*, as also all the Lands and Territories lying to the West and North West as aforesaid." [Emphasis added.]

The above paragraph suggests the following legal consequences:

i) Aside from the general recognition of pre-existing and inherent rights of Aboriginal peoples in North America (see preamble and paras. 1 & 3), para. 2 establishes "Indian Country".[250] As indicated by B. Slattery, "[t]he Country is defined negatively as all British Territories lying west of the Appalachian Mountains that are not included within the colonial boundaries of Quebec, East and West Florida, and Rupert's Land (the territories granted to the

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[245] See B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 230, *supra*, at 208, where it is indicated that the Proclamation is not clear on this point. However, the author appears to put forward the broader interpretation.

[246] The same conclusion would apply to other provisions of the Proclamation where the phrase "our Royal Will and Pleasure" is used.

[247] *Delgamuukw* v. *B.C.*, [1991] 3 W.W.R. 97 (B.C. S.C.), at 227, per McEachern C.J.

[248] See text accompanying note 1288 *infra*.

[249] In regard to constitutional and legal capacity to extinguish aboriginal rights, see generally heading 6 *infra*.

[250] B. Slattery, *Understanding Aboriginal Rights*, note 232, *supra*, at 773: "The Indian Country is a creature of the Proclamation...The Country clearly does not include all the lands in the Indian Territories. Large parts of Quebec and Rupert's Land, for example, were still part of the Indian Territories, yet they are excluded from the Country as defined. Nor does it include most of the Aboriginal and Granted Reserves existing at that period."

Hudson's Bay Company)."[251]

ii) The rights granted under this paragraph, through the creation of "Indian Country", overlap with the inherent and pre-existing rights of Aboriginal peoples in such areas.

iii) This paragraph has no effect on the inherent and pre-existing rights recognized in other provisions of the Proclamation. In addition, the Royal Charter of 1670, which granted northern territories to the Hudson's Bay Company, does not have the effect of abrogating the aboriginal rights of Aboriginal peoples.[252]

iv) It has been said that "[f]or most purposes, Indian Country is of little interest today."[253] However, it is not certain that the series of treaties negotiated subsequently with the various Aboriginal nations are valid in respect to the purported land cession provisions.[254] In addition, the extent of the territory acquired by the Hudson's Bay Company is far from clear. According to K. McNeil, "...the aboriginal nations were in actual control of most of the area east of Hudson Bay, [therefore] the territory the Company acquired there was in fact very limited."[255]

Para. 2a: Prohibition on purchases, settlements, and possession of aboriginal lands without Crown approval

The following substantive paragraph provides:

> "And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of *any of the Lands above reserved*, without our especial leave and Licence for that Purpose first obtained." [Emphasis added.]

The above paragraph stipulates the following:

i) Except with the approval and licence from the Crown, British subjects are prohibited from making any purchases or settlements or taking possession in regard to lands reserved for Aboriginal peoples.

ii) Only non-Aboriginal peoples are contemplated by the term "loving Subjects", since

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[251] Id. at 772. It is important to note that although Rupert's Land is expressly excluded from the "Indian Country" provision of the Proclamation, the territories of the Hudson's Bay Company in Rupert's Land constitutes a "proprietary colony" and is covered by the other aboriginal provisions in the Royal Proclamation: see, for example, P. Cumming & N. Mickenberg, (eds.), *Native Rights in Canada* (Toronto: Indian-Eskimo Association of Canada, 1972) at 167-169.

[252] B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 230, *supra*, at 162.

[253] B. Slattery, *Understanding Aboriginal Rights*, note 232, *supra*, at 773.

[254] As indicated in various parts of this study, it is not clear that the Aboriginal parties (particularly in regard to the historic treaties) had a sufficient understanding of the meaning and consequences of the so-called land cession provisions and that there was an adequate "meeting of the minds" to constitute a valid agreement on this aspect. In addition, it would appear in many instances that both historic and contemporary treaties were negotiated under conditions that arguably amount to fraud, misrepresentation, undue influence, or duress. Improvident or other unconscionable transactions were often the result of the negotiations and cannot be considered as consistent with the fiduciary obligations of the Crown.

[255] K. McNeil, "Aboriginal Nations and Quebec's Boundaries: Canada Couldn't Give What It Didn't Have" in D. Drache & R. Perrin, (eds.), *Negotiating With a Sovereign Québec* (Toronto: James Lorimer & Co., 1992) 107 at 118. The author adds: "The territory which Canada received on the east side of Hudson Bay by the Rupert's Land transfer would therefore be limited to trading posts and any other territory effectively controlled by the Company. Territories which were occupied and controlled by the aboriginal nations would not have been included."

it is clear that Aboriginal peoples were not intended here to be unable, for example, to make settlements on the lands reserved for them. In other words, the Proclamation (at least para. 2a above) does not restrict in any way alienations or other land transactions between Aboriginal peoples themselves. Any restrictions are formulated so as to apply to non-Aboriginal parties seeking to obtain rights in or to aboriginal lands.

iii) The restrictions to be imposed on non-Aboriginal parties do not amount to a prohibition on alienation. The above paragraph of the Proclamation only provides that British subjects must seek "especial leave and Licence" for such purposes from the Crown.

iv) There is a lack of clarity as to whether the above provision (para. 2a) is intended to apply to all unceded Aboriginal lands or solely reserved lands within Indian Country referred to in para. 2. The reason for this is that the version of the Proclamation in the Revised Statutes of Canada reproduces para. 2a as a totally separate provision from para. 2. However, in another version of the Proclamation that is said to be more accurate, para. 2a is included as an integral part of para. 2.[256]

The better view may be that there are in fact two differing processes: one for Indian Country and another potentially more stringent one for Aboriginal lands within the settled colonies.[257] This view is reinforced by the fact that restrictions on alienation within colonies are addressed in another provision of the Proclamation (para. 4a *infra*). However, those regions of what is now Canada that were not within a British proprietary or non-proprietary colony eventually were included within the Dominion of Canada. Therefore, the more onerous safeguards in para. 4a became applicable to these territories at such time.[258]

Para. 3: Removal of unauthorized settlers from reserved Aboriginal lands

The third substantive paragraph provides:

> "And, We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves *upon any Lands within the Countries above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid*, forthwith to remove themselves from such Settlements." [Emphasis added.]

The above paragraph imposes the following requirements:

i) Non-Aboriginal settlers are required to remove themselves from unceded lands reserved for Aboriginal peoples. Based on other provisions of the Proclamation,[259] only unauthorized

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[256] See note 228 *supra*.

[257] See P. Salembier, *How Many Sheep Make a Flock? An Analysis of the Surrender Provisions of the Indian Act*, [1992] 1 C.N.L.R. 14 at 32: "*The Royal Proclamation of 1763 also imposed restrictions on the purchase of Indian lands. In doing so, it distinguished between two categories of Indian land*:

1. Indian Territory, and
2. Indian lands within the settled colonies,

and applied different rules to each. Any land purchases within Indian Territory were to be made only by order of the Imperial Government in England. Local governors could no longer authorize purchases of land beyond the boundaries of their colonies. Purchases of Indian land within the settled colonies were to be made only in the name of the Crown, and at a public meeting called for that purpose by the governor or commander in chief of the colony in question." [Emphasis added.]

[258] A significant example is the North-Western Territory which became part of the Dominion of Canada in 1870. For a discussion of the applicability of para. 4a to this Territory in 1870, see note 66 *supra*.

[259] Specific reference is made here to paras. 2a & 4a that are analysed under the present sub-heading.

settlers are affected by para. 3.

ii) The above requirement of removal, in respect to unceded lands reserved to Aboriginal peoples, applies throughout North America ("upon any Lands within the Countries above described, or upon any other Lands...").

Para. 4a[260] (includes preamble): Restrictions and safeguards regarding the purchases of aboriginal lands within the Colonies

The fourth substantive paragraph (including preamble) provides:

"And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interest, and to the great Dissatisfaction of the said Indians; In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of *any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement*; but 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 public Meeting or Assembly of the said Indians*, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie; and in case they shall lie *within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries*, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose;" [Emphasis added.]

The above provision stipulates or suggests the following:

i) Non-Aboriginal[261] private persons are generally prohibited from making any purchases of lands reserved for Aboriginal peoples within the British colonies. The stated purpose of this prohibition is to prevent the "great Frauds and Abuses" from continuing to take place in regard to Aboriginal lands.

ii) Nevertheless, purchases of aboriginal lands within the colonies are to be permitted if the Aboriginal people concerned freely choose to alienate their lands (i.e. "inclined to dispose"). In such case, purchases could only be made in the name of the Crown in all colonies, except proprietary colonies. In addition, the purchase would have to be approved "at some public Meeting or Assembly of the said Indians, to be held for that Purpose". Where such private purchases were to take place, the meeting or assembly was to be held by the Governor or Commander in Chief of the colony in which the lands were located.[262]

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[260] In regard to the different versions of the Royal Proclamation, it should be noted that paras. 4a and 4b are part of the same paragraph in the version provided in the Revised Statutes of Canada. In respect to the most accurate printed text of the Proclamation that is provided in C.S. Brigham, (ed.), *British Royal Proclamations Relating to America*, vol. 12, Transactions and Collections of the American Antiquarian Society (Worcester, Mass.: American Antiquarian Society, 1911), pp. 212-218, paras. 4a, 4b and 4c are all part of the same paragraph.

[261] As indicated in the analysis in regard to para. 2a above, solely non-Aboriginal people are contemplated as being subject to restrictions in the purchase of unceded Aboriginal lands. There is no evidence that land transactions between Aboriginal peoples themselves are intended to be covered by the safeguards in the Proclamation.

[262] The present *Indian Act*, R.S.C. 1985, c. I-5, provides in s. 39(2)(b) for assent to an absolute surrender or designation of land "by a majority of the electors of the band

i) at a general meeting of the band called by the council of the band,

ii) at a special meeting of the band called by the Minister for the purpose of considering a proposed absolute surrender or designation, or

iii) In proprietary colonies, such as Rupert's Land,[263] purchases of aboriginal lands could only be made by private persons and "only for the Use and in the name of such Proprietaries". The requirement of a public meeting or assembly would also apply within a proprietary colony to lands offered by Aboriginal peoples for purchase to non-Aboriginal persons. However, purchases were permitted "only for the Use and in the name of such Proprietaries". In addition, these transactions were subject to the "Directions and Instructions as [the Crown] or the [Proprietary Government] shall think proper to give for that Purpose".

iv) Purchases of unceded Aboriginal lands within British colonies, whether proprietary or non-proprietary, would not be valid if they did not conform with the above conditions and procedures in the Proclamation.[264] Such rules bind not only private purchasers, but also purchases or cessions in favour of the Crown or proprietaries.[265] As B. Slattery indicates, "it cannot be assumed that the Crown, having stated the aim of avoiding the 'Frauds and Abuses' of past eras, intended to benefit from cessions or purchases tainted by irregularities."[266]

v) There is some uncertainty as to whether para. 4a above is intended to cover leases affecting unceded lands reserved for Aboriginal peoples. The term "dispose" (used in the provision) might conceivably, in some circumstances, be broad enough to include leasing activities. However, in the present context of the Proclamation, the preamble in para. 4a refers only to the frauds and abuses committed in "purchasing" Aboriginal lands. Yet Canadian cases have held that 99-year leases (with rights of renewal) are subject to the terms of the Proclamation.[267]

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iii) by a referendum as provided in the regulations.

In 1868, the federal *Department of the Secretary of State Act*, S.C. 1868, c. 42 required surrenders to be "assented to by the chief of the tribe, or, where there was more than one chief, by a majority of the chiefs assembled at a meeting of the chiefs of the tribe assembled for that purpose, in the presence of the Secretary of State or his delegate": see J.P. Salembier, *How Many Sheep Make a Flock? An Analysis of the Surrender Provisions of the Indian Act*, *supra*, note 257, at 34. Although the author states that "[t]his procedure is a straight adoption of that prescribed by the Royal Proclamation of 1763 for the alienation of settled lands", it would appear that the procedure in the 1868 Act runs counter to that in the Proclamation. In particular, it cannot be assumed that chiefs alone would have a mandate to alienate the lands of the people they represent: see *Sheldon* v. *Ramsay*, (1852), 9 U.C.Q.B. 105 at 133 (Q.B.); *A.G. Ont.* v. *Francis*, (1889), Public Archives of Ontario, Irving Papers, Box 43, File 42, Item 9, at 73. These cases and the matter of a lack of mandate by chiefs are referred to in B. Clark, *Indian Title in Canada*, *supra*, note 236, at 74.

At 35, Salembier describes how the various *Indian Acts* unilaterally altered the procedure required: "The *Indian Act, 1876* [S.C. 1876, c. 18, s. 26] instituted a requirement of a majority vote (of males twenty-one years or older), which was carried over into the 1906 Act [R.S.C. 1906, c. 81, s. 49]...The same wording continued into the 1927 consolidation [R.S.C. 1927, c. 98, s. 51], and through to the enactment of the 1951 *Indian Act*, [S.C. 1951, c. 29, s. 39,] which introduced wording similar to the present wording...In 1956 the *Indian Act* was amended by adding subparagraph 39(1)(b)(iii) relating to referenda." It is the view of this study that the expressed intention in the fourth preamble to the Proclamation that Aboriginal peoples not be "molested or disturbed" reinforces the principle that the manner of providing free and informed consent to any cession or purchase of land by Aboriginal peoples must be determined by the people affected and not by the federal government or Parliament.

[263] B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 230, *supra*, at 209, 310. At 298-301, Slattery adds that the Hudson's Bay Company had limited legislative powers that could not be repugnant to the laws of England; that the Imperial Crown retained its legislative powers; and that the Proclamation's provisions regarding Aboriginal lands would be valid in Rupert's Land. For a discussion that the territories of the Hudson's Bay Company in Rupert's Land constituted a proprietary colony and government under the Royal Proclamation, see note 67 *supra*.

[264] B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 230, *supra*, at 313.

[265] J.P. Salembier, *How Many Sheep Make a Flock? An Analysis of the Surrender Provisions of the Indian Act*, *supra*, note 257, at 32: "Prior to 1763, there had been considerable evidence that, when faced with the competing demands of settlers for new land and their duty to protect Indian lands from encroachment, colonial governors would generally opt to sacrifice the latter."

[266] B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, *supra*, note 230, at 313.

[267] *R.* v. *Lady McMaster*, [1926] Ex.C.R. 68 at 73; *Easterbrook* v. *The King*, [1931] S.C.R. 210 at 217-218; aff'g [1929] Ex.C.R. 28. See also note 84 *supra*.

Perhaps it was felt by the Canadian judiciary that such long-term leases are covered in the overall spirit or intention of para. 4a of the Proclamation. But it would not be in the interest of Aboriginal peoples to be required to surrender their rights to land to the Crown, merely because they sought to lease some of their land to non-Aboriginal people in the short term. Nothing in the Proclamation could justify such an interpretation that would undermine the existing land and resource base of Aboriginal societies.

Moreover, unlike Indians under the *Indian Act*, Inuit and Metis have never been subject to such an interpretation whereby they must surrender their lands to the Crown in order to engage in leases with third parties. This unequal treatment of Indians from that of Inuit and Metis make it difficult to accept that, in regard to leases, surrenders to the Crown were required by the terms of the Royal Proclamation.

Para. 4b: Regulation of trade with Aboriginal peoples

The following substantive paragraph provides:

> "And we do, by the Advice of our Privy Council, declare and enjoin, that the Trade with the said Indians shall be free and open to all our Subjects whatever, provided that every Person who may incline to Trade with the said Indians do take out a *Licence for carrying on such Trade* from the Governor or Commander in Chief of any of our Colonies respectively where such Person shall reside, and *also give Security to observe such Regulations as We shall at any Time think fit*, by ourselves or by our Commissaries to be appointed for this Purpose, to direct and appoint for the Benefit of the said Trade:" [Emphasis added.]

Para. 4b stipulates:

i) Although trade with Aboriginal peoples was declared to be "free and open" to all British subjects, trade licences had to be obtained from the Governor or Commander in Chief of the colony in which such subject resided. In addition, security was to be given by British traders as a guarantee that the regulations governing British-Aboriginal trade would be respected. The regulations were to be adopted by either the British Crown or its "Commissaries to be appointed for this purpose".

ii) These requirements applied to all trade with Aboriginal peoples at least within the proprietary and non-proprietary colonies in North America (including Rupert's Land).[268]

iii) The trade licences were only required for non-Aboriginal people who wished to trade with Aboriginal peoples.

Para. 4c: Granting of gratuitous trade licences, subject to forfeiture of licence and security in the event of violation of regulations

The following substantive paragraph provides:

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[268] B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 230, *supra*, at 210: "Once again, on the face of it, these provisions have application to all British colonies in North America. The effect on the trade monopoly of the Hudson's Bay Company in Rupert's Land is unclear."

"And we do hereby authorize, enjoin, and require the Governors and Commanders in Chief of *all our Colonies respectively, as well those under Our immediate Government as those under the Government and Direction of Proprietaries*, to grant such Licences without Fee or Reward, taking especial Care to insert therein a Condition, that such *Licence shall be void, and the Security forfeited* in case the Person to whom the same is granted shall refuse or neglect to observe such Regulations as We shall think proper to prescribe as aforesaid." [Emphasis added.]

The above provision stipulates as follows:

i) Governors and Commanders in Chief in all British colonies, whether proprietary or non-proprietary are required to issue gratuitous licences (i.e. "without Fee or Reward").

ii) A mandatory condition of each licence is that the licence will be void and the security given forfeited by any person who violates the regulations issued by the Crown.

Para. 5: Apprehension of persons charged with criminal offences, who flee to Aboriginal territories

The fifth substantive paragraph provides:

"And we do further expressly enjoin and require all Officers whatever, as well Military as those Employed in the Management and Direction of Indian Affairs, *within the Territories reserved as aforesaid for the use of the said Indians*, to seize and apprehend all Persons whatever, who standing charged with *Treason, Misprisions of Treason, Murders, or other Felonies or Misdemeanors*, shall fly from Justice and take Refuge in the said Territory, and to send them under a proper guard to the Colony *where the Crime was committed of which they stand accused*, in order to take their Trial for the same." [Emphasis added.]

The above provision stipulates:

i) Military and non-military personnel are required to "seize and apprehend" all persons who flee and take refuge in Aboriginal territories from such crimes as "Treason,..Murders, or other Felonies or Misdemeanors". Such persons are to be sent back to the colony where they are alleged to have committed the crime, in order to stand trial.

ii) This provision appears to apply to all British colonies.[269]

iii) Further, Aboriginal peoples in "Indian Country" may be "disturbed"[270] to the extent that those persons accused of crimes who take refuge in such Aboriginal territories may be apprehended and brought back for trial to the colony where the crime was alleged to have been committed. Unceded lands reserved for Aboriginal peoples within the colonies do not appear to be contemplated. The provision only speaks of bringing back to the colonies those accused persons who have fled. The provision refers to "Territories reserved as aforesaid for the use of the said Indians", which is the language used in para. 2 above to describe "Indian Country".

iv) It is uncertain whether only non-Aboriginal suspects are contemplated, or if Aboriginal persons accused of committing crimes in the colonies are also intended to be covered by the above provision (i.e. "seize and apprehend all Persons whatever").

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[269] B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 230, *supra*, at 210.

[270] The preamble in the initial paragraph of the Aboriginal provisions of the Proclamation indicates that Aboriginal peoples are not to be "molested or disturbed" in the possession of their lands.

It is sometimes said that the notion of "extinguishment" of aboriginal rights finds its roots in British policy as reflected in the *Royal Proclamation of 1763*. Yet, it is evident from all of the above provisions that the term "extinguishment" is not explicitly used in the Proclamation. Moreover, to our knowledge, no other Imperial legislation employed this term.

The Royal Proclamation refers to "cessions" or "purchases". However, as the above analysis suggests, such actions appear to be explicitly circumscribed in an overall context of confirming and safeguarding the rights and interests of Aboriginal peoples. Under the Proclamation, cessions or purchases are not intended to result in land dispossessions that substantially undermine Aboriginal interests or increase the vulnerabilty of the Aboriginal peoples concerned. This conclusion is further examined below through a purposive analysis of the Proclamation.

2.2 Purposive Analysis of Royal Proclamation

In a later section of this study, it is argued that the Royal Proclamation is a constitutional instrument.[271] Consequently, there are principles of constitutional interpretation that would necessarily be applied. With regard to constitutional provisions pertaining to aboriginal rights, Dickson C.J., in *Sparrow* v. *The Queen*, delineates the interpretative approach to be taken as follows:

> "The approach to be taken with respect to interpreting the meaning of s. 35(1) [of the *Constitution Act, 1982*] is derived from *general principles of constitutional interpretation*, *principles relating to aboriginal rights*, and the *purposes behind the constitutional provision itself*...
>
> .....
>
> The nature of s. 35(1) itself suggests that it be *construed in a purposive way. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded*."[272] [Emphasis added.]

In *Delgamuukw* v. *British Columbia*, McEachern C.J. of the British Columbia Supreme Court applies a purposive[273] analysis to the Royal Proclamation in the following terms:

> "...I think it is *appropriate to apply a purposive approach to the language of an instrument such as the Royal Proclamation* which is much closer to a statute than to a treaty. As I have said, its principal purposes were to establish new governments, to settle present and anticipated difficulties on the frontier, and to encourage British mercantilism by limiting the spread of settlement too distant from coastal trade. The extension or application of the Proclamation to unknown Indians in unknown lands beyond or north-west of the Mississippi, particularly to the *terra incognita* of the "Canadian West," in no

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[271] See sub-heading 2.5 *infra*.

[272] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 at 1106.

[273] See also *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145 at 156, where Dickson J. indicates that the appropriate approach to take is "a broad, purposive analysis, which interprets specific provisions of a constitutional document in the light of its larger objects..." This judgment deals with fundamental rights under the *Canadian Charter of Rights and Freedoms*, but the interpretative principles that the Supreme Court enunciates would also apply to constitutional rights in other instruments. In particular, the *Royal Proclamation of 1763* is viewed "as having a status analogous to the *Magna Carta*": see *Calder* v. *A.-G. British Columbia*, [1973] S.C.R. 313, at 394-395 per Hall J.

way served these purposes."[274] [Emphasis added.]

Although the purposes described above are relevant to the Proclamation as a whole, they are not the sole purposes. In particular, the Chief Justice has omitted from his purposive approach any substantive analysis of the intention behind the Aboriginal provisions. With respect, this omission creates a fundamental imbalance in his analysis. The Aboriginal provisions constitute a critical part of the Proclamation and, as described in this study, affect the interpretation of the instrument as a whole.[275]

For example, the powers of colonial governments are limited by the Aboriginal provisions in the Proclamation. Purchases of aboriginal lands within the colonies are to be done in the name of the British Crown and subject to procedural safeguards. In addition, McEachern C.J. states that a purpose of the Proclamation was to encourage British mercantilism by restricting settlement that was too far from coastal trade. However, the Chief Justice fails to even refer to the safeguards imposed through specific licences, security requirements and regulations in respect to any colonial trade with Aboriginal peoples.

Much greater and far-reaching omissions in the Chief Justice's purposive approach pertain to the overall reasons and incentives for the adoption of the Royal Proclamation. In particular, the Chief Justice fails to consider the critical intentions to improve Crown-Aboriginal relations, to assure Aboriginal peoples of the good faith, equity and justice of the Crown through the recognition, affirmation and protection of their territorial and land rights, and the imposition of procedural and other safeguards in respect to any purchases or cessions.

In regard to the territorial and lands rights of Aboriginal peoples in the Royal Proclamation, a purposive analysis of this "Indian Bill of Rights"[276] (which is an integral part of the constitutional instrument) would call for a "generous interpretation" that recognized the "full measure of their fundamental rights". For example, in *Minister of Home Affairs* v. *Fisher*, Lord Wilberforce assesses the Bermudian Constitution which included a *Bill of Rights*. He indicates that this calls for:

> "...*a generous interpretation* avoiding what has been called 'the austerity of tabulated legalism,' suitable to give individuals the *full measure of the fundamental rights and freedoms referred to.*"[277] [Emphasis added.]

As indicated earlier in this study,[278] the notion of "cession" under the Royal Proclamation of 1763 is not simply limited to obtaining surrenders of aboriginal title to land with the *consent* of the "Nations and Tribes" concerned. When "cessions" are referred to in the Proclamation, they are circumscribed in an overall regime of confirming and safeguarding Aboriginal peoples and their territorial rights.

As R. Clinton describes:

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[274] *Delgamuukw* v. *B.C.*, [1991] 3 W.W.R. 97 (B.C. S.C.), at 230-231, per McEachern C.J.

[275] It is the view of this study that had an adequate purposive analysis been completed by McEachern C.J., the conclusions reached by him as to the applicability of the Proclamation to British Columbia would have had to be fundamentally altered. For further discussion of British Columbia and McEachern C.J.'s views, see note 325 *infra*.

[276] *St. Catherines Milling and Lumber Co.* v. *The Queen*, (1887), 13 S.C.R. 577, at 652, per Gwynne J.; *Calder* v. *A.-G. British Columbia*, [1973] S.C.R. 313, at 394-395 per Hall J.

[277] *Minister of Home Affairs* v. *Fisher*, [1980] A.C. 319 at 328. Cited by Dickson J. in *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145 at 156. On the same page, Dickson J. takes the same interpretive approach with respect to the *Canadian Charter of Rights and Freedoms*, which he states is a "purposive document": "[The Charter's] purpose is to *guarantee and protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines*. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action." [Emphasis added.]

[278] See sub-heading 1.2, *supra*.

> "The Proclamation emerged from over a century of colonial confusion, mismanagement, and greed in the implementation of Indian policy, and *ought to resolve such problems by restructuring relations* between local Euro-American colonial governments and Indian tribes. It established the British model for the management of Indian affairs in the American colonies, emphasizing three key elements: (1) centralization of trade, diplomatic, *land-cession*, and other relations with Indian tribes...; (2) long-term, effective *guarantees of Indian tribal land and resources* including hunting and fishing rights; and (3) *protection of Indian autonomy and territory* separated from local colonial authority."[279] [Emphasis added.]

The humane and just underpinnings of the Royal Proclamation are emphasized by the Supreme Court of Canada in *Province of Ontario* v. *Dominion of Canada*:

> "A line of policy begotten of *prudence, humanity and justice* adopted by the British Crown *to be observed in all future dealings with the Indians* in respect of such rights as they suppose themselves to possess was outlined in the Royal Proclamation of 1763..."[280] [Emphasis added.]

It has already been demonstrated[281] that there is a clear intention under the Proclamation to avoid "great Frauds and Abuses", and other "Irregularities" that would result in unfair or improvident[282] transactions to the detriment of the Aboriginal peoples affected.

Cession of Indian lands is only mentioned in the Proclamation in the context of ensuring the liberty[283] and security of "Indians" in their territories. As Dickson J. indicated in *Guerin* v. *The Queen*, the rule of alienation of aboriginal title solely to the Crown was "to prevent the Indians from being exploited" and enable the Crown to act in the "Indians' best interests".[284] Moreover, the government has a "distinctive fiduciary obligation" to ensure that it is "acting for the benefit of" such peoples when it acts on their behalf in regard to land alienations.[285]

The terms of the Proclamation envisage first and foremost the protection of Indian Nations or Tribes and their lands which covered vast areas:

> "...any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West ... *any Lands whatever, which, not having been ceded to or purchased ..., are reserved to the said Indians, or any of them.*" [Emphasis

The objective of the Proclamation, in terms of protecting and recognizing the rights of Aboriginal peoples, has been highlighted by the Supreme Court of Canada as well as a wide range of legal commentators. Lamer J. (as he then was), in *R.* v. *Sioui*, describes the objective

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[279] R. Clinton, *The Royal Proclamation of 1763: Colonial Pr... Centuries of Federal-State Conflict Over the Management of Indian Affairs*, (1989) 69 Boston Univ. L. Rev ...1.

[280] *Province of Ontario* v. *Dominion of Canada*, (190... at 103-104 per Idington J. This view of the Royal Proclamation is cited with approval by Hall J. in *Cal... ...h Columbia*, [1973] S.C.R. 313 at 395.

[281] See sub-heading 1.2, *supra*.

[282] See, for example, *Canadian Pacific Ltd.* v. *Paul*, [1...88] 2 S.C.R. 654 at 677, where the Supreme Court of Canada states: "This feature of inalienability was adopted as a protective measure for the Indian population *lest they be persuaded into improvident transactions*." [Emphasis added.]

[283] See, for example, B. Clark, *Native Liberty, Crown Sovereignty [:] The Existing Aboriginal Right to Self-Government in Canada* (Montreal: McGill-Queen's University Press, 1990), at 3: "Faced with numerous and warlike tribes, and not being entirely impervious to sentiments of natural justice, the imperial government of Great Britain in the eighteenth century recognized the liberty of the indigenous peoples not to be molested or disturbed on their unceded territories."

[284] *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 at 340.

[285] *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 at 339 per Dickson J.

of the Royal Proclamation, in regard to Aboriginal peoples, in terms of redressing existing problems faced by them:

> "The very wording of the Royal Proclamation clearly shows that its objective, so far as the Indians were concerned, was to provide *a solution to the problems created by the greed which hitherto some of the English had all too often demonstrated in buying up Indian land at low prices*. The situation was causing dangerous trouble among the Indians and the Royal Proclamation was meant to remedy this."[286] [Emphasis added.]

When the Crown (in right of Quebec) argued that the Royal Proclamation extinguished the treaty of September 5, 1760 with the Hurons, Lamer J. concluded that the British Crown had no intention to extinguish any treaty rights:

> "I see nothing in these passages which can be interpreted as an intention on the part of the British Crown to extinguish the treaty of September 5. *The Proclamation confers rights on the Indians without necessarily thereby extinguishing any other right conferred on them by the British Crown under a treaty*."[287] [Emphasis added.]

Also, in *Mitchell* v. *Peguis Indian Band*, La Forest J. highlights the protective objectives of the Royal Proclamation:

> "From that time [of the Royal Proclamation of 1763] 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 the chattels on that land base."[288] [Emphasis added.]

As B. Slattery explains, a principal intention and purpose of the Royal Proclamation was to provide "Indians" with assurances concerning the integrity of their territories:

> "Since mid-century the British government had been increasingly occupied with Indian affairs, and the war with France had emphasized the importance of native friendship and support. *For some time a plan had been afoot to assure the Indians of the crown's good intentions by removing a principal cause of Indian discontent - white intrusion on Indian lands*. This plan culminated in the publication of a royal proclamation on 7 October 1763."[289] [Emphasis added.]

K.M. Narvey describes the protection of Indian lands under the Royal Proclamation as follows:

> "...all lands in the possession of the Indians as their hunting grounds were intended to be *ipso facto* reserved to them...until ceded or purchased by competent authority."[290]

As confirmed in *Le Chef Max "One-Onti" Gros-Louis* v. *La Societé de développement de la Baie James*[291] by Malouf J. of Québec's Superior Court, "consent"[292] was the basis

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[286] *R.* v. *Sioui*, [1990] 1 S.C.R. 1025, at 1064.

[287] Id., at 1064-1065.

[288] *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85 (S.C.C.) at 131.

[289] B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" in M. Boldt and J.A. Long, *The Quest for Justice [:] Aboriginal Peoples and Aboriginal Rights* (Toronto: Univ. of Toronto Press, 1985) 114 at 120.

[290] K.M. Narvey, *The Royal Proclamation of 7 October 1763, the Common Law, and Native Rights to Land within the Territory Granted to the Hudson's Bay Company*, (1973-74) 38 Sask. L. Rev. 123 at 134.

[291] *Le Chef Max "One-Onti" Gros-Louis* v. *La Societé de développement de la Baie James*, [1974] R.P. 38.

[292] For an interesting discussion on the various forms of "consent", see generally D. Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, (1994) 80 Virginia L. Rev. 403.

of British Imperial policy with Aboriginal peoples:

> "C'était la politique de la Couronne Impériale d'entrer dans des ententes avec les Indiens quand elle avait besoin de terres pour la colonisation de colons blancs."[293]

There is no doubt in reading the Royal Proclamation that the notion of cession of Aboriginal lands was a substantially qualified one. At least in times of peace, it was qualified by the principle of consent. As D. Sanders describes:

> "For Canada the treaty policy became established in the Royal Proclamation of 1763. The Proclamation assumed colonial jurisdiction over Indian areas and described the tribes as living under the protection of the Crown. *Yet the only methodology of change described in the Proclamation was consensual.*"[294] [Emphasis added.]

The notion of "cession" of Aboriginal lands was also qualified by the primary objective of providing security to and protection of Indians in their territory. In this regard, the *Royal Proclamation of 1763* provides:

> "And whereas *it is just and reasonable, and essential to our Interest, and the Security of our Colonies*, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, *should not be molested or disturbed*[295] *in the Possession* of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds." [Emphasis added.]

And in a further paragraph of the Royal Proclamation, the obligation to safeguard Indian Nations or Tribes from "great Frauds and Abuses" is highlighted:

> "And whereas *great Frauds and Abuses have been committed in purchasing Lands of the Indians*, to the great Prejudice of our Interest, and to the great Dissatisfaction of the said Indians; In order, therefore, *to prevent such Irregularities for the future*, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with Advice of our Privy Council *strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians*, within those parts of our Colonies where, We have thought proper to allow Settlement; but 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 public Meeting or Assembly of the said Indians*, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie;..." [Emphasis added.]

The obligation to accept cessions or engage in purchases in the context of ensuring the protection and security of Aboriginal peoples was and continues to be an essential component of the Royal Proclamation.[296] Despite the contention over the territorial scope of the

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[293] Id. at 60. Unofficial English translation: "It was the policy of the Imperial Crown to enter into agreements with the Indians when it needed lands for the colonization of White settlers."

[294] D. Sanders, *The Rights of the Aboriginal Peoples of Canada*, (1983) 61 Can. Bar Rev. 314 at 335.

[295] See also Imperial *Instructions to Governor Murray*, December 7, 1763, reproduced in A. Shortt and A. Doughty, *Documents Relating to the Constitutional History of Canada 1759-1791*, 2nd ed. (Ottawa: King's Printer, 1918), at 145, where it is provided: "And you are upon no account to molest or disturb them in the possession of such parts of the said province as they at present occupy or possess..." Quoted in *Chef Max "One-Onti" Gros-Louis* v. *Societé de développement de la Baie James*, [1974] R.P. 38 (Québec S.C.) at 60.

[296] Not all legal commentators view the prohibition to alienate Aboriginal lands (except to the Crown) as a protective measure in favour of the Aboriginal peoples concerned. See R. Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, (1983) 57 So. Calif. L. Rev. 1, at 3, n. 5: "...even if Indian tribes never went to war, the Doctrine of Discovery effectively regarded them as conquered anyway, and their property rights were diminished to the extent that they could only alienate their lands to the 'discovering' European sovereign...European

Proclamation,[297] it is important to emphasize that obligations or restrictions in favour of Aboriginal peoples consistent with those that are included in this "Indian Bill of Rights[298]" have also been reflected in other Imperial[299] instruments applicable both in and outside Canada.

For example, similar prohibitions and restrictions were also reflected in the Instructions received by negotiators of the British Crown in other parts of the British Commonwealth. In the Instructions received by Captain Hobson, the negotiator for the British Crown, from Lord Normanby, the Secretary of State for War and Colonies, dated August 14, 1839, it is provided:

> "All dealings with the Aborigines for their Lands must be conducted on the same *principles of sincerity, justice, and good faith* as must govern your transactions with them for the recognition of Her Majesty's Sovereignty in the Islands. Nor is this all. *They must not be permitted to enter into any Contracts in which they might be the ignorant and unintentional authors of injuries to themselves. You will not, for example, purchase from them any Territory, the retention of which by them would be essential, or highly conducive, to their own comfort, safety or subsistence.* The acquisition of Land by the Crown for the future Settlement of British Subjects *must be confined to such Districts as the Natives can alienate without distress or serious inconvenience to themselves.* To secure the observance of this rule will be one of the first duties of their official protector."[300] [Emphasis added.]

As L. Heinemann confirms, the term "extinguishment" is not used in the Royal Proclamation:

> "[G]overnments and courts unilaterally developed the concept that it was possible to extinguish or put out [aboriginal] title which, in Canada, was referred to as 'Indian title'. *This concept is neither spelled out nor is the terminology used in the Royal Proclamation.* The *Proclamation* simply speaks of Indian lands and states that Indians can choose to sell their lands to the Crown under certain conditions. *These provisions were designed to*

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colonizing nations imposed a trade monopoly on Indian land sales. The Indians' ability to engage in multilateral relations with other sovereign powers, an important aspect of tribal political sovereignty , was thereby diminished without the consent of the tribes."

[297] J. Woodward, *Native Law* (Toronto: Carswell, 1989) at 76 provides: "...Canadian law is very unsettled as to the territorial scope of the Proclamation. It has been held inapplicable to Rupert's Land - the territories held in 1763 by the Hudson's Bay Company. It has been said [by Judson J. in *Calder*] to be inapplicable to British Columbia. On the other hand, Professor Slattery has said that the Proclamation applies to any North American territories acquired by Britain after 1763. By this view, Rupert's Land and British Columbia have become subject to the Proclamation upon their full acquisition by the Crown." For Canadian cases pertaining to the territorial application of the Proclamation, see B. Clark, *Native Liberty, Crown Sovereignty*, *supra*, note 283, at 75, n. 47. See also R. Pugh, *Are Northern Lands Reserved for the Indians?*, (1982), 60 Can. Bar Rev. 36, where it is said that areas in which aboriginal title persists in the Northwest Territories are lands reserved for the Indians by the Royal Proclamation of 1763.

[298] *St. Catherines Milling and Lumber Co. v. The Queen*, (1887), 13 S.C.R. 577, at 652, per Gwynne J.

[299] See, for example, the mandatory terms of the *Royal Commission of Governor Seymour of British Columbia*, 11 January 1864, Entry Books Series II no. 18, Commissions & Colonial Office Records (381-18 pro London) Public Archives of Canada microform reel 890, 106, at 141-2, cited in B. Clark, *Native Liberty, Crown Sovereignty*, *supra*, 283, at 62: "XXVI. And it is Our further will and pleasure...that you do especially take care to *protect [the Indians] in their Persons and in the Free Enjoyment of their Possessions*, and that you do by all lawful means *prevent and restrain all Violence and Injustice which in any manner be practiced or attempted against them.*" [Emphasis added.] See also supplemental "reminders" in the royal commission and set of instructions to James Murray, governor of Quebec, on 7 December 1763: "Article 61...You are upon no account to molest or disturb [the Indians] in the Possession of such Parts of the said Province as they at present occupy or possess.", cited in B. Clark, *supra*, at 77, 93 and found in A. Shortt and A. Doughty, *Documents Relating to the Constitutional History of Canada 1759-1791*, 2nd ed. (Ottawa: King's Printer, 1918), vol. 1.

[300] Normanby to Hobson, August 14-15, 1839, CO 209 4, pp. 251-281, cited in I. Brownlie (F.M. Brookfield, ed.), *Treaties and Indigenous Peoples [:] The Robb Lectures 1991* (Oxford: Clarendon Press, 1992) at 34. Lord Normanby's Instructions are also cited in the *New Zealand Maori Council* case, [1987] 1 N.Z.L.R. at 682 (per Richardson J.) and 692-3 (Somers J.): I. Brownlie, *supra*, at 31, n. 5.

protect Indian rights, not to extinguish them."[301] [Emphasis added.]

In interpreting the Aboriginal provisions of the Royal Proclamation, it is important to apply the judicial rules of interpretation established by the Supreme Court of Canada in *Nowegijick* v. *The Queen*.[302] In view of the broad constitutional powers included in the royal prerogative at the time of the Royal Proclamation, the Proclamation is judicially considered to have the force of a statute in Canada.[303] Consequently, the same liberal rules of interpretation in favour of Aboriginal peoples must be applied to the Proclamation (at least the Aboriginal provisions) as are generally applicable to statutes relating to Aboriginal peoples.[304] If the same rules of judicial interpretation were not applied, the Proclamation would be denied the full effect of a statute in Canada.

In *Mitchell* v. *Peguis Indian Band*, Dickson C.J. comments on the interpretative principles in *Nowegijick* and their application to statutes as follows:

> "The *Nowegijick* principles must be understood in the context of this Court's sensitivity to the historical and continuing status of aboriginal peoples in Canadian society...*[T]he liberal interpretative approach applies to any statute relating to Indians, even if the relationship thereby affected is a private one.* Underlying *Nowegijick* is an appreciation of societal responsibility and a concern with remedying disadvantage, if only in the somewhat marginal context of treaty and statutory interpretation."[305] [Emphasis added.]

In *Mitchell*, LaForest J. indicates that he "does not find it particularly helpful to engage in speculation as to how Indians may be taken to understand a given provision" in a statute.[306] However, LaForest J. elaborates on the interpretive approach to be taken:

> "...it is clear that in the interpretation of any statutory enactment dealing with Indians,...it is appropriate to *interpret in a broad manner provisions that are aimed at maintaining Indian rights*, and to *interpret narrowly provisions aimed at limiting or abrogating them*."[307] [Emphasis added.]

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[301] L. Heinemann, *An Investigation into the Origins and Development of the Metis Nation, the Rights of the Metis as an Aboriginal People, and their Relationship and Dealings with the Government of Canada* (research report prepared for the Association of Metis and Non-Status Indians, March 31, 1984, available from the Metis National Council, Ottawa), at 267.

[302] *Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29 (S.C.C.) at 36: "...treaties and *statutes* relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."

[303] See *R.* v. *Lady McMaster*, [1926] Ex. C.R. 68, at 72-73; *Easterbrook* v. *The King*, [1931] S.C.R. 210 at 214-215, 217-218, affirming [1929] Ex. C.R. 28, at 29-30; *R.* v. *White and Bob*, (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), per Norris J.A., at 636, 644; *R.* v. *Isaac*, (1975), 13 N.S.R. (2d) 460, per MacKeigan C.J., at 478, per Cooper J.A., at 496; *Calder* v. *A.-G. British Columbia*, [1973] S.C.R. 313, per Hall J. at 394-395; *R.* v. *George*, [1964] 1 O.R. 24 (Ont. High Court), where McRuer C.J.H.C. held: "Since the Proclamation of 1763 has the force of a statute, I am satisfied that whatever power the Parliament of Canada may have to interfere with the treaty rights of the Indians, *the rights conferred on them by the Proclamation cannot in any case be abrogated, abridged or infringed upon by an order-in-council passed under the Migratory Birds Convention Act.*" [Emphasis added.] This statement is cited by Cartwright J. (dissenting) in *R.* v. *George*, [1966] S.C.R. 267, at 274, when the Supreme Court of Canada reversed on other grounds the decision of McRuer C.J.H.C.

[304] Judicial rules of interpretation require that "ambiguities in the interpretation of treaties and statutes relating to Indians...be resolved in favour of the Indians...": *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85, at 98 (per Dickson C.J.), affirming *Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29. In *Mitchell*, La Forest J. at 143 qualifies the rule that statutory ambiguities must be resolved in favour of the Indians, by indicating that: "It is also necessary to reconcile any given interpretation with the policies the Act is trying to promote." However, in the case of the Royal Proclamation, the overall intention to safeguard Aboriginal peoples and their lands is clear. Therefore, La Forest J.'s qualified approach to judicial interpretation of ambiguities in any statute relating to Aboriginal peoples would not lead to a different conclusion than if the rule cited by Dickson C.J. were to be applied.

[305] *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85, at 99.

[306] Id., at 143. La Forest J. immediately adds: "Rather, I think the approach must be to read the Act concerned with a view to elucidating what it was that Parliament wished to effect in enacting the particular section in question. This approach is not a jettisoning of the liberal interpretive method."

[307] Id.

If the above judicial rules of interpretation were applied to the Royal Proclamation, these rules would confirm: i) the intention in the Proclamation to recognize the wide-ranging rights of Aboriginal peoples in the different regions of Canada; ii) the protective nature of the overall regime in the Proclamation applicable to Aboriginal peoples; iii) the fiduciary nature of the Crown's obligations to Aboriginal peoples in Canada; iv) in particular, the limitations on any purchase or cession of Aboriginal lands, so as to ensure that such transactions are in the best interests of the people concerned; and v) the principle of Aboriginal consent underlying any obtention by the Crown of Aboriginal lands and resources.

While a number of these aspects have already been addressed in this study, others will be dealt with below.

2.3 Universal Application of Proclamation Policies[308]

There is still some controversy as to whether the Royal Proclamation applies everywhere in Canada. As J. Woodward puts it:

> "...Canadian law is very unsettled as to the territorial scope of the Proclamation. It has been held inapplicable to Rupert's Land - the territories held in 1763 by the Hudson's Bay Company.[309] It has been said to be inapplicable to British Columbia.[310] On the other hand, Professor Slattery has said that the Proclamation applies to any North American territories acquired by Britain after 1763. By this view, Rupert's Land and British Columbia have become subject to the Proclamation upon their full acquisition by

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[308] For a more narrow and technical analysis of the meaning and scope of the *Royal Proclamation of 1763*, see J. Beaulieu *et al.*, *La Proclamation royale de 1763: le droit refait l'histoire*, (1989) 49 R. du B. 317; G. Emery, *Réflexions sur le sens et la portée au Québec des articles 25, 35, et 37 de la Loi constitutionnelle de 1982*, (1984) 25 Cahiers de Droit 145; J. Stagg, *Anglo-Indian Relations in North America to 1763 and an Analysis of the Royal Proclamation of 7 October 1763* (Ottawa: Research Branch Indian and Northern Affairs Canada, 1981). However, judicial rules of interpretation of statutes pertaining to Aboriginal peoples call for a broad and liberal construction that would maintain the rights of the Aboriginal peoples. Similarly, according to the doctrine of progressive interpretation (see note 332), a generous and liberal interpretation is required in determining the meaning of constitutional instruments and their provisions. It is the view of this study that the Proclamation is a constitutional instrument (see sub-heading 2.5).

[309] *Sigeareak* v. *The Queen*, [1966] S.C.R. 645 at 650, per Hall J.; however, see also K.M. Narvey, *The Royal Proclamation of 7 October 1763, the Common Law, and Native Rights to Land within the Territory Granted to the Hudson's Bay Company*, (1973-74) 38 Sask. L. Rev. 123, at 230-231, where it said that Hall J. publicly affirmed after he retired that his conclusion that the Proclamation did not apply to the territory granted by the Hudson's Bay Company had been *obiter dictum* and one with which he no longer agreed. Rather, Hall was now of the view that, upon surrender of Hudson Bay Company (HBC) lands to the Crown in 1869, the northern territory previously granted to HBC became a legal vacuum filled by the Proclamation in accordance with the *Colonial Laws Validity Act*, (1865) 28 & 29 Vict., c. 63 (Imp.). Evidence that Hall J. may have in fact changed his view, as reported by Narvey, is found in the subsequent decision of *Calder* v. *A.-G. British Columbia*, [1973] S.C.R. 313, at 395, where Hall J. provides: "[The Royal Proclamation] was a law *which followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories*. It follows, therefore, that the *Colonial Laws Validity Act* applied to make the Proclamation the law of British Columbia." See also *Re Paulette*, (1973), 42 D.L.R. (3d) 8 (N.W.T.S.C.)., at 24-25, where Morrow J. concludes that the Royal Proclamation applies to the area in N.W.T. subject to dispute in that case.

In this context, it is also important to note that the territory validly transferred to Hudson's Bay is said not to include Aboriginal territories, significantly reducing the actual size of Rupert's Land. In this regard, see K. McNeil, "Aboriginal Nations and Quebec's Boundaries: Canada Couldn't Give What It Didn't Have", *supra*, note 255, at 115: "...territory within the Hudson Bay watershed which was occupied and controlled by aboriginal nations has to be excluded from Rupert's Land."

[310] *Calder* v. *A.G. British Columbia*, (1973), 34 D.L.R. (3d) 145 at 153-156 (S.C.C.), per Judson J.; however Hall J., in the same judgement at 203-208, concluded that the Proclamation applied to British Columbia. More recently, in *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) at 226, Wallace J.A. of the British Columbia Court of Appeal concludes: "...the *Royal Proclamation, 1763* has never applied directly to British Columbia."

the Crown."[311]

In the analysis of the specific Aboriginal provisions in the Proclamation, it has already been demonstrated[312] that the Proclamation's terms clearly cover all British colonies in North America (although in some cases, the scope is more limited). Certain provisions refer specifically to the proprietary colonies (which include Rupert's Land). Further, when Rupert's Land and the North-Western Territory became part of the Dominion of Canada in 1870, the Aboriginal provisions pertaining to non-proprietary colonies became applicable at the same time.

Regardless of what position one takes on these questions, this study concludes below that the policies in the Royal Proclamation continue to have universal application in Canada,[313] whether through the Proclamation or other constitutional and statutory instruments reflecting the same equitable and protective principles. Support for this view is elaborated as follows.

At the outset, it must be emphasized that the Royal Proclamation has been judicially characterized as an "Indian Bill of Rights"[314] and a "Charter of Indian Rights"[315], and having a status analogous to the *Magna Carta*[316]. In the absence of clear language to the contrary, instruments of such a fundamental nature should be applied to all Aboriginal peoples in Canada and not solely to some Aboriginal peoples on a regional basis. Otherwise, the result would be a "checkerboard" system of rights and obligations. This would run directly counter to the established British practice of a uniform policy[317] in relation to Aboriginal peoples, their lands and territories, and basic rights.

In *Mitchel* v. *U.S.*, the U.S. Supreme Court described the universal application of the Royal Proclamation in North America as follows:

> "This proclamation was also the law of all of the North American colonies in relation to crown lands."[318]

It is important to note that the government of Canada expressly acknowledges the universal application "in this country" of the Royal Proclamation in terms of a basic declaration of Aboriginal peoples' land rights:

> "The Government see its position...as an historic evolution dating back to the *Royal Proclamation of 1763*, which, whatever differences there may be about its judicial

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[311] J. Woodward, *Native Law*, *supra*, note 297, at 76. For a view that the Proclamation applies only to Upper Canada, and not to Quebec, British Columbia, Rupert's Land, or generally to the Canadian Arctic, see O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: MacLelland & Stewart, 1992) at 188, 232.

[312] See sub-heading 2.1 *supra*.

[313] See, for example, D. Johnston, *A Theory of Crown Trust Towards Aboriginal Peoples*, (1986) 18 Ottawa L.Rev. 307, at 310: "The basic principles set forth in *The Royal Proclamation* informed all subsequent Indian-Crown dealings."; and J. Hurley, *Aboriginal Rights, the Constitution and the Marshall Court*, (1982-1983) 17 R.J.T. 403, at 412: "The Royal Proclamation of 1763 has generally marked the point of departure for judicial considerations of aboriginal rights in North America. *It is clear that the instrument articulates a uniform British policy respecting Indian territorial rights throughout North America.*" [Emphasis added.]

[314] *St. Catherines Milling and Lumber Co.* v. *The Queen*, (1887), 13 S.C.R. 577, at 652, per Gwynne J.; *Calder* v. *A.-G. British Columbia*, [1973] S.C.R. 313, at 394-395 per Hall J.

[315] *R.* v. *Sikyea*, 40 W.W.R. 494 (N.W.T. Terr. Ct.), per Sissons J.; *R.* v. *Wesley*, [1932] 4 D.L.R. 774 (Alta. C.A.) at 784 per McGillivray J.A.

[316] *Calder* v. *A.-G. British Columbia*, [1973] S.C.R. 313, at 394-395 per Hall J.

[317] In order to maintain a uniform legislative policy in relation to Aboriginal peoples, jurisdiction in relation to Aboriginal peoples under the *Constitution Act, 1867* was conferred by the Imperial Parliament at the time of Confederation on the central government in Canada.

[318] *Mitchel* v. *U.S.*, 9 Peters 711 at 748-9 (1835) (U.S.S.C.) at 756.

interpretation, *stands as a basic declaration of the Indian people's interests in land in this country*."[319] [Emphasis added.]

The federal government further acknowledges that, since 1867, it has had responsibility for applying the principles of the Royal Proclamation. In its most recent *Federal Policy for the Settlement of Native Claims*, it is provided:

> "Early in the history of British North America, the *Royal Proclamation of 1763* set out a process prohibiting settlers within its geographic area of application from acquiring lands which were occupied by Aboriginal peoples and which had not been ceded to or purchased by the Crown. *With Confederation, Canada assumed responsibility for applying this principle*."[320] [Emphasis added.]

Further, the federal government states that the early treaty-making process followed the principles set out in the Royal Proclamation:

> "In Canada, uncertainties over the nature of Aboriginal rights have *traditionally been dealt with through the signing of treaties. Following the principles set down in the Royal Proclamation of 1763*, Aboriginal rights to lands and resources have, in many cases, been purchased by the Crown before non-Native peoples moved into an area in any significant numbers."[321] [Emphasis added.]

The principles in the Royal Proclamation concerning the protection of the "several Nations or Tribes of Indians" and the limited cession of lands allowable in such context were and continue to be of universal application in what is now Canada. This is in part due to the widespread territories that the Royal Proclamation of 1763 covers. As B. Slattery provides:

> "In 1763, most of the American territories claimed by Britain were unceded lands held by native peoples...
>
> It is sometimes argued that the proclamation recognized aboriginal land rights only in the exclusive Indian territory created in the American hinterland. On this supposition, Indian title was not recognized in areas specifically excluded from the territory, such as the coastal belt east of the Appalachian mountains and the colonies of Quebec and Rupert's Land. But *the text does not support this view*. After describing the boundaries of the territory, the proclamation orders the removal of all persons who have settled either within the territory 'or upon *any other Lands*, which, not having been ceded to, or purchased by Us, are still reserved to the said Indians as aforesaid'...[Also], the ban [on colonial governors regarding the making of grants of unceded or unpurchased lands] *applies to unceded Indian lands generally, wherever they happen to be located generally*."[322] [Emphasis added.]

And Slattery concludes:

> "In brief, the proclamation recognized that lands possessed by Indians throughout British territories in America were reserved for their exclusive use unless previously ceded to the Crown. Prior to a public cession of such lands, they could not be granted away or settled. *These provisions applied not only to the Indian territory but to the full range of*

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[319] Indian and Northern Affairs Canada, *Statement Made by the Honourable Jean Chretien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People* (Ottawa: Indian Affairs and Northern Development, August 8, 1973) at 2.

[320] Indian and Northern Affairs, *Federal Policy for the Settlement of Native Claims* (Ottawa: Indian and Northern Affairs, March 1993) at 1.

[321] Id. at 2.

[322] B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" in M. Boldt and J.A. Long, *The Quest for Justice [:] Aboriginal Peoples and Aboriginal Rights* (Toronto: Univ. of Toronto Press, 1985) 114 at 121.

British colonies in North America...In this respect, Rupert's Land, Quebec[323]*, Nova Scotia, Newfoundland, the Thirteen Colonies, and the Floridas were brought under a uniform legal regime."*[324] [Emphasis added.]

In regard to the controversy concerning present British Columbia[325] and the Yukon,

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[323] See P. Dionne, *Les postulats de la Commission Dorion et le titre aborigène au Québec: vingt ans après*, (1991) 51 R. du B. 127, where the author explains in detail why the Dorion Commission Report [*Rapport de la Commission sur l'intégrité du territoire du Québec* (Québec: Éditeur officiel, 1971), vol. 4.1] in 1971 was wrong to conclude that the Royal Proclamation did not apply to the colony of Quebec as it existed in 1763. Dionne cites the following cases in support of the view that the Proclamation applied within the colonies: *Worcester* v. *Georgia*, (1832) 6 Pet. 515, at 548; *Mitchel* v. *U.S.*, (1835) 9 Pet. 711, at 746-747, 756; *St. Catherines Milling and Lumber Co.* v. *The Queen*, (1888) 14 A.C. 46, at 53 (P.C.), and in the Supreme Court of Canada, (1887) 13 S.C.R. 577, at 647 (Taschereau J.), at 651-652 (Gwynne J.); *Calder* v. *A.G. B.C.*, [1973] S.C.R. 313, at 323-324 (Judson J.); *R.* v. *White* and *Bob*, (1964) 52 W.W.R. 193, at 226-227 (B.C.C.A.); *R.* v. *Isaac*, (1975) 13 N.S.R. (2d) 460, at 478.

The author indicates, however, that the courts in Quebec have been divided in this respect: cases *for* applying the Proclamation within the colony of Quebec include: *Corinthe* v. *Ecclesiastics of the Seminary of St. Sulpice*, (1910) 38 C.S. 268, at 273 (Hutchinson J.); *Easterbrook* v. *The King*, [1931] S.C.R. 210, at 214; *A.G. Québec* v. *Adams*, [1985] C.S.P. 1001, at 1008 (Barrette J.) (Quebec Superior Court); *R.* v. *Sioui*, [1990] 1 S.C.R. 1025, at 1052; cases *against* applying the Proclamation within the colony of Quebec include: *R.* v. *Bonhomme*, (1917) 38 D.L.R. 647, at 650 (Exchequer Court), confirmed without reasons by Supreme Court of Canada in (1918) 59 S.C.R. 679; *A.G. Québec* v. *Dumont*, Hauterive, 30 Nov. 1977, C.S. 655-05-000330-76; *R.* v. *Smith*, [1981] 1 C.F. 346, at 379 (Le Dain J.); *R.* v. *Côté*, [1988] R.J.Q. 1969, at 1975 (Barrière J.) (Prov. Ct.); *Algonquins of Barrière Lake* v. *Lise Bacon*, [1990] R.J.Q. 1144 (Frenette J.) (Superior Ct.). It is worth noting that the same paragraph in *R.* v. *Sioui*, [1990] 1 S.C.R. 1025, at 1052, that Dionne cites in favour of the Proclamation's application within the colony of Quebec is cited by Beaudoin J. of the Quebec Court of Appeal in *Frank Côté* v. *The Queen*, [1993] R.J.Q. 1350, at 1363, to limit the Proclamation's scope within the same area. Yet in another recent case, *Adams* v. *The Queen*, [1993] R.J.Q. 1011, at 1021, Beauregard J. of the Quebec Court of Appeal applies the same paragraph in the *Sioui* case in a liberal manner so as not to limit the Proclamation's scope; and Rothman J. (dissenting for other reasons), at p. 1035, also applied the Proclamation to lands within the colony of Quebec (as had been held by the trial judge of the Superior Court).

[324] B. Slattery, *The Hidden Constitution: Aboriginal Rights in Canada*, *supra*, note 322, at 122. At note 31, Slattery cites in support of this view the following cases which he states is the "dominant judicial trend": in relation to the Maritime provinces, *Warman* v. *Francis*, (1958) 20 D.L.R. (2d) 627 at 634 (N.B.S.C. Q.B. Div.); *R.* v. *Isaac*, (1975) 13 N.S.R. (2d) 460 at 478 (N.S.S.C., App. Div.); *R.* v. *Smith*, (1980) 113 D.L.R. (3d) 522 at 528, 548-50 (F.C.A.). See also *Mitchel* v. *U.S.*, 9 Peters 711 at 748-9 (1835) (U.S.S.C.) at 756: "This proclamation was also the law of all of the North American colonies in relation to crown lands."; and *St. Catherine's Milling and Lumber Co.* v. *The Queen*, (1888) 14 A.C. 46 at 54 (P.C.). Slattery adds in note 31 that the "Supreme Court of Canada stated in *Sigeareak* v. *The Queen*, [1966] S.C.R. 645 at 649-50 that the proclamation did not apply to Rupert's Land, but that statement should probably be read as referring only to the extent of the Indian Territory, from which Rupert's Land was clearly excluded. The proclamation's land purchase provisions were not at issue."

[325] Article 13 of the British Columbia Terms of Union (R.S.C. 1985, App. II, No. 10, included as part of the Constitution of Canada in Item 4 of the Schedule to the *Constitution Act, 1982*) provides: "The charge of the Indians, and the trusteeship and management of the lands reserved for their use and benefit, shall be assumed by the Dominion Government, and *a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued by the Dominion Government after the Union.*[new para.] To carry out such policy, *tracts of land of such extent as it has hitherto been the practice of the British Columbia Government to appropriate for that purpose, shall from time to time be conveyed by the Local Government to the Dominion Government in trust for the use and benefit of the Indians* on application of the Dominion Government; and in case of disagreement between the two Governments respecting the quantity of such tracts of land to be so granted, the matter shall be referred for the decision of the Secretary of State for the Colonies." [Emphasis added.]

In the view of this study, it would be erroneous to interpret the meaning of Article 13 of the British Columbia Terms of Union without taking into account the constitutional context that existed at that time. Article 13 is not intended to represent a comprehensive statement of British policy applicable to British Columbia. The British Crown had already adopted a uniform policy in respect to Aboriginal peoples, as reflected in such constitutional instruments as the *Royal Proclamation of 1763* and the *Rupert's Land and North-Western Territory Order*, 1870 (and accompanying terms and conditions in favour of Aboriginal peoples). These constitutional instruments could not be amended by Parliament or the provincial legislatures and, therefore, served to ensure that the British constitutional policy of safeguarding Aboriginal peoples and their rights would persist.

It is in this light that the expression "a policy as liberal as that hitherto pursued by the British Columbia Government shall be continued" (Article 13) should be interpreted. In addition, Article 13 provides for some intervention by the British Secretary of State for the Colonies, in order to resolve "disagreement between the two Governments" regarding quantities of land reserved for the Indians. This is further evidence that constitutional constraints on the power of governments within the Dominion of Canada were intended to continue, as in the *Royal Proclamation of 1763*. Moreover, the particular power of the Secretary of State to decide disagreements can be viewed as an additional means of ensuring that uniformity of policy towards Indians would endure.

Slattery states that the better view is that the uniform policies reflected in the Royal Proclamation were intended to apply to these western regions:

> "*The purpose of the proclamation was to establish a uniform set of rules governing Indian lands throughout British territories in North America.* There is no reason to think that Indian lands located in territories acquired after 1763 needed less protection than those acquired earlier."[326] [Emphasis added.]

The view that the provisions of the Royal Proclamation in relation to Aboriginal peoples would have prospective application to new British colonies after 1763 is fully consistent with constitutional and other statutory rules of interpretation. In regard to the territorial scope of a statutory instrument, P.A. Côté indicates that the general rule is that the instrument would be applied to the full boundaries of the juridiction in question:

> "The legislator is presumed to intend a territorial operation of the statute that *coincides with the boundaries of his jurisdiction*. But the legislator, within the limits of his sovereignty, may make exceptions to this general principle."[327] [Emphasis added.]

According to the above rule and subject to any explicit exceptions[328], the Royal Proclamation would be applied to all of the British colonies in North America. Since the law is always speaking, any new British colonies in North America would also be subject to the terms of the Proclamation unless specific exceptions were provided through a subsequent and valid

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See B. Clark, *Native Liberty, Crown Sovereignty*, *supra*, note 283, at 101-105, where imperial legislation is cited in support of the view that the Royal Proclamation applied to British Columbia. And at 115, Clark states why the liberal policy referred to had to be that of the Imperial government: "The 'policy..pursued' by the former colonial government in British Columbia meant the official policy established for legal purposes by the imperial government. British Columbia before the union had not achieved 'responsible government' let alone sovereignty." For a useful description of the legal history pertaining to Article 13 of the Terms of Union, see N.D. Bankes, "Indian Resource Rights and Constitutional Enactments in Western Canada, 1871-1930" in L.A. Knafla, (ed.), *Law and Justice in a New Land [:] Essays in Western Canadian Legal History* (Toronto: Carswell, 1986) 129 at 134-144.

See also B. Clark, *Indian Title in Canada*, *supra*, note 236, at 111-112, where he comments on the Supreme Court of Canada's ruling in the *Calder* case as follows: "It went quite unremarked that the Indian territory (created by the *Proclamation*) was consistently referred to in imperial legislation as including British Columbia. The view of the imperial Parliament regarding the extent of the "Indian Territory", which one might have thought determinative, was not canvassed." Imperial legislation cited by Clark in this regard include, *inter alia*: *Government of British Columbia Act*, 1858 (21 & 22 Vict.), c. 99; *An Act to make further Provision for the Regulation of the Trade with the Indians, and for the Administration of Justice in the North-western Territories of America*, 1859 (22 & 23 Vict.), c. 26; *British Columbia Boundaries Act*, 1863 (26 & 27 Vict.), c. 83.

For a view that the Royal Proclamation has never applied to British Columbia, see *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) at 226-227, per Wallace J.A. The learned justice indicated that he was in agreement with the view on the Proclamation expressed in the lower court by McEachern C.J. In this regard, see *Delgamuukw* v. *British Columbia*, [1991] 3 W.W.R. 97 (B.C. S.C.), at 211-231. However, in regard to the view that McEachern C.J.'s purposive analysis is fundamentally lacking, see text accompanying note 275 *supra* and subsequent comments in text.

At 230, McEachern C.J. refers to *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85 and states: "...LaForest J. suggests different principles may apply as between treaties and statutes. He expressly disagrees that statutory interpretation favourable to Indians must always be reached." However, LaForest J. provides in *Mitchell* at 143: "...it is clear that in the interpretation of any statutory enactment dealing with Indians,...it is appropriate to *interpret in a broad manner provisions that are aimed at maintaining Indian rights*, and to *interpret narrowly provisions aimed at limiting or abrogating them.*" [Emphasis added.]

[326] B. Slattery, *The Hidden Constitution: Aboriginal Rights in Canada*, *supra*, note 322, at 122.

[327] P.A. Côté, *The Interpretation of Legislation in Canada* (Cowansville, Québec: Éditions Yvon Blais, 1984) at 147.

[328] It is not clear that there are any exceptions to the Proclamation - at least any that have prevailed since the turn of the century. For example, if Rupert's Land was in fact excluded from application of the Proclamation (which is not clear), the Proclamation's terms would have become applicable once Rupert's Land was transferred to Canada in 1870. This and other aspects are addressed further below.

Imperial statute.[329] For example, even if the Proclamation were to be found to not originally apply to British Columbia in 1763, this constitutional instrument should be accorded a prospective application. Such a uniform approach is reinforced by the repeated judicial characterization of the Proclamation as an "Indian Bill of Rights", a "Charter of Indian Rights" and analogous to the *Magna Carta*.[330]

Since the Proclamation is a constitutional instrument,[331] the "doctrine of progressive interpretation" should be applied to ensure a flexible interpretation that can be adapted to changing and unforeseen conditions.[332] The doctrine of progressive interpretation is aptly described in *Edwards* v. *A.G. Canada* in Lord Sankey's metaphor of "a living tree capable of growth and expansion within its natural limits".[333] Lord Sankey indicated that constitutional provisions should receive a "broad and liberal interpretation" and not be "cut down" by "a narrow and technical construction".[334]

This approach would also be consistent with judicial rules of interpretation in Canada pertaining to statutes containing aboriginal provisions. Since the Proclamation is said to have the force of a statute, the judicial rules pertaining to statutory instruments relating to Aboriginal peoples must be applied here. Since this aspect has already been addressed in this study,[335] it will not be repeated here.[336]

That a uniform set of principles was established by the British Crown is acknowledged by the Canadian Parliament in the joint "Addresses" which preceded the Imperial *Rupert's Land*[337] *and North-Western Territory*[338] *Order*,[339] adopted in accordance with s. 146[340]

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[329] See also J.E. Côté, *The Reception of English Law*, (1977), 15 Alta. L. Rev. 29 at 34: "One matter which has received little attention is whether Imperial statutes passed to deal with all the colonies apply to colonies acquired *after* the passage of the Acts in question (whether by conquest or settlement). *There is some authority which suggests that they do, after all, the contrary result would be most anomalous.*" [Emphasis added.] In this regard, it is worth noting that the Royal Proclamation is said to have the force and effect of an Imperial statute: see, for example, *Calder* v. *A.G. British Columbia*, [1973] S.C.R. 313 (S.C.C.) at 394-395 per Hall J.

[330] See text *supra* under this sub-heading.

[331] This conclusion is reached under sub-heading 2.5 *infra*.

[332] P. Hogg, *Constitutional Law of Canada*, (Toronto: Carswell, 1992), vol. 2, at 33-17: "It is never seriously doubted that progressive interpretation is necessary and desirable in order to adapt the Constitution to facts that did not exist and could not have been foreseen at the time when it was written."

[333] *Edwards* v. *A.G. Canada*, [1930] A.C. 124 at 136. Cited in P. Hogg, *Constitutional Law of Canada*, *supra*, note 332, vol. 2, at 33-17.

[334] This point is highlighted in P. Hogg, *Constitutional Law of Canada*, *supra*, note 332, vol. 2, at 33-19.

[335] See text accompanying note 304, *supra*.

[336] However, it is worth noting again the rules laid down in *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85, at 99, by Dickson C.J. in regard to statutes: "The *Nowegijick* principles must be understood in the context of this Court's sensitivity to the historical and continuing status of aboriginal peoples in Canadian society...*[T]he liberal interpretative approach applies to any statute relating to Indians, even if the relationship thereby affected is a private one.* Underlying *Nowegijick* is an appreciation of societal responsibility and a concern with remedying disadvantage, if only in the somewhat marginal context of treaty and statutory interpretation." [Emphasis added.]

In addition, LaForest J. elaborates on the interpretive approach to be taken at 143: "...it is clear that in the interpretation of any statutory enactment dealing with Indians,...it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them."

[337] It is not clear what were the boundaries of Rupert's Land, the expansive territory granted by King Charles II to the Hudson's Bay Company by the Royal Charter of May 2, 1670. In K. McNeil, *Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations* (Saskatoon: University of Saskatchewan Native Law Centre, 1982), at 2, it is said that Rupert's Land may include the whole of the Hudson drainage basin, but "any territory within the Hudson watershed that was possessed by France prior to the cession of Canada to Great Britain in 1763 must be excluded from Rupert's Land." Under this definition, McNeil indicates (at p. 3) that Rupert's Land would embrace "portions of present-day Quebec, Ontario, Manitoba, Saskatchewan, and possibly Alberta, as well as the eastern Northwest Territories."

of the *Constitution Act, 1867*. The Order was made on terms and conditions that included those contained in the two "Addresses"[341] of Parliament.[342] The Addresses, which are included in the Order as Schedule (A) and Schedule (B) respectively, confirm the Canadian government's positive duty to protect the "Indian tribes" concerned and their interests, and settle their "claims" in conformity with "equitable principles" and in a timely manner:

> "...*upon the transference of the territories in question* to the Canadian government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled *in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines...*"[343] [December 1867 Address]

> "That *upon the transference of the territories in question* to the Canadian Government *it will be our duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer...*"[344] [May 1869 Address] [Emphasis added.]

Schedule (B) and the Order itself also included a further stipulation that reinforces the affirmative duty of the government of Canada to settle land claims. This constitutional duty had to be carried

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However, in a subsequent analysis, McNeil has altered his view in order to appropriately recognize and take into account the rights of Aboriginal peoples in regard to their traditional territories. See K. McNeil, "Aboriginal Nations and Quebec's Boundaries: Canada Couldn't Give What It Didn't Have", *supra*, note 255, at 260-261, n. 35: "...I thought that Rupert's Land could be defined by subtracting the territory occupied and controlled by France prior to 1763 from the Hudson watershed. In light of *Simon* and *Sioui*, and my own reassessment of the colonial attitude implicit in my earlier view, I now realize that *territories occupied and controlled by aboriginal nations must be subtracted as well.*" [Emphasis added.]

[338] See K. McNeil, *Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations*, *supra*, note 337, at 3, where the "North-Western Territory" is said to comprise British Territory adjacent to Rupert's Land. McNeil cites the *Parliamentary Papers, House of Commons (U.K.)*, No. 547 of 1842, p. 22 in describing the North-Western Territory as "...all such parts of North America to the northward and the westward of the lands and territories belonging to the United States of America as shall not form part of any of our provinces in North America, or of any lands or territories belonging to the said United States of America, or to any European government, state or power." At 4-5, McNeil adds: "The North-Western Territories (or Territory) were therefore defined by exclusion - they embraced all British territory north of the United States and north and west of Canada which was not part of Rupert's Land, British Columbia or Vancouver Island." See also *Rupert's Land and North-Western Territory Order*, Schedule (C), Appendix, where the Hudson's Bay posts are listed both in Rupert's Land and in the North-Western Territory.

[339] R.S.C. 1985, App. II, No. 9, confirmed as part of the Constitution of Canada in Item 3 of the Schedule to the *Constitution Act, 1982*.

[340] Section 146 provides: "It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council,...on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-Western Territory, or either of them, into the Union, *on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve*, subject to the provisions of this Act: and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland." [Emphasis added.]

[341] In regard to the constitutionally binding "addresses", B. Clark, *supra*, note 2829, at 112-113, provides: "...additional constitutionally binding 'Terms and Conditions' within the meaning of section 146 of the Constitution Act, 1867 were set out in schedules to this order in council of 23 June 1870. Schedule A was the Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada, dated December 1867...[A] second and revised "Address" [Schedule B] [was] from the Senate and House of Commons dated 31 May 1869."

[342] J. Woodward, *Native Law* (Toronto: Carswell, 1989), at 78-79. See also *Montana Indian Band* v. *Canada*, (1991) 120 N.R. 200 (Fed. C.A.) at 203, where it is indicated that the Aboriginal parties are seeking a declaration from the Federal Court "that the undertaking given by Canada [in the joint Address of Parliament] in 1869 was incorporated by reference in the *Rupert's Land Order* of 1870 and is therefore part of the *Constitution of Canada*".

[343] *Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada*, Schedule (A), R.S.C. 1985, App. II, No. 9, 8 at 8-9.

[344] *Address*, Schedule (B), R.S.C. 1985, App. II, No. 9, 14 at 16.

out "in communication with the Imperial government":[345]

> "Any claims of Indians to compensation[346] for lands required for purposes of settlement shall be disposed of by the Canadian Government *in communication with the Imperial Government...*"[347] [Emphasis added.]

Not only was the Canadian government constitutionally obligated to satisfy Aboriginal claims "in communication with the Imperial Government", but it was further obliged to take the "necessary directions" from one of the Queen's principal Secretaries of State. In this regard, the Order provides at Term 15:

> "The Governor in Council is authorized and empowered to arrange any details that may be necessary to carry out the above terms and conditions. [new para.] *And the Right Honourable Earl Granville, one of Her Majesty's principal Secretaries of State, is to give the necessary directions herein accordingly.*"[348] [Emphasis added.]

On a literal reading of the *Order* alone, K. McNeil points out:

> "On its face, then, the *Rupert's Land Order* is clear the North-Western Territory was to be admitted on the terms and conditions expressed in the 1867 Address, and Rupert's Land was to be admitted on the terms and conditions enumerated in the Order itself."[349]

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[345] This point is also made in D. Sanders, "Remembering Deskaheh: Indigenous Peoples and International Law" in I. Cotler & F.P. Eliadis, (eds.), *International Human... and Practice* (Montreal: Canadian Human Rights Foundation, 1992) 485 at 486.

[346] In view of the recognition in the *Royal Proclamation of 1763* of the importance of land to Aboriginal peoples, it cannot be assumed that the term "compensation", as used in the Rupert's Land Order, refers solely to financial compensation. Nor would the judicial rules in regard to statutory provisions pertaining to Aboriginal peoples, or the rules of progressive interpretation of constitutional provisions, allow such a narrow construction. Moreover, since the time of the Royal Proclamation, the established practice of the Crown has been to satisfy aboriginal claims through "compensation" that included primarily the recognition or restitution of Aboriginal lands and not simply financial payments. For further discussion of the meaning of "compensation" in regard to Aboriginal lands, see note 1390 *infra*.

See also s. 2.14 of the James Bay and Northern Quebec Agreement, where it is provided in regard to Aboriginal third parties that "Québec undertakes to negotiate with other Indians or Inuit who are not entitled to participate in the *compensation* and benefits of the present Agreement". [Emphasis added.] The Agreement was entered into pursuant to the obligations under the 1870 *Rupert's Land and North-Western Territory Order* and the *Quebec Boundaries Extension Act, 1912*, and "compensation" under the Agreement clearly includes lands.

[347] Schedule (B), R.S.C. 1985, App. II, No. 9, at 12. The same provision is also included as Term 14 of the Order, as well as in Schedule (C) (Deed of Surrender). It should be noted that Mahoney J. in *Hamlet of Baker Lake* v. *Minister of Indian Affairs*, (1979) 107 D.L.R. (3d) 513 at 549 declares that Term 14 of the *Order* "neither created nor extinguished rights or obligations *vis-à-vis* the aborigines, nor did it, through s. 146 of the *British North America Act, 1867* limit the legislative competence of Parliament." [Emphasis in original.] With respect, Mahoney J. seriously erred in this regard. The learned judge never considered Term 14 in the context of all the relevant ...sions attached to the *Order*, especially in the two Addresses of the Canadian Parliament. Nor did Mr. ... reasoning to support his conclusions in relation to his interpretation of Term 14.

[348] If the Canadian government were to fail to ... unication with the Imperial government concerning the satisfying of Aboriginal claims, it would be of course more difficult for the Secretary of State to provide the "necessary directions". As discussed later in this study, such omissions appear to have occurred in regard to satisfying Metis claims in the North-West (see discussion under sub-heading 3.1) and in regard to the Aboriginal peoples in northern Québec (see sub-heading 7.1 *infra* and the case study of the James Bay and Northern Québec Agreement, *infra*, heading 11).

[349] K. McNeil, *Native Claims in Rupert's Land and the North-West... Territory: Canada's Constitutional Obligations*, *supra*, note 337, at 11. The author is referring to the specific text ... *s Land and North-Western Territory Order*, *supra*, at 4. McNeil does provide in the conclusion to his article ... that "it may be that the 'equitable principles' condition applies to both territories."

In *Chef Max "One-Onti" Gros-Louis* v. *Societé de dév...ement de la Baie James*, [1974] R.P. 38 at 64, Malouf J. of Québec's Superior Court concludes that, in the transfer of Rupert's Land by the Imperial government, the Canadian government undertook to satisfy the claims of Indian tribes in conformity with equitable principles (as indicated in the 1867 Address by the Canadian Parliament). However, the Québec Court of Appeal took the position, without further explanation, that the 1867 Address did not apply to Rupert's Land: see *Societé de développement de la Baie James* v. *Chief Robert*

However, there are strong arguments to suggest that the above-quoted obligations (pertaining to Aboriginal peoples) from the 1867 and 1869 Addresses in fact contemplate application in both the North-Western Territory and Rupert's Land without distinction.[350] That the December

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Kanatewat, [1975] C.A. 166 at 173.

[350] Arguments in favour of interpreting the above-mentioned obligations concerning Aboriginal peoples in the two Addresses as applying both to the North-Western Territory and to Rupert's Land, include:

i) The opening phrase in both obligations is identical, namely: "*upon the transference of the territories in question*". Moreover, the 1867 Address makes clear that those "territories" are both Rupert's Land and the North-Western Territory (see *Order*, Schedule (A), *supra*, at 8) and adds in the same paragraph that "[Canada is] willing to assume the duties and obligations of government and legislation as regards those territories." The 1869 Address repeats in exact terms the same reference to both territories and to the assumption of the related "duties and obligations" (see *Order*, Schedule (B), *supra*, at 14). See also P. Cumming & N. Mickenberg, (eds.), *Native Rights in Canada* (Toronto: Indian-Eskimo Association of Canada, 1972) at 149-150, where the phrase "territories in question" in connection with the two Addresses is said to relate to both Rupert's Land and the North-Western Territory, insofar as the Addresses deal with Aboriginal claims;

ii) According to s. 146 of the *Constitution Act, 1867*, the Queen, with the advice of the Privy Council, has the constitutional capacity to approve the admission of Rupert's Land and the North-Western Territory into the Union, "on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve". As indicated in the preamble of the *Order*, both Addresses of the Canadian Parliament were approved by the Queen. In other words, there is no need for obligations in the Addresses to be repeated in the Order itself for a constitutional duty to be created;

iii) The first joint Address by the Dominion Parliament in 1867 clearly addresses both Rupert's Land and the North-Western Territory, and the commitments made on behalf of Canada constitute conditions of transfer for both territories. It was only subsequent to the 1867 Address that the Canadian government was informed that this first Address was not sufficient.

It is true that additional measures were later taken and additional commitments subsequently made primarily pertaining to Rupert's Land. However, this does not alter the fact that Parliament's clear intention at the time that it had made the constitutional commitments in the 1867 Address, was to create obligations in favour of Aboriginal peoples in both Rupert's Land and the North-Western Territory. That the terms in the 1867 Address apply to both territories is confirmed in Schedule (B), Resolution, May 28, 1869, para. 1;

iv) The wording in the *Order* to the effect that the North-Western Territory and Rupert's Land will be subject to the terms and conditions in the 1867 and 1869 Addresses respectively are simply a parrotting of the language in the request made by the Canadian Parliament in the last paragraph of the 1869 Address. In reality, the Schedules and the Addresses of the Dominion Parliament refer repeatedly to both Rupert's Land and the North-Western Territory.

It is possible that some of the confusion may have originated from the 1867 Address of Parliament, where "colonization of the fertile lands of the Saskatchewan, the Assiniboine, and the Red River districts" is said to be "dependent on the establishment of a stable government...*in the North-Western Territories*" (para. 3). As clearly indicated in the Appendix to Schedule (C), these areas are a part of Rupert's Land and not the North-Western Territory. Perhaps the term "North-Western Territories" was intended to refer to both territories;

v) In reading both Addresses as a whole, it would appear that the constitutional commitments made by Parliament in favour of Aboriginal peoples are intended to apply to both territories. In particular, para. 14 of the Order itself refers to "[a]ny claims of Indians to *compensation for lands required for purposes of settlement*..." This same clause is also found in Schedules (B) and (C); and the exact same phrase "compensation for lands required for purposes of settlement" is found in Schedule (A) in relation to "Indian" claims. Therefore, despite some wording to the contrary in the Order, it would be most difficult to argue that para. 14 of the Order did not contemplate both territories, or that the terms and conditions in both Schedules (A) and (B) are not intended to apply to both territories;

vi) It is clear that Schedule (B) does not only refer to Rupert's Land. In Schedule (B) and in the 1869 Address included therein, the surrender of the rights of the Hudson's Bay Company and their acquisition by Canada are spoken in territorial terms that encompass both Rupert's Land and the North-Western Territory as follows: "...the acquisition by Canada of the territorial and other rights claimed by the Hudson's Bay Company in Rupert's Land *and in any other part of British North America not comprised in Rupert's Land, Canada, or British Columbia*..." This latter description refers to the rights of the Company in the North-Western Territory. A similar territorial description of the rights of the Hudson's Bay Company is included in both the Order and the Deed of Surrender (Schedule (C)).

Moreover, the last preambular paragraph in the 1869 Address makes clear that Canada accepts the rights surrendered in Rupert's Land *and in any other part of British North America* (i.e. North-Western Territory) "on terms conditionally agreed to" in the March 9, 1869 letter and two subsequent Memorandums of March 22 and 29, 1869, which documents are appended to the 1869 Address and form a part of it;

vii) It would be inconsistent to conclude that a surrender of the rights of the Hudson's Bay Company was an essential pre-condition to the transfer of Rupert's Land to Canada; yet, at the same time, conclude that a surrender of similar rights of the Company in the North-Western Territory was not a condition of transfer of the latter Territory to Canada. This would be the result, if it were deemed that the only terms and conditions for the transfer of the North-Western Territory are

1867 Address of the Canadian Parliament applies to Rupert's Land as well as to the North-Western Territory is made clear by Duff C.J. of the Supreme Court of Canada in *Re Eskimo*:

> "The *British North America Act*[351] came into force on the 1st of July, 1867, and, *in December of that year, a joint address* to Her Majesty was voted by the Senate and House of Commons of Canada praying that authority might be granted to the Parliament of Canada to legislate for the future welfare and good government of *these regions [i.e. Rupert's Land and the North-Western Territory] and expressing the willingness of that Parliament to assume the duties and obligations of government and legislation as regards those territories.*"[352] [Emphasis added.]

Consistent with the above view of the Supreme Court of Canada, Malouf J. in *Gros-Louis* v. *Société de développement de la Baie James*,[353] expressly indicates that the transfer of Rupert's Land to Canada was subject to the Canadian government settling the claims of Indian tribes in conformity with "equitable principles" (as indicated in the December 1867 Address[354]):

> "Quand la Couronne impériale transféra la Terre de Rupert au Canada, le gouvernement canadien entreprit de régler les réclamations des tribus indiennes pour les compenser des

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in the 1867 Address (Schedule (A)), and not also in the 1869 Address (Schedule (B)) and the Deed of Surrender (Schedule (C)). Schedules (B) and (C) make repeated references to both Rupert's Land and the North-Western Territory, and Schedule (C) contains the surrender of rights to both territories;

viii) Another possible source of confusion is the uneven use of the term "Rupert's Land" by the Imperial Parliament so as to sometimes encompass the North-Western Territory. For example, the *Rupert's Land Act, 1868*, 31-32 Vict., c. 105, refers in its preamble to both Rupert's Land and the North-Western Territory. At the same time, the Act defines only "Rupert's Land", but includes in this term (for purposes of surrender) all lands held by the Hudson's Bay Company: "For the Purposes of this Act the Term 'Rupert's Land' shall include *the whole of the Lands and Territories held or claimed to be held by the said Governor and Company*." This broad definition would include the Company's similar rights in the North-Western Territory (which in fact were also surrendered in the 1869 Deed of Surrender). In addition, in the *Temporary Government of Rupert's Land Act, 1869*, the Canadian Parliament provides equally for both territories under a new name - "The North-West Territories" (see Act, s. 1).

Moreover, the preamble of the 1869 Deed of Surrender makes reference to the *Rupert's Land Act, 1868* and indicates that the Act also refers to "all similar rights which have been exercised or assumed by the said Governor and Company in any of parts of British North America not forming part of Rupert's Land, or of Canada, or of British Columbia". In other words, the terms and conditions of surrender of Rupert's Land and the North-Western Territory are intimately linked and are not easily severable;

ix) It is consistent with the fiduciary duty of the Crown since at least the time of the *Royal Proclamation of 1763* that Aboriginal "claims" to lands "be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines". Therefore, this commitment in the 1867 Address should apply to both territories as specifically contemplated in this Address; and

x) Consistent with *Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29, at 36, "treaties and *statutes* relating to Indians should be liberally construed and doubtful espressions resolved in favour of the Indians." While the 1867 and 1869 Addresses of the Canadian Parliament and the *Rupert's Land and North-Western Territory Order* (of which the terms and conditions of the Addresses are an integral part) are not "statutes", s. 146 of the *Constitution Act, 1867* provides that "the Provisions of any Order in Council in that behalf *shall have effect as if they had been enacted by the [U.K.] Parliament*". [Emphasis added.]

This approach would also be consistent with judicial rules of interpretation in Canada pertaining to constitutional instruments. Since the *Rupert's Land and North-Western Territory Order* is a constitutional document, the "doctrine of progressive interpretation" should be applied to ensure a flexible interpretation. As Lord Sankey described in *Edwards* v. *A.G. Canada*, [1930] A.C. 124 at 136, constitutional provisions should receive a "broad and liberal interpretation" and not be "cut down" by "a narrow and technical construction".

[351] Since 1982, this Act is now referred to as the *Constitution Act, 1867*.

[352] *Re Eskimo*, [1939] S.C.R. 104 (S.C.C.) at 108.

[353] *Gros-Louis* v. *Société de développement de la Baie James*, [1974] R.P. 38 (Québec S.C.), per Malouf J. The decision was reversed in appeal in *Société de développement de la Baie James* v. *Kanatewat*, [1975] C.A. 166.

[354] The equitable principles requirement in the December 1867 Address of the Canadian Parliament is specifically cited by Malouf J. in *Gros-Louis* v. *Société de développement de la Baie James*, [1974] R.P. 38 (Québec S.C.), at 63.

> terres requises pour la colonisation *en conformité avec des principes équitables.*"[355] [Emphasis added.]

Also, as B. Clark provides, additional undertakings ensued from the Parliament of Canada in regard to Rupert's Land and the North-Western Territory:

> "[The December 1867] undertaking apparently did not go far enough to satisfy the imperial government. Negotiations ensued[356] which culminated in a further undertaking..."[357]

Consequently, regardless of whether the Royal Proclamation initially applied to or excluded Rupert's Land and the North-Western Territory, there are constitutional obligations on the part of the Canadian government to adhere to the same equitable principles[358] or standards in such northern and western areas and provide protection to the Aboriginal peoples concerned.[359] In addition, the provisions of the Proclamation would automatically apply as soon as Rupert's Land and the North-Western Territory was transferred to Canada from the Hudson's Bay Company in 1870 by the Imperial Parliament.

Further evidence of the uniform application of the Royal Proclamation throughout Canada is found in the *Adjacent Territories Order*,[360] an Imperial Order in Council of constitutional status that is still in effect in Canada.[361] This 1880 *Order* annexed to the Dominion of Canada all British Territories and Possessions in North America and adjacent Islands which were not already included in the Dominion.[362]

In particular, the *Order* quotes the constitutional commitments made by the Parliament of Canada in an Address of May 3, 1878 to Her Majesty as part of the terms and conditions for

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[355] Id. at 64. Unofficial English translation: "When the Imperial Crown transferred Rupert's Land to Canada, the Canadian government undertook to settle the claims of Indian tribes to compensate them for lands required for colonization *in conformity with equitable principles.*" [Emphasis added.]

[356] In the 1867 Address in Schedule (A) of the Order, it is clear that Parliament intended to commit the government of Canada to terms and conditions that applied not only to the North-Western Territory but also to Rupert's Land: "That we do therefore most humbly pray that your Majesty will be graciously pleased...to unite *Rupert's Land and the North-Western Territory* with this Dominion...and we are willing to assume the duties and obligations of government and legislation *as regards these territories.*" [Emphasis added.]

Further, the request in the 1867 Address for the transfer of *both* territories to Canada is referred to in the second Address in 1869, as well as the need for additional steps and negotiations to be undertaken as indicated by the Queen's representatives (see Schedule (B)). Had the 1867 Address of the Dominion Parliament been adequate, both Rupert's Land and the North-Western Territories would have been transferred to Canada at that time.

[357] B. Clark, *Native Liberty, Crown Sovereignty [:] The Existing Aboriginal Right to Self-Government in Canada*, *supra*, note 283, at 113. See also *R.* v. *Wesley*, [1932] 2 W.W.R. 337 at 349, where the two Addresses are referred to and applied without distinction.

[358] The "equitable principles" obligation in the 1867 Address necessarily refers back to the *Royal Proclamation of 1763*. As indicated in Indian and Northern Affairs Canada, *In All Fairness [:] A Native Claims Policy* (Ottawa: Indian Affairs and Northern Development, 1981) at 9: "The best known expression of British colonial policy towards Indians is to be found in the Royal Proclamation of 1763".

[359] For a similar conclusion in regard to the North-Western Territory, see K. McNeil, *Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations*, *supra*, note 337, at 21; S. Grammond, *Les traités entre l'État canadien et les peuples autochtones* (Cowansville, Québec: Les Éditions Yvon Blais, 1994), at 118.

[360] *Adjacent Territories Order*, 1880 (U.K.), R.S.C. 1985, App. II, No. 14.

[361] The *Adjacent Territories Order* is specifically included as part of the "Constitution of Canada", as defined in s. 52(2) of the *Constitution Act, 1982*. The *Order* is included in the Schedule to the Act under Item 8.

[362] See first preambular para. of *Order*. The sole territory or possession not annexed at that time was said to be the "Colony of Newfoundland and its dependencies". The *Order* transferred to Canada the remaining Arctic territories claimed by Britain: see P. Hogg, *Constitutional Law of Canada*, *supra*, note 332, vol. 1, at 2-12, n. 41; N. Nicholson, *The Boundaries of the Canadian Federation* (Toronto: Macmillan of Canada, 1979) at 57-60; F.W. King, *Report upon the Title of Canada to the Islands North of the Mainland of Canada* (Ottawa: Government Printing Bureau, 1905).

the requested territorial transfers:[363]

> "And whereas the Senate and House of Commons of Canada in Parliament assembled, have, in and by the Address, dated 3rd day of May, 1878, represented to Her Majesty 'That it is desirable that the Parliament of Canada, on the transfer of the before-mentioned Territories being completed, should have authority to legislate for their future welfare and good government, and *the power to make all needful rules and regulations respecting them, the same as in the case of the other territories (of the Dominion)*; and that *the Parliament of Canada expressed its willingness to assume the duties and obligations consequent thereon*:'".[364] [Emphasis added.]

Based on the *Order* and accompanying Address of May 3, 1878, it is clear that it was (and continues to be) the understanding of both the Imperial Crown and the Parliament of Canada that the federal power to make rules and regulations would apply to the newly-acquired territories only to the same extent and subject to the same obligations as in the case of the "other territories"[365] of the Dominion. Moreover, the Parliament of Canada explicitly accepted the "duties and obligations consequent thereon". These limitations constitute constitutional terms and conditions.

In addition, the last paragraph of the *Adjacent Territories Order* transfers the Territories or Possessions, including adjacent Islands, in accordance with the following:

> "...[they] become and be annexed to and form part of the said Dominion of Canada; and *become and be subject to the laws for the time being in force in the said Dominion, in so far as such laws may be applicable thereto.*" [Emphasis added.]

In regard to Aboriginal peoples, the "laws for the time being in force" in Canada include the *Royal Proclamation of 1763* and the *Rupert's Land and North-Western Territory Order*. These laws could only be altered at any time through constitutional amendment.

These constitutional provisions in the *Adjacent Territories Order* are of a general nature, but they serve to affirm that, in relation to Aboriginal peoples, the "duties and obligations" of the Canadian government and Parliament in the other territories of Canada were extended to apply to the territories transferred to Canada under this *Order*. At the very least, these constitutional constraints and obligations include the commitments of the Canadian government and Parliament relating to Aboriginal peoples in the *Rupert's Land and North-Western Territory Order* and the equitable principles in the *Royal Proclamation of 1763*.[366] In this way, a uniform regime of constitutional recognition and protection was maintained for Aboriginal peoples in all regions of Canada.

In relation to Aboriginal peoples, the uniformity of government duty or obligation that is confirmed by various Imperial instruments reinforces the importance of continuing to use the Royal Proclamation as a constitutional and legal standard. In particular, the norms in the Proclamation are critical to consider in matters or circumstances pertaining to any purported cession, purchase or extinguishment of aboriginal rights.

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[363] It is worth noting that the use of an Imperial Order in Council to transfer territory to Canada, subject to terms and conditions included in an Address by the Parliament of Canada is provided for in s. 146 of the *Constitution Act, 1867*. Technically speaking, s. 146 does not specifically contemplate any transfer of the territories and possessions and adjacent islands referred to in the *Adjacent Territories Order*. In any event, in order to erase any doubts of the constitutionality of the *Order*, the Imperial Parliament enacted the *Colonial Boundaries Act*, 1895, 58 & 59 Vict., c. 34. See P. Cumming & N. Mickenberg, (eds.), *Native Rights in Canada* (Toronto: Indian-Eskimo Association of Canada, 1972) at 150.

[364] Second preambular para. of *Order*.

[365] The term "other territories" certainly included Rupert's Land and the North-Western Territory. However, as indicated below, it also included other territories in Canada subject to the Royal Proclamation.

[366] Whether through the provisions of the *Rupert's Land Order* or through direct application of the *Royal Proclamation* itself, the equitable principles of the Proclamation applied to the territories envisaged by the *Adjacent Territories Order*.

In this regard, it is worth repeating here the dictum of Dickson J. in *Guerin* v. *The Queen*, when he emphasized the universal application throughout Canada's history of the policies enunciated in the Royal Proclamation. It is especially noteworthy that the following comments were made in a case in British Columbia, where the applicability of the Proclamation has been subject to considerable debate:

> "*[T]his policy with respect to the sale or transfer of the Indians' interest in land has been continuously maintained by the British Crown*, by the governments of the colonies when they became responsible for the administration of Indian affairs, *and, after 1867, by the federal government of Canada*. Successive federal statutes, predecessors to the present *Indian Act*, have all provided for the general inalienability of Indian reserve land except upon surrender to the Crown, the relevant provisions in the present Act being ss. 37-41."[367] [Emphasis added.]

The above pronouncement by Dickson J. appears to confirm or at least be consistent with the finding of Hall J. (dissenting) eleven years earlier in *Calder* v. *A.G. British Columbia*:

> "[The Royal Proclamation] was a law *which followed the flag as England assumed jurisdiction over newly-discovered or acquired lands or territories*. It follows, therefore, that the *Colonial Laws Validity Act*[368] applied to make the Proclamation the law of British Columbia. That it was regarded as being the law of England is clear from the fact that when it was deemed advisable to amend it the amendment was effected by an Act of Parliament, namely the *Quebec Act* of 1774."[369] [Emphasis added.]

Based on the above, it is concluded that the Royal Proclamation of 1763 should be universally applied throughout Canada. Regardless of whether the *Royal Proclamation of 1763* initially applied to or excluded Rupert's Land and the North-Western Territory, the constitutional obligations in the *Order* required the Canadian government to adhere to the same equitable principles or standards in the vast northern and western areas of Canada and provide protection to the Aboriginal peoples concerned. In this way, the *Order* served to affirm that, in relation to Aboriginal peoples, a uniform regime of constitutional recognition and protection was contemplated for all regions of Canada.

In regard to Aboriginal peoples, the constitutional obligations connected with the *Rupert's Land and North-Western Territory Order* continue to be applicable and in effect in Canada. Yet, too often, these important provisions are ignored or underestimated by governments and courts in Canada. This disregard for the rule of law acts to the severe detriment of the Aboriginal peoples concerned.

The binding nature of the Proclamation is further examined under the next sub-heading.

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[367] *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 at 340 per Dickson J. In B. Slattery, *First Nations and the Constitution: A Question of Trust*, (1992) 71 Can. Bar Rev. 261, at 291, it is provided: "There is good reason to think that the Royal Proclamation, 1763 applied to British Columbia when it was issued, *or at any rate became applicable whenever the area was officially claimed by the Crown*...Even if the Proclamation did not apply, it seems clear that the common law principles reflected in the Proclamation extended to British Columbia, as they did to other parts of Canada." [Emphasis added.]

[368] *An Act to Remove Doubts as to the Validity of Colonial Laws*, 28 & 29 Vict., c. 63 (1865).

[369] *Calder* v. *A.-G. British Columbia*, [1973] S.C.R. 313, at 395.

2.4 Binding Nature of the Royal Proclamation[370]

In *R.* v. *White* and *Bob*, Norris J.A. indicates that the Royal Proclamation prevails over any colonial legislation, as follows:

> "It would have required specific legislation to extinguish the aboriginal rights, and it is doubtful whether Colonial legislation, even of a special kind, could extinguish these rights in view of the fact that such rights had been confirmed by the Royal Proclamation of 1763."[371]

Moreover, to amend or repeal the terms of the Royal Proclamation would have had to have been effected by Imperial statute. As B. Slattery provides:

> "...the Imperial Parliament had the authority to modify or to rescind the Proclamation's provisions regarding Indian lands, and to extinguish land rights recognized there, in any of the American colonies under the Crown's sovereignty."[372]

In addition, it is the view of this study that the Royal Proclamation is a constitutional instrument.[373] Based on the doctrine of *ultra vires*, constitutional instruments are not within the competence of either the federal or provincial legislatures to repeal or amend (unless expressly provided otherwise in a valid constitutional instrument). In other words, it can be argued that even in the absence of the *Colonial Laws Validity Act*[374], the Royal Proclamation of 1763 as a constitutional instrument would be binding on federal or provincial legislatures in Canada. Laws in contravention of the terms of the Proclamation would be subject to judicial review.[375]

Nevertheless, it is still uselful to examine the *Colonial Laws Validity Act* to determine its constitutional implications in regard to the Royal Proclamation. Section 4 of the Act provided:

> "No colonial law passed with the concurrence of or assented to by the governor of any colony, or to be hereafter so passed or assented to, shall be or be deemed to have been void or inoperative by reason only of any instructions with reference to such law or the subject thereof which may have been given to such governor by on behalf of Her Majesty, by any instrument *other than the letters patent or instrument authorizing such governor to concur in passing or to assent to laws for the peace, order, and good government of such colony*, even though such instructions may be referred to in such letters patent or last-mentioned instrument." [Emphasis added.]

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[370] The views in this sub-heading are inspired principally from those expressed in B. Clark, *Native Liberty, Crown Sovereignty*, *supra*, note 283, at 73-75.

[371] *R.* v. *White* and *Bob*, (1964) 50 D.L.R. (2d) 613 (B.C.C.A.) at 662. This holding by Norris J.A. is quoted in *R.* v. *Isaac*, (1975) 13 N.S.R. (2d) 460 (N.S.S.C. App. Div.) at 485.

[372] B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 230, *supra*, at 314.

[373] See sub-heading 2.5 *infra*.

[374] *An Act to Remove Doubts as to the Validity of Colonial Laws*, 28 & 29 Vict., c. 63 (1865).

[375] In this regard, see K.C. Wheare, *The Constitutional Structure of the Commonwealth* (Oxford: Clarendon Press, 1960), c. 3; and P. Hogg, *Constitutional Law of Canada*, *supra*, note 332, vol. 1, at 5-21, n. 81: "It could be argued that judicial review does not now depend on s. 52(1) [of the *Constitution Act, 1982*], and *did not before 1982 depend on the Colonial Laws Validity Act*. The argument is that judicial review depends, not on a doctrine of inconsistency or repugnancy, but on a doctrine of ultra vires. *What is important about a constitution is, not that it is a supreme law, but that it limits the powers of legislative bodies. An attempt by a legislative body to act outside its powers is void because it is ultra vires.*" [Emphasis added.]

As B. Clark explains:

> "This crucial section in effect said that laws made by the colonial government would be deemed *invalid if contrary to constitutive instructions in the governor's royal commission under the great seal of Great Britain*; but they would not be deemed invalid merely for breaching the governor's royal instructions under the signet and sign-manual."[376] [Emphasis added.]

As evidenced from the following excerpt from the *Royal Proclamation of 1763*, the Proclamation was issued by letters patent under the great seal of Great Britain;[377] the letters patent authorized colonial governors to establish Assemblies and make laws for the peace, order, and good government of their colonies; and new and old colonies were treated uniformly in regard to their powers:

> "We have thought to publish and declare, by this Our Proclamation, that We have, in the *Letters Patent under our Great Seal of Great Britain*, by which the said Governments are constituted, given express Power and Direction to our Governors of our Said Colonies respectively, that so soon as the state and circumstances of the said Colonies will admit thereof, they shall, with the Advice and Consent of the Members of our Council, *summon and call General Assemblies*, within the said Governments respectively, in such Manner and Form as is used and directed in *those Colonies and Provinces in America which are under our immediate Government*; And We have also given Power to the said Governors, with the consent of our Said Councils, and the Representatives of the People so to be summoned as aforesaid, to *make, constitute, and ordain Laws, Statutes, and Ordinances for the Public Peace, Welfare, and good Government of our said Colonies*, and of the People and Inhabitants thereof, as near as may be agreeable to the Laws of England, and under such Regulations and restrictions *as used in other Colonies*." [Emphasis added.]

Therefore, Clark concludes:

> "...the Royal Proclamation of 1763 was covered by section 4, and thereby was confirmed in its binding effect upon colonial governments in virtue of the imperial Parliament's Colonial Laws Validity Act."[378]

In *Delgamuukw* v. *British Columbia*, Wallace J.A. recognizes the binding nature of the Proclamation as follows:

> "...the *Royal Proclamation* was binding upon any subjects within the territories to which it applied, and may have been an expression of the policy of Great Britain with respect to Indians in its North American territories..."[379]

However, what is not clear is how Wallace J.A. reaches the conclusion that local institutions of government were not restricted by the Royal Proclamation. In this regard, it is provided:

> "In my view, when the Crown acquired sovereignty over the territory and created the colonies of Vancouver Island, and later, British Columbia, Parliament acquired the power to give effect to policies considered beneficial to all the inhabitants. All of the inhabitants, native and non-native were protected by the common law which could be altered only through Parliament. Neither the Imperial Parliament, *nor local institutions were restricted*

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[376] B. Clark, *Native Liberty, Crown Sovereignty*, *supra*, note 283, at 73.

[377] *Campbell* v. *Hall*, (1774) Lofft 655, 739, 98 E.R. 848.

[378] Id., at 74.

[379] *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.), at 227.

in this by the Royal Proclamation or any policy it might have reflected."[380] [Emphasis added.]

It may be that Wallace J.A. is referring here solely to colonial institutions in British Columbia. The judge had indicated in an earlier part of his judgment that, in his view, the Proclamation did not apply to British Columbia.[381] Alternatively, Wallace J.A. may be saying that local institutions were not restricted in altering the common law by the Royal Proclamation. In any event, it cannot be said that the Royal Proclamation was not binding on colonial institutions in areas where the Proclamation applied.[382]

2.5 Constitutional Status of the Royal Proclamation

It has been held by the courts that the Royal Proclamation of 1763 has the force and effect of statute in Canada.[383] In *Calder* v. *A.-G. British Columbia*, Hall J. describes the Proclamation as analogous to the *Magna Carta*:

> "This Proclamation was an Executive Order having the force and effect of an Act of Parliament and was described...as the 'Indian Bill of Rights'. *Its force as a statute is analogous to the status of the Magna Carta which has always been considered to be the law throughout the Empire*...The Proclamation must be regarded as *a fundamental document upon which any just determination of original rights rests.*"[384] [Emphasis added.]

B. Slattery describes the constitutional significance of this statutory impact in the following terms:

> "As such, [the Proclamation] had the effect of an *Imperial* statute[385] and was *paramount to local statutes under the Colonial Laws Validity Act, 1865.*[386] If this is correct, pre-Confederation colonial legislation must be read subject to the Proclamation's terms. *The same may hold true of statutes passed by the Canadian Parliament and provincial legislatures prior to the Statute of Westminster*, which in 1931 released Canada

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[380] Id.

[381] Id. at 226.

[382] See B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 230, *supra*, at 308: "Acts done by colonial officials in violation of Imperial Orders in Council pertaining to the government of a colony have been held to be invalid. The same, a fortiori, would hold true of Royal Proclamations, which are essentially acts of the Crown embodied in Orders in Council..." [Emphasis in original.]

[383] *R.* v. *Lady McMaster*, [1926] Ex. C.R. 68, at 72-73; *Easterbrook* v. *The King*, [1931] S.C.R. 210 at 214-215, 217-218, affirming [1929] Ex. C.R. 28, at 29-30; *R.* v. *White and Bob*, (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), per Norris J.A., at 636, 644; *R.* v. *Isaac*, (1975), 13 N.S.R. (2d) 460, per MacKeigan C.J., at 478, per Cooper J.A., at 496; *Calder* v. *A.-G. British Columbia*, [1973] S.C.R. 313, per Hall J. at 394-395. These cases are cited in B. Slattery, *Understanding Aboriginal Rights*, note 232, *supra*, at 774, n. 184.

[384] *Calder* v. *A.-G. British Columbia*, [1973] S.C.R. 313, at 394-395.

[385] K. McNeil, *The High Cost of Accepting Benefits From the Crown: A Comment on the Temagami Indian Land Case*, [1992] 1 C.N.L.R. 40 at 55: "This proclamation has the force of Imperial legislation and is binding on the Crown's executive officers in the dominions of the Crown to which it applies."

[386] B. Slattery, *Understanding Aboriginal Rights*, note 232, *supra*, at 775, n. 185, cites the following cases in support: *R.* v. *White and Bob*, (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), per Norris J.A., at 662; *R.* v. *Isaac*, (1975), 13 N.S.R. (2d) 460, per MacKeigan C.J., at 485; *R.* v. *Secretary of State for Foreign and Commonwealth Affairs*, [1982] 2 All E.R. 118 (C.A.), per Lord Denning M.R., at 124-125.

> from any imperial bonds other than those embedded in the Constitution Acts."[387] [Emphasis added.]

In a more recent publication, Slattery suggests that it is doubtful that Canadian legislatures had the constitutional power to repeal the Royal Proclamation, "at least" prior to the Statute of Westminster:

> "The proclamation was open to repeal by imperial statute, but there is doubt as to whether it could be repealed by a local Canadian legislature, *at least prior to the Statute of Westminster, 1931, which released Canada from the bonds of ordinary imperial acts*."[388] [Emphasis added.]

R. Dussault and L. Borgeat provide:

> "Apparently, until the enactment of the *Statute of Westminster, 1931*, the rights conferred by the *Proclamation* could be neither amended nor revoked except by an Imperial statute."[389]

If the Royal Proclamation is equivalent only to an "ordinary imperial act", then the Canadian Parliament likely gained the power to repeal the Proclamation (or at least the Aboriginal provisions[390]) at the time the Statute of Westminster came into effect.[391] If the Proclamation has a status analogous to the *Magna Carta*, as declared by Hall J., then the terms of the Proclamation relating to Aboriginal peoples are implied terms of Canada's Constitution as is the *Magna Carta* of 1215. As G.-A. Beaudoin explains:

> "Ils ont déclaré dans le préambule de la *Loi constitutionnelle de 1867* que nous avons une Constitution semblable en principe à celle du Royaume-Uni. Les tribunaux, à partir de ce texte, de même que les juristes, devaient conclure, par la suite, que les grands documents comme la *Magna Carta*, le *Bill of Rights*, l'*Habeas Corpus*, l'*Act of Settlement* font partie de notre Constitution. En 1938, la Cour suprême [dans *Alberta Press*] devait même ajouter que certaines libertés sont protégées implicitement[392]."[393]

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[387] B. Slattery, *Understanding Aboriginal Rights*, *supra*, note 232, at 775. For a similar view, see S. Grammond, *Les traités entre l'État canadien et les peuples autochtones* (Cowansville, Québec: Les Éditions Yvon Blais, 1994), at 119-120.

[388] B. Slattery, *The Hidden Constitution: Aboriginal Rights in Canada*, *supra*, note 322 at 385, n. 28.

[389] R. Dussault and L. Borgeat, *Administrative Law [:] A Treatise*, 2nd ed. (Toronto: Carswell, 1985), vol. 3, at 76. For a similar view, see H. Brun, *Le Territoire du Québec* (Québec: Les Presses de l'université Laval, 1974), at 80.

[390] B. Slattery, *Understanding Aboriginal Rights*, *supra*, note 232, at 778: "...section 129 of the Constitution Act, 1867...provides that laws in effect in the uniting colonies shall continue in effect after Confederation, subject to alteration or repeal *by the legislature empowered to deal with the subject-matter in question. So, where the subject-matter of a pre-Confederation law falls under federal jurisdiction, Parliament alone can repeal or amend it...[T]he Canadian Parliament has the exclusive power to repeal the Indian provisions of the Proclamation of 1763, under section 91(24) of the Constitution Act, 1867*. Therefore, the Proclamation takes precedence over conflicting provincial laws." [Emphasis added.]

[391] In *Re Offshore Mineral Rights of British Columbia*, [1967] S.C.R. 792, at 816, it is provided: "[Canadian] sovereignty was acquired in the period between its separate signature of the Treaty of Versailles in 1919 and the Statute of Westminster, 1931." However, with respect to the Proclamation, it is only in 1931 that the *Colonial Laws Validity Act* was repealed. Note also that from 1926, by virtue of a constitutional convention, the British Parliament could no longer legislate for Canada except on its request and with its consent (which rule was formalized by s. 4 of the *Statute of Westminster, 1931*): see H. Brun & G. Tremblay, *Droit constitutionnel*, 2e éd. (Cowansville, Québec: Les Éditions Yvon Blais, 1990), at 14.

[392] *Re Alberta Statutes*, [1938] S.C.R. 100, at 133-134, where Duff C.J. appeared to suggest that the *Constitution Act, 1867* impliedly forbade the federal Parliament and provincial legislatures from curtailing political speech. As indicated in P. Hogg, *Constitutional Law of Canada*, *supra*, note 332, vol. 2, at 31-11, n. 55, Duff's view was quoted with approval in *Saumur* v. *City of Quebec*, [1953] 2 S.C.R. 299 by Rand J. at 331; Kellock J. at 353-354, and Locke J. at 373-374. Hogg also points out that Kellock J. at 354 and Locke J. at 363 each suggested the possibility of an implied bill of rights.

[393] G.-A. Beaudoin, *La Constitution du Canada* (Montréal: Wilson & Lafleur, 1990), at 27-28: "It is declared in the preamble of the *Constitution Act, 1867* that we have a Constitution similar in principle to that of the United Kingdom. The courts, based on this text, as well as jurists, have concluded, as a result, that important documents as the *Magna Carta*, the *Bill of Rights*, the *Habeas Corpus*, the *Act of Settlement* form a part of our Constitution. In 1938, the Supreme Court [in

Following this line of thinking, the Supreme Court of Canada has fairly recently stated its approval of the dictum in the *Alberta Press* case[394] and on a number of occasions declared that there exists an implied bill of rights.[395]

However, it would appear that the Royal Proclamation of 1763 is a constitutional instrument and does not simply constitute an implied bill of rights. G.-A. Beaudoin highlights the constitutional status of the Royal Proclamation as follows:

> "À partir de 1759 le Canada connut un second régime, le régime britannique. *La Proclamation Royale du 7 octobre 1763 peut être considérée comme notre première Constitution depuis la Conquête.*[396] Elle abolissait le droit civil français, octroyait un premier gouvernement civil et créait un système judicaire. Le Canada devint une colonie britannique qui acquit graduellement son autonomie interne..."[397] [Emphasis added.]

Similarly, L. Mandell provides:

> "The Royal Proclamation issued in October of 1763 became *the constitutional basis* to establish a lasting peace between the Crown and Indian Nations...
>
> The Royal Proclamation of 1763 was *the first constitutional instrument applicable to Canada* and as such, attempted to do many things, including the convening of General Assemblies in the settled colonies."[398] [Emphasis added.]

B. Clark also indicates:

> "*The essential perception is that the imperial prerogative instruments were Canada's first*

Alberta Press] even added that certain freedoms are implicitly protected." [Unofficial translation, emphasis added.]

[394] *OPSEU* v. *Ontario*, [1987] 1 S.C.R. 2, at 57 per Beetz J., and at 25 per Dickson C.J. P. Hogg, *Constitutional Law of Canada*, *supra*, note 332, vol. 2, at 31-12 explains (though Hogg does not share the Court's view): "In the *OPSEU* case (1987), his lordship for the majority [Beetz J.] quoted with evident approval the dicta in the *Alberta Press* case and *Switzman* v. *Elbling*, and said that 'quite apart from Charter considerations, the legislative bodies in this country must conform to these basic structural imperatives and can in no way override them'. In context, it is clear that by 'basic structural imperatives' he meant the basic freedoms, including freedom of expression, that were necessary to preserve 'the essential structure of free parliamentary institutions'."

[395] *Fraser* v. *Public Service Staff Relations Bd.*, [1985] 2 S.C.R. 455, 462-463 per Dickson J.; *RWDSU* v. *Dolphin Delivery*, [1986] 2 S.C.R. 573, 584 per McIntyre J., which cases are cited by P. Hogg, *Constitutional Law of Canada*, *supra*, note 332, vol. 2, at 31-12, n. 60.

[396] That the Royal Proclamation of 1763 was Canada's first Constitution is indicated in P. Kulchyski, (ed.), *Unjust Relations: Aboriginal Rights in Canadian Courts* (Toronto: Oxford University Press, 1994) at 7. See also H. Brun, *Le Territoire du Québec* (Québec: Les Presses de l'université Laval, 1974), where in the study entitled "L'évolution du territoire du Québec", the author refers at 15 to the Royal Proclamation as "[l]a consitution de 1763"; and yet in the same volume, in the study entitled "Les droits des Indiens sur le territoire du Québec", the author indicates at 81 that the Proclamation has only the effect of an ordinary law and not any supra-legal authority. At the same time, Brun states at 80 that prior to the *Statute of Westminster, 1931*, no Canadian law could contradict the Royal Proclamation and abrogate or alter Indian title in a part of Québec territory.

[397] G.-A. Beaudoin, *La Constitution du Canada* (Montréal: Wilson & Lafleur, 1990), at 5: "From 1759 Canada experienced a second regime, the British regime. *The Royal Proclamation of 7 October 1763 can be considered as our first Constitution following the Conquest.* It abolished French civil law, granted a first civil government and created a judicial system. Canada became a British colony which gradually gained its internal autonomy..." [Unofficial translation, emphasis added.] See also *Campbell* v. *Hall*, (1774) 98 E.R. 848, at 898, where Lord Mansfield indicates that the "proclamation [of 1763] assured [new settlers of Grenada] of the constitution under which they were to live" and that "the constitution having been established by proclamation"; and J.-Y. Morin, "L'évolution constitutionnelle du Canada et du Québec de 1534 à 1867" in J.-Y. Morin & J. Woehrling, *Les Constitutions du Canada et du Québec [:] du régime français à nos jours* (Montréal: Éditions Thémis, 1992), 1 at 46, where it said that the first constitution of the "Province of Quebec" was granted by the *Royal Proclamation of 1763*.

[398] L. Mandell, *Indian Nations: Not Minorities*, (1986) 27 Les Cahiers de Droit 101, at 105.

constitutions.[399] When subsequent constitutional instruments such as the Constitution Act, 1867 or the Constitution Act, 1982 subsume preexisting constitutional laws, they effectively incorporate the unrepealed principles settled by this predecessor legislation."[400] [Emphasis added.]

Similarly, B. Wildsmith provides:

"Indeed, from 1763, when France through the Treaty of Paris ceded its holdings in America to Britain, and 1774, when the Quebec Act was passed by the British Parliament, *the Royal Proclamation was the main constitutional document for large areas of present-day Canada...*"[401]

R. Dupuis also indicates:

"Cette proclamation a force de loi au Canada et *fait partie intégrante de la Constitution canadienne...*

Il s'agit...*du premier texte constitutionnel* faisant mention d'une forme de reconnaissance de droits territoriaux aux Indiens."[402] [Emphasis added.]

D. Sanders lists the Royal Proclamation as one of Canada's constitutional instruments, as follows:

"The provisions on the rights of aboriginal people in the Constitution Act, 1982, are a re-emergence of issues which were *featured in constitutional documents from 1763 to 1930. Constitutional provisions on aboriginal peoples are found in the Royal Proclamation of 1763*, the Constitution Act, 1867, the Manitoba Act, 1870, the Rupert's Land and North-Western Territory Order, 1870, the British Columbia Terms of Union, 1871, the Ontario and Quebec boundaries extension Acts of 1912 and the Constitution Act, 1930."[403] [Emphasis added.]

Also, O.P. Dickason confirms:

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[399] See also B. Slattery, *The Independence of Canada*, [1983] 5 Supreme Court L. Rev. 369, at 374: "No Act of Parliament was necessary for a colony to be acquired or granted a constitution, and very few Acts were passed to deal with such matters prior to the era of the American Revolution. *Colonies were normally acquired and supplied with constitutions by means of prerogative instruments.*" [Emphasis added.] In support of his statement, Slattery generally cites A. Keith, *Constitutional History of the First British Empire* (London: MacMillan, 1930); and L. Labaree, *Royal Government in America* (New Haven: Yale University Press, 1930).

[400] B. Clark, *Native Liberty, Crown Sovereignty [:] The Existing Aboriginal Right to Self-Government in Canada*, *supra*, note 283, at 58. At 70, Clark adds: "Like the royal commissions, a [single omnibus royal] proclamation bore the Great Seal of Great Britain, being no less an order in council. The advantage of this royal proclamation device was that by a single stroke, *constitutionally binding terms could be imposed* that otherwise would have required the cancellation and reissuance of the several individual commissions outstanding for each of the colonies." [Emphasis added.]

[401] B. Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: University of Saskatchewan Native Law Centre, 1988), at 43. To the same effect, Wildsmith cites K. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada (Ss. 25, 35 and 37)" in W.S. Tarnopolsky & G.-A. Beaudoin, (eds.), *The Canadian Charter of Rights and Freedoms [:] Commentary* (Toronto: Carswell, 1982) 467, at 473: "The Proclamation has been described as the Imperial Constitution of Canada during the period 1763 to 1774, and as having the force of law." Although portions of the Proclamation were in effect replaced by subsequent constitutional legislation (e.g. *Quebec Act* in 1774), the provisions pertaining to Aboriginal peoples in the Proclamation continue to apply.

[402] R. Dupuis, *La Question indienne au Canada* (Montréal: Les Éditions du Boréal, 1991), at 15: "This proclamation has the force of law in Canada and is *an integral part of the Canadian Constitution*...It serves...as *the first constitutional text* making mention of a form of recognition of the territorial rights of Indians." [Unofficial translation, emphasis added.] See also A. Pratt, *Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?*, (1992) 2 N.J.C.L. 163, at 192, where the Proclamation is characterized as "a constitutional enactment sui generis".

[403] D. Sanders, *The Rights of the Aboriginal Peoples of Canada*, (1983) 61 Can. Bar Rev. 314 at 316.

"...today the Proclamation remains embedded in the Canadian Constitution."[404]

In addition, B. Slattery notes:

"Recognition [of aboriginal rights] has also been extended in a series of earlier *constitutional instruments, notably the Royal Proclamation of 1763...*"[405]

Moreover, on at least one occasion,[406] the Proclamation has been judicially characterized as a pre-Confederation constitutional document and not an "ordinary imperial statute". In *R.* v. *Secretary of State for Foreign and Commonwealth Affairs*, Lord Denning provides as follows:

"The Royal Proclamation of 1763 has had great impact *throughout Canada*. It was regarded as of *high constitutional importance*...To my mind the Royal Proclamation of 1763 was *equivalent to an entrenched provision in the constitution of the colonies* in North America. It was *binding on the Crown 'so long as the sun rises and the river flows'*."[407] [Emphasis added.]

And Lord Denning adds in the same judgment:

"Save for that reference in s. 91(24), the 1867 Act was silent on Indian affairs. Nothing was said about the title to property in the 'lands reserved for the Indians', not to the revenues therefrom, nor to the rights and obligations of the Crown or the Indians thenceforward in regard thereto. But I have no doubt that all concerned regarded the royal proclamation of 1763 as still of binding force. *It was an unwritten provision which went without saying. It was binding on the legislature of the Dominion and the Provinces just as if there had been included in the [1867] statute a sentence: 'The aboriginal peoples of Canada shall continue to have all their rights and freedoms as recognized by the royal proclamation of 1763.'*"[408]

B. Clark comments on Lord Denning's constitutional characterization of the Royal Proclamation, indicating that the Royal Proclamation was possibly an implicit term of the *Constitution Act, 1867*:

"...Lord Denning held in *R.* v. *Secretary of State for Foreign and Commonwealth Affairs*, that the Royal Proclamation was an implicit part of the Constitution Act, 1867, 'still of binding force,' and 'unwritten provision which went without saying'...The very phrase *'Indians, and Lands reserved for Indians' employed in section 91(24) of the Constitution Act, 1867 thus implicitly reiterated the pre[illegible]ned imperial law that informed*

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[404] O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: MacLelland & Stewart, 1992) at 185.

[405] B. Slattery, *Aboriginal Sovereignty and Imperial Claims*, (1991) 29 Osgoode Hall L.J. 681 at 703, n. 27.

[406] See also *Campbell* v. *Hall*, (1774) 98 E.R. 848, at 898, where Lord Mansfield indicates that a constitution has been established by the Royal Proclamation of 1763; *R.* v. *George*, [1964] 1 O.R. 24 (Ont. High Court), where McRuer C.J.H.C. held: "Since the Proclamation of 1763 has the force of a statute, I am satisfied that whatever power the Parliament of Canada may have to interfere with the treaty rights of the Indians, *the rights granted to them by the Proclamation cannot in any case be abrogated, abridged or infringed upon by an order-in-council made under the Migratory Birds Convention Act.*" [Emphasis added.] This statement is cited by Cartwright J. (as he then was) in *R.* v. *George*, [1966] S.C.R. 267, at 274, when the Supreme Court of Canada reversed on other grounds the decision of McRuer C.J.H.C.

[407] *R.* v. *Secretary of State for Foreign and Commonwealth Affairs*, [1982] 2 W.L.R. 641 (C.A.), at 647. It should be noted that a majority of judges in this decision expressly indicated that the matters before them were for the courts of Canada to decide and not those of the United Kingdom. At the same time, it is worth noting that Lord Denning's remarks were referred to in *R.* v. *Sioui*, [1990] 1 S.C.R. 1025, at 1064 (per Lamer J. on behalf of the Supreme Court of Canada).

[408] Id., at 648-649.

the constitutional meaning of the terms employed."[409] [Emphasis added.]

P. Hogg indicates that the Royal Proclamation "made provision for the constitutions of Grenada, East Florida and West Florida, as well as Quebec."[410] Also, he suggests in general terms that the two primary reasons for adopting s. 91(24) are linked to the Royal Proclamation:

> *"The main reason for s. 91(24) seems to have been a concern for the protection of the Indians against local settlers*, whose interests lay in an absence of restrictions on the expansion of European settlement...A *second reason* was probably to the desire to maintain uniform national policies respecting the Indians. *The Royal Proclamation had established that treaty-making with the Indians was to be the sole responsibility of the (imperial) Crown in right of the United Kingdom. After confederation, the federal government was the natural successor to that responsibility.*"[411] [Emphasis added.]

Furthermore, Hogg confirms that the federal power in relation to "lands reserved for the Indians" in s. 91(24) "includes the huge area of land recognized by the Royal Proclamation of 1763 as 'reserved' for the Indians, that is, all the land within the territory covered by the Royal Proclamation that was in the possession of the Indians and that had not been ceded to the Crown."[412]

Clark underlines the significance of the Royal Proclamation possibly being an implicit term of the *Constitution Act, 1867*:

> "[I]f the Royal Proclamation of 1763 was an implicit term of the Constitution Act, 1867, as held by Lord Denning, then *section 7(1)*[413] *of the Statute of Westminster would necessarily have rendered aboriginal rights immune from federal government repeal in spite of section 2(2)*[414]. The point has never been settled by the courts; nor does it appear pragmatically necessary that it be litigated, because *the federal government in the period 1867 to 1982 never expressly purported to repeal the relevant imperial legislation; and in 1982 the Constitution Act, 1982 rendered such an unilateral repeal impossible in future except by the amendment procedure provided.*"[415] [Emphasis added.]

Generally, it may be true that the status of the Proclamation between the period 1867 to 1982 may not be of great consequence from the point of view that no express repeal of this instrument had been undertaken by the federal Parliament. However, in determining the standards upon which extinguishments policies and actions should be measured (including questions of validity), it is still important to examine the legal status of this fundamental instrument.

As suggested above, it may also be true that the Royal Proclamation was intended to be

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[409] B. Clark, *Native Liberty, Crown Sovereignty*, *supra*, note 283, at 107. For a similar view to the effect that s. 91(24) was simply a head of jurisdiction, but "imposed constitutional obligations on the Federal Government to protect aboriginal rights", see L. Mandell, *Indian Nations: Not Minorities*, (1986) 27 Les Cahiers de Droit 101, at 108.

[410] P. Hogg, *Constitutional Law of Canada*, *supra*, note 332, (Toronto: Carswell, 1992), vol. 1, at 2-8, n. 27.

[411] Id. at 27-2.

[412] Id. at 27-5.

[413] Section 7(1) of the *Statute of Westminster* provides: "Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule, or regulation made thereunder."

[414] Section 2(2) of the *Statute of Westminster* provides: "No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion."

[415] B. Clark, *Native Liberty, Crown Sovereignty*, *supra*, note 283, at 107.

an implied term of the *Constitution Act, 1867*. In any event, as will be further described, the Proclamation was and remains a constitutional instrument that serves to limit federal and provincial legislative and administrative powers. In particular, despite general legal findings that might imply the contrary,[416] the *Statute of Westminster, 1931* does not appear to have affected either the status of the Proclamation or the requirement that it be amended solely by the Imperial Parliament. Section 2(2) of the *Statute of Westminster* provides:

> "No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the *law of England*, or to the provisions of any existing or future *Act of Parliament of the United Kingdom*, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the *law of the Dominion*." [Emphasis added.]

The above provision served to extend the legislative powers of the Dominion Parliament, but these new powers to repeal or amend did not extend to prerogatives instruments of the Imperial Crown, such as the Royal Proclamation of 1763, that had constitutional status[417] and that were not adopted pursuant to any Imperial statute[418]. Section 2(2) only allowed Dominion legislation to be "repugnant" to i) the "law of England"[419]; ii) "any existing or future Act of

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[416] To our knowledge, existing analyses of the *Statute of Westminster*, do not specifically address the constitutional status of, or capacity to amend, the Royal Proclamation of 1763. See generally B. Slattery, *The Independence of Canada*, [1983] 5 Supreme Court L. Rev. 369 at 394: "[Section 2(2) provides that no law made in future by the Parliament of a Dominion shall be void on the ground that it is repugnant to the provisions of any existing or future Act of the British Parliament, and that a Dominion Parliament shall have the power to repeal or amend any such Act"; P. Hogg, *Constitutional Law of Canada*, *supra*, note 332, vol. 1, at 3-4 - 3-7; G.-A. Beaudoin, *La Constitution du Canada* (Montréal: Wilson & Lafleur, 1990) at 147-148, 230; H. Brun & G. Tremblay, *Droit constitutionnel*, 2e éd. (Cowansville, Québec: Les Éditions Yvon Blais, 1990) at 214.

[417] It would appear that, after 1931, prerogative instruments of the Imperial Crown that addressed *non-constitutional* matters would not continue to prevail over valid legislation of the Dominion Parliament or the provincial legislatures, in the event of an inconsistency. Based on the analysis under the present sub-heading, following the adoption of the *Statute of Westminster*, solely those Imperial instruments that were of a constitutional nature were protected from repeal or amendment by Parliament or the provincial legislatures in Canada.

[418] B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 230, *supra*, at 317: "The Royal Proclamation of 1763 was not issued under the authority of an Act of Parliament."

[419] The "law of England", as used in s. 2(2) of the *Statute of Westminster, 1931*, refers solely to the common law and statutes applicable in England and that was received or adopted by settled overseas colonies such as those in North America. As clear from the text of s. 2(2), the "law of England" is distinguished from Imperial statutes that were intended to be in force in overseas colonies and that never formed any part of the law of England. In this regard, see J.E. Côté, *The Reception of English Law*, (1977), 15 Alta. L. Rev. 29 at 31-32: "The first and most important distinction to be borne in mind is that between: 1. Imperial Law in force *proprio vigore*, and 2. English law received in the colony as such..." Côté describes the second category as including "an English common-law rule or an English statute...copied by the law of a colony *because it was part of the law of England*." [Emphasis in original.] The author adds: "Imperial law in force *proprio vigore*, i.e. by its own force is very different. It consists of statutes which were passed by the Imperial Parliament at Westminster and intended by that Parliament to be in force in the colony at a time when it was part of the Empire and so subject to the Imperial Parliament." At 33, the distinction between the "law of England" and Imperial statutes (in the context of British colonies) is described as follows: "The introduction of English law was intended to import only statutes which were *purely English*, and was *not intended to cover statutes in force all over the Empire* and so needing no introduction." [Emphasis added.] The same distinctions are made and discussed in P. Hogg, *Constitutional Law of Canada*, *supra*, note 332, vol. 1, at 2-17 - 2-18.

Côté indicates that the above distinctions were in fact employed in the Imperial *Colonial Laws Validity Act, 1865* (which the *Statute of Westminster, 1931* repealed). At 34, the author states: "Section 2 [of the 1865 Act] made void any local colonial legislation which was 'repugnant to the provisions of any Act of [the Imperial] Parliament extending to the colony' or subsidiary legislation made thereunder, thus confirming the rule which had always been understood to exist. But section 3 confined this rule to Imperial legislation, providing that colonial law was not to be void because of 'repugnancy to the *law of England*'." [Emphasis added.] The author adds that this distinction was upheld in the leading case of *Phillips* v. *Eyre*, (1870) 40 L.J.Q.B. 28 at 36; L.R. 6 Q.B. 1 at 21-22. See also P. Hogg, *supra*, at 3-3 - 3-4.

Based on the above, it is clear that the Royal Proclamation of 1763, which applied to British colonies and territories in North America, was not a part of the "law of England".

Parliament of the United Kingdom"[420]; or iii) "any order, rule or regulation made under any such [Imperial] Act". None of these categories includes the Royal Proclamation of 1763.[421]

The question may be raised that, if the Royal Proclamation of 1763 was intended to be exempted from repeal or amendment by the Dominion Parliament, why was the Proclamation not referred to in s. 7(1) of the *Statute of Westminster*? Section 7(1) provides:

> "Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule, or regulation made thereunder."

First, as already described, s. 2(2) does not empower the Dominion Parliament to repeal, amend or alter such Orders in Council as the Royal Proclamation of 1763. Therefore, it is not necessary that s. 7(1) explicitly protect the Proclamation from the effect of the other provisions of the *Statute of Westminster*.[422] Second, s. 7(1) is not inclusive of all constitutional instruments of relevance to Canada, so the Proclamation was one of several other constitutional instruments that were not referred to or contemplated in that provision.[423] Certainly, the absence of a specific reference to the Proclamation in s. 7(1) cannot strip the instrument of its constitutional status.

Third, constitutional instruments would not be within the competence of either the federal or provincial legislatures to repeal or amend (unless expressly provided otherwise), even in the absence of s. 7(1). In this regard, P. Gérin-Lajoie provides:

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[420] The Royal Proclamation is an Order in Council. See B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 230, *supra*, at 308: "Royal Proclamations...are essentially acts of the Crown embodied in Orders in Council". The Royal Proclamation is not an Imperial statute, but is said to have the force and effect of an Imperial statute. Section 2(2) includes Orders in Council, but only those made under an Imperial Act. However, the Royal Proclamation of 1763 was an exercise of the royal prerogative that did not arise pursuant to any Imperial statute. See J.E. Côté, *The Reception of English Law*, (1977), 15 Alta. L. Rev. 29 at 49: "[I]t is possible that not all these [prerogative] instruments were authorized by statute." In a footnote to this point, the author refers to the Royal Proclamation of 1763.

[421] The Royal Proclamation of 1763 is said to have the "force and effect of an Imperial statute", although the Proclamation (as an Imperial Order in Council) was not adopted under the authority of any Imperial statute. This category of instrument was not covered by the *Statute of Westminster* in extending legislative authority to the Parliament in Canada or the provincial legislatures. Moreover, the Proclamation, as an Imperial constitutional instrument, did not require the *Colonial Laws Validity Act* to safeguard it from amendment by colonial or Dominion governments.

However, it is interesting to note that, unlike the *Statute of Westminster*, the *Colonial Laws Validity Act* referred to or contemplated orders "having in the colony the force and effect of [an Imperial] Act". Section 2 of the Act provides: "Any colonial law, which is or shall be repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any *order* or regulation made under the authority of such Act of Parliament, *or having in the colony the force or effect of such Act*, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."

It is also worth noting that s. 129 of the *Constitution Act, 1867* empowers the Parliament of Canada or the provincial legislatures respectively to amend or repeal "all Laws in force in Canada, Nova Scotia, or New Brunswick at the Union", but such powers are said to be "according to the Authority of the Parliament or of that Legislature under this Act". However, in the absence of express authority, neither Parliament nor any provincial legislature in Canada had the competence to amend Imperial instruments of a constitutional nature. See *Penikett* v. *The Queen*, (1987) 45 D.L.R. (4th) 108 (Yukon Court of Appeal) at 114: "A constitutional amendment is not a 'matter' within the authority of either Parliament or the provinces." For further discussion of this issue, see note 425 *infra*.

[422] As mentioned in P. Hogg, *Constitutional Law of Canada*, *supra*, note 332, vol. 1, at 3-6: "[Section 7(1)] was inserted because the Canadian delegation to the imperial conferences feared that without such a provision the Canadian Parliament and Legislatures would have gained the power to alter the B.N.A. Act by ordinary statute."

[423] P. Gérin-Lajoie, *Constitutional Amendment in Canada* (Toronto: Univ. of Toronto, 1950) at 10: "The phrase 'British North America Acts, 1867 to 1930,' thus defined in 1930 and used in the Statute of Westminster is *greatly deficient* if the framers of the Canadian clause in the Statute (section 7) intended to refer expressly not only to the original act of 1867 but also to all its [*existing*] amendments. Four British acts passed in 1875, 1889, 1895 and 1907 respectively, which may be considered as amending acts..." And at 11: "The form of citation provided by the act of 1930 and used in the Statute also fails to include all amending acts which have been *passed since 1930 or may be passed in the future*." [Emphasis added.]

"...an amending act deals, essentially, with a matter which is not within the competence of any of the legislative bodies in Canada. Under section 7(3)[424] of the Statute [of Westminster], the *federal Parliament and the provincial legislature are precluded drom dealing with any such matters which is not within their respective competence*, quite apart from the document in which the matter was last dealt with - whether it be one of the British North America Acts, 1867 to 1930, *or not.*"[425] [Emphasis added.]

P. Gérin-Lajoie indicates that Canada's "Constitution" is made up of a number of different Imperial and Canadian instruments, including British Orders in Council (such as the Royal Proclamation[426]):

"...Canada does not possess any constitutional document called 'the Constitution' or 'the Constitution Act.' [Canada's] constitutional rules are to be found in British and Canadian acts of Parliament, in British orders-in-council, in the conventions of the constitution inherited from Britain or developed on Canadian soil."[427]

Section 52(2) of the *Constitution Act, 1982* indicates what instruments are included in the "Constitution of Canada":

"The Constitution of Canada *includes*

(a) the *Canada Act 1982*, including this Act;
(b) the Acts and orders referred to in the schedule; and
(c) any amendment to any Act or order referred to in paragraph (a) or (b)." [Emphasis added.]

B. Slattery comments on the non-exhaustive nature of the above definition as follows:

"Significantly, this catalogue of the contents of the Constitution *does not purport to be exhaustive*. The section states only that the Constitution '*includes*' the Acts and orders referred to, *leaving open the possibility that other sources might exist, in particular the common law.*"[428] [Emphasis added.]

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[424] Section 7(3) provides: "The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively."

[425] P. Gérin-Lajoie, *Constitutional Amendment in Canada*, *supra*, note 423, at 14-15. At 14, the author adds: "The powers of the Parliament of Canada are thus limited by the terms of the Constitution in general, and not only by the few provisions of that Constitution determining the legislative powers of the provinces." See also K.C. Wheare, *The Constitutional Structure of the Commonwealth* (Oxford: Clarendon Press, 1960), c. 3; and P. Hogg, *Constitutional Law of Canada*, *supra*, note 332, vol. 1, at 5-21, n. 81.

Further, it is provided in *Penikett* v. *The Queen*, (1987) 45 D.L.R. (4th) 108 (Yukon Court of Appeal) at 114: "The Parliament of the United Kingdom possessed the power to amend the Constitution of Canada until 1982. This power, as embodied in Part V of the *Constitution Act, 1982*, is now possessed jointly by Parliament and the provincial legislative assemblies. *A constitutional amendment is not a 'matter' within the authority of either Parliament or the provinces.* The amending power is vested in a joint decision of both federal and provincial authority." [Emphasis added.] Similarly, see *Sibbeston* v. *A.G. Canada*, (1988) 48 D.L.R. (4th) 691 (N.W.T. Court of Appeal) at 696-697.

[426] See B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 230, *supra*, at 308: "Royal Proclamations...are essentially acts of the Crown embodied in Orders in Council". See also B. Clark, *Native Liberty, Crown Sovereignty*, *supra*, note 283, at 74: "The proclamation [of 1763] was an order in council bearing the great seal of Great Britain, promulgated by means of what section 4 [of the *Colonial Laws Validity Act, 1865*] described as 'letters patent...authorizing such governor to concur in passing or to assent to laws for the peace, order, and good government of such colony.'" In regard to the constitutional effect of the Royal Proclamation on colonial governments, Clark states on the same page: "I submit that the Royal Proclamation of 1763 was covered by section 4, and thereby was *confirmed in its binding effect upon colonial governments in virtue of the imperial Parliament's Colonial Laws Validity Act.*" [Emphasis added.]

[427] P. Gérin-Lajoie, *Constitutional Amendment in Canada*, *supra*, note 423, at 5.

[428] B. Slattery, *The Independence of Canada*, [1983] 5 Supreme Court L. Rev. 369, at 371.

H. Brun and G. Tremblay conclude that the definition of "Constitution of Canada" in s. 52(2) is not exhaustive and speculate that the use of the term "includes" (or "comprend" in French) is includes unspecified imperial documents:

> "La raison principale semble découler d'impératifs purement techniques: les textes britanniques qui ont parsemé notre histoire constitutionnelle depuis 1867 n'ont jamais clairement séparé les clauses supra-législatives des clauses simplement législatives. Il aurait donc été difficile de le faire lors du rapatriement."[429]

N. Lyon also takes the position that s. 52(2) employs the term "includes" so as to enable the inclusion of imperial instruments in the definition of "Constitution of Canada":

> "Now we can appreciate the caution of the drafter of [s. 52(2) of the *Constitution Act, 1982*] and *we have been introduced to a body of imperial law which...is also included in the Constitution.*[430] Not only does this give rich content to section 35 of that Act, but *it puts the fundamental rights of Aboriginal peoples secured by those old laws beyond the reach of ordinary legislation.*"[431] [Emphasis added.]

P. Hogg suggests that the "Constitution of Canada" might possibly include other documents than those mentioned, but does not feel that that is the better view:

> "The definition of the "Constitution of Canada" in s. 52(2) is introduced by the word 'includes'. *In general, in Canadian statutes, the word 'includes' indicates that the definition is not exhaustive.* The word 'means' is customary for an exhaustive definition. *But, considering the specificity of the list of Acts and orders, and the grave consequences (namely, supremacy and entrenchment...) of the inclusion of other instruments, surely no court would be so bold as to make additions to the 30 instruments in the schedule.* It seems only realistic, therefore, to regard the definition as exhaustive, although it omits many instruments of importance to the government of Canada or the provinces."[432] [Emphasis added.]

Yet, even in respect to the post-1867 years, it is not clear that all instruments of a constitutional nature were in fact included in the Schedule to the *Constitution Act, 1982*. For example, the boundaries extension acts concerning Quebec,[433] Ontario[434] and Manitoba[435] are not found in the Schedule.[436]

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[429] H. Brun & G. Tremblay, *Droit constitutionnel*, 2e éd. (Cowansville, Québec: Les Éditions Yvon Blais, 1990), at 12-13: "The main reason seems to flow from purely technical requirements: the British texts which have scattered our constitutional history have never clearly separated, since 1867, supra-legislative clauses from ordinary legislative clauses. It was therefore difficult to do it at the time of patriation." [Unofficial translation.]

[430] N. Lyon is referring here to the body of imperial laws relevant to Aboriginal peoples (including the Royal Proclamation) that are identified in B. Clark, *Native Liberty, Crown Sovereignty [:] The Existing Aboriginal Right to Self-Government in Canada*, *supra*, note 283.

[431] N. Lyon, *Book Review [:] Native Liberty, Crown Sovereignty*, (1990) 15 Queen's L.J. 361 at 363.

[432] P. Hogg, *Constitutional Law of Canada*, *supra*, note 332, at 1-7.

[433] *Quebec Boundaries Extension Act, 1912*, S.C. 1912, c. 45; *Quebec Boundaries Extension Act, 1912*, S.Q. 1912, c. 7; *An Act respecting the north-western, northern and north-eastern boundaries of the province of Quebec*, S.C. 1898, c. 3; *An Act respecting the delineation of the north-western, northern and north-eastern boundaries of the province of Quebec*, S.Q. 1898, c. 6.

[434] See, for example, *Ontario Boundaries Extension Act*, S.C. 1912, c. 40.

[435] See, for example, *Manitoba Boundaries Extension Act, 1912*, S.C. 1912, c. 32.

[436] The constitutional status of boundaries extension legislation is affirmed in *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 (S.C.C.) at 1103-1104: "...the James Bay development by Quebec Hydro was originally initiated without regard to the rights of the Indians who lived there, even though they were expressly protected by a constitutional instrument; see the *Quebec Boundaries Extension Act, 1912*, S.C. 1912, c. 45." For the same conclusion as to the constitutionality of boundaries extension legislation, see D. Sanders, *The Rights of the Aboriginal Peoples of Canada*, (1983) 61 Can. Bar Rev. 314 at 316.

J. Woehrling indicates that it would be preferable to view the enumeration in s. 52(2) as exhaustive,[437] but leaves open the possibility that "includes" would be given its ordinary meaning:

> "Dans la mesure où l'article 52(2) definit la Constitution comme *comprenant notamment* les lois et décrets a l'annexe, il faut l'interpreter comme ne visant que les textes encore en vigeur. Par ailleurs, l'énumeration à l'annexe de certains textes aujourd'hui abrogés s'explique sans doute par le désir de faciliter la compréhension de l'évolution historique des *Lois constitutionnelles*."[438] [Emphasis added.]

With respect, it would be highly premature and inconsistent to conclude that s. 52(2), despite its use of the non-exhaustive terms "includes" in English and "comprend" in French, provides an exhaustive definition of the "Constitution of Canada". In this regard, it is worth noting that the schedule of Acts and orders referred to in s. 52(2) only refers to instruments adopted from the time of Confederation. Pre-1867 instruments simply are not listed, despite their constitutional significance. This most likely was done for symbolic reasons emphasizing the independence of the Canadian state, rather than to deny constitutional status to important pre-Confederation instruments.[439]

In this regard, B. Wildsmith points out that previous consolidations of constitutional instruments in Canada included the Royal Proclamation as a constitutional document:

> "...Appendix II of R.S.C. 1970 (Appendices) titled 'Constitutional Acts and Documents' and arranged chronologically...lists the *Royal Proclamation of 1763* as the first document..."[440]

Hogg lists a number of pre-Confederation instruments omitted from the schedule and mentions, in some cases, their ongoing constitutional significance:

> "For example, the definition omits the pre-1867 instruments which governed the territory now forming part of Ontario and Quebec: the *Royal Proclamation of 1763*, the Quebec Act of 1774, the Constitutional Act of 1791 and the Union Act of 1840. Also excluded are the *pre-1867 instruments which are still the constitutions of Nova Scotia (1749),*

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[437] J. Woehrling, "L'évolution constitutionnelle du Canada et du Québec de 1867 à nos jours" in J.-Y. Morin & J. Woehrling, *Les Constitutions du Canada et du Québec [:] du régime français à nos jours* (Montréal: Éditions Thémis, 1992) 123, at 483. For a similar view, the author cites at n. 1227 *Dixon* v. *A.G. B.C.*, (1986) 31 D.L.R. (4th) 546 (S.C. B.C.), at 556-557, per MacEachern C.J.

[438] Id., at 144, n. 56: "In the event that section 52(2) defines the Constitution as *including in particular* the Acts and orders appearing in the schedule, one must interpret it as only contemplating those texts still in force. Morever, the enumeration in the schedule of certain texts that are currently abrogated is undoubtedly explained by the desire to facilitate understanding of the historic evolution of *constitutional laws*." [Unofficial translation, emphasis added.] In this context, it is worth noting that the *Royal Proclamation of 1763* would be contemplated by "include" in s. 52(2), since the Proclamation is still in force in Canada.

[439] In some cases, it is also likely that particular pre-1867 instruments were believed to no longer have any legal impact or effect. For example, the *Union Act, 1840*, (U.K.), R.S.C. 1985, Appendix II, No. 4, had fused the provinces of Upper Canada and Lower Canada into the united province of Canada with a single legislature. This arrangement was terminated at the time of Confederation with the adoption of the *Constitution Act, 1867*. See P. Hogg, *Constitutional Law of Canada, supra*, note 332, at 2-9 and 2-10. A second example is the *Constitutional Act, 1791* which repealed the *Quebec Act, 1774*, thereby eliminating any further reason for including the latter legislation as a constitutional document.

[440] B. Wildsmith, *Aboriginal Peoples and Section 25 of the Canadian Charter of Rights and Freedoms* (Saskatoon: University of Saskatchewan Native Law Centre, 1988), at 43, n. 108. In *R.* v. *Sikyea*, 40 W.W.R. 494 (N.W.T. Terr. Ct.), Sissons J. also notes the constitutional characterization of the Royal Proclamation as follows: "Reference was made to the Royal Proclamation of October 7, 1763, *cited in the Revised Statutes of Canada, Vol. VI, 6127, as the first of Canada's Constitutional Acts and Documents*, and commonly spoken of as the Charter of Indian Rights". In fact, the Revised Statutes of Canada, have included the Royal Proclamation as a constitutional instrument both prior to and subsequent to the adoption of the *Constitution Act, 1982*. See also B. Slattery, *Understanding Aboriginal Rights*, *supra*, note 232, at 783: "[The principles that defined the relationship between the British Crown and the native peoples of Canada and the status of their lands, laws, and existing political structures] were protected in part by the provisions of *constitutional instruments such as the Proclamation of 1763*, and the Constitution Act, 1867." [Emphasis added.]

Prince Edward Island[441] *(1769), New Brunswick (1784), Newfoundland (1832), and British Columbia*[442] *(1866)."*[443] [Emphasis added.]

Since pre-Confederation instruments still make up the constitutions of half the provinces of Canada, it would be difficult to conclude that the "Constitution of Canada" as defined in s. 52(2) of the *Constitution Act, 1982* does not include documents of ongoing constitutional relevance and status.[444] Such documents include the *Royal Proclamation of 1763*.

In relation to Aboriginal peoples, it is hardly surprising to conclude that the Proclamation was always and continues to be a constitutional instrument. Constitutional obligations in favour of Aboriginal peoples were again required by the British Crown, and duly made and agreed to by the Dominion Parliament in 1867[445] and 1869[446], as part of the terms and conditions for admitting Rupert's Land and the North-Western Territory into the Union. In this regard, the joint Addresses of the Dominion Parliament made specific reference to the "equitable principles that have uniformly governed the British Crown in its dealings with the aborigines"[447] and to the "duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer"[448].

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[441] P.E.I. was separated from Nova Scotia and constituted as a separate colony in 1769: see P. Hogg, *supra*, note 2829, at 2-15. For a description of the constitutions of the maritime provinces, J.E. Read, *The Early Provincial Constitutions*, (1948) 26 Can. Bar Rev. 621, cited by P. Hogg, *Constitutional Law of Canada*, *supra*, note 332, at 2-3, n. 4.

[442] See *Union of Vancouver Island and British Columbia Act, 1866*, (U.K.), 29 & 30 Vict., c. 67. Note that P. Hogg, *Constitutional Law of Canada*, *supra*, note 332, at 2-14, n. 52, refers to this and other *pre-confederation* documents pertaining to British Columbia as "constitutional" documents.

[443] P. Hogg, *Constitutional Law of Canada*, *supra*, note 332, at 1-7.

[444] H. Brun & G. Tremblay, *Droit constitutionnel*, 2e éd. (Cowansville, Québec: Les Éditions Yvon Blais, 1990), at 13, makes specific reference to provincial and federal constitutional documents, of imperial status, as being contemplated by s. 52(2), but indicates that some constitutional provisions relating exclusively to provincial or federal constitutions are subject to amendment by ordinary provincial law (according to ss. 44 and 45 of the *Constitution Act, 1982*).

In *Dixon* v. *A.-G. British Columbia*, [1987] 1 W.W.R. 313, McEachern C.J.S.C. suggested that the *Constitution Act of British Columbia*, possibly a part of the provincial constitution of British Columbia, is "'constitutional' in the wider sense, but s. 52(2) is a narrow, precise definition" (p. 323) that does not contemplate provincial constitutions.

With respect, it is submitted that "Constitution of Canada" as defined in s. 52(2) embraces the constitutions of the provinces. Reasons supporting this position include the following:

i) Part V of the *Constitution Act, 1982* is entitled "Procedure for Amending the *Constitution of Canada*". A number of different amending procedures are explicitly provided in Part V, including the procedure for amending the constitution of any province (s. 45). Moreover, s. 45 is qualified by or made subject to another procedure for amending the Constitution of Canada (s. 41, unanimous amending formula). For a similar view, see J. Woehrling, "L'évolution constitutionnelle du Canada et du Québec de 1867 à nos jours" in J.-Y. Morin & J. Woehrling, *Les Constitutions du Canada et du Québec [:] du régime français à nos jours* (Montréal: Éditions Thémis, 1992) 123, at 489.

ii) Similarly, s. 44 of Part V provides that, subject to ss. 41 and 42, Parliament may amend the "Constitution of Canada" in relation to the executive government of Canada or the Senate and House of Commons. If an amendment to the executive government at the federal level (s. 44) is specifically stated to be a modification of the "Constitution of Canada", then it would be consistent that amendments to provincial constitutions (s. 45) also be regarded as changes to the "Constitution of Canada".

The fact that provincial constitutions are part of the "Constitution of Canada" does not mean that they would not be subject to the *Canadian Charter of Rights and Freedoms*. Consistent with s. 52(1) of the *Constitution Act, 1982*, s. 32(1) of the Charter makes clear that provincial governments and legislatures are subject to the Charter's provisions for all matters within their competence. See *Dixon* v. *A.-G. British Columbia*, *supra*, at 325-326.

[445] *Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada*, Schedule (A), R.S.C. 1985, App. II, No. 9, 8 at 8-9.

[446] *Address*, Schedule (B), R.S.C. 1985, App. II, No. 9, 14 at 16.

[447] *Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada*, Schedule (A), R.S.C. 1985, App. II, No. 9, 8 at 8-9.

[448] *Address*, Schedule (B), R.S.C. 1985, App. II, No. 9, 14 at 16.

In this way, the equitable principles and protective provisions in the *Royal Proclamation of 1763* were ensured to be constitutional obligations on the part of Canada, in respect to Rupert's Land and the North-Western Territory. Such constitutional requirements by the British Crown were entirely consistent with those taken a century earlier through the Proclamation, since the latter was also a constitutional instrument.

Furthermore, in relation to the Royal Proclamation, it is important to note that section 25 of the *Constitution Act, 1982* does not permit the guarantee of certain rights and freedoms in the *Canadian Charter of Rights and Freedoms* to:

> "abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
>
> (a) *any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763...*" [Emphasis added.]

The explicit reference to the Royal Proclamation in section 25 is significant in a number of ways. First, it implies that the Royal Proclamation, or at least its aboriginal provisions, have always had constitutional status.[449] Perhaps, some might argue that the rights or freedoms recognized by the Royal Proclamation only relate in s. 25 to "other rights or freedoms" that are of a non-constitutional nature. While such an interpretation appears theoretically possible, it is most unlikely. An examination of the *Constitution Acts, 1867 to 1982* suggests that specific instruments are generally only mentioned by name if they are already constitutional in nature,[450] or if they are to be given validity as constitutional instruments.[451]

Second, should the Royal Proclamation ever be determined in the future not to have been a constitutional instrument during any period between 1867 to 1982, s. 25 still confirms the fundamental importance and ongoing relevance of the rights and freedoms recognized in the Proclamation. In particular, it entrenches constitutional standards to the extent that the constitutional guarantees of certain rights and freedoms *of non-Aboriginal peoples* in the *Canadian Charter of Rights and Freedoms* cannot abrogate or derogate from the rights or freedoms recognized in the Royal Proclamation. Since the Charter is binding[452] on federal and provincial governments and legislatures, the reference to the Royal Proclamation serves to constitutionally limit the respective powers of these two levels of government.

Third, the guarantee of rights and freedoms *of Aboriginal peoples* in the *Canadian Charter of Rights and Freedoms* cannot be construed in a manner that abrogates or derogates from those rights and freedoms in the Royal Proclamation. This ensures that there is a continuity of the enjoyment by Aboriginal peoples of the rights and freedoms that were recognized in the Royal Proclamation in respect to them.

Fourth, the rights and freedoms in the Royal Proclamation have corresponding obligations on the part of governments and others that reinforce and give added meaning to such rights and freedoms. It is especially worth noting the historical context reflected in the Royal Proclamation, whereby the Crown has a general fiduciary duty "toward native people to protect them in the

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[449] Since the Imperial Parliament is not subject to a "federal" constitution, Parliament could have amended at any time (up to the adoption of the *Statute of Westminster, 1931*) the Royal Proclamation through ordinary imperial legislation.

[450] It would make little sense for Canada's Constitution to refer to "ordinary" legislation or orders in council specifically by name, unless there be a most compelling reason, since ordinary legislation can be easily repealed at any time by the appropriate legislature.

[451] An example of this latter situation is the *Constitution Act, 1930*, which confirmed the Natural Resource Transfer Agreements between Canada and the Western provinces and conferred such Agreements with constitutional status.

[452] Section 32(1) of the *Canadian Charter of Rights and Freedoms*.

enjoyment of their aboriginal rights and in particular in the possession and use of their lands".[453] Where relevant to a specific situation, this historic fiduciary duty should be fully considered in applying the non-derogation provision in section 25 of the *Constitution Act, 1982*.

In conclusion, the Royal Proclamation appears to have always had and continues to have constitutional status. As an Imperial Order in Council, the Proclamation (at least its Aboriginal provisions) is an integral part of the "Constitution of Canada". As already indicated, prerogative instruments (such as the Proclamation) were the principal means of constituting colonies in early times. To date, the Revised Statutes of Canada still includes the Royal Proclamation as the first of Canada's Constitutional Acts and Documents. Further, numerous jurists in Canada characterize the Royal Proclamation as a constitutional instrument.[454] In addition, legal experts take the view that the Proclamation could not have been amended by federal or provincial legislatures in Canada at least until 1931. It has also been demonstrated that the *Statute of Westminster, 1931* did not provide Parliament or provincial legislatures in Canada with the power to repeal or amend the Royal Proclamation.

Further, there has never been any other imperial legislation that has empowered Parliament or provincial legislatures to abrogate or derogate from the aboriginal provisions of the Royal Proclamation. Rather, since 1982 and the entrenchment of s. 25 of the *Constitution Act, 1982*, the rights and freedoms relating to Aboriginal peoples in the Proclamation constitute important constitutional standards by which to measure or interpret the constitutional guarantees in the *Canadian Charter of Rights and Freedoms*.[455] It is explicitly stated in s. 25 that no abrogation or derogation from the rights and freedoms of Aboriginal peoples in the Royal Proclamation is permitted in construing the guarantees in the Charter.

2.6 Do the Aboriginal Provisions in the Proclamation Apply in "Settled"[456] Areas?

In relation to the application of imperial prerogatives, such as the Royal Proclamation, in settled territories, K. McNeil provides:

> "Our view that the Royal Proclamation's Indian provisions do not apply in settled Canada...stems from the fundamental rule of British colonial law that *apart from statute the Crown has no legislative authority in settled colonies*. It makes no difference that the Crown may have purported to legislate for such colonies (even if the practice remained unquestioned for many years), *for without the assistance of Parliament or a local assembly, its legislative acts would simply be void*."[457] [Emphasis added.]

McNeil states the above rule in advancing the point that the Crown could not *take away or reduce* aboriginal title in settled territories by prerogative act:

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[453] B. Slattery, *Understanding Aboriginal Rights*, *supra*, note 232, at 753. See also *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335 at 383, where Dickson J. of the Supreme Court of Canada refers to "the historic responsibility which the Crown has undertaken , to act on behalf of the Indians so as to protect their interests in transactions with third parties". See also Wilson J. at 349, where she also makes reference to "a historic reality" and the Crown's responsibility to protect Indian interests on reserved lands.

[454] See, for example, the various jurists cited earlier under this sub-heading.

[455] In regard to the relevance of aboriginal rights and s. 25 to interpretation of human rights under the Charter, see sub-heading 8.3.1 *infra*.

[456] In regard to the notion of "settlement", see also sub-heading 4.4.4.

[457] K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989), at 274.

> "If, then, the aboriginal peoples of settled Canada had land rights as of the moment the Crown acquired sovereignty, either by virtue of their own customary laws or the doctrine of common law aboriginal title, *the Crown could not take those rights away, or modify them in any way, by prerogative act*. Accordingly, it could not, by issuing a Proclamation or extending it to a newly-acquired settlement, *reduce* existing land rights to a 'personal and usufructuary right, dependent upon [its own] good will'[458]."[459] [Emphasis added.]

McNeil is correct that the Crown through the royal prerogative could not derogate from common law aboriginal title so as to take away rights. Moreover, the Royal Proclamation is said to be confirmatory of Aboriginal title, which is not dependent on any executive or legislative instrument for its existence.[460]

There is also support for the rule that in "settled" areas the Crown has no legal authority apart from statute, although it did have the power to set up courts of justice and constitute a representative assembly.[461] However, it does not mean that this doctrine has the effect of excluding[462] the application of the Royal Proclamation of 1763 for the following reasons:

(i) It is far from clear that this doctrine was firmly established in 1763 at the time of the Royal Proclamation. As McNeil indicates, "these general rules were well settled *before the end* of the eighteenth century". [463] B. Slattery states that "there is considerable doubt whether the common law of the eighteenth century recognized a principle whereby so-called 'uncivilized' acquisitions automatically constituted settled colonies. *The evidence suggests that such a doctrine did not achieve prominence until the following century.*"[464] [Emphasis added.]

(ii) The two rules of reception concerning "settled" colonies and "conquered or ceded" colonies were most often not applied in British North America by the courts in any consistent way. As P. Hogg emphasizes, the "settled" classification was blatently applied to "conquered" or "ceded" areas so as to avoid the reception of French (as opposed to English) law:

> "...outside the territory now included in Ontario and Quebec (*which was indisputably acquired by either conquest or cession*), the tendency of the courts was to prefer the 'settled' classification. The settled classification entailed the automatic reception of English, not French law, a result that was congenial to the English population...The *reception of English law into [the Maritime] provinces has often been explained on the patently false basis that they were "settled" colonies.*"[465] [Emphasis added.]

(iii) In particular, the rules of reception ignored the existence of Aboriginal peoples and their customary laws in British North America, in a manner that was discriminatory and caused

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[458] See opinion of Lord Watson in *St. Catherine's Milling and Lumber Co.* v. *The Queen*, (1888) 14 App. Cas. 46 (P.C.), at 54-55.

[459] K. McNeil, *Common Law Aboriginal Title*, *supra*, note 457, at 275.

[460] *Guerin* v.*The Queen*, [1984] 2 S.C.R. 335, at 376-379.

[461] K. McNeil, *Common Law Aboriginal Title*, *supra*, note 457, at 114-115 and authorities cited at 115, n. 27. See also B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 230, *supra*, at 30-34.

[462] See, for example, J.E. Côté, *The Reception of English Law*, (1977), 15 Alta. L. Rev. 29 at 49, n. 123: "Mr. Roberts-Wray points out that the Royal Proclamation of 1763 covered some settled colonies."

[463] K. McNeil, *Common Law Aboriginal Title*, *supra*, note 457, at 115.

[464] B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 230, *supra*, at 297.

[465] P. Hogg, *Constitutional Law of Canada*, *supra*, note 332, at 2-2. See also K. McNeil, *Common Law Aboriginal Title*, *supra*, note 457, at 115: "...in conquered and ceded territories where local law was unsuitable for Europeans, the colonists were held to be subject to English law instead."

great injustice[466]. Any notion of settlement that ignores the prior existence of indigenous inhabitants is based on notions of cultural superiority[467] that cannot be justified. In this regard, P. Hogg confirms:

> "...[rules of reception] were *often applied in disregard of the existence of aboriginal peoples, who were in possession of much of British North America before the arrival of the Europeans*...It seems clear that all aboriginal customary law did not disappear at the time of European settlement, as the rule of reception for a settled British colony might imply."[468]

(iv) In cases where the reception of English law in a specific province came after the Royal Proclamation, the doctrine could only affect in any event *future* uses of the prerogative power by the Crown. For example, it is said that, in regard to Manitoba, Saskatchewan, and British Columbia, the adopted reception date is 1870,[469] more than a century after the Royal Proclamation.

(v) It has also been judicially established in some instances that the date of reception is the date of "institution of a local legislature in the colony"[470] and not the date of first settlement. In the case of Newfoundland, English law was deemed to have first been received in 1832 when the first legislature was held.[471] Again, in the case of Newfoundland and a number of other provinces, this occurred well after the issuance of the Royal Proclamation.[472]

(vi) The early constitutions of the colonies, including the power of colonies to set up courts of justice and constitutive assemblies, are provided by the Royal Proclamation of 1763, *at the same time as providing widespread protections for Aboriginal peoples*. Therefore, a compelling argument exists that the Aboriginal provisions necessarily qualify and limit the provisions (and resulting colonial competence) regarding courts of justice and constitutive assemblies in the Proclamation.

When interpreting specific provisions, such as those pertaining to the powers of colonies, it is critical to remember that constitutional and other statutory instruments must be read as a whole. Consistent with this rule, colonial laws passed henceforth could not be in contravention of the provisions in the Royal Proclamation in regard to Aboriginal peoples.

(vii) If the Indian Territories covered by the numbered treaties included both "settled"

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[466] K. McNeil, *Common Law Aboriginal Title*, *supra*, note 457, at 115, n. 29, indicates that some precedents exist whereby English law did not apply to non-European cultures and religions if injustice or oppression were to result. McNeil refers to case-law surveyed in *Re Loh Toh Met*, (1961) 27 M.L.J. 234 at 237-243, esp. *Khoo Hooi Leong* v. *Khoo Chong Yeok*, [1930] A.C. 346 at 355.

[467] See M. Asch & P. Macklem, *Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow*, (1991) 29 Alta. L. Rev. 498 at 511. See also B. Slattery, *The Independence of Canada*, [1983] 5 Supreme Court L. Rev. 369, at 378: "The concept [of settled colonies] was also extended to settlements of British subjects in territories with a native population, *where the local laws were deemed 'barbarous' or 'unchristian,'* or at any rate inappropriate for the needs of the settler communities." [Emphasis added.]

[468] See P. Hogg, *Constitutional Law of Canada*, *supra*, note 332, at 2-2.

[469] Id. at 2-4; see esp. n. 10, where Hogg indicates that "[t]he rules regarding the significance of the date of reception were the same regardless of whether the date was fixed by settlement or by legislative adoption."

[470] *Young* v. *Blaikie*, (1822) 1 Nfld. L.R. 277, 283 (S.C. Nfld.), cited in P. Hogg, *Constitutional Law of Canada*, *supra*, note 332, vol. 1, at 2-4. Similarly, see J.E. Côté, *The Reception of English Law*, (1977), 15 Alta. L. Rev. 29, at 48, 87; and B. Slattery, *The Independence of Canada*, [1983] 5 Supreme Court L. Rev. 369, at 383, n. 47.

[471] P. Hogg, *Constitutional Law of Canada*, *supra*, note 332, vol. 1, at 2-4.

[472] It is important to remember that the Royal Proclamation was a constitutional document, which provided for the constitutive assemblies of colonies, at the same time as providing a number of important safeguards for Aboriginal peoples.

areas and "ceded" or "conquered"[473] areas, the Crown's representatives would be required to respect in any event the terms of the Royal Proclamation in relation to cession and protection.

(viii) Subsequent to the Royal Proclamation, Imperial legislation and related instruments[474] with broad geographical application made repeated references to the fundamental concepts in the Proclamation [i.e. "Indian Territories" and the punishment of crimes and offences therein].[475] Such legislative references demonstrate tacit Parliamentary support to the ongoing broad application of the Royal Proclamation (regardless of the dubious distinction between "settled" and " ceded" or "conquered" areas").[476]

In addition, Marshall C.J. in *Johnson* v. *M'Intosh*, states that the Crown's prerogative powers to grant lands or restrain encroachments on Aboriginal peoples has always been recognized (even in colonies where a local government had already been established):

> "In the case of *Campbell* v. *Hall*, that part of the proclamation was determined to be illegal, which imposed a tax on a conquered province, *after a government had been bestowed on it*. The correctness of this decision cannot be questioned, but its application to the case at bar cannot be admitted. Since the expulsion of the Stuart family, the power of imposing taxes, by proclamation, has never been claimed as a branch of regal prerogative; *but the powers of granting or refusing to grant, vacant lands, and of restraining encroachments on the Indians, have always been asserted and admitted. The authority of this proclamation, so far as it respected this continent, has never been denied, and the titles it gave to lands have always been sustained in our courts*."[477] [Emphasis added.]

Based on the above, it cannot be said that the Royal Proclamation's application was definitively excluded in the case of "settled" territories. This is especially the conclusion in relation to the Aboriginal provisions in the Proclamation. Not only is it generally unclear that the reception of English law in specific areas of Canada preceded the promulgation of the Proclamation, but also the classification of "settled" areas has defied factual and historical evidence pertaining to actual conquest and cession. In relation to Aboriginal peoples, it is absurd to employ theories that would deny their prior existence or that are premised on the absence of Aboriginal settlement.

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[473] It is also most difficult to justify applying to Aboriginal peoples and their territories any such rules concerning "conquered" areas, since (in regard to Canada and the United States) conquest generally refers to the results of war with France and not conquest of Aboriginal peoples.

[474] Reference is being here to prerogative instruments promulgated pursuant to imperial legislation: see B. Clark, *Native Liberty, Crown Sovereignty*, *supra*, note 283, at 101.

[475] B. Clark, *Native Liberty, Crown Sovereignty*, *supra*, note 283, at 98-105.

[476] See also B. Slattery, *The Independence of Canada*, [1983] 5 Supreme Court L. Rev. 369, at 378, where it is said that the "principles" applying to settled colonies were not applied to Aborlginal peoples: "The American colonies had a 'mixed' aspect, with settlers benefitting from principles applying in settled colonies, and native peoples initially enjoying the principle of continuity associated with conquests."

[477] *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) at 597.

3. GOVERNMENT EXTINGUISHMENT POLICIES AND THE METIS[478]

In general terms, it can be said that the experience of Metis throughout Canada's history has been exceedingly harsh and debilitating. For the most part, the Metis have been treated both legally[479] and politically as a marginal people and denied a land base.[480] Since it has commonly been assumed by non-Aboriginal governments that Metis rights have been extinguished and that Metis are not a federal responsibility,[481] the Metis were most often excluded from programs and services available to other Aboriginal peoples.[482]

In regard to extinguishment questions, government policies have been applied to the Metis in ways that are quite different from "Indians" and Inuit. As already indicated, until 1977[483], it would appear that the only Canadian legislative provisions expressly contemplating (though not actually legislating) "extinguishment" of "Indian title" were found in the *Manitoba Act*,

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[478] It is beyond the scope of the present study to fully describe all aspects of Metis history or the social, cultural and political development of the Metis in Canada. Literature pertaining to the historical, legal and political issues relevant to Metis includes: P. Chartrand, *Manitoba's Métis Settlement Scheme of 1870* (Saskatoon: Native Law Centre, Univ. of Saskatchewan, 1991); P. Chartrand, *Aboriginal Rights: The Dispossession of the Métis*, (1991) 29 Osgoode Hall L. J. 457; J. Peterson & J. Brown, (eds.), *The New Peoples: Being and Becoming Metis in North America* (Winnepeg: University of Manitoba Press, 1985); D. Purich, *The Metis* (Toronto: James Lorimer & Co., 1988); E. Pelletier, *A Social History of the Manitoba Metis: The Development and Loss of Aboriginal Rights* (Winnipeg: Manitoba Metis Federation Press, 1987); D. Sprague, *Government Lawlessness in the Administration of Manitoba Land Claims, 1870-1887*, (1980) 10 Man. L. J. 415; D. Sprague, *Canada and the Metis, 1869-1885* (Waterloo: Wilfred Laurier Press, 1988); T. Flanagan, *The Case Against Metis Aboriginal Rights*, (1983) 9 Can. Public Policy 314; T. Flanagan, *Riel and the Rebellion: 1885 Reconsidered* (Saskatoon: Western Producer Prairie Books, 1983); C. Chartier, *In the Best of the Interest of the Metis Child* (Saskatoon: University of Saskatchewan Native Law Centre, 1988); J. Sawchuk et al., *Metis Land Rights in Alberta: A Political History* (Edmonton: Metis Association of Alberta, 1981); G.F. Stanley, *The Birth of Western Canada: A History of the Riel Rebellions* (Toronto: University of Toronto Press, 1960); B. Morse & R. Groves, *Canada's Forgotten Peoples: The Aboriginal Rights of Metis and Non-Status Indians*, (1987) 2 Law and Anthropology 139; J.E. Magnet, *Metis Land Rights in Canada*, Draft report submitted to the Royal Commission on Aboriginal Peoples, October 28, 1993; F. Tough & L. Dorion, *"the claims of the Half-breeds...have been finally closed": A Study of Treaty Ten and Treaty Five Adhesion Scrip*, Draft report submitted to the Royal Commission on Aboriginal Peoples, October 22, 1993; L. Mandell, *Land Rights of the Metis*, Draft report submitted to the Royal Commission on Aboriginal Peoples, November 18, 1993; D. Sprague, *Administrative History of Metis Claims*, Draft report submitted to the Royal Commission on Aboriginal Peoples, n.d.; C. Chartier, *'Indian': An Analysis of the Term as Used in Section 91(24) of the British North America Act*, (1978) 43 Sask. L. Rev. 37; C. Bell, *Who are the Metis People in Section 35(2)?*, (1991) 29 Alta. L. Rev. 351; A. Jordan, *Who is an Indian?*, [1977] 1 C.N.L.R. 22; D. Sanders, "Metis Rights in the Prairie Provinces and the Northwest Territories: A Legal Interpretation" in H. Daniels, (ed.), *The Forgotten People: Metis and Non-Status Land Claims in Alberta* (Ottawa: Native Council of Canada, 1979).

[479] In 1982, the Metis were expressly recognized in s. 35(2) of the *Constitution Act, 1982* as one of the "aboriginal peoples of Canada".

[480] A notable exception is found in Alberta, where *The Metis Population Betterment Act*, S.A. 1938 (2nd Session), c. 6. Since then the situation of Metis in Alberta has progressed through the adoption of the *Metis Settlements Act*, R.S.A., c. M-14.3, the *Metis Settlements Accord Implementation Act*, R.S.A., c. M-14.5, and the *Metis Settlements Land Protection Act*, R.S.A., c. M-14.8. This latter Act and "Metis settlement lands" are further protected by the *Constitution of Alberta Amendment Act, 1990*, R.S.A., c. C-22.2.

[481] The federal government has not clearly accepted responsibility for the Metis or that they are included under the class of federal legislative authority, "Indians, and Lands reserved for the Indians", in s. 91(24) of the *Constitution Act, 1867*. This issue is discussed under sub-heading 3.1 *infra*.

[482] The result of this treatment over countless decades is described in B. Richardson, *People of Terra Nullius [:] Betrayal and Rebirth in Aboriginal Canada* (Vancouver: Douglas & McIntyre, 1993) at 269-270: "...if the treatment of status Indians, for whom the federal government acknowledged responsibility, was considered scandalous, 'how can one describe the treatment of the other 250,000 Indians for whom almost no special programmes exist...? If Indian poverty is bad, Métis poverty is worse. If Indian housing is inadequate, Métis housing is not fit for human beings. If Indian morale is low, their pride shattered in many communities, Métis morale has been even lower.'" Richardson is quoting from an earlier article he wrote entitled "Métis organize to fight for recognition", *Montreal Star*, December 26, 1970.

[483] In addition to the surrender provisions in the James Bay and Northern Quebec Agreement, the extinguishment of rights, titles, etc. was explicitly provided in the *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32, s. 3(3).

1870[484] and the *Dominion Lands Acts*[485] in regard to the Metis.

As will be described, the *Manitoba Act, 1870* and the *Dominion Lands Acts* refer to "Half-Breeds"[486] in Manitoba and in, what is now, Saskatchewan, Alberta and the Northwest Territories.[487] Metis in other parts of Canada were not subject to this legislation. The discussion under this sub-heading focusses solely on the Metis covered by these two Acts.

Around 1870, the term "Métis" or "Métif" was used to refer to persons of French-Indian descent, and the term "Half-Breed" to those Indians whose white ancestry was other than French.[488] However, for purposes of the *Manitoba Act, 1870* and the *Dominion Lands Acts*, the term "Half-Breed" refers to all people of mixed Indian-White ancestry.[489] Similarly, the current usage of the term "Metis" or "Métis" refers to all persons of mixed ancestry in the prairie provinces and elsewhere in Canada.[490]

Prior to examining the relevant provisions of the two Acts and the extinguishment practices that arose from these laws and the orders-in-council that followed, it is critical to determine whether the term "Indians" in constitutional instruments includes the Metis. This is undertaken under the following sub-heading.

3.1 Are Metis Included in the Constitutional Term "Indians"?

There are numerous reasons why it is crucial to determine whether the term "Indians"

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[484] See Item 2 of the Schedule of the *Constitution Act, 1982*. Section 31 of the *Manitoba Act* provides: "And whereas, it is expedient, *towards the extinguishment of the Indian Title to the lands in the Province*, to appropriate a portion of such ungranted lands..." [Emphasis added.] See also s. 32 of the Act.

[485] There were various *Dominion Lands Acts* which made explicit reference to the Metis ("Half-breeds"). See, for example, *An Act to Amend and Consolidate the Several Acts Respecting the Public Lands of the Dominion*, 1879, 42 Victoria, c. 31, s. 125: "The following powers are hereby delegated to the Governor in Council:- e. *To satisfy any claims existing in connection with the extinguishment of the Indian title preferred by half-breeds* resident in the North-West Territories outside of the limits of Manitoba, on the fifteenth day of July, one thousand eight hundred and seventy, by granting lands to such persons, to such extent and on such terms and conditions, as may be deemed expedient". [Emphasis added.] See also *An Act to Amend and Consolidate the Several Acts Respecting the Public Lands of the Dominion*, 1883, 46 Victoria, c. 17, s. 81, where s. 125 was amended to read "previous to the fifteenth day of July" rather than "on the fifteenth day of July".

[486] The term is sometimes spelled as "half-breeds" or "Half-breeds" in legislative instuments.

[487] The *Dominion Lands Act* also applied to the Peace River Block in British Columbia from 1884-1930: see K. Lysyk, *The Indian Title Question in Canada: An Appraisal in the Light of Calder*, (1973) 51 Can. Bar Rev. 450 at 457-458, n. 19.

[488] P. Chartrand, *Manitoba's Métis Settlement Scheme of 1870*, note 478, *supra*, at 1, n. 3. See also J. Sawchuk *et al.*, *Metis Land Rights in Alberta: A Political History*, note 478, *supra*, at 8-9; K. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada (Ss. 25, 35 and 37)" in W.S. Tarnopolsky & G.-A. Beaudoin, (eds.), *The Canadian Charter of Rights and Freedoms [:] Commentary* (Toronto: Carswell, 1982) 467 at 470.

[489] P. Chartrand, *Manitoba's Métis Settlement Scheme of 1870*, note 478, *supra*, at 26-31; K. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada (Ss. 25, 35 and 37)" in W.S. Tarnopolsky & G.-A. Beaudoin, (eds.), *The Canadian Charter of Rights and Freedoms [:] Commentary* (Toronto: Carswell, 1982) 467 at 470.

See also J. Sawchuk *et al.*, *Metis Land Rights in Alberta: A Political History*, note 478, *supra*, at 8, where the authors explain: "[The term "Half-Breed"] was not intended as a derogatory term, although in later years, it sometimes took on this connotation. *It simply separated for administrative purposes two populations Indians who were to be settled on reserves and Half-breeds who were allowed scrip.*" [Emphasis added.]

[490] J. Sawchuk *et al.*, *Metis Land Rights in Alberta: A Political History*, note 478, *supra*, at 8; K. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada (Ss. 25, 35 and 37)" in W.S. Tarnopolsky & G.-A. Beaudoin, (eds.), *The Canadian Charter of Rights and Freedoms [:] Commentary* (Toronto: Carswell, 1982) 467 at 470. See also *R.* v. *McPherson*, [1993] 1 W.W.R. 415 at 423 (Man. Prov. Ct.), reversed on other grounds [1994] 2 W.W.R. 761 (Man. Q.B.): "It appears that today's Metis could be someone with North American aboriginal blood who holds himself out as such."

in constitutional instruments includes the Metis. Should Metis be "Indians" for constitutional purposes, this could mean that: i) in relation to s. 91 (24) of the *Constitution Act, 1867*, the Canadian Parliament had and continues to have legislative authority in regard to Metis and lands "reserved" for the Metis; ii) at the same time, provincial legislative capacity in regard to affecting the Metis and their land rights would be significantly limited; iii) federal constitutional obligations in favour of "Indians" would also apply to the Metis; iv) in particular, the constitutional duties of protection under the *Rupert's Land and North-Western Territory Order*, 1870 or the *Royal Proclamation of 1763* would govern the conduct of the Canadian government and Parliament in regard to the Metis and their lands; and v) the strict standards of a fiduciary would apply to the Canadian government and Parliament in carrying out their protective duties in respect to the Metis.

These changes in constitutional interpretation, if valid, are likely to affect any analysis as to whether the land rights of Metis were lawfully extinguished. Moreover, it would likely have substantial impacts on Metis relationships with federal and provincial governments both now and in the future.

To date, it has not been determined by the Supreme Court whether the term "Indians" as used in constitutional instruments includes the Metis. Therefore, it remains uncertain whether Metis are included in the term "Indians" in all constitutional documents, in some of them, or none at all.

However, the constitutional status of the Metis is highly relevant to this extinguishment study, especially in determining the nature of the constitutional rights and obligations that exist in favour of the Metis. In particular, in the context of the *Manitoba Act, 1870* and the *Dominion Lands Acts*, the constitutionality of the actions of governments and legislatures, and the validity of purported extinguishments of Metis land rights, depend on the constitutional context in which such actions took place.

First, it is clear that the aboriginal rights or "Indian title" of the Metis are a result of their Indian ancestry. The fact that persons of Indian-white descent choose to identify as Metis or belong to the Metis nation[491] (rather than the Indian nation that is a part of their heritage) cannot *per se* lead to a loss of their aboriginal rights.

In this regard, it is important to note that the *Manitoba Act, 1870* recognizes that "Half-Breeds" possess "Indian Title"[492] so it would be most difficult to argue that Metis cannot possibly qualify as possessing aboriginal rights. Moreover, s. 35(1) of the *Constitution Act, 1982* confirms that Metis have constitutionally-protected aboriginal rights, unless these have been validly extinguished. In light of such constitutional recognitions of Metis rights, any criteria that may have been specified at common law that would serve to deny Metis the possibility of possessing aboriginal rights cannot prevail over specific constitutional or other statutory enactments that indicate the contrary.[493]

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[491] It is said that "[t]he Métis population developed in the West during the fur-trade period, roughly from 1670 to 1870": see D. Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada" in S. Beck & I. Bernier, (eds.), *Canada and the New Constitution [:] The Unfinished Agenda* (Montreal: Institute for Research on Public Policy, 1983) 225 at 253. Regardless of when the Metis were recognized as a distinct people or nation, it is clear that by 1870 when the *Manitoba Act, 1870* was passed and in 1871 when the *Constitution Act, 1871* confirmed the validity of the *Manitoba Act*, both the Parliament in Canada and the Imperial Parliament recognized that Metis as "Metis" or "Half-Breeds" and not solely as "Indians" who had aboriginal rights.

[492] Section 31 of the *Manitoba Act, 1870*.

[493] For example, in T. Flanagan, *The Case Against Metis Aboriginal Rights*, (1983) 9 Can. Public Policy 314 at 320, the criteria in *Hamlet of Baker Lake* v. *Minister of Indian Affairs*, [1980] 1 F.C. 518 (F.C.T.D.) at 557-558, is cited to reach the conclusion that Metis would be "disqualified" from possessing aboriginal rights. In *Baker Lake*, Mahoney J. indicates that two of the criteria for proof of aboriginal title are that occupation must be to the "exclusion of other organized societies" and must be "an established fact at the time sovereignty was asserted by England."

In regard to Aboriginal peoples in general, the validity of both these criteria has been challenged: see B. Slattery, *Understanding Aboriginal Rights*, (1987), 66 Can. Bar Rev. 727, at 758-761. Moreover, common law criteria cannot be so

In *Re Eskimo*,[494] the Supreme Court of Canada considered whether the term "Indians" in s. 91(24) of the *Constitution Act, 1867* includes "Eskimos" or "Inuit". After examining existing pre-Confederation documents and the understandings that prevailed during that period, it was concluded:

> "...the English word 'Indians' was equivalent to or equated the French word 'Sauvages' and *included all the present and future aborigines native subjects of the proposed Confederation of British North America...*"[495]

However, in regard to the Metis, it has been pointed out that "evidence exists...which goes the other way".[496] In particular, some of the historical documents examined by the Supreme Court of Canada in *Re Eskimo* may have considered "Eskimos" as "Indians" but specifically excluded "Half-Breeds".[497]

While it is true that in some instances, "Inuit" or "Eskimos" were included in the notion of "Indians", the Supreme Court noted that this was not always the case.[498] Nevertheless, it was held that "the weight of opinion favours the construction" that the term "Indians" includes "Inuit" in s. 91(24).[499]

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devised as to prevent or otherwise frustrate the constitutional or other statutory recognition of aboriginal rights, including those of the Metis. See also *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.), where Lambert J.A. (dissenting) provides at 286: "In my opinion, the indefinite or long, long user test, requiring a period dating back to before contact, is conclusively rebutted by the inclusion of Metis in s. 35 of the *Constitution Act, 1982*, not as Indians but as a distinct aboriginal people"; and Macfarlane J.A. at 147, where it is suggested that there may exist two different standards for Indians and Metis: "The requirement that the [Indian] plaintiffs' practices had to be traditional before qualifying for the protection of the common law as aboriginal rights may involve a time consideration which has no parallel in the determination of the aboriginal rights of the Métis." See also *R.* v. *Vanderpeet*, [1993] 5 W.W.R. 459 (B.C.C.A.) at 501, per Lambert J.A. (dissenting): "...having regard to the protection given by s. 35 of the *Constitution Act, 1982* to the aboriginal rights of the Métis people it may well be that aboriginal customary rights can arise after the arrival of British sovereignty and the common law."

The existence of coexistent, as opposed to exclusive, aboriginal title in relation to Metis and Indians was recognized by the federal government in *Order in Council*, May 6, 1899, P.C. 918, which provides in part: "As already set forth, [the Minister] is of the opinion that *Indian and Half-Breed rights are co-existent* and should properly be extinguished concurrently. When Half-Breed rights are not so extinguished, they must, he considers, be held to exist after the extinguishment of the Indian title and up to such time as action is taken for their extinguishment." [Emphasis added.] See also *Order in Council*, December 14, 1888, where territory said to have been surrendered by the Green Lake Indians (Treaty No. 6 Adhesion) is recognized as possibly having unsurrendered "claims of Half-breeds". See also *Report of the Honourable W.A. MacDonald of the Alberta District Court on the Exclusion of Half-Breeds from Treaty Lists*, August 7, 1944, reprinted in part in P. Cumming & N. Mickenberg, (eds.), *Native Rights in Canada* (Toronto: Indian-Eskimo Association of Canada, 1972) at 325, Appendix 5: "It would appear that whenever it became necessary to or expedient to extinguish Indian rights in any specified territory, *the fact that Halfbreeds also had rights by virtue of their Indian blood was invariably recognized. These rights co-existed with the rights of the Indians.*" [Emphasis added.]

It is also worth noting that the federal government has not based its land claims policy wholly on Mahoney J.'s criteria for proof of aboriginal title. In Indian and Northern Affairs Canada, *Federal Policy for the Settlement of Native Claims* (Ottawa: Indian Affairs and Northern Development, 1993), at 5, the government indicates that its own criteria for acceptance of aboriginal claims for negotiation was "derived initially from the 1979 *Baker Lake* decision". However, the 1993 policy requires that occupation of a territory by an Aboriginal people must have been "*largely* to the exclusion of other organized societies" rather than total exclusion as implied by Mahoney J.'s criteria. While adding the term "largely" may provide some flexibility, the notion of "largely to the exclusion of other organized societies" appears to be arbitrary and does not reflect adequately the traditional land use patterns among Aboriginal peoples.

[494] *Re Eskimo*, [1939] S.C.R. 104 (S.C.C.).

[495] Id., at 118 per Cannon J.

[496] J. Woodward, *Native Law* (Toronto: Carswell, 1989), at 56.

[497] *Re Eskimo*, [1939] S.C.R. 104 (S.C.C.). In particular, the Supreme Court examined at 106-107 and 123 the census prepared by the Hudson's Bay Company, which census was included in the Report of the Select Committee on the Hudson's Bay Company to the Houses of Parliament of Great Britain and Ireland in 1857. The census included "Esquimaux" in the population of "Indian Races", but tabulated the population of "Whites and half-breeds in Hudson's Bay Territory" separately.

[498] Id. at 115, 120 -121.

[499] Id. at 124.

Similarly, it can be concluded that the "weight of opinion" favours including "Metis" in the constitutional usage of the term "Indians". In addition, an increasing number of Canadian jurists take the view that the term "Indians" in s. 91(24) includes the Metis.[500] It is the view of this study that such a conclusion is correct not only in the case of s. 91(24) of the *Constitution Act, 1867*, but also in relation to the *Royal Proclamation of 1763*, the *Rupert's Land and North-Western Territory Order*, and the *Natural Resources Transfer Agreements* of 1930.[501]

"Inuit" generally constitute a different race[502] than "Indians", so it had to be determined if the constitutional term "Indians" in s. 91(24) of the *Constitution Act, 1867* included "Inuit". However, in the case of Metis, any definition of "Metis" acknowledges that such persons generally have Indian ancestry. Therefore, it would make little sense to exclude generally such persons of mixed Indian-white ancestry from s. 91(24). In this context, it would also make little

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[500] See, for example, P. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1992), vol. 1, at 27-4: "...[Metis] are probably 'Indians' within the meaning of s. 91(24)"; B. Slattery, *First Nations and the Constitution: A Question of Trust*, (1992) 71 Can. Bar Rev. 261, at 283; C. Chartier, *'Indian': An Analysis of the Term as Used in Section 91(24) of the British North America Act*, (1978) 43 Sask. L. Rev. 37 at 68; J.E. Magnet, *Metis Land Rights in Canada*, Draft report submitted to the Royal Commission on Aboriginal Peoples, October 28, 1993, at 24-26; L. Mandell, *Land Rights of the Metis*, Draft report submitted to the Royal Commission on Aboriginal Peoples, November 18, 1993, at 26-44; B. Morse & J. Giokas, *Do the Metis Fall Within Section 91(24) of the Constitution Act, 1867 and If So, What Are the Ramifications in 1993?*, Report prepared for the Royal Commission on Aboriginal Peoples, September 1993; D. Sanders, "Aboriginal People in the Constitution of Canada" in S. Beck & I. Bernier, (eds.), *Canada and the New Constitution [:] The Unfinished Agenda* (Montreal: Institute for Research on Public Policy, 1983) 225 at 254-255; D. Sanders, *Aboriginal Peoples and the Constitution*, (1981) 19 Alta. L. Rev. 410 at 420-421.

In elaborating its position that s. 35(1) of the *Constitution Act, 1982* includes the inherent right of Aboriginal peoples to self-government and that Aboriginal governments and the federal government have concurrent legislative powers, the Royal Commission on Aboriginal Peoples described its approach as follows: "This approach assumes that, in the interests of constitutional rationality and harmony, *the word Indians in section 91(24) carries the same meaning as the term Aboriginal peoples in section 35; that is, it extends not only to 'Indians' in the narrow sense of the word, but also to the Inuit and Métis peoples of Canada.*" [Emphasis added.] See Royal Commission on Aboriginal Peoples, *Partners in Confederation[:] Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services, 1993) at 38.

For a judicial view that Metis are included within s. 91(24), see *R.* v. *Rocher*, (1982) 3 C.N.L.R. 122 (N.W.T. Terr. Ct.). In addition, it is worth noting that, in addition to the four national Aboriginal organizations, the federal government and the ten provincial governments had agreed in the now defunct Charlottetown Accord that a new s. 91A would be added to the *Constitution Act, 1867* to clarify that Metis were in fact included in s. 91(24). See Draft Legal Text, October 9, 1992, s. 8: "*For greater certainty*, class 24 of section 91 applies, except as provided in section 95E, in relation to all the Aboriginal peoples of Canada." [Emphasis added.] Section 95E constituted a proposed exception that recognized the concurrent jurisdiction of the Alberta legislature to make laws in relation to Metis and their lands within Alberta, subject to federal paramountcy. See also Report of the Aboriginal Justice Inquiry of Manitoba, *The Justice System and Aboriginal People* (Winnipeg: Queen's Printer, 1991), vol. 1, at 201, where it is recommended that "[t]he federal and provincial governments...specifically acknowledge and recognize the Metis people as coming within the meaning of section 91(24) of the *Constitution Act, 1867* and that the Government of Canada accept that it has primary constitutional responsibility to seek to fulfill this mandate".

For a contrary view on Metis and s. 91(24), see B. Schwartz, *First Principles: Constitutional Reform with Respect to the Aboriginal Peoples of Canada, 1982-1984* (Kingston, Ontario: Institute of Intergovernmental Relations, 1985) at 183-228.

[501] In regard to Inuit being included in the term "Indians" in Canadian constitutional law, see Mahoney J. in *Hamlet of Baker Lake* v. *Minister of Indian Affairs*, (1979) 107 D.L.R. (3d) 513 at 540-541: "While the *Royal Proclamation* of 1763, various statutes and almost all decided cases refer to Indians and do not mention Inuit or Eskimos, the term 'Indians', in Canadian constitutional law, includes the Inuit: *Re Eskimos*, [1939] 2 D.L.R. 417...In the absence of their exclusion from that term, either expressly or by compelling inference, decisions relevant to the aboriginal rights of Indians apply to the Inuit."

It is worth noting that s. 35(2) of the *Constitution Act, 1982* defines "aboriginal peoples of Canada" as specifically including the Metis. Therefore, in the context of s. 35 it is not critical that Metis be included in the term "Indians" as used in subsection (2). At the same time, it must be recognized that many persons of mixed Indian and white ancestry would in any event be included in the term "Indians" if they so choose to identify themselves as "Indians" and are accepted as such by the Indian nation to which they belong.

[502] See O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: MacLelland & Stewart, 1992), at 30, 381, where it is said that Inuit are genetically distinct from Indians, except for the Athapathskan-speakers of the Northwest. In this regard, the author cites at 30, n. 48 and 381, n. 81, E. Szathmary, "Human Biology in the Arctic" in D. Damas, (ed.), *Handbook of North American Indians 5: Arctic* (Washington D.C.: Smithsonian Institute, 1984) at 70-71.

sense to determine the inclusion of Metis in s. 91(24) based on the historical documents of the Hudson's Bay Company or particular views of legislatures during the pre-Confederation period. As D. Sanders provides:

> "...the practice after 1870 indicated that the government did not see a firm and clear division between the two populations. A federally appointed commissioner reporting in 1944 commented: 'In negotiating the various Indian treaties from time to time the aboriginal inhabitants of mixed blood were given the right to elect whether to take treaty or scrip...*When Treaty No. 8...was concluded in 1899, a large proportion of those admitted into treaty at that time were of mixed blood.*' The term used in the Manitoba Act and the Dominion Lands Act was 'Half-Breed'. *Clearly, mixed-blood peoples were not excluded from Indian status when membership lists were first prepared and could not now be excluded from Indian status without purging the Indian-reserve communities of at least half their population.*"[503] [Emphasis added.]

In relation to the Metis, it would appear that better evidence than Hudson's Bay Company documents[504] can be found in the *Manitoba Act, 1870*. As already indicated, s. 31 expressly recognizes that "Metis" or "Half-Breeds" possess "Indian Title". Section 91(24) not only refers to "Indians", but also to "Lands reserved for the Indians". It would be difficult to imagine how Metis possessing aboriginal title to lands would be excluded from the latter designation. Presently, Indians with mixed blood who identify themselves as Indians, and Inuit with mixed Inuit-white ancestry who identify themselves as Inuit, are not excluded from s. 91(24).

As D. Sanders emphasizes:

> "The exclusion of 'Half-Breeds' or Métis from the constitutional category of 'Indians' would seem contrary to the Manitoba Act, contrary to early practice, and disruptive of well established patterns of Indian policy."[505]

Consequently, in the absence of incontrovertible evidence to the contrary, it would appear to be discriminatory to conclude that persons of Indian-white descent who identify as Metis are excluded from s. 91(24), simply because they identify themselves as a part of the Metis people. As s. 35(2) of the *Constitution Act, 1982* makes clear, Metis are part of the "aboriginal peoples of Canada" in the constitutional context. As indicated by C. Bell, "Parliament cannot control or alter the constitutional definition of the term ["Indians"] through legislation.[506]

In *Re Eskimo*, Kerwin J. emphasizes that the intention of the Imperial Parliament in regard to s. 91(24) was to enable policies concerning "all the aborigines" to be confided to the Dominion Parliament:

> "...when the Imperial Parliament enacted that there should be confided to the Dominion

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[503] D. Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada" in S. Beck & I. Bernier, (eds.), *Canada and the New Constitution [:] The Unfinished Agenda* (Montreal: Institute for Research on Public Policy, 1983) 225 at 255.

[504] Census documentation by the Hudson's Bay Company or others may not be the most reliable source of information. For example, in the 1871 census, Indians were totally excluded from the population of Red River. "The amalgamation of the North West Company and Hudson's Bay Company made the Metis the largest element in Red River's population; the 1871 census counted 9,800 Metis, of whom 5,720 were French-speaking and roughly 4,000 were English-speaking...out of a total population of 11,400. The remaining 1,600 were whites; Amerindians had not been counted": O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: MacLelland & Stewart, 1992) at 263.

[505] D. Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada" in S. Beck & I. Bernier, (eds.), *Canada and the New Constitution [:] The Unfinished Agenda* (Montreal: Institute for Research on Public Policy, 1983) 225 at 255.

[506] C. Bell, *Who are the Metis People in Section 35(2)?*, (1991) 29 Alta. L. Rev. 351 at 371. The same point is made in K. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada (Ss. 25, 35 and 37)" in W.S. Tarnopolsky & G.-A. Beaudoin, (eds.), *The Canadian Charter of Rights and Freedoms [:] Commentary* (Toronto: Carswell, 1982) 467 at 469; K. McNeil, *The Constitutional Rights of the Aboriginal Peoples of Canada*, [1982] 4 Supreme Court Law Review 255 at 261.

> Parliament power to deal with 'Indians and lands reserved for the Indians,' *the intention was to allocate to it authority over all the aborigines within the territory to be included in the confederation.* The fact that there were no Eskimos within the boundaries of the provinces that first constituted the Dominion is beside the point as provision was made by the *British North America Act* to include the greater part, if not all, of the territory belonging to the Hudson's Bay Company."[507] [Emphasis added.]

Similarly, in *A.G. Ontario* v. *A.G. Canada*,[508] Idington J. emphasizes that section 91(24) was conferred to the Dominion Parliament, in order to carry out "the high, honourable, and onerous duties of the guardians of the *many races of Indians then within or that might at any future time fall within the borders of Canada*".[509] These "high duties of national importance" were said to be discharged "all the better by being freed from the trammels of being confined within the narrow views that the provincial range of vision might have restricted action...".[510]

As in the case of Inuit, Metis *per se* did not have to be specifically contemplated in 1867 in order to be included in the term "Indians". In *Re Eskimo*, Kerwin J. concludes:

> "...the majority of authoritative publications, and particularly those that one would expect to be in common use in 1867, adopt the interpretation that the term "Indians" includes *all the aborigines of the territory subsequently included in the Dominion.*"[511] [Emphasis added.]

In addition, both the doctrine of "progressive interpretation"[512] and the judicial rules of interpretation established by the Supreme Court of Canada in regard to statutory enactments pertaining to Aboriginal peoples[513] call for generous, liberal constructions that would favour the inclusion of Metis as "Indians" in s. 91(24).

These same rules of interpretation would also favour the inclusion of Metis in the term "Indians"[514] in the *Royal Proclamation of 1763*. In the context of the Proclamation, the term "Indians" includes both "Inuit"[515] and "Metis"[516] without distinction. In addition, there exist

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[507] *Re Eskimo*, [1939] S.C.R. 104 (S.C.C.) at 119 per Kerwin J. (Cannon and Crocket JJ. concurring).

[508] *A.G. Ontario* v. *A.G. Canada*, (1908) 42 S.C.R. 1.

[509] Id. at 117-118. Cited in L. Mandell, *Land Rights of the Metis*, Draft report submitted to the Royal Commission on Aboriginal Peoples, November 18, 1993, at 9.

[510] Ibid.

[511] *Re Eskimo*, [1939] S.C.R. 104 (S.C.C.) per Kerwin J. (Cannon and Crocket JJ. concurring) at 121.

[512] In relation to the doctrine of progressive interpretation used in relation to constitutional instruments, see note 332 and accompanying text, *supra*.

[513] In regard to judicial rules of interpretation concerning statutory enactments pertaining to Aboriginal peoples, see note 304, *supra*.

[514] See J. Brown, "Metis" in *Canadian Encyclopedia*, vol. 2 (Edmonton: Hurtig, 1985) 1126, where it is said that in 1818 an observer noted that "the 'Half-Breeds' under the denominations of *bois-brûlés* and *métifs* have formed a separate and distinct tribe of Indians for a considerable time back." Cited in P. Chartrand, *Manitoba's Métis Settlement Scheme of 1870*, note 478, *supra*, at 27.

[515] For a view that "Inuit" or "Eskimos" are included in the use of the term "Indian" in the Royal Proclamation, see *Re Eskimo*, [1939] S.C.R. 104 at 115 per Duff C.J. (*obiter dictum*); B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories* (Saskatoon: Univ. of Saskatchewan Native Law Centre, 1979), at 231-233.

[516] See K. McNeil, *The Constitutional Rights of the Aboriginal Peoples of Canada*, [1982] 4 Supreme Court Law Review 255 at 262, n. 35, where the author refers to the "non-compliance with the *Royal Proclamation of 1763*" in respect to the Metis; J.E. Magnet, *Metis Land Rights in Canada*, Draft report submitted to the Royal Commission on Aboriginal Peoples, October 28, 1993, at 74, where it is said that "the Metis had already come under Crown protection through the Royal Proclamation..."

no exceptions or limitations in the Proclamation that would exclude persons of mixed Indian-white or Inuit-white ancestry.[517] Rather, the overriding concern and objective in the Proclamation is to safeguard Aboriginal peoples and their lands and territories.[518]

The fact that both the Dominion Parliament and the Imperial Parliament[519] constitutionally recognized in the *Manitoba Act, 1870* that "Half-Breeds" possessed "Indian Title" is critical in determining the meaning of the term "Indians" in other constitutional instruments of that period. It is especially relevant in considering the Imperial *Rupert's Land and North-Western Territory Order,*[520] adopted in accordance with s. 146[521] of the *Constitution Act, 1867.*

Since the original province of Manitoba was formed out of a part of Rupert's Land, it is not surprising that the Rupert's Land Order was adopted by the Imperial Parliament within a few weeks of the *Manitoba Act, 1870.*[522] In this context, it is important to note that the "ungranted lands" from which "Half-Breeds" were to receive 1.4 million acres[523] were said in the *Manitoba Act, 1870* to be "subject to...the conditions and stipulations contained in the agreement for the surrender of Rupert's Land by the Hudson's Bay Company to Her Majesty."[524] One of these "conditions" relevant to Aboriginal peoples is found in Term 14 of the Deed of Surrender:

> "Any claims of Indians[525] to compensation[526] for lands required for purposes of settlement shall be disposed of by the Canadian Government *in communication with the Imperial Government...*"[527] [Emphasis added.]

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[517] A related question is which individuals would qualify to be a citizen or member of an Indian, Inuit or Metis nation. This point is emphasized in regard to the Metis in K. Lysyk, "The Rights and Freedoms of the Aboriginal Peoples of Canada (Ss. 25, 35 and 37)" in W.S. Tarnopolsky & G.-A. Beaudoin, (eds.), *The Canadian Charter of Rights and Freedoms [:] Commentary* (Toronto: Carswell, 1982) 467 at 470. Equitable and effective criteria should be developed in regard to citizenship or membership, consistent with the right of self-identification of each people or nation.

[518] The nature and scope of the Aboriginal provisions in the Proclamation are discussed under sub-heading 2.1 *supra.*

[519] Section 5 of the *Constitution Act, 1871* confirmed the validity of the *Manitoba Act 1870*, which was believed to have been *ultra vires* of the Parliament of Canada. See G.F. Stanley, *The Birth of Western Canada: A History of the Riel Rebellions* (Toronto: University of Toronto Press, 1960) at 120.

[520] R.S.C. 1985, App. II, No. 7, confirmed as part of the Constitution of Canada in Item 3 of the Schedule to the *Constitution Act, 1982.* For a discussion of the Rupert's Land Order and the accompanying terms and conditions relevant to Aboriginal peoples, see the text and ensuing discussion accompanying notes 339, 702.

[521] Section 146 provides: "It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council,...on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-Western Territory, or either of them, into the Union, *on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve*, subject to the provisions of this Act: and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland." [Emphasis added.]

[522] The *Rupert's Land and North-Western Territory Order* was adopted on June 23, 1870 and the *Manitoba Act, 1870* was adopted on May 12,1870.

[523] Section 31 of the *Manitoba Act, 1870.*

[524] Section 30 of the *Manitoba Act, 1870.*

[525] In regard to the Metis in Manitoba, "claims of Indians" could refer to lands claimed under ss. 31 or 32 of the *Manitoba Act, 1870*, or future claims in the context of the government requiring lands for the "purposes of settlement".

[526] "Compensation" could entail recognition of some of the Aboriginal peoples' lands, restitution either in terms of other lands suitable to Aboriginal peoples or financial compensation, or any combination of these elements. See also note 346 *supra.*

[527] The Deed of Surrender is included as Schedule (C) of the Imperial *Rupert's Land and North-Western Territory Order.* Moreover, the above provision in the Surrender is also included as Term 14 of the Order itself. It is also important to emphasize that the Canadian government was not free to satisfy claims of Aboriginal peoples without receiving the "necessary directions" from one of the Queen's principal Secretaries of State. In this regard, the Order provides at Term 15:

Based on all of the above, there is strong evidence that Metis land rights were also contemplated in the phrase "claims of Indians" and were inextricably linked to the constitutional terms and conditions attached to the transfer of Rupert's Land to Canada.[528]

The constitutional terms and conditions also include the joint addresses of the House of Commons and the Senate that took place in 1867 and 1869 respectively and which are included as Schedule (A) and (B) of the Rupert's Land Order. Two provisions directly relevant to "Indians" (including the Inuit and Metis) are:

> "...*upon the transference of the territories in question* to the Canadian government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled *in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines*[529]...[Order, Schedule (A), December 1867 Address]

> That *upon the transference of the territories in question* to the Canadian Government *it will be our duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer...*"[530] [Order, Schedule (B), May 1869 Address] [Emphasis added.]

As indicated in the above provision, the overall federal constitutional "duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer" is another reason why Metis are to be included within s. 91(24) of the *Constitution Act, 1867.*

As already discussed in this study, there is some controversy whether the Royal Proclamation applies to Rupert's Land. In this regard, it is a conclusion of this study that the Proclamation's terms expressly contemplated *proprietary colonies*, such as that of the Hudson's Bay Company, in some of its terms.[531] Moreover, upon the transfer of Rupert's Land to Canada, the terms of the Proclamation would by extension apply. The study also concludes that the above-quoted requirement in Schedule (A) of the Rupert's Land Order to settle Aboriginal claims "in conformity with the *equitable principles* which have uniformly governed the British Crown in its dealings with the aborigines" would in any event incorporate all of the "equitable principles" found in the Proclamation.[532]

"The Governor in Council is authorized and empowered to arrange any details that may be necessary to carry out the above terms and conditions. [new para.] And the Right Honourable Earl Granville, one of Her Majesty's principal Secretaries of State, is to *give the necessary directions* herein accordingly." [Emphasis added.]

[528] J.E. Magnet, *Metis Land Rights in Canada*, Draft report submitted to the Royal Commission on Aboriginal Peoples, October 28, 1993, at 23: "The Rupert's Land and North-Western Territory Order and Schedule A thereto speak of governmental obligations in respect of 'claims of Indians' and the 'claims of the Indian tribes'. 'Half-breeds' are not mentioned specifically. Nonetheless, there is evidence that Metis claims were intended to be included under that heading. *During that period the rubric 'Indian title' was a generic expression used to refer to all aboriginal title.* Under the *Manitoba Act*, the s. 31 lands reserved for Metis were 'towards the extinguishment of the Indian title'. Similarly, the *Dominion Lands Act, 1879* refers to the 'Indian title' of the Half-breeds. Prime Minister Macdonald stated in the House of Commons that Metis had claim to the land by virtue of their Indian ancestry." [Emphasis added.]

See also P. Cumming & N. Mickenberg, (eds.), *Native Rights in Canada* (Toronto: Indian-Eskimo Association of Canada, 1972) at 168: "Further, the very strong support which successive governments of Canada have given to the aboriginal rights of native people in the Hudson's Bay Company territories, would indicate that Indian, *Metis*, and Inuit title extend throughout those lands." [Emphasis added.]

[529] *Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada*, Schedule (A), R.S.C. 1985, App. II, No. 9, 8 at 8-9.

[530] *Address*, Schedule (B), R.S.C. 1985, App. II, No. 9, 14 at 16.

[531] For a discussion that the territories of the Hudson's Bay Company in Rupert's Land constituted a proprietary colony and government under the Royal Proclamation, see note 67 *supra*.

[532] See sub-heading 2.3 *supra*.

As illustrated in the above discussion, there is a consistency of constitutional purpose, as well as an interrelationship or linkage, between the Aboriginal provisions in the *Royal Proclamation of 1763*, the *Constitution Act, 1867* (s. 91(24)), the *Manitoba Act, 1870*, and the *Rupert's Land and North-Western Territory Order*. Similarly, it would appear that the reference to "Indians" in para. 13[533] of the *Natural Resources Transfer Agreements* of 1930 includes the Metis.[534]

In regard to the meaning of the term "Indians" in the *Natural Resources Trans. Agreements*,[535] it has been determined in Saskatchewan that the term follows the definition of "Indian" in the federal *Indian Act*. As D. Sanders describes:

> "The case [of *R.*v. *Pritchard*[536]] was appealed to the Saskatchewan District Court, where it was mistakenly ruled that *Pritchard* came within the Indian Act definition of 'Indian'. In the *Laprise*[537] case in 1978, the Saskatchewan Court of Appeal noted that at the time of the Natural Resources Transfer Agreements, the Indian Act defined 'Indians' as 'persons entitled to be registered as such.'*...This meant giving a different meaning to the term 'Indian'in the Natural Resources Transfer Agreements from that given to the term in section 91(24) of the BNA Act of 1867.*"[538] [Emphasis added.]

Such rulings have been subject to strong criticism.[539] In 1993, in *R. v. Ferguson*, Goodson J. of the Alberta Provincial Court did not accept the criterion used in the *Laprise* case and ruled that "non-treaty Indians" are included in the term "Indians" in the Natural Resources Transfer Agreements.[540] In an *obiter dictum*, the judge also queried whether Metis might also be included in such constitutional term.[541]

It is the view of this study that reasons for embracing Metis within the term "Indians" as used in the *Natural Resources Transfer Agreements* would include the following.

First, the Manitoba Transfer Agreement directly refers in its first preamble to the "ungranted and waste lands" in the *Manitoba Act, 1870* and that such lands are "subject to the conditions and stipulations contained in the Agreement for the surrender of Rupert's Land by the Hudson's Bay Company". Therefore, in ways already described above, the overall context of

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[533] In the Manitoba Natural Resources Transfer Agreement, the provision on "...hunting, trapping and fishing game and fish for food at all seasons of the year..." is in para. 13. In the equivalent Agreements with Alberta and Saskatchewan, the provision is in para. 12.

[534] Further analysis of the *Natural Resource Transfer Agreements* is found under sub-heading 6.6 *infra*.

[535] The Natural Resource Transfer Agreements are included as Schedules to the *Constitution Act, 1930*, R.S.C. 1985, Appendix II, No. 26. The Parliament of Canada ratified the Transfer Agreements through legislation: see *Manitoba Natural Resources Act*, 20-21 Geo. V, c. 29; *Saskatchewan Natural Resources Act*, 20-21 Geo. V, c. 41; and *Alberta Natural Resources Act*, 20-21 Geo. V, c. 3.

[536] *R.*v. *Pritchard*, (1973) 32 D.L.R. (3d) 617 (Sask. D.Ct., Battleford).

[537] *R.* v. *Laprise*, (1978) 6 W.W.R. 85 (Sask. C.A.). Sanders indicates that a third case, *R.* v. *Budd*, *R.* v. *Crane*, (1979) 6 W.W.R. 450 (Sask. C.A.) has followed the *Laprise* decision.

[538] D. Sanders, "Aboriginal People in the Constitution of Canada" in S. Beck & I. Bernier, (eds.), *Canada and the New Constitution [:] The Unfinished Agenda* (Montreal: Institute for Research on Public Policy, 1983) 225 at 255-256.

[539] A. Jordan, *Who is an Indian?*, [1977] 1 C.N.L.R. 22; D. Sanders, "Metis Rights in the Prairie Provinces and the Northwest Territories: A Legal Interpretation" in H. Daniels, (ed.), *The Forgotten People: Metis and Non-Status Land Claims in Alberta* (Ottawa: Native Council of Canada, 1979) at 20; D. Sanders, "Aboriginal People in the Constitution of Canada" in S. Beck & I. Bernier, (eds.), *Canada and the New Constitution [:] The Unfinished Agenda* (Montreal: Institute for Research on Public Policy, 1983) 225 at 255-256; K. McNeil, *The Constitutional Rights of the Aboriginal Peoples of Canada*, [1982] 4 Supreme Court Law Review 255 at 261; C. Bell, *Who are the Metis People in Section 35(2)?*, (1991) 29 Alta. L. Rev. 351 at 371.

[540] *R.* v. *Ferguson*, [1993] 2 C.N.L.R. 148, affirmed [1994] 1 C.N.L.R. 117 (Alta. Q.B.).

[541] Id.

the Transfer Agreement would encompass constitutional provisions relevant to the Metis.[542]

Similarly, in order for the prairie provinces to be placed in the same position of the four original provinces of Canada, a similar provision to s. 109 of the *Constitution Act, 1867* is included in each Transfer Agreement to transfer natural resources to the prairie provinces.[543] As in s. 109, the transfer of such resources to the prairie provinces is "subject to any *trusts* existing in respect thereof, and to any *interest* other than that of the Crown in the same".[544] As in the case of s. 109, such "trust" or "interest" would include those existing in favour of any of the Aboriginal peoples, including the Metis. Once again, it is clear that the overall context of the Transfer Agreements is sufficiently broad to include all Aboriginal peoples, including the Metis.

Second, para. 13[545] of the Transfer Agreements stipulates that the province's jurisdiction over game is extended "to Indians within the boundaries [of the province], provided, however, that the said Indians shall have the right...of hunting, trapping and fishing...". In *R.* v. *Frank*, the Supreme Court held that "Indians within the boundaries" refers to more than "Indians" residing within the province. Rather, the paragraph[546] refers to all "Indians who, at any particular moment, happen to be found within the boundaries of the Province of Alberta".[547]

However, if "Indians" in para. 13 would not refer also to the Metis, then the legislative jurisdiction that is extended to the province in this regard would also not extend to the Metis by virtue of this paragraph. A purposive analysis would suggest that the better interpretation is that the term "Indians" in the Transfer Agreements is intended to refer to all Aboriginal peoples, including the Metis.

Third, the doctrine of progressive interpretation and the judicial rules of interpretation in regard to statutory enactments pertaining to Aboriginal peoples would favour an interpretation of the constitutional term "Indians" that includes the Metis.[548]

It is worth noting that pre-Confederation legislation in 1850 included mixed blood persons

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[542] In the Transfer Agreements pertaining to Saskatchewan and Alberta, there is obviously no similar clause pertaining to the *Manitoba Act, 1870* and the terms and conditions in the Deed of Surrender of the Hudson's Bay Company. However, both Agreements provide that the province concerned is entitled to be placed in a "*position of equality*" with the other Provinces of Confederation with respect to its natural resources. The reference date for such equality is stated in the preamble to the Saskatchewan Transfer Agreement to be July 15, 1870, when Rupert's Land and the North-Western Territory were admitted into and became part of Canada. Moreover, s. 2 of the *Constitution Act, 1930* provides that the Alberta Transfer Agreement is to be construed so that Alberta "may enjoy rights equal to those conferred upon, or reserved to...Saskatchewan" under its Transfer Agreement.

In addition, if all three prairie provinces have the same paragraph in their Transfer Agreement pertaining to "hunting, trapping and fishing for game and fish...", the principle of equality would reinforce the conclusion that the same interpretation must be accorded to all three paragraphs.

[543] See section 1 of each of the three Transfer Agreements pertaining to the prairie provinces.

[544] Id.

[545] Para. 13 of the Manitoba Transfer Agreement provides: "In order to secure to the *Indians of the Province* the continuance of the supply of game and fish for their support and subsistence, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the *Indians within the boundaries thereof*, provided, however, that the said Indians shall have the right, which the Province hereby assures to them of *hunting, trapping and fishing game and fish for food at all seasons of the year* on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access." [Emphasis added.]

[546] The same paragraph in the Alberta Transfer Agreement is found in para. 12.

[547] *R.* v. *Frank*, [1978] 1 S.C.R. 95 (S.C.C.) at 101.

[548] The same point is made in L. Mandell, *Land Rights of the Metis*, Draft report submitted to the Royal Commission on Aboriginal Peoples, November 18, 1993, at 68.

within the term "Indian".[549] In 1876, the *Indian Act* confirmed that "Half-Breeds" were entitled to receive treaty.[550] However, it was stipulated for the first time in legislation that "Half-Breeds" in Manitoba were to lose their status as "Indians" if they "shared in the distribution of half-breed lands".[551] In regard to "Half-Breeds" outside of Manitoba, it was only in 1951 that the *Indian Act* excluded them from registration under the Act if they received or had been allotted "half-breed lands or money scrip".[552]

Therefore, both pre- and post-Confederation legislation in Canada confirms that "Half-Breeds" or Metis were considered to be "Indians". However, such status was inappropriately deemed at different times for different Metis to be lost if they accepted scrip. As already discussed, Parliament cannot control or alter the constitutional definition of the term "Indians" through legislation.

In regard to all of the constitutional instruments referred to above and the use of the term "Indians", it would make little sense to suggest that persons of Indian-white ancestry would enjoy a wide range of constitutional protections if they were to choose treaty. Yet, these same persons would be stripped of such protections if they chose scrip. Apparently, this is the type of conclusion that would be reached if legislative policies are followed[553] and Metis are not included in the constitutional term "Indians".[554]

In summary, in regard to use of the term "Indians" in the constitutional instruments referred to under this sub-heading, it is the conclusion of this study that such term makes reference to all Aboriginal peoples, including the Metis.[555] As D. Sanders concludes:

> "It is logical for the courts, in defining the term 'Indian' for constitutional purposes, to allow it to *encompass virtually all descendants of the aboriginal population*. What legislative categories are to be used for the purposes of government programs is a separate question...*The existence of 'Indian' hunting rights on the Prairies under the*

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[549] *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, S.C. 1850, c. 42 (13 & 14 Vict.), definition of "Indian". Note that the ensuing discussion on pre- and post-Confederation legislation is taken from L. Mandell, *Land Rights of the Metis*, Draft report submitted to the Royal Commission on Aboriginal Peoples, November 18, 1993 at 35-41.

[550] *Indian Act, 1876*, S.C. 1876, c. 18, s. 3.3 (e), which provided in part: "Provided also that *no half-breed in Manitoba* who has shared in the distribution of half-breed lands shall be accounted an Indian; and that no half-breed head of a family (except the widow of an Indian, or a half-breed who has already been admitted into a treaty), shall unless under very special circumstances, to be determined by the Superintendant-General or his agent, be accounted an Indian, or entitled to be admitted into any Indian treaty." [Emphasis added.] Issues of status concerning "Half-Breeds" and the *Indian Act* are discussed in D. Sanders, "The Queen's Promises" in L.A. Knafla, (ed.), *Law and Justice in a New Land [:] Essays in Western Canadian Legal History* (Toronto: Carswell, 1986) 101 at 109 *et seq.*

[551] Id.

[552] *Indian Act*, S.C. 1951, c. 29, s. 12 (1)(a): "The following persons are not entitled to be registered, namely, (a) a person who (i) has received or has been allotted half-breed lands or money scrip, (ii) is a descendant of a person described in sub-paragraph (i),..."

[553] It seems illogical and unjustifiable to determine Aboriginal status based on whether Metis opted for treaty or, alternatively, scrip. Yet this is what appears to have been attempted in the legislative and policy initiatives of the Canadian government. As O.P. Dickason describes: "[The Metis] dilemma was that if they took treaty, they became legally Amerindian; if they took scrip, they moved into the white camp. Acceptance of scrip meant loss of entitlement to be registered as an Indian and exclusion from the Indian Act. Culturally, the line between the two classifications was far from clear-cut, but the distinction in legal consequences was enormous." See O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: MacLelland & Stewart, 1992) at 316. Although Metis had developed a distinct political status as a people by 1870 and the *Manitoba Act, 1870* recognizes "Half-Breeds" as a distinct group in s. 31, the only option that apparently was provided by the federal government to Metis was, in effect, to choose on an individual basis to be "Indian" or else "white".

[554] If this were the case, there is no evidence that such far-reaching legal consequences were ever explained to the Metis by government representatives when Metis were offered scrip.

[555] This general conclusion does not prevent a finding based on clear evidence that, in respect to a specific constitutional provision, there is a clear intention to have a narrower meaning of the term "Indians".

Natural Resources Transfer Agreements should not be taken to require the courts to develop a limited definition of the term 'Indian'."[556] [Emphasis added.]

3.2 Rights and Obligations Under the *Manitoba Act, 1870*

> "I suppose the Half-breeds in Manitoba, in 1870, did not fight for two hundred and forty acres of land, but it is to be understood that there were two societies who treated together. One was small, but in its smallness had its rights. The other was great, but in its greatness had no greater rights than the rights of the small, because the right is the same for everyone."[557]
>
> Louis Riel (at his trial), 1885

In examining the question of extinguishment of Metis land rights in Manitoba, the *Manitoba Act, 1870* is of central significance for a number of reasons. First, the Act provides for the land rights of the Metis ("Half-Breeds") and the corresponding government obligations in this regard. Second, the Act contemplates that some extinguishment of rights may take place, so this aspect must be carefully scrutinized. Third, the provisions of the Act pertaining to the Metis were, as Louis Riel suggests in the above quote, the result of "two societies who treated together".

It is important to highlight that the terms of the *Manitoba Act, 1870* that refer to the Metis were the product of negotiations[558] between representatives of the federal government and Louis Riel's provisional government. This point is emphasized by O'Sullivan J.A. in *Dumont* v. *Canada* as follows:

> "But that a half-breed people existed as a people in the western plains of British North America in 1869 can hardly be doubted by those familiar with the history of this country. The half-breeds formed the overwhelming majority of the population of the Red River Colony and had achieved such a degree of self-awareness as a people that...they were able to form a provisional government which maintained law and order for many months in 1870. *This provisional government may not have been recognized by some of the Canadian settlers in Rupert's Land, but it was recognized by the British government, which entered into negotiations with delegates appointed by the convention that sanctioned and elected the provisional government.*"[559] [Emphasis added.]

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[556] D. Sanders, "Aboriginal People in the Constitution of Canada" in S. Beck & I. Bernier, (eds.), *Canada and the New Constitution [:] The Unfinished Agenda* (Montreal: Institute for Research on Public Policy, 1983) 225 at 256.

[557] Louis Riel at his trial in 1885, cited in T.R. Berger, *Fragile Freedoms [:] Human Rights and Dissent in Canada* (Toronto: Clarke, Irwin & Co., 1981) at 56.

[558] P. Chartrand, *Manitoba's Métis Settlement Scheme of 1870*, note 478, *supra*, at 131-132; D. Sanders, "The Queen's Promises" in L.A. Knafla, (ed.), *Law and Justice in a New Land [:] Essays in Western Canadian Legal History* (Toronto: Carswell, 1986) 101 at 107; T.R. Berger, *Fragile Freedoms [:] Human Rights and Dissent in Canada* (Toronto: Clarke, Irwin & Co., 1981) at 26, 39.

[559] *Dumont* v. *A.G. Canada*, [1988] 5 W.W.R. 193 (Man. C.A.) at 198 per O'Sullivan J.A. (dissenting); majority opinion of the Court of Appeal reversed by Supreme Court of Canada. Cited in L. Mandell, *Land Rights of the Metis*, Draft report submitted to the Royal Commission on Aboriginal Peoples, November 18, 1993, at 31-32. See also J.E. Magnet, *Metis Land Rights in Canada*, Draft report submitted to the Royal Commission on Aboriginal Peoples, October 28, 1993, at 14.

In view of these negotiations that preceded the adoption of the *Manitoba Act, 1870*, it has been argued by some commentators that the provisions in the Act in favour of the Metis constitute a "treaty".[560] This view has some support in that Canadian courts have determined that a treaty is not a "word of art".[561] Moreover, at least one major land claims has been negotiated and then implemented through legislation, in the absence of a written agreement.[562] As a treaty, the relevant provisions of the *Manitoba Act, 1870* would take on added significance.[563]

In relation to the Metis, the key provisions under the *Manitoba Act, 1870* are sections 30, 31 and 32. Section 30 deals with "ungranted or waste lands" and will be addressed within the context of s. 31. Sections 31 and 32 will be analysed in some detail below.

Both ss. 31 and 32 recognized land rights in regard to the Metis.[564] However, the purpose of each of these provisions was quite different. As historian D. Sprague explains:

> "Section 31 of the *Manitoba Act* provided a land bonus to all people of one specified ancestry, because of that ancestry. Section 32 assured all people, regardless of ancestry, that the lots they occupied in 1869 would not be jeopardized by an influx of newcomers expected to follow the transfer of Rupert's Land from the Hudson's Bay Company to Canada."[565]

Therefore, while s. 31 contemplated the settlement of certain land claims, s. 32 addressed the needs for enhanced legal recognition of the lands of all settlers in the newly-established province,

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[560] See P. Chartrand, *Manitoba's Métis Settlement Scheme of 1870*, note 478, *supra*, at 127-137; P. Chartrand, *Aboriginal Rights: The Dispossession of the Métis*, (1991) 29 Osgoode Hall L. J. 457 at 480; J.E. Magnet, *Metis Land Rights in Canada*, Draft report submitted to the Royal Commission on Aboriginal Peoples, October 28, 1993, at 16; D. Sprague, *Administrative History of Metis Claims*, Draft report submitted to the Royal Commission on Aboriginal Peoples, n.d., at 8. See also *Dumont* v. *A.G. Canada*, [1988] 5 W.W.R. 193 (Man. C.A.) at 198 per O'Sullivan J.A. (dissenting), where it is said that the 1870 Act embodied a "treaty" entered into between Metis delegates and Crown authorities.

[561] See *R.* v. *White* and *Bob*, (1964) 50 D.L.R. (2d) 613 (B.C.C.A.) per Norris J.A. at 648-649: "...Treaty is not a word of art and in my respectful opinion, it embraces all such engagements made by persons in authority as may be brought within the term 'word of the white man' the sanctity of which was, at the time of British exploration and settlement, the most important means of obtaining the goodwill and co-operation of the native tribes and ensuring that the colonists would be protected from death and destruction. On such assurance the Indians relied." This passage is cited with approval in *Simon* v. *The Queen*, [1985] 2 S.C.R. 387 (S.C.C.) at 410.

[562] An example is the *Alaska Native Claims Settlement Act of 1971*, 43 U.S.C. §§ 1601-1641 (1982 & Supp.III 1985). For analyses and criticisms of ANCSA, see T.R. Berger, *Village Journey [:] The Report of the Alaska Native Review Commission* (New York: Hill and Wang, 1985); Comment, *The Alaska Native Claims Settlement Act: An Illusion in the Quest for Native Self-Determination*, (1987) 66 Ore. L. Rev. 195; L. Fuller, *Alaska Native Claims Settlement Act: Analysis of the Protective Clauses of the Act Through a Comparison with the Dawes Act of 1887*, (1977) 4 Am. Indian L. Rev. 269; M. Price, *A Moment in History: The Alaska Native Claims Settlement Act*, (1979) 8 U.C.L.A. - Alaska L. Rev. 89. See also Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy* (Ottawa: Department of Indian Affairs and Northern Development, 1985) at 38: "The language of extinguishment is...found in the Alaska Native Claims Settlement Act, which cleared aboriginal title through a process that was not strictly consensual." [Emphasis in original.]

[563] For example, the status of the Metis, as a distinct people with treaty-making powers would be reinforced; a consensual aspect to the Metis provisions in the *Manitoba Act, 1870* would be confirmed; the judicial rules respecting treaty interpretation would be applied; and fiduciary obligations on the part of the Crown would likely arise from the resulting treaty obligations. As the ensuing discussion of Metis in this study will demonstrate, the Metis would still have constitutional rights and obligations of a fiduciary nature in their favour even if the provisions in the Act are not determined to constitute a "treaty".

[564] D. Sprague, *Government Lawlessness in the Administration of Manitoba Land Claims, 1870-1887*, (1980) 10 Man. L. J. 415 at 416; J.E. Magnet, *Metis Land Rights in Canada*, Draft report submitted to the Royal Commission on Aboriginal Peoples, October 28, 1993, at 15-16; P. Chartrand, *Aboriginal Rights: The Dispossession of the Métis*, (1991) 29 Osgoode Hall L. J. 457 at 465.

[565] D. Sprague, *Government Lawlessness in the Administration of Manitoba Land Claims, 1870-1887*, (1980) 10 Man. L. J. 415 at 416.

over 80% of which settlers were Metis.[566]

Section 31

Section 31 provides:

> "And whereas, it is expedient, *towards the extinguishment of the Indian Title to the lands in the Province*, to appropriate a portion of such ungranted lands, to the extent of one million four hundred thousand acres thereof, for the benefit of the half-breed residents, it is hereby enacted, that, under regulations to be from time to time made by the Governor General in Council, the Lieutenant-Governor shall select such lots or tracts in such parts of the Province as he shall deem expedient, to the extent aforesaid, and divide the same among the children of the half-breed heads of families residing in the Province *at the time of the said transfer*[567] *to Canada*, and the same shall be granted to the said children respectively, in such mode and on such conditions as to settlement and otherwise, as the Governor General in Council may from time to time determine." [Emphasis added.]

Section 31 has been described as "untidy and ambiguous legalese".[568] In the view of this study, interpretation of the various elements in s. 31 would include the following:

i) Section 31 does not *per se* extinguish any Metis land rights. It contemplates that, in return for 1.4 million acres of land, there may be partial or total extinguishment[569] of the

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[566] About 10,000 of the population of a little more than 12,000 in the province were persons of Indian-white ancestry: see D. Sprague, *Government Lawlessness in the Administration of Manitoba Land Claims, 1870-1887*, (1980) 10 Man. L. J. 415 at 417. See also J.E. Magnet, *Metis Land Rights in Canada*, Draft report submitted to the Royal Commission on Aboriginal Peoples, October 28, 1993, at 15; P. Chartrand, *Aboriginal Rights: The Dispossession of the Métis*, (1991) 29 Osgoode Hall L. J. 457 at 459, 465; T.R. Berger, *Fragile Freedoms [:] Human Rights and Dissent in Canada* (Toronto: Clarke, Irwin & Co., 1981) at 34.

[567] The transfer was made on July 15, 1870, pursuant to the *Rupert's Land and North-Western Territory Order*, June 23, 1970.

[568] P. Chartrand, *Aboriginal Rights: The Dispossession of the Métis*, (1991) 29 Osgoode Hall L. J. 457 at 467.

[569] It is unclear whether extinguishment of all Metis aboriginal title within the original province of Manitoba would be extinguished simply by appropriating 1.4 million acres of land among the "children of the half-breed heads of families". Allotments to individual children may not *per se* have the effect of extinguishing Metis aboriginal title, which is collective in nature. Consistent with the judicial rule that strict proof of extinguishment is necessary, it would seem that what would be required is some form of actual surrender by the Metis in Manitoba as evidence of any extinguishment. For example, what if some, but not all, of the Metis children concerned validly received their share of the 1.4 million acres of land. How would this constitute an extinguishment of Metis aboriginal title in the original province of Manitoba?

See also *An Act respecting the appropriation of certain Dominion Lands in Manitoba*, S.C. 1874, 37 Vict., c. 20, where reference is made in the preamble to the appropriation of 1.4 million acres of land under s. 31 of the *Manitoba Act* but the preamble goes on to suggest that no valid extinguishment has yet taken place: "And whereas *no provision has been made for extinguishing the Indian title to such lands as respects the said half-breed heads of families residing in the Province [of Manitoba] at the period named*". In s. 1 of the Act, land or scrip is then contemplated for each half-breed head of family "[t]o effect the purpose mentioned above". However, the validity of this purported extinguishment of Metis aboriginal title in the original province of Manitoba may be questioned on the following grounds: i) whether a half-breed head of family can consent to extinguishment of aboriginal title for all members of the family; ii) whether aboriginal title is not in fact held collectively by a broader collectivity of Metis than the "family"; iii) whether a public meeting was every held for the purpose of extinguishing the aboriginal title of the Metis, as required by the Royal Proclamation of 1763; iv) whether the full implications of receiving land or scrip was ever adequately explained to Metis prior to their agreement to accept such property; v) whether other requirements for "free and informed consent" were met by the procedures used by the government; and vi) whether the giving of scrip fulfilled the government's constitutional and fiduciary duty to protect Aboriginal peoples, including safeguards against frauds and abuses in regard to the Metis.

"Indian Title" of the Half-Breeds" or Metis beneficiaries[570] ("it is expedient, towards the extinguishment of the Indian Title to the lands in the Province"). Any extinguishment that is contemplated in s. 31 pertains solely to Metis lands within the original[571] Province ("in the Province").[572]

ii) The appropriation of 1.4 million acres of land for the benefit of the Metis is to be taken from "ungranted lands". According to s. 30 of the *Manitoba Act*, all "ungranted or waste lands" in the original province of Manitoba were vested in the Crown in right of Canada. These "ungranted lands" referred to Crown lands that were not the subject of private interests derived from Crown grant.[573] Further, these ungranted lands were subject to the conditions and stipulations in the deed of surrender of Rupert's Land by the Hudson's Bay Company.[574]

iii) The preamble in s. 31 provides that the 1.4 million acres to be appropriated is "for the benefit of the families of the half-breed residents". Although somewhat ambiguous, the phrase "for the benefit of the families" implies some form of collective rights and ongoing benefit, rather than outright, unconditional grants on an individual basis to children. In other words, the grants were to be made to "children of the half-breed heads of families", but the intention was that the use and occupation of such lands were to be enjoyed by the families as a whole.[575]

By dividing the 1.4 acres of land among the children rather than the heads of families, although for the benefit of the families, the Act appears to intend that the land remain to be used and enjoyed by the youngest generations of Metis. According to P. Chartrand, such an

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[570] All "Half-Breeds" (whether English or French) who intended to settle upon the lands were contemplated as beneficiaries. See P. Chartrand, *Manitoba's Métis Settlement Scheme of 1870*, note 478, *supra*, at 26-32.

[571] The original province was only a tiny fraction of the present size of Manitoba. Extensions of the boundaries of Manitoba subsequently took place in 1881 and 1912. See *An Act to provide for the extension of the boundaries of the Province of Manitoba*, S.C. 1881, 44 Vict., c.14; *An Act to provide for the extension of the boundaries of the Province of Manitoba*, S.M. 1881, 44 Vict., c. 1; *An Act to provide for the extension of the Boundaries of the Province of Manitoba*, S.C. 1912, 2 Geo. V, c.32; *An Act to provide for the Further Extension of the Boundaries of the Province of Manitoba*, R.S.M. 1913, c. 18. See also D. Purich, *The Metis* (Toronto: James Lorimer & Co., 1988) at 62 where the original province is said to have been a mere one hundred square miles.

[572] The same conclusion is reached in J.E. Magnet, *Metis Land Rights in Canada*, Draft report submitted to the Royal Commission on Aboriginal Peoples, October 28, 1993, at 19-21. In the absence of clear evidence to the contrary, it cannot be concluded that the provisional government in Manitoba had a mandate to negotiate a settlement concerning Metis aboriginal title, in respect to those Metis outside the boundaries of the original province, especially when s. 31 only provides for lands to be appropriated to "children of the half-breed heads of families *residing in the Province at the time of the said transfer to Canada*". In addition, in the absence of strict proof, one cannot assume that any extinguishment was intended to take place or actually effected outside the original province. Further, in 1870, no one knew what would be the extent of the future extensions of the boundaries of the province of Manitoba, so it would not be possible to say what greater area was in fact contemplated.

It is also worth noting that s. 35 of the *Manitoba Act* specifically provides for "such portion of Rupert's Land and the North-Western Territory, *as is not included in the Province of Manitoba*" and is confirmed to be subject to a different legal regime, namely *An Act for the Temporary Government of Rupert's Land and the North-Western Territory when united with Canada*, R.S.C. 1985, App. II, No. 7.

[573] P. Chartrand, *Manitoba's Métis Settlement Scheme of 1870*, note 478, *supra*, at 53, where the author cites as authority Canada, *Royal Commission on the Transfer of the Natural Resources of Manitoba, Summary of Hearings* (Ottawa: March 27, 1929) at 95.

[574] Section 30 of the *Manitoba Act, 1870*. As already described, some of the conditions related to the surrender by the Hudson's Bay Company and transfer of Rupert's Land to Canada imposed constitutional obligations in favour of Aboriginal peoples in such territory.

[575] After the *Manitoba Act* was adopted and in effect, the Canadian government took the position that the Metis should apply for land under the Act on an individual basis, as was being done with white settlers. As O.P. Dickason points out, "[i]t is not clear that the Metis were informed about Ottawa's position concerning treating them as individuals rather than as communities; in any event, groups scattered from Red River to establish independent settlements, a pattern that had been in effect for some time...": O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: MacLelland & Stewart, 1992) at 293.

interpretation accorded with Indian settlement schemes during the same period.[576]

iv) The phrase "children of *half-breed heads of families* residing in the Province at the time" should be interpreted so as not to exclude any children of Indian-white ancestry residing in the province as of July 15, 1870. If the children are "Half-Breeds", then the heads of families should not have to be "Half-Breeds".[577] Such an interpretation would be consistent with the applicable judicial rules of interpretation that call for a generous, liberal and broad interpretation of enactments pertaining to Aboriginal peoples.

v) Subject to federal regulations, the Lieutenant-Governor has a mandatory obligation to select lots or tracts in such parts of the province that the latter deems expedient and to divide the 1.4 million acres among the "Half-Breed" children concerned. While s. 31 of the Act does provide for discretion on the part of the Lieutenant-Governor in selecting tracts of land, such discretion must operate within the objectives of the overall provision. In particular, the lands selected must "benefit...the families of the half-breed residents".[578]

This process of selection and division of lands among the children is stipulated to be under federal regulations, and there is no indication whatsoever in s. 31 that the province can adopt laws or regulations in regard to the Lieutenant-Governor's duties under s. 31.

vi) The Governor General in Council (federal Cabinet) is required to adopt regulations from time to time in regard to the Lieutenant-Governor's duties to select and divide the appropriated land among "Half-Breed" children. Although regulations must be adopted in this regard, the federal Cabinet has discretion in establishing criteria for such purposes. As in the case of the Lieutenant-Governor, the federal Cabinet's discretion must operate within the objectives of the overall provision. In particular, the lands selected must "benefit...the families of the half-breed residents".

vii) In addition, in regard to the granting of land to the children concerned, the Governor in Council "*may*" from time to time determine the mode and on what conditions as to settlement and otherwise.[579] Unlike the same duty that is provided in s. 33[580] in respect to "Grants of

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[576] P. Chartrand, *Manitoba's Métis Settlement Scheme of 1870*, note 478, *supra*, at 39: "In these Indian settlement schemes, grants of estate in land were not given outright, but were first granted with restrictions on alienation and provisions for transmission to succeeding generations *within* the families." [Emphasis in original.] On the same page, the author cites W.L. Morton, *Manitoba: The Birth of a Province* (Winnipeg: Manitoba Record Society Publications, 1984) at 204, in making the point that a gradual settlement scheme (rather than an outright, alienable land grant to children) was promoted by Abbé Ritchot, special negotiator for the Metis, and was the type actually expressed as the object of s. 31 by Canadian Ministers John A. Macdonald and George-Etienne Cartier.

[577] A strict literal interpretation of "half-breed heads" of families could mean that if the father was white and the mother Indian and the father was the "head" of the family, he would not be a Half-Breed and therefore his children would not qualify as beneficiaries under s. 31. In other words, a literal interpretation could allow "Half-Breed" children to be excluded as beneficiaries, if their father and mother were not themselves "Half-Breeds".

[578] See preamble within s. 31 (discussed earlier).

[579] See also discussion in P. Chartrand, *Manitoba's Métis Settlement Scheme of 1870*, note 478, *supra*, at 99: "Although 'shall' properly indicates the positive obligation to make the grants, 'may' refers to the discretionary power that the Crown was required to make in each individual case whether or not to attach conditions, and if so, which conditions."

[580] Section 33 provides: "The Governor General in Council *shall* from time to time settle and appoint the mode and form of Grants of Land from the Crown, any Order in Council for that purpose when published in the *Canada Gazette*, shall have the same force and effect as if it were a portion of this Act." [Emphasis added.] The fact that s. 33 creates the exact same duty as provided in s. 31, suggests that s. 33 only applies to grants of the Crown under s. 32. In addition, s. 33 describes the duty in mandatory terms ("shall"), while the same duty under s. 31 is described as discretionary ("may").

In considering the "presumptively imperative" nature of the term "shall" (as opposed to "may"), see *Reference Manitoba Language Rights*, [1985] 1 S.C.R. 721 (S.C.C.) at 737, where the Supreme Court of Canada considered the use of "shall" and "may" in another provision of the *Manitoba Act*: "As used in its normal grammatical sense, the word 'shall' is presumptively imperative...It is therefore incumbent upon this Court to conclude that Parliament, when it used the word 'shall' in s. 23 of the *Manitoba Act, 1870* and s. 133 of the *Constitution Act, 1867*, intended that those sections be construed as mandatory or imperative, in the sense that they must be obeyed, unless such an interpretation of the word 'shall' would be utterly inconsistent with the context in which it has been used and would render the sections irrational or meaningless."

Land" under s. 32, the duty to act here is discretionary.[581]

Although the federal Cabinet may determine the mode of the land grants, this does not empower the federal government to select a mode that would be inconsistent with the mandatory obligation to grant land under s. 31. In other words, the government cannot use its power so as to grant "Half-Breeds" something else other than the 1.4 million acres of land.

viii) Further, consistent with their fiduciary responsibilities, both the government and Parliament[582] are constitutionally constrained to act solely in ways that ensure that the 1.4 million acres are "for the benefit of the families of the half-breed residents". Similarly, to the extent of his or her discretionary duties in effecting any extinguishment of "Indian Title" under s. 31, the Lieutenant-Governor would also be subject to a fiduciary responsibility of a constitutional nature.[583]

ix) The restrictions against alienation that exist to safeguard Aboriginal peoples would also apply to the "Half-Breeds" or Metis. Such restrictions are of a constitutional nature, insofar as they are provided for in the *Royal Proclamation of 1763* and in the *Rupert's Land and North-Western Territory Order*. In the latter Order (Schedule A), of particular importance is the duty to settle Aboriginal claims "in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines".

Section 32

Section 32 provides:

"For the quieting of titles, and assuring to the settlers in the Province the peaceable possession of the lands now held by them, it is enacted as follows:-

1. All grants of land in freehold made by the Hudson's Bay Company up to the eighth day of March, in the year 1869, shall, if required by the owner, be confirmed by grant from the Crown.

2. All grants of estates less than freehold in land made by the Hudson's Bay Company up to the eighth day of March aforesaid, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.

3. All titles by occupancy with the sanction and under license and authority of the Hudson's Bay Company up to the eighth day of March aforesaid, of *land in that part of the Province in which the Indian Title has been extinguished*, shall, if required by the owner, be converted into an estate in freehold by grant from the Crown.

4. All persons in peaceable possession of tracts of *land* at the time of the transfer to Canada, in those parts of the Province in which the *Indian Title has not been extinguished*, shall have the right of pre-emption of the same, on such terms and

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[581] See also discussion in P. Chartrand, *Manitoba's Métis Settlement Scheme of 1870*, note 478, *supra*, at 121-122.

[582] Since the rights of the "Half-Breeds" are constitutionally protected under s. 31 of the *Manitoba Act*, the fiduciary obligation that attaches to such rights is also of a constitutional nature. Consequently, both the government and Parliament of Canada are subject to and limited by the fiduciary responsibility. See *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 (S.C.C.).

[583] In view of the differing duties of the Lieutenant-Governor (as compared with the federal government and Parliament), the nature of the fiduciary obligations incurred would also be different.

conditions as may be determined by the Governor in Council.

5. The Lieutenant-Governor is hereby authorized, under regulations to be made from time to time by the Governor General in Council, to make all such provisions for ascertaining and adjusting, on fair and equitable terms, the rights of Common, and rights of cutting Hay held and enjoyed by the settlers in the Province, and for the commutation of the same by grants of land from the Crown."

In addition to the 1.4 million acres in s. 31, the Metis and other settlers were to have confirmed the rights contemplated in s. 32. The critical importance of the s. 32 provisions is highlighted by D. Sprague in the following terms:

> "...at this point, it should be stated that the acreage promised by Section 31 was not the land which was indispensable. The partly Indian population of Manitoba in 1870 might have lost every acre of the 1.4 million and still survived with relative comfort on their important riverlot holdings if Section 32 of the *Manitoba Act* had been administered in accordance with the true intent of the law."[584]

Interpretation of the various subsections of s. 32 would include the following:

i) The preamble in s. 32 specifies the objective of the subsections concerned. The overall purpose was to firmly establish[585] or confirm the titles of all settlers within the original province and assure to them the "peaceable possession" of the lands held by them at the time of the *Manitoba Act, 1870*. Therefore, in regard to the Metis, the riverlots that they occupied were to be protected under s. 32.

The need for clear legal protection for Metis riverlots was a result of the anticipated pressures from new settlers who were arriving from Ontario and other regions.[586] As the historical record indicates, the Metis had grave concerns that they "would be all driven back from the River & their land given to others..."[587]

ii) Subsection (1) provided that settlers who had received grants of land in freehold from the Hudson's Bay Company up to March 8, 1869, had the right to have the grant "confirmed" by the Crown. The Crown had a duty to confirm such grants, "if required by the owner". A "freehold estate" is a right of title to land, which title is of indeterminate or unfixed duration.[588]

iii) Subsection (2) provided that settlers who had received "grants of estates less than freehold" in land from the Hudson's Bay Company up to March 8, 1869, had the right to have the grant "converted" by the Crown into an estate in freehold. The Crown had a duty to convert such grants, "if required by the owner".

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[584] D. Sprague, *Government Lawlessness in the Administration of Manitoba Land Claims, 1870-1887*, (1980) 10 Man. L. J. 415 at 422.

[585] In some cases, the subsections of s. 32 provide for a more complete or full title than that possessed by the local settlers.

[586] P. Chartrand, *Manitoba's Métis Settlement Scheme of 1870*, note 478, *supra*, at 18: ""[Sections 31 & 32] represented constitutionally protected guarantees by Canada in respect of the concerns voiced by the local population about the security of their lands in the face of an anticipated inflow of immigrants following political union." See also Chartrand, at 84-86.

[587] P.A.C., Macdonald Papers, Incoming Correspondence, pp. 40752, 40753, McDougall to MacDonald, 31 October 1869, cited by D. Sprague, *Canada and the Metis, 1869-1885* (Waterloo: Wilfred Laurier Press, 1988) at 41; and cited by J.E. Magnet, *Metis Land Rights in Canada*, Draft report submitted to the Royal Commission on Aboriginal Peoples, October 28, 1993, at 14.

[588] *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing Co., 1990) at 665.

iv) Subsection (3) provided that persons who possessed title "by occupancy" and " with the sanction and under the licence and authority of the Hudson's Bay Company" up to March 8, 1869, had the right to have the grant "converted" by the Crown into an estate in freehold. "Occupancy" signifies that no formal land grant was necessary. As D. Sprague explains:

> "This was to protect persons who settled without prior grant but whose occupancy had not caused protest, and received tacit recognition in accordance with a provision for homesteaders adopted by the Council of Assiniboia in 1860."[589]

The Crown had a duty to convert such titles into a freehold estate, "if required by the owner".

The lands subject to ss. (3) were only those lands in the original province where the "Indian Title" had been extinguished. It appears to refer to what is known as the "settlement belt", a strip of two miles (four miles wide) on each side of the Red and Assiniboine Rivers.[590] "Indian title" to these tracts are said to have been extinguished through a deed or treaty[591] purportedly entered into by the Earl of Selkirk with Indian Chiefs of the Cree and Saulteaux tribes, although the validity of such deed has been challenged by the Indian parties.[592]

v) Subsection (4) provides for a right of pre-emption, on terms that may be determined by the Governor in Council, to all persons in "peaceable possession" of tracts of land in the original province, at the time of the transfer of such lands to Canada. The subsection covers all persons not covered by ss. (1) - (3).[593] The lands covered are solely in those parts of the province "in which the Indian Title has not been extinguished". This would preclude lands within the "settlement belt", if such lands were the subject of a valid extinguishment of Indian title.

Therefore, the Metis, who were in peaceable possession within the settlement belt, did not have any right of pre-emption under ss. (4). However, such lands could still be open for selection under s. 31.[594] Moreover, Metis claims within the settlement belt would appear to be governed by the terms and conditions attached to the transfer of Rupert's Land to Canada, which call for a settlement based on "equitable principles".

vi) Subsection (5) authorized the Lieutenant-Governor to "make all such provisions for ascertaining and adjusting, *on fair and equitable terms*, the rights of Common, and rights of cutting Hay held and enjoyed by the settlers" in the original province. Apparently, the rights to backlots and haylands extended "an additional two miles behind the inner portion of the lot on

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589 D. Sprague, *Government Lawlessness in the Administration of Manitoba Land Claims, 1870-1887*, (1980) 10 Man. L. J. 415 at 422.

590 P.A.C. RG 15, vol. 229, Governor Archibald's Despatch on Occupied Land in Manitoba, 20 December 1870, reproduced in P. Chartrand, *Manitoba's Métis Settlement Scheme of 1870*, note 478, *supra*, at 194, Appendix 8. See also Chartrand, *supra*, at 52-53; A. Martin, *The Hudson's Bay Company's Land Tenures and the Occupation of Assiniboia by Lord Selkirk's Settlers* (London: William Clowes & Sons, 1898) at 12 *et seq.*

591 See K. Lysyk, *The Indian Title Question in Canada: An Appraisal in the Light of Calder*, (1973) 51 Can. Bar Rev. 450 at 456, where the deed entered into is referred to as the Selkirk Treaty of July 18, 1817. A copy of the Selkirk Treaty is reproduced in A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, including the Negotiations on which they were based* (Toronto: Belfords, Clarke & Co., 1880) (reprint Saskatoon, Saskatchewan: Fifth House Publishers, 1991), at 299-300.

592 Id. at 194-195. See also P. Cumming & N. Mickenberg, (eds.), *Native Rights in Canada* (Toronto: Indian-Eskimo Association of Canada, 1972) at 143, n. 41 (where the authority of the chiefs to conclude the Selkirk treaty is questioned) and 168, n. 10 (where even the government of Canada is said not to have considered this treaty sufficient to extinguish aboriginal rights).

593 D. Sprague, *Government Lawlessness in the Administration of Manitoba Land Claims, 1870-1887*, (1980) 10 Man. L. J. 415 at 422.

594 P. Chartrand, *Manitoba's Métis Settlement Scheme of 1870*, note 478, *supra*, at 54-55.

the river front."[595] Subsection (5) contemplates the substitution ("commutation") of such rights by the Lieutenant-Governor with grants of land by the Crown.

The duties of the Lieutenant-Governor, in ss. (5), are subject to regulations to be made from time to time by the Governor General in Council.

3.2.1 Implementation of ss. 31 and 32 of the *Manitoba Act, 1870*

In considering the implementation of the rights and obligations in favour of the "Half-Breeds" or Metis under the *Manitoba Act, 1870* and other legislation, it is critical to measure any executive or legislative actions of the federal and Manitoba governments against the constitutional rights, obligations and constraints that the Imperial Crown and Parliament recognized and put in place for the protection of Aboriginal peoples in British North America. This constitutional context ensures that the powers of federal and provincial governments and legislatures, vis-a-vis Aboriginal peoples, are not unfettered. Moreover, the fiduciary relationship between Aboriginal peoples and the Crown further delimits the strict standards of conduct expected of the Crown.

It is beyond the scope of this study to identify and analyse every relevant action by the federal and Manitoba governments in implementing or otherwise affecting Metis rights and government obligations that existed in favour of the Metis. However, it is important to at least highlight briefly some of the legislative acts that do not appear consistent with existing constitutional rights and obligations that serve to constrain the powers of the governments concerned.

Based on the analysis in this study, the weight of evidence suggests that existing constitutional constraints on the federal and Manitoba governments would include the following:

- The Metis are included in the term "Indians" under s. 91(24) of the *Constitution Act, 1867*.[596] This would limit provincial legislation in respect to Metis, if it fell within the subject matters included in s. 91(24), namely "Indians and Lands reserved for the Indians".

- Federal jurisdiction over "ungranted or waste lands" in the original Province of Manitoba was subject to the terms and conditions contained in the deed of surrender of Rupert's Land by the Hudson's Bay Company. The terms and conditions in the Schedules of the *Rupert's Land and North-Western Territory Order* also imposed constitutional restrictions, in favour of Aboriginal peoples, on federal and provincial governments. In particular, the Canadian Government is said to have a "duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer".

- As a proprietary colony, the territory of the Hudson's Bay Company in Rupert's Land was subject to the constitutional terms of the *Royal Proclamation of 1763*.[597] In any event, the constitutional requirements in the terms and conditions attached to the Rupert's Land Order effectively incorporate the

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[595] D. Sprague, *Government Lawlessness in the Administration of Manitoba Land Claims, 1870-1887*, (1980) 10 Man. L. J. 415 at 422.

[596] See analysis under sub-heading 3.1 *supra*.

[597] For an analysis of the provisions relevant to Aboriginal peoples in the Royal Proclamation, see sub-headings 2.1 & 2.2 *supra*.

equitable principles in the Proclamation by requiring Aboriginal claims to be "settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines". The protections in the Proclamation include restrictions on alienation of lands reserved for the "Indians", so as to prevent frauds and abuses. A further procedural safeguard is the requirement of a public meeting when a purchase or cession of Aboriginal lands is being proposed.

- Sections 31, 32 and 33 of the *Manitoba Act, 1870* specifically provides for federal (as opposed to provincial) regulation in relation to the matters addressed in those sections. Actions of the Lieutenant-Governor are also subject to federal regulation. The federal regulatory powers provided are constitutionally restricted, since they must in effect be exercised in a manner consistent with the intentions and purposes of sections 31 and 32.

- In view of the constitutional nature of the rights and obligations in favour of Aboriginal peoples or Metis in the above-mentioned instruments, the fiduciary obligations that arise in this context would also be of a constitutional nature. As a result, the strict standards of conduct demanded of a fiduciary would apply to both the executive and legislative branches of the governments concerned.

Legislative actions of the federal and Manitoba governments that are of questionable constitutionality include:

i) **Federal "amendments" to the *Manitoba Act, 1870*.** In 1981, the validity of Metis land claims was denied by the Canadian government, in part on the basis that "[section 6 of the *Constitution Act, 1871*] did not prevent alterations or amendments to Sections 31 and 32 [of the *Manitoba Act*]."[598] However, it is now clear that the federal Parliament has no authority to amend the *Manitoba Act, 1870* (except in relation to the boundaries of Manitoba[599]), since the Act is a constitutional instrument.[600]

Federal legislation that may constitute unconstitutional amendments to the *Manitoba Act* include:[601]

* An Act to remove doubts as to the construction of Section 31 of the Act 33 Victoria, Chapter 3, and to amend Section 108 of the Dominion Lands Act[602]. Half-Breed heads of families were excluded from a share of the lands to be allotted under s. 31 of the *Manitoba Act*. To the extent that s. 31 provides for benefit to accrue to all families of Half-Breed residents, the

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[598] Letter (and accompanying federal response to Metis land claims submission), dated April 24, 1981, from the Honourable Jean Chretien, Minister of Justice and Attorney General of Canada, to Mr. Harry Daniels, President, Native Council of Canada (on file with the authors). The letter from the Canadian government does not deny that ss. 31 and 32 of the *Manitoba Act* were amended by the Parliament of Canada.

[599] See ss. 3 and 6 of the *Constitution Act, 1871*, where alterations of provincial boundaries are permitted with the consent of the provincial legislature concerned.

[600] See *A.G. Manitoba* v. *Forest*, [1979] 2 S.C.R. 1032 (S.C.C.) at 1039: "If...the *Manitoba Act* it taken by itself it must be observed that this is a federal statute, which means that, unless otherwise provided, it is subject to amendment by the Parliament that enacted it and no other. It is, however, otherwise provided in s. 6 of the *British North America Act, 1871. This section denies any amending power to the federal Parliament*...[new para.] The *Manitoba Act, 1870* is also referred to in the schedule to the *Constitution Act, 1982*. Section 52(2) of the *Constitution Act, 1982* provides that 'the Constitution of Canada includes...(b) the Acts and orders referred to in the schedule'." [Emphasis added.] Cited in J.E. Magnet, *Metis Land Rights in Canada*, Draft report submitted to the Royal Commission on Aboriginal Peoples, October 28, 1993, at 17. See also *Reference Manitoba Language Rights*, [1985] 1 S.C.R. 721 (S.C.C.) at 739.

[601] For a more complete list of federal statutes that are alleged to be unconstitutional alterations of the *Manitoba Act, 1870*, see D. Sprague, *Government Lawlessness in the Administration of Manitoba Land Claims, 1870-1887*, (1980) 10 Man. L. J. 415 at 435-436.

[602] *An Act to remove doubts as to the construction of Section 31 of the Act 33 Victoria, Chapter 3, and to amend Section 108 of the Dominion Lands Act*, S.C. 1873, 36 Vict., c. 38.

provision of the Act may be unconstitutional.

* An Act respecting the appropriation of certain Dominion lands in Manitoba[603]. In return for the extinguishment of their Indian title to lands in Manitoba, "Half-Breed" heads of families are provided with either a grant of 160 acres of land or $160 in scrip. The issuance of scrip (as opposed to allotments of land) and the failure to restrict alienability appear to be a violation of the government's constitutional obligations.

* An Act respecting Conflicting Claims to Lands of Occupants in Manitoba[604]. Judicial consideration of riverlot patents was replaced with an internal governmental process. In addition, at the Minister's discretion, unsuccessful claimants were allowed recourse to a Manitoba-based judicial proceeding. Such a governmental process and ministerial discretion appear to violate the *nemo judex* rule and, if so, would be unconstitutional.[605]

ii) **Federal orders in council**. Federal orders in council that may, in whole or in part, be *ultra vires* and in contravention of the *Manitoba Act, 1870* include:[606]

* Order in Council of May 26, 1871. New settlers arriving in Manitoba were allowed by Order in Council to take up homesteads, prior to completing the necessary surveys of lands claimed by "Half-Breeds". This system served to dispossess Metis of lands over which they claimed possession. Although this Order in Council was confirmed by the *Dominion Lands Act*,[607] it is still incompatible with the fiduciary duties owed to the Metis.[608]

* Order in Council of April 3, 1873[609]. Only children of Half-Breed heads of families (and not the heads of families themselves) are said to be entitled to a share of the lands to be allotted under s. 31 of the *Manitoba Act*. To the extent that s. 31 provides for benefit to accrue to all families of Half-Breed residents, the Order in Council may be unconstitutional.

* Order in Council of April 20, 1885[610]. After the 1.4 million acres are said to have been allotted, children of "Half-Breeds" with proven claims are to receive money scrip worth $240. The scrip can be redeemed for Dominion Lands at a price of $1/acre. However, s. 31 called for an allotment of land to children and there should have been safeguards incorporated to restrict alienation of such lands so as to benefit the families concerned.

* Order in Council of December 4, 1893[611]. The federal policy of not recognizing assignments of scrip is terminated. Again, the fiduciary responsibility of the Crown, and duties of protecting "Half-Breeds" or Metis, including the need for restrictions on alienation, are virtually ignored.

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[603] *An Act respecting the appropriation of certain Dominion lands in Manitoba*, S.C. 1874, 37 Vict., c. 20.

[604] *An Act respecting Conflicting Claims to Lands of Occupants in Manitoba*, S. C. 1875, 38 Vict., c. 53.

[605] The federal government could not be the "impartial arbiter" necessary to determine the constitutional and other fundamental rights of the Metis. For a discussion of the *nemo judex* rule and the need for a "truly neutral and detached arbiter", see *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145 at 164-165.

[606] It has been documented that "[b]etween 1871 and 1925 over 120 separate Orders-in-Council were issued regarding land claims and scrip issues to Half-breeds of Manitoba, Saskatchewan, Alberta and the North West Territories": J. Sawchuk *et al.*, *Metis Land Rights in Alberta: A Political History*, note 478, *supra*, at 94.

[607] *Dominion Lands Act*, S.C. 1872, 35 Vict. c. 23, s. 108.

[608] The fiduciary duties referred to here arise from the historical Crown-Aboriginal relationship reflected in the *Royal Proclamation of 1763*; the terms and conditions attached to the *Rupert's Land and North-Western Territory Order*; and ss. 31 and 32 of the *Manitoba Act, 1870*.

[609] *Order in Council*, April 3, 1873, P.C. 369.

[610] *Order in Council*, April 20, 1885, P.C. 810.

[611] *Order in Council*, December 4, 1893, P.C. 3058.

iii) **Provincial legislation.** Provincial legislation in Manitoba that directly addressed the "Half-Breeds" or Metis or lands reserved for these people would appear to be *ultra vires.*[612] If so, the federal government had a fiduciary duty to disallow[613] such legislation in carrying out its constitutional responsibilities under the *Manitoba Act, 1870* and other constitutional instruments.

Provincial legislation of questionable constitutionality include:[614]

* Half-Breed Land Grant Protection Act[615], which originally sought to safeguard the lands reserved for "Half-Breeds".

* An Act to amend the Act passed in the 37th year of Her Majesty's reign entitled "The Half-Breed Land Grant Protection Act"[616], where any sale of land, for valid consideration, by a "Half-Breed" of land allotted under s. 31 of the *Manitoba Act* is deemed to be legally valid and binding.

* An Act respecting Infants and their Estates[617], which enabled courts generally to permit sales of a minor's estate without the child having to appear before a judge. As a result, minors who were "Half-Breeds" were more easily dispossessed of their lands under s. 31 of the *Manitoba Act*.

* An Act to enable certain children of Half-breed heads of families to convey their land[618], which enabled "Half-Breed" children over the age of 18 to alienate their allotted land, if the transaction was voluntary and with parental consent.

* An Act respecting Half-Breed lands and quieting certain titles thereto[619], where the rules concerning powers of attorney, in regard to children claiming land under s. 31 of the *Manitoba Act*, are made more lax. In addition, court orders are deemed to be valid regardless

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[612] Arguments that the Manitoba legislature exceeded its legislative jurisdiction are based on s. 91(24) of the *Constitution Act, 1867* and federal regulatory powers under ss. 31-33 of the *Manitoba Act, 1870*. To the extent that the Manitoba government had a legitimate role in obtaining extinguishments of Metis title, the province also had a fiduciary obligation of a constitutional nature (based on the *Manitoba Act*) to act in the best interests of the Metis.

[613] See G.V. La Forest, *Disallowance and Reservation of Provincial Legislation* (Ottawa: Dept. of Justice, 1955) at 36, where it is said that provincial laws were disallowed on the basis of four main grounds: "(1) as being invalid because beyond the legislative sphere assigned to the provinces or in conflict with validly enacted Dominion or Imperial legislation; (2) as conflicting with Dominion policies or interests; (3) as conflicting with Imperial policies or interests; (4) as being contrary to sound principles of legislation, an abuse of power, or unjust, unwise or otherwise inexpedient." The fourth category was considered to be the most controversial.

It is indicated in La Forest, *supra*, at 85, that the federal government disallowed *An Act to amend Cap. 46 Vict. 37, intituled: The Half-breed Land Grant Protection Act*. The reasons given for disallowance were: *"Act was not to advantage of half-breeds*. No notice of passage of Act was given in Manitoba Gazette for 3 months as required, and same was not considered in force in province." [Emphasis added.]

[614] For a more complete list of provincial statutes that regulated the dispossession of "Half-Breed" allottees, see D. Sprague, *Government Lawlessness in the Administration of Manitoba Land Claims, 1870-1887*, (1980) 10 Man. L. J. 415 at 420.

[615] *Half-Breed Land Grant Protection Act*, S.M. 1873, 37 Vict., c. 44. Section 1 provided: "No promise or agreement, verbal or in writing, made by any Half-breed, previous to the issue of the Patent...either for or without a money consideration, to convey to any person after the Patent shall issue, the title of such Half-breed...shall be binding on such Half-breed, and no damages shall be recoverable against him or her, either at law, or in equity, by reason of his or her refusing to carry out such promise or agreement."

[616] *An Act to amend the Act passed in the 37th year of Her Majesty's reign entitled "The Half-Breed Land Grant Protection Act"*, S.M. 1877, 40 Vict., c. 5.

[617] *An Act respecting Infants and their Estates*, S.M. 1878, 41 Vict., c. 7.

[618] *An Act to enable certain children of Half-breed heads of families to convey their land*, S.M. 1878, 41 Vict., c. 20.

[619] *An Act respecting Half-Breed lands and quieting certain titles thereto*, S.M. 1881, 44 Vict., c. 19.

of irregularities that might have occurred.

* An Act relating to the Titles of Half-Breed Lands[620], where the land titles of infant "Half-Breeds" were deemed to be valid, if executed by a parent, guardian, "next friend" or prothonotary of the court on behalf of the infants concerned.[621]

The dubious constitutionality of the above instruments, or their individual provisions, raises serious questions about the validity of any extinguishment of Metis title to land in the original Manitoba. At the same time, it is important to emphasize that, in addition to such legislative actions, there are a host of other alleged wrongs that are relevant to the Metis extinguishment question.

Although it is beyond the scope of this study to explore these different factors pertaining to the dispossession of the Metis, it is important to at least identify some of the main allegations that have been advanced and debated.[622] These include: prejudicial delays in allotting s. 31 lands that facilitated the dispossession of Metis and loss of a land base;[623] racial discrimination in the land administration under s. 32;[624] frauds and abuses that occurred with government knowledge;[625] refusal to protect Metis land rights through restrictions on alienation;[626] failure to provide a secure land settlement scheme that would benefit Metis families;[627] failure to maintain adequate Crown supervision over the intended regulated scheme;[628] failure to consider the choice of Metis beneficiaries in respect to land selections;[629] and failure to grant lands for purposes of settlement only.[630]

The history of the Metis in the original province of Manitoba is instructive towards appreciating the application of government extinguishment policies. Beyond this, it is important

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[620] *An Act relating to the Titles of Half-Breed Lands*, S.M. 1885, c. 30.

[621] Section 1 of the Act provided: "In all cases where lands...belonging to infant Half-Breeds...have been sold...and whether the same shall have been executed by the parent or guardian or next friend or prothonotary of the court on behalf of the said infant...such conveyance shall be, and shall always be deemed to have always...been sufficient to vest in the grantee or grantees...all the estate thereby purported to be granted..."

[622] For authors who have challenged some or many of the Metis allegations and positions, see T. Flanagan, *The Case Against Metis Aboriginal Rights*, (1983) 9 Can. Public Policy 314; T. Flanagan, *Riel and the Rebellion: 1885 Reconsidered* (Saskatoon: Western Producer Prairie Books, 1983); B. Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research on Public Policy, 1986).

[623] P. Chartrand, *Manitoba's Métis Settlement Scheme of 1870*, note 478, *supra*, at 102, 138; D. Purich, *The Metis* (Toronto: James Lorimer & Co., 1988) at 68.

[624] See, for example, Letter (and accompanying federal response to Metis land claims submission), dated April 24, 1981, from the Honourable Jean Chretien, Minister of Justice and Attorney General of Canada, to Mr. Harry Daniels, President, Native Council of Canada (on file with the authors): "*It would not be surprising to find an element of racial discrimination in the land administration under Section 32.* However, it would be most difficult to assess the extent to which it may have diminished Metis land holdings." [Emphasis added.]

[625] P. Chartrand, *Manitoba's Métis Settlement Scheme of 1870*, note 478, *supra*, at 83-84, 105; P. Chartrand, *Aboriginal Rights: The Dispossession of the Métis*, (1991) 29 Osgoode Hall L. J. 457 at 476; D. Sprague, *Government Lawlessness in the Administration of Manitoba Land Claims, 1870-1887*, (1980) 10 Man. L. J. 415 at 432-433; D. Purich, *The Metis* (Toronto: James Lorimer & Co., 1988) at 67.

[626] P. Chartrand, *Aboriginal Rights: The Dispossession of the Métis*, (1991) 29 Osgoode Hall L. J. 457 at 467, n. 37, 469, 474; P. Chartrand, *Manitoba's Métis Settlement Scheme of 1870*, note 478, *supra*, at 77, 103, 138.

[627] P. Chartrand, *Manitoba's Métis Settlement Scheme of 1870*, note 478, *supra*, at 48, 75-76, 90, 95-99, 107, 123, 125.

[628] Id., at 139.

[629] Id., at 140-141.

[630] Id., at 143.

to examine the treatment of Metis land issues in areas outside the original province.[631] This will be done briefly under the following sub-headings.

3.3 Extinguishment Policies and Metis Land Rights under the *Dominion Lands Acts*[632]

In order to deal with the general administration and management of lands in Manitoba and the Northwest Territories[633], the *Dominion Lands Act*[634] was adopted in 1872.[635] However, it was only in 1879 that some provision for settling the land claims of "Half-Breeds" was added to the legislation. In this regard, s. 125(e) delegated the following powers to the Governor in Council:

> "*To satisfy any claims in connection with the extinguishment of the Indian title*, preferred by half-breeds resident in the North-West Territories *outside the limits of Manitoba, on [July 15, 1870]*[636], *by granting land to such persons*, to such extent and on such terms and conditions, as may be deemed expedient."[637] [Emphasis added.]

Unlike the case in the original province of Manitoba, the basis for settlement of Metis land rights in areas subject to s. 125(e) of the *Dominion Lands Act* was not negotiations. It was a unilateral legislative policy of requiring extinguishment in return for "granting land".[638] The original Dominion lands legislation did not provide for the recognition of existing Metis land rights as had been done under s. 32 of the *Manitoba Act, 1870*. It was only in 1885 that an order in council decreed that lands or scrip would be granted in settlement of their claims as settlers,

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[631] Although it can be concluded that the results of Metis land dispossession were the same, the history of scrip in northern Manitoba and northern Saskatchewan is said to be "somewhat different from the land granted under the *Manitoba Act* or the Northwest Scrip Commissions in the 1880s": J. Sawchuk *et al.*, *Metis Land Rights in Alberta: A Political History*, note 478, *supra*, at 3.

[632] For a concise and useful history of the various amendments and consolidations pertaining to the *Dominion Lands Act* until its repeal in 1950, see K. Lysyk, *The Indian Title Question in Canada: An Appraisal in the Light of Calder*, (1973) 51 Can. Bar Rev. 450 at 457-458, n. 19.

[633] In 1908, soon after the creation of the three prairie provinces out of the Northwest Territories, a new consolidation of the *Dominion Lands Act*, S.C. 1908, c. 20, replaced and amended the existing legislation. Section 3 of the Act indicated that the Act applied to Manitoba, Saskatchewan, Alberta, Northwest Territories, and the Peace River Block in British Columbia. The Peace River Block had been deemed to be "Dominion lands" within the meaning of the *Dominion Lands Act, 1883*, by s. 12 of *An Act respecting the Vancouver Railway, the Esquimault Graving Dock, and certain Railway Lands of the Province of British Columbia, granted to the Dominion*, S.C. 1884, c. 6.

[634] *Dominion Lands Act*, S.C. 1872, c. 23.

[635] In 1884, the Peace River Block was added as Dominion lands until it was reconveyed (along with the Railway Belt) to the province of British Columbia in 1930 under the Memorandum of Agreement of February 20, 1930, confirmed by the *Constitution Act, 1930*.

[636] The grant of scrip was extended by *Order in Council*, May 6, 1899, P.C. 438, to Metis born in the North-West Territories between July 15, 1870 and December 31, 1885; and by *Order in Council*, March 2, 1900, P.C. 438, to Manitoba Half-Breeds born between July 15, 1870 and December 31, 1885. See also *An Act to further amend the Dominion Lands Act*, S.C. 1899, 62-63 Vict., c. 16, s. 4, where the cut-off date of July 15, 1870 was altered accordingly.

[637] *Dominion Lands Act*, S.C. 1879, c. 31, s. 125 (e). In 1899, the wording in the legislation had been altered to read: "(f) grant lands in satisfaction of claims of half-breeds arising out of the extinguishment of Indian title": see *An Act to further amend the Dominion Lands Act*, S.C. 1899, c. 16, s. 4 (amended s. 90). The provision totally disappeared when the *Dominion Lands Act* was repealed and replaced by the *Territorial Lands Act*, S.C. 1950, c. 22.

[638] By way of contrast, it is interesting to note that the *Royal Proclamation of 1763* protected lands in the possession of Aboriginal peoples and reserved such lands to them. The Proclamation did not presume to "grant" lands to Aboriginal peoples who were already in possession of their lands, but provided equitable procedures for others to purchase the title to such lands, if the Aboriginal people concerned were "inclined to dispose of the said Lands".

in addition to any grants to them to purportedly extinguish their Indian title.[639]

From a constitutional viewpoint, it was unnecessary for the Dominion Parliament to enact s. 125(e) of the *Dominion Lands Act* in order to settle the land rights of the Metis. Through the *Rupert's Land and North-Western Territory Order*, which has the effect of an Imperial statute applicable in Canada,[640] the Canadian government and the Governor in Council were already expressly empowered[641] to provide safeguards and address the claims of Aboriginal peoples in regard to both those territories.

Rather than provide for negotiations with the Metis in conformity with "equitable principles" uniformly applied by the British Crown,[642] the Dominion Parliament through s. 125(e) appears to have unilaterally pre-determined some critical criteria in relation to resolving Metis land rights. First, as already indicated, Parliament decided that satisfaction of the claims of Metis would be tied to extinguishment of their Indian title.[643] However, any extinguishment scheme might only be valid, if it were voluntary and consistent with the Canadian government's constitutional "duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer".[644]

Second, in s. 125(e), a residency cut-off date of July 15, 1870 is imposed for any such claims by Metis. This meant that Metis resident in the North-West Territories after that date, such as new-born children, would be precluded from resolving their claims. It was only towards the turn of the century that grants of scrip were extended by order in council to persons born between July 15, 1870 and December 31, 1885.[645]

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[639] *Order in Council*, April 18, 1885, P.C. 821. See also *An Act to further amend the Dominion Lands Act*, S.C. 1899, c. 16, s. 4 (amended s. 90), where the Act was amended to provide "free grants" up to 160 acres, upon extinguishment of Indian title, to those persons who could establish "undisturbed occupation" and "actual peaceable possession" at such time.

It is also worth noting that "Indians" and "non-treaty Indians" were discriminated against under federal homestead laws from 1876 to 1951. Section 70 of the *Indian Act, 1876*, S.C. 1876, c. 18 provided: "No Indian or non-treaty Indian, resident in the province of Manitoba, the North-West Territories or the territory of Keewatin, shall be held capable of having acquired or acquiring a homestead or pre-emption right to a quarter section, or any portion of land in any surveyed or unsurveyed lands in the said province of Manitoba, the North-West Territories or the territory of Keewatin, *or the right to share in the distribution of any lands allotted to half-breeds*, subject to the following exceptions..." [Emphasis added.] For a discussion of this and other discriminatory homesteading provisions, see W. Moss, *History of Federal and Provincial Laws Discriminating Against Aboriginal People* (Ottawa: Library of Parliament, 1987) at 11-14.

[640] See *Constitution Act, 1867*, s. 146.

[641] Term 14 of the Order provides: "Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government *in communication with the Imperial Government*..." [Emphasis added.] Term 15 adds: "The Governor in Council is authorized and empowered to arrange any details that may be necessary to carry out the above terms and conditions. [new para.] And the Right Honourable Earl Granville, one of Her Majesty's principal Secretaries of State, is to give the necessary directions herein accordingly."

[642] See *Rupert's Land and North-Western Territory Order*, Schedule (A): "...*upon the transference of the territories in question* to the Canadian government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled *in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines*..." [Emphasis added.]

[643] In regard to the extinguishment of Metis aboriginal rights through the *Dominion Lands Act* and subsequent orders in council, the Canadian government's position (as indicated in 1981) is: "The Courts have consistently held that Parliament has the unfettered authority to extinguish aboriginal rights on whatever basis it chooses to do so...As a result of the scrip program, which was authorized by Parliament, whatever aboriginal rights or title that the Metis might have had were extinguished." See Letter (and accompanying federal response to Metis land claims submission), dated April 24, 1981, from the Honourable Jean Chretien, Minister of Justice and Attorney General of Canada, to Mr. Harry Daniels, President, Native Council of Canada (on file with the authors).

[644] *Rupert's Land and North-Western Territory Order*, Schedule (B).

[645] *Order in Council*, May 6, 1899, P.C. 918 (grants of scrip extended to Metis born in the North-West Territories between July 15, 1870 and December 31, 1885); *Order in Council*, March 2, 1900, P.C. 438 (grants of scrip extended to children of the Manitoba Half-Breeds born between July 15, 1870 and December 31, 1885). These orders in council are described in J.E. Magnet, *Metis Land Rights in Canada*, Draft report submitted to the Royal Commission on Aboriginal Peoples, October 28, 1993, at 66.

A further constitutional issue is whether the scheme in s. 125(e) and the subsequent orders in council were done "in communication with the Imperial Government" (Order, Term 14). Without such communication, it would be highly difficult for the Governor in Council to receive the "necessary directions" from one of the Queen's principal Secretaries of State (Order, Term 15).[646] To our knowledge, there is no evidence that these constitutional obligations were properly complied with by the Canadian government.

In addition, the Canadian government had the constitutional duty to satisfy aboriginal land rights and provide adequate protections in a timely manner. These measures in favour of Aboriginal peoples were to be taken by the government "upon the transference of the territories in question".[647] Yet, no action was taken by the federal government for approximately fifteen years to safeguard the Metis outside the original province of Manitoba.

By the early 1880s, with the decline in the buffalo herd[648] and the large influx of incoming settlers, both Metis and Indians were in a highly vulnerable and threatened state. As J. Sawchuk *et al.* describe, the Metis urgently needed to have their land rights recognized by the government:

> "The population in the North-West felt *threatened by the large number of incoming settlers from Ontario and the buying up of land by the colonization companies in the 1880's*. The government had made agreements with these companies to bring settlers into the North-West. *Without having secured titles to their lands, those people already established in the area were in a very precarious position.*"[649] [Emphasis added.]

Despite existing constitutional duties and authority since 1870, and the adoption of s. 125(e) of the *Dominion Lands Act* in 1879, the Canadian government continued to neglect the land claims and pleas of the Metis in north-western regions. Instead, agreements were signed with colonization companies to bring more settlers into the regions occupied by Metis and Indians. Until 1885, when the government was already facing a "discontented and rebellious population of Metis"[650], no meaningful measures were taken by the Canadian government to deal with Metis land rights. As T.R. Berger describes:

> "...the [federal] cabinet was not prepared to implement this [1879] legislation - indeed, no lands were allotted to any of the Metis outside Manitoba, and no scrip reached the Metis on the Saskatchewan until after the outbreak of rebellion in 1885...Despite official entreaties by Inspector Crozier of the North-West Mounted Police in which he urged that Metis claims be settled immediately, John A. Macdonald, who was again prime minister, would not act."[651]

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[646] For the requirement for the Canadian government to receive the "necessary directions" from one of the Queen's Secretaries of State, see note 641, *supra*, where Term 15 of the Rupert's Land Order is reproduced.

[647] In relation to Aboriginal peoples, the Canadian government's constitutional duties that are provided in Schedules (A) and (B) of the Order both stipulate that they are to be carried out "upon the transference of the territories in question".

[648] The buffalo hunt was the "foundation of the Metis economy and culture": T.R. Berger, *Fragile Freedoms [:] Human Rights and Dissent in Canada* (Toronto: Clarke, Irwin & Co., 1981) at 32.

[649] J. Sawchuk *et al.*, *Metis Land Rights in Alberta: A Political History*, note 478, *supra*, at 36.

[650] J.E. Magnet, *Metis Land Rights in Canada*, Draft report submitted to the Royal Commission on Aboriginal Peoples, October 28, 1993, at 55. Events leading up to the 1885 rebellion of the Metis are described in J. Sawchuk *et al.*, *Metis Land Rights in Alberta: A Political History*, note 478, *supra*, at 36-39.

[651] T.R. Berger, *Fragile Freedoms [:] Human Rights and Dissent in Canada* (Toronto: Clarke, Irwin & Co., 1981) at 45.

3.3.1 Exemption of territories Under the *Dominion Lands Acts*

A further issue relating to the *Dominion Lands Act* concerns the government's interpretation of the exemption in the Act of territories subject to Indian title. As section 42 of the original Act suggests, the legislative exemption operated in favour of both Indians[652] and Metis:

> "*None of the provisions of this Act* respecting the settlement of Agricultural lands, or the lease of Timber lands, or the purchase and sale of Mineral lands, *shall be held to apply to territory the Indian title to which shall not at the time have been extinguished.*"[653] [Emphasis added.]

In 1883, this provision became a blanket exemption from all provisions of the Act.[654] By 1908, the exemption concerning territories subject to Indian title was totally dropped from the Act.[655] However, the federal cabinet's powers to withdraw from the operation of the Act, "such lands as have been or may be reserved for Indians"[656] and to "grant lands in satisfaction of claims of half-breeds arising out of the extinguishment of the Indian title"[657] remained.

The legislative exemption that existed between 1872 and 1908 suggests that the "Indian title" of all Aboriginal peoples, whether Indian or Metis,[658] would have to be extinguished in a specific territory before the provisions of the *Dominion Lands Act* could apply to that area. For example, the power of the Governor in Council in the 1883 Act to "withdraw from the operation of this Act...such lands as have been or may be reserved for Indians"[659] could not be used to satisfy the treaty obligations towards Indians, so long as unsurrendered "Indian title" to the same lands existed in favour of Metis.

Conversely, federal powers under the Act to grant such lands "as may be required to satisfy the half-breed claims created under [s. 31 of the *Manitoba Act*]"[660] and "to satisfy any claims...preferred by half-breeds resident in the North-West Territories"[661] could not be used to satisfy obligations owed to the Metis, so long as unsurrendered "Indian title" to the same lands

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[652] Heading 3 of the study is restricted to an analysis of government extinguishment policies as they concern Metis. However in regard to Indians, it would appear that, in view of the exemption for territories subject to unsurrendered Indian title, the lands granted to settlers would not have been validly effected under the *Dominion Lands Act*, if it were demonstrated that no valid surrender of Indian title took place through the treaties.

[653] *Dominion Lands Act*, S.C. 1872, c. 23, s. 42.

[654] *Dominion Lands Act, 1883*, S.C. 1883, 46 Vict., c. 17, s. 3: "None of the provisions of this Act shall be held to apply to territory the Indian title to which shall not, at the time, have been extinguished."

[655] *Dominion Lands Act*, S.C. 1908, 7-8 Edward VII, c. 20.

[656] Id., s. 76(a).

[657] Id., s. 76(b).

[658] The term "Indian title", as used in constitutional instruments, would include the aboriginal title of Inuit, as well as that of Indians and Metis. Inuit aboriginal title did exist concurrently with other Aboriginal peoples in certain parts of the North-West Territories during the lengthy period in which the *Dominion Lands Act* was in force. However, as indicated by Mahoney J. in *Hamlet of Baker Lake* v. *Minister of Indian Affairs and Northern Development*, (1979) 107 D.L.R. (3d) 513 at 55, "[I]n the case of the Inuit on the barren lands, the extinguishment of their aboriginal title was plainly not in Parliament's mind in 1950", when the *Territorial Lands Act*, S.C. 1950, c. 22, replaced the *Dominion Lands Act*, 1908 and the provisions that contemplated extinguishment of "Indian title" in the event of settlement were not carried into the new legislation.

[659] *Dominion Lands Act, 1883*, S.C. 1883, 46 Vict., c. 17, s. 81(a).

[660] Id.

[661] Id., s. 81(e).

existed in favour of any Indian nations.[662] Therefore, in such instances, the coexisting titles of Indians and "Half-Breeds" would have to be settled concurrently in order for the federal Cabinet's powers under the *Dominion Lands Act* to apply.[663]

This scheme arising out of the *Dominion Lands Act* hardly provided certainty in terms of land titles granted under the legislation. In cases where the "Indian title" of all Indians and all Metis were not validly extinguished in a given territory, the land grants emanating from the Act would be of questionable validity. In fact, for many years after land grants were made to settlers under the Act, "Indian title" was not surrendered[664] by some Indian[665] and Metis[666] people. In the case of the majority of the Lubicon people in Alberta, they have yet to surrender their aboriginal title in their territory.[667]

However, the principle of equality of protection for both Indians and Metis, emanating from the legislative exemption, was not how the federal cabinet interpreted the law. As J.

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[662] Based on the analysis in this study, it can be said that the Canadian Government and the Governor in Council already had the necessary powers to settle the land rights of Aboriginal peoples in accordance with Terms 14 and 15 of the *Rupert's Land and North-Western Territories Order*. Moreover, to the extent of any inconsistency, this constitutional instrument would prevail over the *Dominion Lands Act*. However, the powers of the Canadian government and cabinet had to conform to "equitable principles" (Order, Schedule (A)) in all respects. In particular, it can hardly be said to be equitable under the circumstances to impose a unilateral regime of settlement of land rights; or to give priority to one group of Aboriginal peoples over another, in the absence of compelling justification.

[663] The need for concurrent settlement of coexisting Indian and Metis land rights was belatedly recognized in *Order in Council*, May 6, 1899, P.C. 918: "Whatever rights [Half-Breeds] have, they have by virtue of their Indian blood; and *the first interference with such rights will be when a surrender is effected of the territorial rights of the Indians*; It is obvious that while differing in degree Indian and Half-Breed rights in an unceded territory must be co-existent and *must be properly extinguished at the same time*." [Emphasis added.]

The need for concurrent settlement was also recognized in a judicial inquiry in 1944: see *Report of the Honourable W.A. MacDonald of the Alberta District Court on the Exclusion of Half-Breeds from Treaty Lists*, August 7, 1944, reprinted in part in P. Cumming & N. Mickenberg, (eds.), *Native Rights in Canada* (Toronto: Indian-Eskimo Association of Canada, 1972) at 325, Appendix 5: "It would appear that whenever it became necessary to or expedient to extinguish Indian rights in any specified territory, the fact that Halfbreeds also had rights by virtue of their Indian blood was invariably recognized. These rights co-existed with the rights of the Indians. *It was considered advisable wherever possible to extinguish the rights of Halfbreeds and Indians by giving them compensation concurrently.*" [Emphasis added.]

In O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: MacLelland & Stewart, 1992) at 316-317, it is apparent that concurrent satifaction of Metis and Indian claims was not consistently undertaken: "Some of the commissions were held in conjuction with treaty negotiations, such as those for Treaty Eight (1899), or with adhesions, such as the one in 1889 for Treaty Six....Treaty Nine (1905-06) was not accompanied by a Half-Breed Claims Commission, whereas for Treaties Ten (1906) and Eleven (1921) the same negotiations dealt with Amerindians and Metis. In the case of Treaty Eleven, the Metis of the Mackenzie River District each received $240 in cash because of the lack of suitable farm land."

[664] We are putting aside here the question of validity of any surrenders of aboriginal title purported to have taken place in the territories contemplated by the *Dominion Lands Act*.

[665] See, for example, L. Mandell, *Land Rights of the Metis*, Draft report submitted to the Royal Commission on Aboriginal Peoples, November 18, 1993, at 69: "In 1899 when the Treaty Commissioners for Treaty 8 travelled Northern Alberta they *failed to come across the Lubicon people and several other bands living between the rivers and north of Lesser Slave Lake*. This was referred to in *Ominayak* v. *Norcen Energy Resources*, (1987) 83 A.R. 363 (Alta. Q.B.) at page 365. Accordingly these people did not sign Treaty 8."

[666] J. Sawchuk *et al.*, *Metis Land Rights in Alberta: A Political History*, note 478, *supra*, at 126: "The work begun by the Half-Breed Commissioners in the mid-1880's *continued for more than two decades after the turn of the century*. The claims of those persons missed by previous commissions were dealt with throughout the North-West, including in those areas ceded by treaties 5, 8 and 10." [Emphasis added.]

[667] L. Mandell, *Land Rights of the Metis*, Draft report submitted to the Royal Commission on Aboriginal Peoples, November 18, 1993, at 69; O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: MacLelland & Stewart, 1992) at 390. In support, Dickason cites at 513-514, n. 30, D.A. Ferreira, *Need Not Greed; The Lubicon Lake Cree Band Claim in Historical Perspective* (M.A. thesis, University of Alberta, 1990); N. Clerici, "The Spirit Still Sings at Lubicon Lake: Indian Rights in Canada, a Case Study" in *Proceedings of the 7th International Convention on Canadian Studies* (Catania, Italy, 1988); B. Richardson, "Wrestling with the Canadian System: A Decade of Lubicon Frustration" in B. Richardson, (ed.), *Drum Beat [:] Anger and Removal in Indian Country* (Ottawa: Assembly of First Nations, 1989) at 231-264.

Magnet describes:

> "In the orders-in-council which were subsequently passed to implement the *Dominion Lands Act[,1883]*, it is apparent that the federal government understood this [exemption] to refer to the extinguishment of the Indian title, not the Metis. The *Dominion Lands Act* was held to apply only to those lands where the Indians had ceded title through treaty or otherwise."[668]

Apparently, Scrip Commissions also always gave priority to signing treaties with Indians first and the federal government urged Half-Breeds that it was in their interest to coax Indians to quickly enter into treaties. As J. Sawchuk *et al.* indicate:

> "In the Scrip Commissions which were to follow, however, it was clearly set forth that the Indians were to be dealt with first and the treaty signed prior to the hearings of the Half-breed Commission. *The government exerted pressure on the Half-breed population to persuade the Indians to sign the treaties as quickly as possible.*"[669] [Emphasis added.]

The federal government practice of holding back settlement of the claims of Half-Breeds, so that the latter would persuade Indians to sign treaties was protested in a petition by Half-Breeds in 1895:

> "The government...took the position that the claims [of Half-Breeds] could not be approved because the territory was not yet ceded to Indians.
>
> Manifestly, this is no answer. *It has never been suggested that it is the duty of these half-breeds to procure treaties by the Indians with the Government.*"[670] [Emphasis added.]

Based on the above analysis, it would appear that the *Dominion Lands Act* (while useful for other purposes) was not necessary for the specific purpose of empowering the federal government and cabinet to settle the land rights of the Metis. The legislative and executive powers to protect Aboriginal peoples and settle their land rights in conformity with "equitable principles" were conferred upon the federal government in 1870, through the *Rupert's Land and North-Western Territories Order*. The Canadian government had a constitutional duty to settle the claims of Aboriginal peoples "upon the transference of the territories in question".

In addition, the exemption provision under the Act legally recognized the need for the government to settle the land rights of Aboriginal peoples, prior to issuing land grants to any persons. However, the exemption provision in favour of all Aboriginal peoples concerned was not applied equally or fairly. Priority was systematically accorded by the federal government to entering into treaties with the Indians over settling the land rights of the Metis. In any event, the exemption provision was not fully respected in relation to both Metis and Indians, since valid surrenders were not obtained from all the Aboriginal peoples concerned prior to issuing land grants to settlers under the Act.

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[668] J.E. Magnet, *Metis Land Rights in Canada*, Draft report submitted to the Royal Commission on Aboriginal Peoples, October 28, 1993, at 56.

[669] J. Sawchuk *et al.*, *Metis Land Rights in Alberta: A Political History*, note 478, *supra*, at 123.

[670] Petition from Half-Breeds in the Saskatchewan District in 1895 to the Governor-General in Council, from E. Champagne, President; C.E. Boucher, MLA from Batoche; F. St. Germein; I. Gariepy; J. Paranteau, and 163 others, P.A.C. RG 15, V. 192, File 138650, cited in J. Sawchuk *et al.*, *Metis Land Rights in Alberta: A Political History*, note 478, *supra*, at 122.

Metis influence on the signing of treaties by the Indians is clearly recognized: see O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: MacLeiland & Stewart, 1992) at 279; see also A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, including the Negotiations on which they were based* (Toronto: Belfords, Clarke & Co., 1880) (reprint Saskatoon, Saskatchewan: Fifth House Publishers, 1991) at 293, where it is said that "[Half-Breed] influence with the Indian population is extensive."

Further, by refusing to even begin hearings on Half-Breed claims until treaties with Indians were negotiated and signed, unnecessary delays were incurred. Also, by not settling the co-existing land rights of Metis at the same time as Indians, the Metis were prejudiced generally in terms of land selection. However, in view of the scrip regime used by the federal government to deal with Metis land claims, the Metis would end up landless in any event.

3.3.2 Use of scrip to satisfy and extinguish Metis claims

In early Canadian history, scrip notes were used in Western Canada as a means of distributing land to various groups of people. These included certain members of the military, veterans of the Boer war, certain officers of the North West Mounted Police, new settlers, and to satisfy and extinguish the claims of the Metis.[671]

As J. Sawchuk *et al.* describe, there were two categories of scrip:

> "'money scrip' or 'land scrip', but both were intended to give the bearer a certain amount of Dominion Lands open for homesteading or pre-emption. The scrip notes looked like paper money;...and were issued in different monetary values, such as $80.00, $160.00, or $240.00, or in amounts of land; 80 acres, 160 acres, and so on..."[672]

In regard to the scrip given to Metis, money scrip was viewed as personal property, that was easily transferable to others with very few restrictions and "anyone in possession of it could go to a Dominion Lands Office and use it to purchase a parcel of land."[673] On the other hand, it is said that "Half-breed land scrip was totally hedged in by regulations aimed at discouraging speculation."[674]

On the face of it, it could be argued that the Canadian government had been quite fair in providing Metis (at least in some cases) with an option of taking either money scrip or land scrip.[675] Moreover, measures had been taken to discourage speculation by not recognizing assignments of Half-Breed scrip to others[676] - particularly assignments of land scrip by minors of less than 18 years of age[677]. Moreover, the Canadian government takes the position that Metis themselves insisted on an "unconditional right to sell their scrip":

> "In most cases, the Metis who received scrip sold it for cash, and few ended up as

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671 J. Sawchuk *et al.*, *Metis Land Rights in Alberta: A Political History*, note 478, *supra*, at 87-88.

672 Id. at 88.

673 Id. at 90.

674 Id.

675 See, for example, *Order in Council*, April 13, 1886, P.C. 657, where children of Half-Breed heads of families may opt for either money scrip for $240 or land scrip redeemable for 240 acres of land; *Order in Council*, December 14, 1888, P.C. 2675 (territory covered by Adhesion to Treaty No. 6), where Half-Breed children may opt for $240 or land scrip for 240 acres and Half-Breed heads of families are deemed to be solely entitled to money scrip for $160.

676 *Order in Council*, March 23, 1876, P.C. 238; but see *Order in Council*, March 13, 1900, P.C. 596, where Commissioners were authorized to accept an assignment or power of attorney "upon their being satisfied that the agreement under which the assignment was made or the power of attorney given does not operate to the disadvantage of the Half-breed..."; and Annex to *Order in Council*, June 6, 1901, where it is clarified that the March 13, 1900 Order in Council only applies to money scrip since "land scrip is non-transferable". See J. Sawchuk *et al.*, *Metis Land Rights in Alberta: A Political History*, note 478, *supra*, at 99.

677 J. Sawchuk *et al.*, *Metis Land Rights in Alberta: A Political History*, note 478, *supra*, at 100-101, where rulings of the Department of the Interior are cited. Reasons why only minors up to the age of 18 years old were given some protection and not those up to age 21 do not appear to have been elaborated by the government at that time.

> landowners. However, *there is historical evidence that the Metis themselves insisted that any such program should allow them the unconditional right to sell their scrip*. This was one of the reasons the government of the day did not restrict the sale of scrip."[678] [Emphasis added.]

However, in examining these questions, it is important to place the scrip regime in its proper context. Scrip was not the product of any negotiations, but a unilateral prescription by the Canadian government to meet its constitutional obligations to Half-Breeds. In this context, there was no choice but to accept scrip. As F. Tough and L. Dorion conclude in a study of Treaty No. 5 and Treaty No. 10 Adhesion Scrip:

> "[Scrip] must have been one of the most convoluted polic[ies] ever created by the Canadian nation state. *Essentially, scrip was irrelevant to the Metis*. At a few points in the process, the Metis play a brief part...
>
> Most of the administration of scrip policies was a matter between Interior officials and the larger scrip middlemen."[679] [Emphasis added.]

Tough and Dorion also underline that even the land scrip offered to Metis were of little use to them:

> "*Clearly if Metis people wanted to locate and live on lands by using the scrip policies, they would have to leave their home communities*...It should be noted that not all land in the 36 sections of any given township were available for entry...Land scrip was applied to lands available for homestead entry. Moreover, *by the time the Metis of northern Saskatchewan and northern Manitoba could have located scrip, much of the land was already occupied*."[680] [Emphasis added.]

In addition, the scrip regime designated by the government for Metis served to undermine the integrity of existing Metis communities and increase the vulnerability of the Metis. As J. Sawchuk *et al.* describe:

> "Locating scrip on a new homestead entry meant more than simply pulling up stakes and leaving old property behind. Not only was the Metis leaving his old community, he would have to move to an isolated homestead, surrounded by hostile strangers. The new settlers entering the territory betrayed a contempt and dislike of the Metis and Indian that had not been experienced before..."[681]

While scrip was purportedly chosen by the government as a means of granting land to Metis, the real impact of the scrip regime appears to have been to "effectively bar" Metis from securing a land base suitable to their needs. As J. Sawchuk *et al.* explain:

> "...a Metis from Batoche would have had to travel by road and rail for nearly 700 miles in one direction to locate land scrip at the land office in Calgary. *The cost of the return journey would be nearly as much as the scrip itself was worth*. In this case, scrip payable to bearer and readily marketable, was obviously worth more to the allottee, although *it effectively barred him from becoming a landowner*."[682] [Emphasis added.]

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[678] Letter (and accompanying federal response to Metis land claims submission), dated April 24, 1981, from the Honourable Jean Chretien, Minister of Justice and Attorney General of Canada, to Mr. Harry Daniels, President, Native Council of Canada (on file with the authors).

[679] F. Tough & L. Dorion, *"the claims of the Half-breeds...have been finally closed": A Study of Treaty Ten and Treaty Five Adhesion Scrip*, Draft report submitted to the Royal Commission on Aboriginal Peoples, October 22, 1993, at 55.

[680] Id. at 10.

[681] J. Sawchuk *et al.*, *Metis Land Rights in Alberta: A Political History*, note 478, *supra*, at 114.

[682] Id. at 112.

J. Sawchuk *et al.* add that the "regulations attached to land scrip often made it impossible for the average Metis of limited means to take advantage of the scrip programmes and take land..."[683]

Faced with the threat of incoming settlers and with the unilateral scrip regime established by government, the only decision Metis could make was what type of scrip might be of some use to them. In this critical context, insistence by some Metis[684] on the capacity to sell scrip, and its actual sale, may have been the most realistic option (albeit ineffective) facing the Half-Breeds. As J. Sawchuk *et al.* conclude:

> "*The Metis are portrayed as impractical, yet as we have seen, selling scrip was often the most practical response to a difficult and iniquitous situation.* It was often too expensive to locate scrip, especially when the nearest Dominion Lands Office was several hundred miles away from the Metis community. Also, it was not likely that scrip would allow the Metis to gain title to the specific plot of land he had already been cultivating."[685] [Emphasis added.]

It is important to note that the scrip regime was defined and applied by government, not within any single period, but was an ever-changing system of rules evolving from legislation, orders in council, and rulings on particular cases by the Department of the Interior. As J. Sawchuk *et al.* describe, the uncertain and complex process that resulted was beyond the comprehension of the Metis:

> "This resulted in an incredibly complicated, and sometimes contradictory set of regulations, which *made the rationale behind the administration of the scrip programme almost incomprehensible to the average recipient of scrip.* However, a detailed knowledge of these regulations allowed some speculators to make a great deal of money."[686] [Emphasis added.]

It was in the Order in Council of March 30, 1885[687] that the federal government first decreed that a regime of land grants for the Metis in the North-West, as contemplated by the *Dominion Lands Act, 1883*[688] was to be founded on scrip. Each Half-Breed head of family and each of his or her children were to receive lands up to 160 acres and 240 acres respectively. Only lands that were currently in "bona fide and undisputed occupation by virtue of residence upon and cultivation thereof" could be claimed up to the limit specified. Children not in occupation of land would receive money scrip for $240 which could be redeemed for land during that period at $1 per acre.

It is beyond the scope of this study to examine all of the features of the scrip system as it evolved through statutes, numerous orders in council and departmental rulings. What will be listed here is some of the shortcomings apparent or alleged in regard to the scrip regime and its implementation. These include: i) the lack of a stable set of rules comprehensible to the stated beneficiaries of the scrip system; ii) the failure to determine and meet the aspirations and needs of the Metis concerned; iii) the failure to ensure land "grants"[689] and incorporate appropriate

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683 Ibid.

684 In the absence of clear evidence that the Metis as a collective "insisted" on an unconditional right to sell their scrip, it would be unfair to assume that this was the Metis position as opposed to that of some individual Metis. Insistence by some individual Metis alone would not justify the claim of the Canadian government that it acted in part to respond to Metis concerns, especially since the scrip system was never negotiated with the Metis.

685 J. Sawchuk *et al.*, *Metis Land Rights in Alberta: A Political History*, note 478, *supra*, at 117.

686 Id. at 92.

687 *Order in Council*, March 30, 1885, P.C. 688.

688 *Dominion Lands Act, 1883*, S.C. 1883, c. 17, s. 81(e), which was virtually the same as s. 125(e) of the 1979 Act.

689 See *Dominion Lands Act*, S.C. 1872, c. 23, s. 125(e).

restrictions on alienation for the protection of the Metis; iv) the unilateral nature of the design and implementation of the scrip regime;[690] v) the individual (as compared to collective) basis upon which the Metis were dealt with;[691] vi) the 15-year delay in dealing with Metis land rights in the North-West;[692] vii) the inappropriate assistance accorded to speculators by government officials responsible for the scrip system;[693] viii) the refusal of government to investigate frauds and abuses;[694] and ix) the government's prior knowledge of the overall failure of the scrip system.

In regard to the scrip system applied to Metis, the overwhelming failures and prejudicial impacts of the regime were apparent from its use in Manitoba. As early as 1873, the federal and Manitoba governments were aware that exploitation of Metis by speculators was rampant even prior to the distribution of s. 31 lands. In Manitoba's *Half-Breed Land Grant Protection Act*, it was acknowledged in the preamble:

> "And whereas in consequence of the condition of the surveys in the Province not permitting the distribution of the said lands in manner as fixed by the Order in Council mentioned [April 25, 1871], and in the meantime *very many persons entitled to participate in the said grant in evident ignorance of the value of their individual shares have agreed severally to sell their right to the same to speculators, receiving therefor a trifling consideration*".[695] [Emphasis added.]

Further, it was evident by 1880 that the failure to secure Metis land rights under the *Manitoba Act, 1870* (through the introduction of scrip) and to protect Metis against the influx of white settlers had caused Metis to abandon their established communities and seek security in other regions. As the Metis Commission on the Canadian Constitution describes:

> "*By 1880, many of the long established Metis communities had been broken up and dispersed. Numerous families fled* to parts of the territories which were later to be added to Manitoba as it expanded from its original 'postage stamp' size along the U.S. border and to territories which later became Saskatchewan and Alberta."[696] [Emphasis added.]

By 1885, Prime Minister John A. Macdonald had publicly proclaimed that the scrip system was a "curse" to the Metis:

> "The claims of the half-breeds in Manitoba were bought up by speculators. It was an

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[690] J.E. Magnet, *Metis Land Rights in Canada*, Draft report submitted to the Royal Commission on Aboriginal Peoples, October 28, 1993, at 57, 58, 71 and 81.

[691] J. Sawchuk *et al.*, *Metis Land Rights in Alberta: A Political History*, note 478, *supra*, at 132: "It is also significant to note that Half-breed claims were dealt with on an individual basis with each person making application independently. This in itself represents a denial of Metis nationhood and political identity and most certainly facilitated the work of speculators by enabling them to approach and make a deal with one person at a time."

[692] The delay is computed from July 15, 1871, the time that Rupert's Land and the North-Western Territory was transferred to Canada and the Canadian government incurred constitutional obligations to settle the land claims of the Metis, to March 30, 1885, when the first order in council was passed that established some system of addressing Metis land rights.

[693] J. Sawchuk *et al.*, *Metis Land Rights in Alberta: A Political History*, note 478, *supra*, at 131: "Speculation was conducted with the government's knowledge and frequently with government assistance. Schedules of the Half-breed Commission hearings were made available to the speculators and it was common practice for them to travel along with the commissioners...[new para.]The speculators were kept abreast of the current prices for scrip, and advertisements quoting the latest prices were displayed in Dominion Lands offices. Half-breed scrip became big business and a significant means of fostering economic growth."

[694] Id., at 103, 109, and 146.

[695] *Half-Breed Land Grant Protection Act*, S.M. 1873, 37 Vict., c. 44 (enacted February 28, 1874). This passage is cited in J.E. Magnet, *Metis Land Rights in Canada*, Draft report submitted to the Royal Commission on Aboriginal Peoples, October 28, 1993, at 75.

[696] Metis Commission on the Canadian Constitution, *Report of the Metis Commission on the Canadian Constitution* (Saskatchewan: Metis Society of Saskatchewan, December 1991) at 46.

unfortunate thing for those poor people; but it is true that this grant of scrip and land to those poor people was a curse and not a blessing."[697]

J. Magnet has concluded that "all government actors ought to have clearly recognized that scrip as a method of granting lands posed an unacceptable risk to Metis interests";[698] that "the federal government was aware, or ought to have been aware, that the scrip system was fundamentally flawed";[699]and by acting unilaterally to extinguish Metis aboriginal title through a scrip system, "the federal government discriminated against the Metis."[700]

Apparently, with virtually no beneficial results to justify the ongoing implementation of the scrip system, the Canadian government continued to use scrip, over a number of decades, as a basis to purportedly extinguish Metis land rights in both original Manitoba and the vast North-West. By 1923, the Canadian Parliament had amended the *Dominion Lands Act* to substitute cash (not exceeding $125.00 in satisfaction of Half-Breed claims arising out of extinguishment of title) for land grants.[701] This was no solution to the problems with scrip.

As already indicated in this study, it cannot be concluded that the Canadian government has fulfilled its constitutional obligations and satisfied the claims of the Metis. In view of the existing constitutional rights and obligations, it cannot be said that the scrip system validly extinguished the "Indian title" of the Metis. Nor can it be said that the free and informed consent of Metis to the extinguishment of their aboriginal rights was obtained under the scrip regime.

3.4 Did Metis Consent to Extinguishment of Their "Indian Title"?

There are numerous factors that militate against a conclusion that the Metis validly gave their free and informed consent to the extinguishment of their aboriginal rights. These are highlighted briefly below. At the same time, it is also emphasized that there are a number of constitutional obligations that the Canadian government had at that time (and continues to have) that have not been respected or fulfilled. These constitutional duties are directly related to matters of surrender or extinguishment of Aboriginal title. Consequently, the question of validity of Metis consent to extinguishment of Aboriginal title is profoundly affected by the failures of the government (described below) to meet its constitutional obligations in this regard.

i) **Failure of government to settle Metis claims in conformity with equitable principles.** As already discussed, the Canadian government has a constitutional obligation to settle aboriginal claims "in conformity with equitable principles which have uniformly governed

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697 House of Commons, *Debates*, July 6, 1885 (speech by Prime Minister John A. Macdonald), at 3113.

698 J.E. Magnet, *Metis Land Rights in Canada*, Draft report submitted to the Royal Commission on Aboriginal Peoples, October 28, 1993, at 80.

699 Id., at 84.

700 Id. at 81.

701 *Dominion Lands Act*, S.C. 1923, 13-14 Geo. V., c. 44, s. 8; amended by *Dominion Lands Act*, R.S. 1927, c. 113, s. 74(b) to increase cash grant to $240.00.

See also J. Sawchuk *et al.*, *Metis Land Rights in Alberta: A Political History*, note 478, *supra*, at 127, where it is indicated that even prior to 1923 under *Order in Council*, April 12, 1921, P.C. 1172, cash grants of $240.00 were authorized by the federal Cabinet to Half-Breeds in the territory purportedly ceded under Treaty No. 11; and that cash grants were also authorized instead of land or scrip under *Order in Council*, March 26, 1924, P.C. 471 and *Order in Council*, July 29, 1925, P.C. 1100.

the British Crown in its dealings with the aborigines".[702]

As reflected in the *Royal Proclamation of 1763*, "equitable principles" uniformly adopted by the British Crown include respect for the principle of Aboriginal consent to any purchase or cession of Aboriginal title; recognition of lands reserved for Aboriginal peoples (as a central objective); and procedural safeguards such as public meetings to explain any proposed surrender or extinguishment.

In the territories of the North-West that were subject to the *Dominion Lands Act*, Metis could only seek recognition of their land rights through a process to extinguish their "Indian title". No consensual process for the recognition of Metis lands was established. The unilateral creation of the scrip regime in the North-West was destined to lead to wholesale land dispossession for Metis (as witnessed in Manitoba). This government scheme was inconsistent with a principal objective in the Proclamation, namely to secure the land rights of Aboriginal peoples so that they could avoid dispossession or being "molested or disturbed".

Moreover, there is no evidence that public meetings took place to explain adequately to Metis the significance of any purported extinguishment through the scrip system. While there are some indications that some Treaty Commissioners attempted to persuade Metis to enter into treaty instead of taking scrip, this is still a different issue from explaining the real significance of extinguishment of aboriginal title under either option.

ii) **Failure of government to made adequate provision for the protection of Metis.** As previously described, the Canadian government has an ongoing constitutional "duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer" of Rupert's Land and the North-Western Territories to Canada.[703]

Failure to adequately protect the Metis has already been demonstrated in this study. It is particularly evident from the fact that the Metis became virtually landless, as a result of the system established to settle Metis claims. The failure to provide adequate restrictions on alienation of Metis lands, as required under the Royal Proclamation, was a most significant factor contributing to Metis land dispossession. Metis claims had to be settled by the Canadian government, and Metis consent obtained, in a context that sufficiently protected the interests and well-being of the Metis rather than a framework that would leave them landless.

In this context, there are virtually no indications as to the suitability of the scrip process to maintaining the integrity of Metis people, either as individuals or as a distinct society, culture and nation.

iii) **Failure of government to settle Metis claims in communication with the Imperial government.** According to the *Rupert's Land and North-Western Territory Order*, the powers of the Canadian Parliament and executive government were not unfettered in settling the claims of Aboriginal peoples in the territories concerned. Moreover, as already described in this study, the terms and conditions in favour of Aboriginal peoples attached to the Order were also applicable to the settlement of Metis claims under the *Manitoba Act, 1870.*

In particular, "[a]ny claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government *in communication with the Imperial Government...*".[704] In addition, "necessary directions" was to be obtained from one of the Queen's principal Secretaries of State.[705] Again, there is no evidence that the Canadian

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[702] See Schedule (A) of *Rupert's Land and North-Western Territorial Order*, R.S.C. 1985, App. II, No. 7, confirmed as part of the Constitution of Canada in Item 3 of the Schedule to the *Constitution Act, 1982*.

[703] See Schedule (B) of *Rupert's Land and North-Western Territorial Order*.

[704] See Term 14 of the Order.

[705] See paragraph following Term 15 of the Order.

government fulfilled this constitutional obligation in relation to the claims of the Metis. This would appear especially to be the case in regard to the design and implementation of the scrip system, as a means of purportedly extinguishing the rights of the Metis.

iv) **Failure of government to meet its fiduciary obligations in regard to Metis.** In seeking the consent of the Metis to extinguishment of their aboriginal title, the government was obligated to conduct itself in conformance with the strict standards of a fiduciary.[706] This was especially important in view of the vulnerability of the Metis to the influx of settlers at the time.

It is important to underline that the obligations to the Metis arose out of constitutional commitments, such as those in the *Manitoba Act, 1870* and those connected to the *Rupert's Land and North-Western Territory Order*. If the government's undertakings and obligations in relation to Metis land rights are of a constitutional nature, so are the fiduciary obligations that pertain to the implementation of these constitutional provisions. As indicated in *Sparrow* v. *The Queen*, fiduciary obligations of a constitutional nature limit both the powers of Parliament and executive government.[707] In order to uphold the honour of the Crown, the legislation and subsequent orders in council establishing the scrip regime for the extinguishment of Metis aboriginal title would have to be justified, with Metis interests as the first consideration.[708]

It cannot be concluded that the Canadian government acted for the benefit of the Metis, in satisfying their claims and purportedly extinguish Metis aboriginal title. The failure of the government to act in conformance with its fiduciary obligations, when it implemented a scrip system for the Metis, is described by J. Magnet as follows:

> "The federal government breached its fiduciary obligation to the Metis by unilaterally implementing a system which it knew, or ought to have known, would ultimately leave the Metis without a land base and the other benefits which Indian tribes[709] received."[710]

In addition, in its role as a fiduciary, the Canadian government should have fully informed the Metis of the constitutional rights and obligations in their favour, particularly those under the *Rupert's Land and North-Western Territory Order*. It is difficult to argue that the Metis validly consented to an extinguishment of their aboriginal title, if they were not even aware of what rights and obligations were owed to them at that time.

v) **Exploitation of Metis illiteracy and lack of understanding of the English language.** J. Sawchuk *et al.* describes the situation faced by the Metis in the following terms:

> "*Another problem associated with poverty was illiteracy. The majority of Half-breeds submitting claims to the commissions were unfamiliar with the English language.* Working

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[706] See, for example, *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 (S.C.C.) at 324 per Dickson J.: The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians." In *Apsassin* v. *Canada*, [1993] 2 C.N.L.R. 20 (Fed. C.A.), at 44 per Stone J.A., it is provided that the "cases support the existence of a fiduciary relationship between the Crown and the Indians *previous* to [a] surrender, just as one has been recognized once a surrender has taken place." [Emphasis added.]

[707] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 (S.C.C.), at 1109 per Dickson C.J.: "...federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights." In regard to fiduciary duties arising in regard to the provincial Crown, see discussion under subheading 6.4.3 *infra*.

[708] Id. at 1114: "...the honour of the Crown is at stake in dealings with aboriginal peoples. *The special trust relationship and the responsibility of the government vis-a-vis aboriginals must be the first consideration* in determining whether the *legislation or action* in question can be justified." [Emphasis added.]

[709] Whether Indian nations in Canada have in practice received "benefits", through their treaties, commensurate with the Crown's fiduciary obligation is another issue beyond the scope of discussion under this sub-heading.

[710] J.E. Magnet, *Metis Land Rights in Canada*, Draft report submitted to the Royal Commission on Aboriginal Peoples, October 28, 1993, at 84.

through interpreters proved to be unsatisfactory and undoubtedly contributed the ease with which the speculators bought scrip from those unsuspecting of their motives." [Emphasis added.]

T. Flanagan also points out that the Metis were mostly illiterate, but adds that "this did not rigorously differentiate them from whites in an age when formal education was not universal."[711] Nevertheless, from a legal perspective, the fact that other people might also have been unable to read cannot remove illiteracy as a potential ground for vitiating consent by Metis.[712]

vi) **Exploitation of Metis lack of understanding of the significance of scrip and the scrip system.** In regard to the legal significance of scrip, J. Sawchuk *et al.* describe the continuing misunderstanding that exists within Metis communities as follows:

> "...for all the interest in scrip and all the significance attached to it, *remarkably little is known about it even by the Metis themselves*. It was the subject of much misunderstanding and misinformation among the Metis people when it was first distributed. *Very few really understood what the government was doing when they accepted scrip. This misunderstanding persists to this day.*"[713] [Emphasis added.]

In addition, J. Magnet provides:

> "Without knowledge of the implementation scheme and its outcome, the Metis could not understand the significance of entering into an agreement for extinguishment of their aboriginal title."[714]

It would be difficult to conclude that Metis agreed to the extinguishment of aboriginal title, if they did not understand the legal implications of scrip and the process it entailed. As F. Tough and L. Dorion suggest, the Metis were little more than unknowing pawns within a process of questionable validity:

> "*At a few points in the process, the Metis play a brief part*. They stand before a Commissioner and provide information. They assign their scrip to a scrip middleman, often negotiated through intermediaries like Horace Halcrow.[715] *Some Xs are attached to paper, a power of attorney, a scrip receipt, a quit claim deed. A few may have entered a Dominion Lands Office and played a part in locating land in their name*, after which the land was assigned to a scrip middleman or small purchaser. If the scrip needed to be redbacked[716], then perhaps more signatures and Xs are attached to another set of documents. *Some of these documents are executed in blank.*"[717] [Emphasis added.]

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[711] T. Flanagan, *The Case Against Metis Aboriginal Rights*, (1983) 9 Can. Public Policy 314 at 321.

[712] See, for example, R. Clark, *Inequality of Bargaining Power [:] Judicial Intervention in Improvident and Unconscionable Bargains* (Toronto: Carswell, 1987) at 45-46 (language difficulties, illiteracy).

[713] J. Sawchuk *et al.*, *Metis Land Rights in Alberta: A Political History*, note 478, *supra*, at 87.

[714] J.E. Magnet, *Metis Land Rights in Canada*, Draft report submitted to the Royal Commission on Aboriginal Peoples, October 28, 1993, at 70.

[715] H. Halcrow is said to have been a member of a scrip syndicate in the early 1900s and to have played a key role in persuading Metis to take scrip instead of treaty: see F. Tough & L. Dorion, *"the claims of the Half-breeds...have been finally closed": A Study of Treaty Ten and Treaty Five Adhesion Scrip*, Draft report submitted to the Royal Commission on Aboriginal Peoples, October 22, 1993, at 53-53.

[716] Id. at 23: "Redbacking was a means by which Interior officials could allow those in possession of scrip certificates to circumvent the ruling that the Metis grantee would have to be present in a Dominion Lands Office in order for the scrip to be located and assigned." Redbacking involved signing declarations and endorsements to the effect that the Metis scrip had been assigned.

[717] Id. at 55.

vii) **Perpetrations of fraud and other unconscionable transactions.** Generally, it would appear that the Metis were in a grossly unequal position in land transactions with speculators and that they seriously undervalued the value of lands subject to aboriginal title. In addition, Metis were victims of improvident transactions that resulted in abject poverty or else substantially reinforced their already impoverished situations.

Unconscionable transactions, including fraud, have been alleged and would have to be proved.[718] Generally, if fraud did occur, it would also be a possible ground to vitiate Metis consent. For example, J. Sawchuk *et al.* describe the findings of Half-Breed Commissioners in 1900 as follows:

> "In 1900, Coté and McLeod, Half-breed Commissioners investigating claims in the District of Saskatchewan, found that most powers of attorney had been obtained many years previous to the sitting of the Commission and *with the exception of a few cases, either no consideration whatever had been paid, or the price mentioned in the agreement was far below the current price*[719]...
>
> The commissioners had obtained evidence that *the Half-breeds 'were ignorant of the purport of the documents they had been induced to sign, and which they most emphatically repudiate'*[720]."[721] [Emphasis added.]

In regard to such "transactions", other legal doctrines relating to unconscionability,[722] economic necessity,[723] duress,[724] misrepresentation,[725] undue influence,[726] and lack

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[718] For a description of fraudulent and exploitive practices in relation to purchases of Metis scrip by speculators, allegations of government knowledge and assistance in speculation activities, and refusal to prosecute speculators for fraud and forgery, see, for example, J. Sawchuk *et al.*, *Metis Land Rights in Alberta: A Political History*, note 478, *supra*, at 130-151. In regard to unconscionable transactions, see generally B. McLachlin, "The Place of Equity and Equitable Doctrines in the Contemporary Common Law World: A Canadian Perspective" in D.M.W. Waters, (ed.), *Equity, Fiduciaries and Trusts 1993* (Toronto: Carswell, 1993) 37 at 45-47.

[719] Report of N.O. Coté and S. McLeod, March 20, 1901, submitted by Minister of Interior to Privy Council, P.C. 830 (1901) Dormant. RG 2 Series 3, vol. 142.

[720] Id.

[721] J. Sawchuk *et al.*, *Metis Land Rights in Alberta: A Political History*, note 478, *supra*, at 108.

[722] See, for example, R. Clark, *Inequality of Bargaining Power [:] Judicial Intervention in Improvident and Unconscionable Bargains* (Toronto: Carswell, 1987), at 28 (unequal position of the parties and gross undervalue of land's value), 148-155 (improvident transactions that result in abject poverty); see also G.H.L. Fridman, *Restitution*, 2nd ed. (Toronto: Carswell, 1992), at 148: "Most, if not all, of the cases in which the doctrine of unconscionability has been applied have involved dealings with land or interests in land."

[723] G.H.L. Fridman, *Restitution*, 2nd ed. (Toronto: Carswell, 1992), at 146: "Such circumstances as...economic necessity have...been held to justify equitable intervention and relief from a bargain that turned out to be harsh and onerous."

[724] Id., at 112: "...the victim has intentionally submitted to the demands of the recipient from the realisation that there is no other practical choice open to him. This is the thread of the principle that links the early law of duress (threat to life or limb) with later developments, when the law has come to recognize as duress,...the threat to property..."

[725] G.H. Treitel, *The Law of Contract*, 8th ed. (London: Sweet & Maxwell, 1991), at 295: "...the representation must be of a kind that the law recognises as giving rise to liability: this excludes 'mere puffs' and certain statements of law or of opinion or as to the future. A number of general conditions must next be satisfied: the representation must be unambiguous and material, and must have been relied upon by the representee. If these requirements are satisfied the representee may be able to claim damages or to rescind the contract or to do both these things."; and G.H.L. Fridman, *Restitution*, *supra*, at 198.

[726] G.H.L. Fridman, *The Law of Contract in Canada*, 2nd ed. (Toronto: Carswell, 1986), at 301: "Any improper use by one contracting party of any form of oppression, coercion, compulsion or abuse of power or authority for the purpose of obtaining the consent of the other party may result in avoidance of the resulting contract on the ground of undue influence...The onus of establishing such undue influence is on the party who is alleging the lack of consent on such basis. However, in some instances the mere fact that the parties stand in a certain relationship to one another raises a presumption of undue influence which at least discharges the preliminary burden of proof. *This will be the case wherever the relationship between the parties is one of a...fiduciary nature.*" [Emphasis added.]

of meeting of the minds,[727] might be invoked by Metis if relevant in specific situations. However, in view of the lengthy passage of time, loss of specific evidence and legal defences based on statutes of limitations, it could be very difficult for Metis to prove in specific instances that unconscionable transactions occurred.

What is more easily established is that, generally, the conditions of illiteracy, impoverishment, improvident transactions, lack of Metis understanding of the significance of scrip, susceptibility of Metis to exploitation by speculators, among other factors, are evidence of the overwhelming vulnerability of the Metis at that time. In such a context, the fact that the Canadian government exceeded its constitutional authority in seeking the extinguishment of Metis aboriginal title emphasizes the extent to which the government violated its fiduciary responsibilities to the Metis at that time. In particular, the constitutional nature of the government's contraventions would, in general terms, go against any finding of Metis consent to extinguishment of aboriginal title.

viii) **Failure to deal with the collective rights of Metis.** Aboriginal rights are collective rights, though they include rights of an individual nature. Consequently, it is difficult to see how scrip transactions with individual Metis would extinguish the collective title of Metis in any region.[728] It would seem fair to conclude that individuals, whether they be Metis children or Half-Breed heads of families, would not have the capacity to extinguish the aboriginal title of Metis, as a collectivity. In the absence of valid mandates that clearly specified the contrary, individuals could not consent to extinguish the collective aboriginal rights of Metis. Moreover, it is far from clear in official scrip documents that extinguishment of Metis aboriginal title is the intended objective.[729]

ix) **Failure to recognize land rights as the *quid pro quo* for Metis.** As already mentioned, it is clear that the *Manitoba Act, 1870* itself did not actually extinguish the aboriginal title of the Metis, but only contemplated it. Any consent by Metis would have to be proved to have taken place based on subsequent events.

In regard to the *Manitoba Act* and subsequent events, J. Magnet describes how the failure to receive what was negotiated and provided for under the Act can nullify agreement to any purported extinguishment of Metis title:

> "In the case of the *Manitoba Act*, the administrative machinery which was supposed to carry out the constitutional promises were faulty. The Metis did not receive the *quid pro quo* which they had negotiated under the *Manitoba Act*. The *quid pro quo* to be received in exchange for extinguishment was nullified. This nullifies the agreement itself and with it, the extinguishment of Metis aboriginal title.[730]

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[727] Id. at 16: "...equitable ideas have infiltrated the law of contract to the extent of permitting a more subjective assessment of the circumstances. In some situations, therefore, the existence of a contract and the nature and content of its terms may be determined by reference to the actual belief and understanding of an individual party rather than by reference to the belief and understanding of a reasonable man hypothetically in the position of such party."

[728] See, for example, *An Act respecting the appropriation of certain Dominion Lands in Manitoba*, S.C. 1874, 37 Vict., c. 20, where reference is made in the preamble to the appropriation of 1.4 million acres of land under s. 31 of the *Manitoba Act* but the preamble goes on to suggest that no valid extinguishment has yet taken place: "And whereas *no provision has been made for extinguishing the Indian title to such lands as respects the said half-breed heads of families residing in the Province [of Manitoba] at the period named*".

[729] Legislative provisions and orders in council of the Canadian government indicate, to varying degrees, an intention to extinguish Metis aboriginal title. However, it would not be sufficient for the Parliament or executive government of Canada to contemplate extinguishment yet not ensure that this is the common intention of the parties when implementing a process for this purpose.

[730] J.E. Magnet, *Metis Land Rights in Canada*, Draft report submitted to the Royal Commission on Aboriginal Peoples, October 28, 1993, at 70.

In conclusion, in the case of the Metis, it is most difficult to accept the view that the Metis voluntarily and knowingly agreed to surrender their "Indian title" in exchange for money or land scrip. In view of the various constitutional obligations of the Canadian government that were never fulfilled, it cannot be said that the government's process of extinguishment of Metis aboriginal title was a valid one. Moreover, the Metis were in an extremely vulnerable position during the periods that extinguishment of their aboriginal title is purported to have taken place. Consequently, any fraud, misrepresentations, and improvident bargains linked to the scrip process, with the knowledge of the government or arising out of government indifference or neglect, would serve to negate any serious suggestion that the government carried out its fiduciary obligations in accordance with its constitutional mandate.

As K. McNeil comments:

> "Métis...who were not included in the treaties were granted land or money scrip in recognition of their claim to 'Indian title.' The federal government has maintained that this distribution of scrip extinguished any aboriginal rights the Métis may have had. *This is a highly debatable proposition and is open to challenge on several grounds. It is therefore quite possible that the Métis have existing aboriginal rights that are now protected under section 35.*"[731] [Emphasis added.]

As examples of grounds on which extinguishment of Metis rights could be challenged, McNeil cites "[f]raud, misrepresentation, and non-compliance with the *Royal Proclamation of 1763*, the *Rupert's Land and North-Western Territory Order*, and the *Manitoba Act*".[732]

History demonstrates that, from a political viewpoint, the Canadian government in the 1870s and 1880s considered Louis Riel and the Metis as a lawless and insurgent people. However, in purporting to satisfy Metis claims and extinguish Metis aboriginal title, it was the Canadian government that repeatedly ignored its constitutional obligations and thereby violated the rule of law.

4. CONTENDING SOVEREIGNTIES

> "But the international system itself is nothing other than a structure of ideas; and it has been made nowhere else than in the human mind. The international order forms the minds of those who make the international order. The masters of the world of tomorrow are the slaves of yesterday's ideas."[733]
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> P. Allott, *Eunomia: New Order for a New World*, 1990

> "En tant que peuples autochtones, descendants des premiers habitants des territoires situés à l'est de la péninsula

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[731] K. McNeil, *The Constitutional Rights of the Aboriginal Peoples of Canada*, [1982] 4 Supreme Ct. L. Rev. 255, at 262.

[732] Id. at 262, n. 35.

[733] P. Allott, *Eunomia: New Order for a New World* (Toronto: Oxford University Press, 1990), at xv-xvi, cited in M.C. Lâm, *Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination*, 25 Cornell Int'l L. J. 603, at 603.

> Québec-Labrador, nous exigeons que nos droits de souveraineté soient reconnus sur ces terres."[734]
>
> Conseil des Atikamekw et des Montagnais, 1979

It is often assumed that the history of sovereignty in Canada may be described, in successive periods, in terms of the acquisition of French, then British and finally Canadian sovereignty. The sovereignty of Aboriginal peoples, if recognized at all, is presumed by some observers to be a vanished fragment of our early history.

In the view of L.C. Green, Aboriginal peoples do not now and never did have anything close to sovereignty:

> "...*whatever title the Indians were acknowledged as having in the land, they certainly did not and do not possess anything similar to sovereignty*. Their title is solely that which is acknowledged as remaining with them by the Crown; it amounts to no more than a right to live on and enjoy the use of such lands as have not been granted to settlers or taken into the complete exercise of jurisdiction by the Crown; and *this Indian title is subject to the overriding sovereign rights of the Crown as ultimate owner who may, subject to such legal procedures as may be required by the local law, extinguish whatever title remains to the Indians.*"[735] [Emphasis added.]

Despite such views, it is most difficult to dismiss the fact that the sovereignty of Aboriginal peoples persists. Though often repressed or subjected to discriminatory and colonial policies, Aboriginal sovereignty must still be accounted for both in the Canadian constitutional[736] and international context.

As will be described in the following sub-headings, the unique history and sovereignty of Aboriginal peoples is being increasingly acknowledged. There is no clear indication that Aboriginal sovereignty has been extinguished or otherwise relinquished. Yet, as B. Slattery underlines, there continues to exist a lack of understanding in these respects and legal thinking has not kept pace[737] in accommodating and providing answers to such fundamental questions:

> "...if the historical role of native peoples is now widely recognized, *it has not been accommodated by the standard intellectual framework that influences legal thinking.*"[738] [Emphasis added.]

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[734] Principle 2 of the 11 Principles of the Conseil des Atikamekw et des Montagnais, cited in R. Dupuis, *Historique de la négotiation sur les revendications territoriales du Conseil des Atikamekw et des Montagnais (1978-1992)*, (1993) 23 Recherches amérindiennes au Québec 35 at 40: "As Aboriginal peoples, descendants of the first inhabitants of the territories situated to the east of the Québec-Labrador peninsula, we demand that our rights to sovereignty be recognized on these lands." [Unofficial translation.]

[735] L.C. Green, "Claims to Territory in Colonial America" in L.C. Green & O.P. Dickason, (eds.), *The Law of Nations and the New World* (Edmonton: University of Alberta Press, 1989), at 125.

[736] See P. Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, (1993) 45 Stanford L. Rev. 1215, at 1367: "Indian sovereignty is not a domestic constitutional issue. Domestic issues of constitutional interpretation should not obscure the fact that justifications for the recognition of Indian government do not find their source in constitutional documents, but instead transcend national borders." And at 1365-1366: "[C]onstitutional provisions ought to be interpreted in light of a prior, more basic, commitment to equality of peoples."

[737] See also B. Slattery, *Aboriginal Sovereignty and Imperial Claims*, (1991) 29 Osgoode Hall L.J. 681, at 683: "The Eurocentric premises of traditional accounts have come under heavy attack in recent decades...Yet, while there is a growing consensus among historians and lawyers that the old legal framework is flawed, there is uncertainty and confusion as to how the situation may be remedied."

[738] B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" in M. Boldt and J.A. Long, *The Quest for Justice [:] Aboriginal Peoples and Aboriginal Rights* (Toronto: Univ. of Toronto Press, 1985), at 116.

And Slattery continues:

> "What we lack is a proper understanding of when and how the native peoples of Canada were won to the allegiance of the crown and what effect this process had on their original land rights, customary laws, and systems of government. Did the crown gain sovereignty over Canada with or without the consent of the aboriginal peoples? On what terms was it achieved?...*It is a remarkable fact that coherent answers to these questions cannot be found in standard treatises on Canadian constitutional law and history, or even in more specialized works.*"[739] [Emphasis added.]

For example, in *Sparrow* v. *The Queen*, the Supreme Court of Canada affirms the existence of British sovereignty (without reference to Aboriginal sovereignty) in the following terms:

> "It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, *there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title*[740]*, to such lands vested in the Crown*[741]*.*"[742] [Emphasis added.]

This far-reaching statement is made in the absence of any substantiation by the Supreme Court.[743] Yet, as H. Foster concludes, "there were in fact plenty of doubts, especially 'at the

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[739] Ibid.

[740] While this sub-heading addresses Crown and Aboriginal sovereignty, there are at the same time important implications affecting underlying title from a property perspective. The common law view that the Crown possesses underlying title to Aboriginal lands is being identified as problematic and fundamentally questioned. See P. Macklem, *First Nations Self-Government and the Borders of the Canadian Legal Imagination*, (1991), 36 McGill L. R. 382, at 397: "Current law on the nature and extent of the native interest in ancestral and reserve lands, however, *represses the fact that native people were the original inhabitants of the continent*. Jurisprudence on native proprietary interests is not formulated with an eye to institutionalizing the special relationships native people have with respect to ancestral and reserve land. *Instead, the common law of aboriginal title...assumes that the Crown possesses underlying title to all of Canada and carves out a property interest unique to native people that places native people in a position of dependence in relation to the Crown*...[R]eform efforts which do not question the hierarchical relationship built into the structure of the native proprietary interest are bound to reproduce native dependency in a new form." [Emphasis added.]

[741] It would appear that "Crown" is being used here as referring to the state, and not simply to the executive arm of the federal government (as distinguished from Parliament). In this regard, see also H. Foster, *Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases*, (1992) 21 Man. L.J. 343 at 346, n. 13: "...ultimate sovereignty is in the Crown only if by 'Crown' the [Supreme] Court means the King in Parliament, and not merely executive authority"; and G. Rémillard, *Souveraineté et fédéralisme*, (1979) 20 C. de D. 237, at 242, where it is said that the notion of the state does not really exist under English public law, that the Crown is the personification of the state, and that sovereignty is situated in the Crown.

[742] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1103, per Dickson C.J.

[743] In *Mitchell* v. *The Queen*, [1990] 2 S.C.R. 85 at 130, La Forest J. makes a similar "no-doubt" statement but adds, on the part of Aboriginal peoples, a consensual aspect to both British sovereignty and the dispossession of their lands:

> "*The historical record leaves no doubt that native peoples acknowledged the ultimate sovereignty of the British Crown, and agreed to cede their traditional homelands* on the understanding that the Crown would thereafter protect them in the possession and use of such lands as were reserved for their use; see the comments of Professor Slattery in his article 'Understanding Aboriginal Rights' (1987), 66 *Can. Bar Rev.* 727, at p. 753." [Emphasis added.]

As his sole reference, La Forest J. cites B. Slattery. The author refers (at 753) to the general fiduciary duty that "has its origins in the Crown's historical commitment to protect native peoples from the inroads of British settlers, in return for a native undertaking to renounce the use of force to defend themselves and to accept the protection of the Crown *as its subjects*." [Emphasis added.]

However, one cannot assume that the protection of the Crown was sought by Aboriginal peoples "as its subjects". In another article, Slattery declares that there are no coherent answers in constitutional legal or historical texts as to whether Aboriginal peoples consented to Crown sovereignty in Canada: see B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" in M. Boldt and J.A. Long, *The Quest for Justice [:] Aboriginal Peoples and Aboriginal Rights*, note 738, *supra*, at 116. See also H. Foster, *Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases*, note

that...such a belief continues to inform political and legal practice in 1991."[756] [Emphasis added.]

In more general terms, K. McNeil indicates:

"The problem is...a general one: the claims of France[757] and Britain, and hence of Canada, to sovereignty over the aboriginal nations and their territories rest on shaky foundations."[758]

In regard to the sovereignty and territorial claims of France, D. Delâge also emphasizes the limits to French power:

"La question de la souveraineté et du droit de localisation illustre également les limites du pouvoir des Français. En effet, en apposant les armoiries de leur monarchie un peu partout sur le continent, *les Français cherchaient à légitimer leur empire aux yeux de leurs rivaux européens, mais pour les Amérindiens, cela n'impliquait aucune forme de cession de territoire et ne conférait aucun droit aux Français à cet égard.*"[759] [Emphasis added.]

Also, A. Lajoie & P. Verville conclude:

"...the vast majority of commentators agree that the French were never able to impose their authority on the Amerindians, and had to achieve their goals by way of negotiated

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[756] M. Asch & P. Macklem, *Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow*, (1991) 29 Alta. L.R. 498, at 510.

[757] In relation to French sovereignty claims, see B. Slattery, *Aboriginal Sovereignty and Imperial Claims*, note 737, *supra*, at 688: "The usual view is that France obtained an original title to New France by virtue of the explorations of Jacques Cartier and the settlements initiated by Champlain...The whole structure depends on the premise that North America was legally a vacant land available for appropriation, *despite the obvious fact that it was occupied and controlled by native peoples*. The critical question is whether this basic premise is justified." [Emphasis added.]

See also W.J. Eccles, *Sovereignty-Association, 1500 - 1783*, (1984) 65 Can. Historical Rev. 475 at 500: "The French, despite their claims to sovereignty over all the land west of the Appalachians, Iroquoia, and Hudson Bay were, in fact, sovereign only inside their garrisoned forts, and beyond, only within the range of their muskets";and *R.* v. *McCoy*, [1993] 1 C.N.L.R. 135 at 139 per Turnbull J. (N.B. Court of Queen's Bench, T.D.): "There was no attempt to exercise sovereignty over the Indians and certainly the Indians never acknowledged that France had title to their land."

[758] K. McNeil, "Aboriginal Nations and Quebec's Boundaries: Canada Couldn't Give What It Didn't Have" in D. Drache & R. Perrin, (ed.), *Negotiating With a Sovereign Québec*, note 747, *supra*, at 109. The author is referring here to areas in Canada that were included in the Hudson's Bay Company Charter, namely northern Quebec, northern Ontario, most of the Prairie provinces, and the eastern part of the Northwest Territories.

In relation to cessions in North America by France to Great Britain, see J. Hurley, *Aboriginal Rights, the Constitution and the Marshall Court*, (1982-1983) 17 R.J.T. 403, at 411: "Although [the Treaty of Paris, 1763] has been interpreted as vesting Great Britain with absolute sovereignty over and title to Canada, its very language clearly indicates that France ceded only such rights over her North American claims as she herself possessed. This was merely the application of the basic principle *nemo dat quod non habet*. Although the courts have sometimes lost sight of this elementary fact, it is necessary to keep it firmly in view in order to maintain the correct perspective." Also, in *Mitchel* v. *United States*, (1835) 9 Peters 711 (U.S.S.C.), at 734, Baldwin J. provides: "That a treaty of cession was a deed or grant by one sovereign to another, which transferred nothing to which he had no right of property, and only such right as he owned and could convey to the grantee."

[759] D. Delâge, *L'alliance franco-amérindienne 1660 - 1701*, note 743, *supra*, at 13: "The question of sovereignty and the right to settle equally illustrates the limits of French power. In effect, in affixing their coat of arms and their monarchy a little throughout the continent, *the French sought to legitimize their empire in the eyes of their European rivals, but for Amerindians, this did not imply any form of territorial cession and did not confer any right to the French in this regard.*" [Unofficial translation, emphasis added.] Delâge adds at 14 that "les alliées Amérindiens ne renoncèrent jamais à leur souveraineté sur leurs terres." Unofficial English translation: "the Amerindian allies never renounced to the sovereignty of their lands." [Unofficial translation.] See also D. Delâge, *Epidemics, Colonization, Alliances: Natives and Europeans in the Seventeenth and Eighteenth Centuries*, Draft report submitted to the Royal Commission on Aboriginal Peoples, August 18, 1994, at 90 *et seq.*

diplomacy."[760]

Second, legal doctrines or perspectives pertaining to British sovereignty were not applicable without some modifications to sovereign governments in federations such as Canada. For example, while British parliamentary sovereignty was viewed in virtually absolute terms, the same is not true for sovereign legislatures within a federal state, where the doctrine of division of powers necessarily limits parliamentary sovereignty.[761]

Third, the interrelationship between British or Canadian sovereignty and Aboriginal sovereignty has never been fully considered by governments or the courts. This situation persists, even though Aboriginal peoples were treated as independent nations with the capacity to enter into treaties with foreign European powers.

In assessing notions of British or Canadian sovereignty, it is increasingly being recognized that there exist "contending sovereignties"[762] in Canada that include Aboriginal peoples. The notion of contending sovereignties is a necessary and positive dynamic in a federal state. It reflects the natural tensions that exist among the constituent entities of federalism, in order to maintain a balance of powers. Recognition of Aboriginal sovereignty does not signify non-recognition of Canadian sovereignty, but it does reinforce the point that parliamentary sovereignty is a relative element in a federal state.

Within the Canadian constitutional context, it is not clear that federal and provincial legislatures had the capacity to extinguish aboriginal sovereign status or rights. In this regard, the retention of certain constitutional powers by the British Parliament, the requirements of the *Royal Proclamation of 1763* and other constitutional instruments, the existence of Aboriginal sovereignty and the inherent right to self-government of Aboriginal peoples, all served to substantially limit the powers of non-Aboriginal governments. As indicated in this study, many of these limitations on the Canadian Parliament or the Crown still exist today.

Throughout Canada's history, repression[763] and discrimination have made the exercise of aboriginal rights and sovereignty extremely difficult. However, one cannot conclude that Aboriginal sovereignty was relinquished simply because Aboriginal nations sought the protection

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[760] A. Lajoie & P. Verville, *Treaties of Alliance Between the French and the First Nations Under the French Regime*, Draft report submitted to the Royal Commission on Aboriginal Peoples, August 31, 1994 (translation of French original version), at 32. For a similar conclusion, see generally R. Boivin, *Le droit des autochtones sur le territoire québécois et les effets du régime français*, (1995) 55 R. du B. 135, where it is said that French authorities felt compelled to respect the Aboriginal system already in place and did not seek to dispossess Aboriginal peoples of their lands. See also J.A. Dickinson, "Native Sovereignty and French Justice in Early Canada" in J. Phillips, T. Loo & S. Lewthwaite, (ed.), *Essays in the History of Canadian Law: Crime and Criminal Justice*, (Toronto: Osgoode Society, 1994), vol. 5, 17; J. Grabowski, "Searching for the Common Ground: Natives & French in Montreal, 1700 - 1730" in J. Pritchard, (ed.), *Actes du Dix-huitième Colloque de la Société d'Histoire Coloniale Française* (Montreal: May 1992) 59.

[761] R. Schaffer (Balkin), "International law and sovereign rights of indigenous peoples" in B. Hocking, (ed.), *International Law and Aboriginal Human Rights* (Toronto: Carswell, 1988) 19 at 38, n. 8, *Comment by B. Hocking*: "...these arguments [of a singular and exclusive sovereignty] do not apply to Federal nation-states constituted by several governments each having limited sovereignty, such as Australia, Canada and the USA."

[762] See also N. Delanoë, *'Minorités', 'populations' ou 'peuples'? [:] La déclaration universelle des droits des peuples autochtones, O.N.U., Genève, août 1989*, (1989) 19 Recherches amérindiennes au Québec 37, at 41, where the phrase "co-existence des souverainetés" (co-existence of sovereignties) is used in relation to indigenous peoples and states.

In the context of Aboriginal peoples and Quebec, see Groupe de réflexion sur les institutions et la citoyenneté (GRIC), "Québécois-Autochtones: il faut relever le défi de la reconnaissance mutuelle", *La Presse*, April 2, 1994, at B3, where it is suggested that Aboriginal peoples be recognized as wholly autonomous, without any non-native administrative control or jurisdiction, and be ensured the resources to develop as sovereign national entities.

[763] A case in point is Canada's and Britain's efforts in the early 1920s to repress any discussion by the League of Nations of Iroquois sovereignty. "While Deskaheh [a leader of the Six Nations Iroquois Confederacy] was in Europe, the Canadian government dissolved the traditional Council at Six Nations, imposing an elected system under the rules found in the federal *Indian Act*. No Indian consent to this change was obtained.": D. Sanders, "Remembering Deskaheh: Indigenous Peoples and International Law" in I. Cotler & F.P. Eliadis, (eds.), *International Human Rights Law [:] Theory and Practice* (Montreal: Canadian Human Rights Foundation, 1992) 485, at 486. This Iroquois sovereignty issue is also discussed in L. Mandell, *Indian Nations: Not Minorities*, (1986) 27 Les Cahiers de Droit 101, at 116-117.

outset'."[744] Such judicial statements on Crown title and sovereignty are generating increased scepticism as to the soundness of the arguments or hypotheses offered by courts. As B. Richardson comments:

> "Given that we are all brought up with the idea of the law as a majestic presence in our national life, of the law's even-handedness towards all citizens, it is almost painful to track its blatant hypocrisies, dishonest leaps of logic, and (when forced to the wall) its barefaced reliance on unproven *obiter dicta*, whenever it has been forced to consider the rights of the people who were here before the law arrived."[745]

While there exist some legal authority under the "law of nations" and under British common law to support the above statement of Dickson C.J. insofar as it relates to British sovereignty, the situation pertaining to Aboriginal peoples is much more complex than the Supreme Court's declaration might suggest.

First, the Eurocentric[746] interpretations of past eras are hardly a reliable basis for considering Aboriginal sovereignty[747] and are increasingly being challenged today.[748] In

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741, *supra*, at 345, n. 9: "*How Indians became British subjects has never been adequately explained*, but the authorities that are usually quoted in support include *Sanderson* v. *Heap* (1909), 19 Man. R. 122 (S.C.), where it is simply asserted, and *Logan* v. *Styres* (1959), 20 D.L.R. (2d) 416 (Ont. H.C.), where it is linked to accepting the protection of the Crown." [Emphasis added.] Protection of First Nations by the British Crown, as reflected in the Royal Proclamation of 1763, does not mean Aboriginal peoples were treated as the Crown's subjects: D. Johnston, "First Nations and Canadian Citizenship" in W. Kaplan, (ed.), *Belonging: The Meaning and Future of Canadian Citizenship* (Montreal: McGill-Queen's University Press, 1993) 349 at 352.

See also D. Delâge, *L'alliance franco-amérindienne 1660 - 1701*, (1989) 19 Recherches amérindiennes au Québec 3 at 4, where it is said that the metaphor of "subjects" and "vassels" used by the French in their relations with Aboriginal allies did not have any "resonance" with the latter; H. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, (1978) 27 Buffalo L.R. 637 at 663, where the author cites Marshall C.J. of the U.S. Supreme Court in stating that "these relationships [with colonial authorities] must be viewed through the understanding of the natives rather than the formal, and often self-serving language of diplomatic documents"; and H. Berman, "Perspectives on American Indian Sovereignty and International Law, 1600 to 1776", in O. Lyons, et al., *Exiled in the Land of the Free [:] Democracy, Indian Nations, and the U.S. Constitution* (Santa Fe: Clear Light Publishers, 1992), 125 at 168, where, in regard to the Haudenosaunee, the author concludes that "[t]he claim of subject status can be disposed of rather easily." See also D. Paul, *We Were Not the Savages [:] A Micmac Perspective on the Collision of European and Aboriginal Civilization* (Halifax: Nimbus Publishing Co., 1993) at 70: "The Micmac would never had signed Treaty of 1725 if they had understood the implications of the language, which portrayed them as servants paying homage to a lord and master, the English King."

[744] H. Foster, *Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases*, note 741, *supra*, at 384.

[745] B. Richardson, *People of Terra Nullius [:] Betrayal and Rebirth in Aboriginal Canada* (Vancouver: Douglas & McIntyre, 1993) at 289.

[746] Eurocentrism is the manifestation of ethnocentrism by Europeans. In E. Kallen, *Ethnicity and Human Rights in Canada* (Toronto: Gage, 1982), ethnocentrism is described as "the ubiquitous tendency to view all peoples and cultures of the world from the central vantage point of one's own particular ethnic group and, consequently, to evaluate and rank all outsiders in terms of one's own particular cultural standards and values." See N. Duclos, *Lessons of Difference: Feminist Theory on Cultural Diversity*, (1990) 38 Buffalo L. Rev. 325 at 333: "Ethnocentrism is what draws people together, making ethnic identities and cultural pluralism possible. *Ethnocentrism is also what diminishes people by calling them outsiders, making discrimination and racism possible.*" See also : J. O'Manique, *Universal and Inalienable Rights: A Search for Foundations*, (1990) 12 Human Rts. Q. 465 at 485: "...all forms of reductionism deny the human spirit and its future. *But perhaps more insidious is the ethnocentrism that locks humanity and human development into a repressive mode.*" [Emphasis added.] In other words, ethnocentrism may be a natural and accepted catalyst that contributes to the internal cohesiveness of a particular cultural group; but in relation to the external treatment of other cultures by a dominant group, ethnocentrism can be discriminatory and racist in character.

[747] K. McNeil, "Aboriginal Nations and Quebec's Boundaries: Canada Couldn't Give What It Didn't Have" in D. Drache & R. Perrin, (ed.), *Negotiating With a Sovereign Québec* (Toronto: James Lorimer & Co., 1992) 107, at 114:

> "...attitudes to the aboriginal peoples during the latter part of the nineteenth century were notoriously ethnocentric, if not outright racist. There can be little doubt that attitudes of this kind underlay the unquestioned assumption in the case that the presence of aboriginal peoples was irrelevant to European claims to sovereignty.
>
> Ethnocentric attitudes which deny aboriginal peoples the status of nations are unacceptable today."

view of peremptory international norms[749] pertaining to racial discrimination,[750] Canada's ratification of the international human rights covenants,[751] and emerging international standards that specifically provide for the right of indigenous peoples to self-determination,[752] Canadian courts should feel compelled to interpret Canada's Constitution in a manner consistent with international human rights objectives[753] and Canada's international obligations.[754]

M. Asch & P. Macklem reject any notions of Canadian sovereignty over Aboriginal peoples that appear to be based on the inherent superiority of European nations,[755] as follows:

> "...the assertion of Canadian sovereignty over aboriginal peoples...ultimately rest[s] on unacceptable notions about the inherent superiority of European nations. If this is true, *unquestioned acceptance of Canadian sovereignty and a contingent theory of aboriginal right does violence to fundamental principles of justice and human rights* in the modern world, such as the assumed *equality of peoples*, especially of their *ability to govern themselves*, and the *basic right of a people to self-determination*. We believe it abhorrent

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[748] See, for example, B. Slattery, *Aboriginal Sovereignty and Imperial Claims*, note 737, *supra*; *Study on treaties, agreements and other constructive arrangements between States and indigenous populations [:] First progress report submitted by Mr. Miguel Alfonso Martínez, Special Rapporteur*, U.N. Doc. E/CN.4/Sub.2/1992/32, 25 August 1992; H. Berman, "Perspectives on American Indian Sovereignty and International Law, 1600 to 1776", in O. Lyons, et al., *Exiled in the Land of the Free [:] Democracy, Indian Nations, and the U.S. Constitution*, note 743, *supra*, 125; P. Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, note 736, *supra*, at 1357-1359. See also W. Fenton, "Structure, Continuity and Change in the Process of Iroquois Treaty Making" in F. Jennings *et al.*, (eds.), *The History and Culture of IROQUOIS DIPLOMACY [:] An Interdisciplinary Guide to the Treaties of the Six Nations and Their League* (Syracuse, N.Y.: Syracuse University Press, 1985), 3, at 4-5: "The search for historical depth and continuity of political institutions is limited by the perceptions of persons who wrote the early sources. Intellectually these Europeans, who often had the best opportunities to observe, were unprepared to cope with the institutions of another culture..." Within the Canadian constitutional context, see B. Ryder, *The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations*, (1991) 36 McGill L.J. 308.

[749] "Peremptory international norms" are discussed under sub-heading 6.5.1 *infra*.

[750] I. Brownlie, *Principles of Public International Law*, 4th ed. (Oxford: Clarendon Press, 1990) at 513, indicates that there are certain "overriding principles of international law" as follows: "The major distinguishing feature is their relative indelibility. They are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect. The least controversial examples of the class are the prohibition of the use of force, the law of genocide, *the principle of racial discrimination*, crimes against humanity, and the rules prohibiting trade in slaves and piracy." [Emphasis added.] In regard to the principle of non-discrimination, see *Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, I.C.J. Reports, 1970, at 3, paras. 33 & 34.

[751] Article 1 of both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* provides that all peoples have the right to self-determination.

[752] Draft *United Nations Declaration on the Rights of Indigenous Peoples*, in E.-I. Daes, Chairperson/Rapporteur, *DISCRIMINATION AGAINST INDIGENOUS PEOPLES [:] Report of the Working Group on Indigenous Populations on its eleventh session*, E/CN.4/Sub.2/1993/29, 23 August 1993, 50 (Annex I), article 3.

[753] In relation to international conventions that Canada has ratified, the Supreme Court has emphasized on occasion the importance of Canada respecting the rights or objectives contained therein. See, for example, Chief Justice Dickson in *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038, at 1051:

> "Especially in light of Canada's ratification of the *International Covenant on Economic, Social and Cultural Rights*...and commitment therein to protect, *inter alia*, the right to work..., it cannot be doubted that the objective in this case is a very important one...
> .....Furthermore,...*the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective*." [Emphasis added.]

[754] In A.F. Bayefsky, *International Human Rights Law [:] Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992), at 85, it is provided that there is "the common-law presumption and the *necessity* of the court ensuring the conformity of Canadian law, including the Charter, with Canada's international legal obligations where the Charter language permits."

[755] See also draft *United Nations Declaration on the Rights of Indigenous Peoples*, third preambular para.: "...all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust".

of, or became dependent on, the British Crown.

The following sub-headings will briefly examine the notion of sovereignty, at the international and national levels. In particular, the recognized means of acquiring sovereignty under English law, the acquisition of Crown sovereignty, and Aboriginal sovereignty will be highlighted.

The issue of sovereignty is important to address in this extinguishment study for at least three reasons. First, if Aboriginal peoples were treated in a manner similar or equal to sovereign nations (as suggested by the Supreme Court of Canada in *Sioui* and by a number of legal commentators and historians), then such status cannot simply be "extinguished" by subsequent denial by non-Aboriginal governments or by the passage of time. Second, if "contending sovereignties" (federal/provincial/aboriginal) do exist in Canada,[764] then the capacity of non-Aboriginal governments to extinguish aboriginal rights based on the principle of parliamentary sovereignty must be revisited. Third, in formulating alternative strategies to extinguishment of aboriginal status and rights, the appropriate recognition of Aboriginal sovereignty should, and is likely to, be an important element in the overall conceptual framework.

4.1 Relative Nature of Sovereignty

> "Those who yearn for 'the good old days' and continue to trumpet terms like 'sovereignty' without relating them to the human rights conditions within the states under discussion do more than commit an anachronism. They undermine human rights."[765]
>
> W.M. Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 1990

It is important to note that the European system of sovereign states is relatively recent (as compared to the centuries of prior occupation and sovereignty of Aboriginal peoples). In relation to the European system of sovereignty, it is said that the Peace of Westphalia in 1648 marked the end of Church predominance[766]:

> "The peace of 1648 marked the end of the period of pretensions by the Church of predominance over secular rulers and confirmed the equal status of Catholic and Protestant States and of republican and monarchical States. It marked the end of religious wars in Europe. *The Peace of Westphalia provided the basis of the development of the present-day international legal system of States.*"[767] [Emphasis added.]

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[764] See R. Schaffer (Balkin), "International law and sovereign rights of indigenous peoples" in B. Hocking, (ed.), *International Law and Aboriginal Human Rights*, note 761, *supra*, at 38, n. 12 (Comment by B. Hocking: "...arguments [against shared sovereignty] do not apply to Federal nation-states constituted by several governments each having limited sovereignty, such as Australia, Canada and the USA...When sovereignty is considered not as the international status of nationhood, but as being where the particular control over people's lives is placed, then it is possible to share sovereignty."

[765] W.M. Reisman, *Sovereignty and Human Rights in Contemporary International Law*, (1990) 84 Am. J. Int'l L. 866, at 869.

[766] The 1648 Peace of Westphalia also marked the end of the Thirty Years' War.

[767] L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law [:] Historical Development, Criteria, Present Status* (Helsinki: Finnish Lawyers' Publishing Co., 1988) at 25. To the same effect, see R. Falk, *A New Paradigm for International Legal Studies*, (1975) 84 Yale L. J. 969 at 975-992.

As colonialism increased, "Eurocentrism" became the predominant force especially in the 19th century and pervaded both legal and political thinking.[768] R.P. Anand describes the nature of this "closed club" as follows:

> "At the Congress of Vienna in 1815 a few Great Powers established an exclusive club in the Concert of Europe and appointed themselves as the founder group of modern international society and assumed authority to admit new member states or to readmit old members who did not participate in the foundation of this closed club."[769]

A byproduct of Eurocentrism was the self-proclaimed society of "civilized States", where admission to this closed society "depended on the common consent of those States who were already members of it."[770] However, admission of other peoples to this society was on a somewhat arbitrary or discriminatory basis. When European states were advancing their colonial ambitions in Africa and Asia, "Europeans were more inclined to admit *new members* to the society of States from the American continent".[771] L. Hannikainen comments:

> "For Latin-American States the admission into membership in the Europe-led society was easier than for Asian States largely *because most of leaders of the Latin-American States were of European origin. It was more difficult when the peoples were of non-European origin and their cultures were non-Christian.*"[772] [Emphasis added.]

J. Crawford indicates that "some [native] communities were generally regarded not only as legal occupants of their territory but as fully sovereign States in international law".[773] M. Lindley confirms that there were different views among international jurists, including those "who recognize sovereignty in backward peoples",[774] those who confer a limited or conditional recognition,[775] and those who deny it.[776]

In some instances, it has been argued that the territory occupied by an indigenous people is *terra nullius* and that sovereignty be denied on that basis. More specifically, it has been suggested that statehood be denied on such grounds as "lack of independence or coherent organization".[777] In this regard, H. Berman comments:

> "It is often overlooked in this context that *the European societies that first encountered indigenous nations were themselves only in the early stages of evolving forms of statehood in the contemporary sense.* European nations that met indigenous nations in North America in the seventeenth century, although different in culture and forms of internal governance, *were not so different as political entities that they could not recognize or*

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[768] Id. at 27.

[769] R.P. Anand, *New States and International Law* (Delhi: 1972) at 19.

[770] L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law [:] Historical Development, Criteria, Present Status*, note 767, *supra*, at 27.

[771] Id. It is said that the United States was admitted as a new member around the end of the eighteenth century.

[772] Id. at 27-28.

[773] J. Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 1979) at 176.

[774] M. Lindley, *The Acquisition and Government of Backward Territory in International Law [:] Being a Treatise on the Law and Practice Relating to Colonial Expansion* (London: Longmans, Green & Co., 1926) at 12-17.

[775] Id. at 17.

[776] Id. at 18-19.

[777] J. Crawford, *The Creation of States in International Law*, note 773, *supra*, at 177-179.

relate to each other in ways familiar to international relations."[778] [Emphasis added.]

Moreover, as L. Hannikainen describes, the orderliness of early European societies and rules of law are seriously questioned:

> "The *major social cause* for the appearance of theories of natural law in the early centuries of the emerging society of European States was *the ruthlessness of the conduct of States and the lack of rules for the new system of States*. The lawlessness of the times led Grotius[779] to appeal to a higher law of natural justice, at a higher level than the *arbitrary conduct manifested in the current practices of nations*...The old principles which had regulated the State relations of medieval Christendom were dead. New principles were presented, clothed with all the authority of accepted theory."[780] [Emphasis added.]

In regard to the argument of *terra nullius* to deny an indigenous people sovereignty who occupied a territory, it has been clearly determined that this doctrine is discriminatory and inapplicable to territories inhabited by indigenous peoples.[781] In *Western Sahara (Advisory Opinion)*, the International Court of Justice declared:

> "...the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through 'occupation' of *terra nullius* by original title but through agreements concluded with local rulers."[782]

Based on the above account of the nature of sovereignty in earlier periods of history, it is most difficult to accept that there is any clear and fair basis under the "law of nations" for not recognizing the sovereignty of indigenous peoples (who possessed both social and political organization appropriate to their way of life).[783] Rather, the contending sovereignties of Aboriginal and non-Aboriginal nations must be perceived in relative terms that show full respect for cultural differences.[784]

Although sovereignty may have had absolutist origins,[785] the concept of sovereignty pertaining to modern nations is no longer viewed in absolute terms.[786] Moreover, it is said that

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[778] H. Berman, "Perspectives on American Indian Sovereignty and International Law, 1600 to 1776", in O. Lyons, et al., *Exiled in the Land of the Free [:] Democracy, Indian Nations, and the U.S. Constitution*, note 743, *supra*, at 130-131.

[779] H. Grotius, *On the Law of War and Peace* (English translation by J.B. Scott) (London: Carnegie Endowment for International Peace, 1925), Book 1, c. 1.

[780] L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law [:] Historical Development, Criteria, Present Status*, note 767, *supra*, at 31.

[781] *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia).

[782] *Western Sahara (Advisory Opinion)*, [1975] I.C.J. Rep. 12 at 39. See also pp. 75, 85-87, 124, 171, and 173.

[783] Sovereignty of Aboriginal peoples is examined further under sub-heading 4.6 *infra*.

[784] See R. Schaffer (Balkin), "International law and sovereign rights of indigenous peoples" in B. Hocking, (ed.), *International Law and Aboriginal Human Rights*, note 761, *supra*, at 38, n. 12 (Comment by B. Hocking: "[Shared sovereignty] is also desirable, because it is the effective nature of what we do in practice that determines how we will avoid any further cultural ethnocide and how we will get on with each other in the efforts we must make to live together."

[785] C. Wilkinson, *American Indians, Time and the Law* (New Haven: Yale University Press, 1987), at 54: "...most [early philosophers] agreed that sovereignty is absolute, indivisible and unlimited".

[786] Id.: "...the term *sovereignty* continues to be employed, even though its meaning has little connection with its absolutist origins. While sovereignty now, as then, presupposes a culturally distinct people within defined territorial limits, it connotes legal competence rather than absolute power." For an opposing view that appears to describe sovereignty in absolute terms, see G. Rémillard, *Souveraineté et fédéralisme*, (1979) 20 C. de D. 237, at 239, 246.

modern international law makes reference to "the people's sovereignty[787] rather than the sovereign's sovereignty"[788] and internal human rights issues are not insulated from international law.[789]

In E.L. Lutz, H. Hannum, and K.J. Burke, *New Directions in Human Rights*, it is said that sovereignty in both international and domestic terms is subject to limitations which detract from any argument of "absolute" sovereignty:

> "International law has long imposed limitations on the permissible scope of the *internal and external actions* of independent sovereign states. The nature of territorial sovereignty necessarily implies the fundamental limitation that no state has the right to impose its will on the territory of another, except in narrow circumstances such as the protection of a state's own nationals...
>
> ...Even within their own territories, states have long been limited by international law in a manner that makes any argument of 'absolute' sovereignty difficult to maintain."[790]

In the June 1992 Report of the Secretary-General of the United Nations, *An Agenda For Peace*, the importance of the State is affirmed but not absolute and exclusive sovereignty:

> "*The time of absolute and exclusive sovereignty, however, has passed; its theory was never matched by reality.* It is the task of leaders of States today to understand this and to find a balance between the needs of good internal governance and the requirements of an ever more interdependent world."[791] [Emphasis added.]

The absence of any concept of "absolute" sovereignty, both in international and Canadian constitutional terms, suggests that there is no need to define the Crown/Aboriginal relationship in terms of state domination and control over Aboriginal peoples. In most situations, states and Aboriginal peoples are really in a debate concerning relational autonomies, in which their respective rights and jurisdictions must be respected. In a federation such as Canada, it may be far more beneficial to accommodate different sovereignties, based on partnership and cooperation, rather than seek to deny or extinguish the "contending sovereignties" of Aboriginal peoples.

4.2 Notions of "Sovereignty" in the International and National Context

For many Aboriginal peoples, issues of sovereignty and self-determination[792] are of

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[787] See, for example, the *Universal Declaration of Human Rights*, article 21(3), where it is provided in part: "The will of the people shall be the basis of the authority of government...".

[788] W.M. Reisman, *Sovereignty and Human Rights in Contemporary International Law*, (1990) 84 Am. J. Int'l L. 866, at 869.

[789] Ibid.

[790] E.L. Lutz, H. Hannum, and K.J. Burke, *New Directions in Human Rights* (Philadelphia: Univ. of Pennsylvania Press, 1989) at 4-5; for a refutation of absolute sovereignty both in the external and internal sense, see P. Dane, *The Maps of Sovereignty: A Meditation*, 12 Cardozo L. Rev. 959 (1991), at 982. In the internal sense, Dane provides: "Modern theories of government are grounded, not in absolute authority, but in limitations on authority and divisions of powers."

[791] Report of the Secretary-General of the United Nations, *An Agenda For Peace*, U.N. Doc. A/47/277 (1992), at 5, para. 17, quoted in B. Kingsbury, *Claims by Non-State Groups in International Law*, (1992) 25 Cornell Int'l L. J. 481, at 509.

[792] It is important to note that whether or not Aboriginal peoples enjoyed external sovereignty at one time in their history does not affect their right to choose freely their form of political association with existing states through exercise of their right to self-determination. In this regard, see R. Barsh, "Indigenous Peoples and the Right to Self-Determination in International Law" in B. Hocking, (ed.), *International Law and Aboriginal Human Rights* (Toronto: Carswell, 1988), at 71-

the highest importance.[793] These fundamental matters are often profoundly and intimately tied to such key elements as Aboriginal identity[794], status, jurisdiction[795] and rights, both in a historical and contemporary context.[796] As B. Slattery explains:

> "The question of native sovereignty is not, of course, simply historical or academic. As the recent armed confrontations at Kanestake and Kahnawake vividly illustrate,[797] issues of sovereignty are implicated in many current disputes between native Americans and governmental authorities over such matters as land claims, treaty rights, the application of customary law, and powers of self-government. *Follow these disputes to their roots and you will often encounter the unresolved issue of indigenous sovereignty. Until some understanding on this matter is reached, it seems unlikely that the disputes will be resolved or fade away.*"[798] [Emphasis added.]

The significance attached to notions of sovereignty and self-determination[799] is not surprising. C. Scott provides:

> "The aspirations that lie behind the concepts of both 'sovereignty' and 'self-determination' are so powerful, the concepts themselves so general, the claims made in the name of the concepts so fundamental and the historical fragments of meaning circulating through the concepts so diverse that any rendering of these ideas in terms of *limited meaning* is, virtually by definition, *suppressive* of deeply felt (and deeply felt to be legitimate) aspirations for freedom, equality and community. 'Sovereignty' and 'self-determination'

72, where it is provided: "Lawyers in the United States, Canada and Australia often argue whether indigenous groups were sovereign, whether they were independent, and what kinds of governments they had. All of this is entirely inappropriate and irrelevant under international law today, because *the issue is not whether indigenous peoples were once sovereign, but whether they have a right to become independent today - or to choose freely some other form of political association with existing powers.*" [Emphasis added.]

[793] M.C. Lâm, *Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination*, note 733, *supra*, at 608: "...self-determination is 'the most strident and persistently declared demand voiced before the Working Group.'" Lâm is quoting R. Williams, Jr., *Encounters of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, (1990) Duke L.J. 660, at 693.

[794] See, for example, L.E.J. Ruiz, "Sovereignty as Transformative Practice" in R.B.J. Walker & S.H. Mendlovitz, (eds.), *Contending Sovereignties* (Boulder/London: Lynne Rienner Publishers, 1990), 79 at 88: "Like the Native Americans in the United States, the Dene in Canada, and the so-called aborigines of Australia, the Cordillera and Muslim peoples have a rich and diverse heritage different from the majority culture. They continue to insist that the state respect and recognize their right and obligation to organize their lives according to their traditions. *State sovereignty, in brief, is re-stated as a question of identity.*" [Emphasis added.]

[795] U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 at 20 (J. Cobo, Special Rapporteur). "[Self-governance is] an *inherent part of their cultural and legal tradition* which has contributed to their cohesion and to the maintenance of their social and cultural tradition....*Self-determination*, in its many forms, is thus a basic precondition if indigenous peoples are to be able to enjoy their fundamental rights and determine their future, while at the same time preserving, developing and passing on their specific ethnic identity to future generations." [Emphasis added.]

[796] P. Dane, *The Maps of Sovereignty: A Meditation*, (1991) 12 Cardozo L. Rev. 959, at 966: "Sovereignty is tied to power, cohesion, identity, culture, faith, community, and ethnicity, among other things. But, it is more than the sum of those parts."

[797] Reference is being made here to the armed confrontation in 1990 between the Mohawks and the combined forces of the Canadian and Quebec governments and the Canadian army. For detailed accounts of this conflict and its history, see G. York & L. Pindera, *People of the Pines [:] The Warriors and the Legacy of Oka* (Boston/London/Toronto: Little, Brown & Co. (Canada) Limited, 1992; Standing Committee on Aboriginal Affairs, *The Summer of 1990* (Ottawa: House of Commons, May 1991), Fifth Report.

[798] B. Slattery, *Aboriginal Sovereignty and Imperial Claims*, note 737, *supra*, at 685.

[799] A. Cassese, "Political Self-Determination - Old Concepts and New Developments" in A. Cassese, (ed.), *UN Law/Fundamental Rights [:] Two Topics in International Law* (Alphen aan den Rijn, The Netherlands: Sijthoff & Noordhoff, 1979) 137 at 142: "...there is little sense in recognizing the rights and freedoms of individuals if the community in which the individuals live is not free. The right of self-determination, though not in itself sufficient, is nonetheless *an essential pre-condition* for the effective recognition of the rights and freedoms of individuals." [Emphasis added.]

(not unlike 'human rights') are the kind of all-encompassing, near-totalizing conceptual rubrics that seek to *explain and justify human existence itself.*"[800] [Emphasis added.]

The meaning of the term "sovereignty" is controversial and may be interpreted differently in different circumstances.[801] In regard to states, C. Iorns explains that there are two primary aspects of sovereignty - external and internal:[802]

> "*External sovereignty* is concerned with *relationships between international personalities.* It has been defined as 'the rights of the state to define its relations with other states or other entities without the restraint or control of another state. This aspect of sovereignty is also known as independence.'[803]" The *internal aspect of sovereignty* is concerned with *internal self-government...*"[804]

As described in this study, Aboriginal peoples have at least a number of aspects of international personality[805]. They are increasingly viewed as subjects of international law[806],

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[800] C. Scott, "Dialogical Sovereignty: Preliminary Metaphorical Musings", in Proceedings of the 1992 Conference of the Canadian Council on International Law, *State Sovereignty: The Challenge of a Changing World* (Ottawa: Canadian Council on International Law, 1992) 267 at 276.

[801] L. Oppenheim, *International Law* (London: Allen & Unwin, 1986), vol. 1, at 1: "There exists perhaps no conception the meaning of which is more controversial than that of sovereignty. It is an indisputable fact that this conception, from the moment it was introduced into political science until the present day, has never had a meaning which was universally agreed upon." See also J. Crawford, *The Creation of States in International Law*, note 773, *supra*, at 27: "The term sovereignty has a long and troubled history, and a variety of meanings." At 71, Crawford adds: "The term 'sovereignty' is sometimes used in place of 'independence' as a basic criterion for statehood...Since the two meanings are distinct, it seems preferable to restrict 'independence' to the prerequisite for statehood, and 'sovereignty' to the legal incident." Further, in a constitutional or "internal" context, the term sovereignty takes on meanings that pertain to self-government and are quite different from the term's international connotations. Further, in W.M. Reisman, *Sovereignty and Human Rights in Contemporary International Law*, (1990) 84 Am. J. Int'l L. 866, at 866, it is provided: "Since Aristotle, the term 'sovereignty' has had a long and varied history during which it has been given different meanings, hues and tones, depending on the context and the objectives of those using the word."

[802] In regard to this double aspect of sovereignty, see also P. Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, note 736, *supra*, at 1346-1347.

[803] N. Mugerwa, "Subjects of International Law", in M. Sorensen, (ed.), *Manual of Public International Law* (London: 1978), 247 at 253.

[804] C. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, (1992) 24 Case W. Reserve J. of Int'l L. 199, at 236.

[805] International personality is not necessarily statehood, see O. Lissitzyn, *Territorial Entities Other Than Independent States in the Law of Treaties*, (1970) 125 Recueil des Cours: Collected Courses of the Hague Academy of International Law 1, at 9, 14. In J. Crawford, *The Creation of States in International Law*, note 773, *supra*, at 25, international personality is described as follows: "To say that a particular entity is an international legal person is to say only that the entity is in fact accorded particular rights, or subjected to particular duties, under international law."

[806] O. Lissitzyn, *supra*, at 13: "A 'subject of international law' or an 'international (legal) person' may be defined as an entity which is a bearer (or addressee) of rights and duties in public international law. The class of such entities is not immutable."; and at 15: "Different kinds of 'international persons' have different capacities. It is the possession of some specific capacities that signifies that an entity has international personality, not the other way around." See also *Reparations for Injuries Suffered in the Service of the United Nations*, (Advisory Opinion), I.C.J. Reports, 1949, at 174, 178-179; R.L. Barsh, *Indigenous Peoples in the 1990s: From Object to Subject of International Law?*, [1994] 7 Harvard Hum. Rts. J. 33. In I. Brownlie, *Principles of Public International Law*, 4th ed. (Oxford: Clarendon Press, 1990), at 58, a subject of international law is defined as follows: "A subject of the law is an entity capable of possessing international rights and duties *and having the capacity to maintain its rights by bringing international claims.*" [Emphasis added.]

In the early international cases, aboriginal peoples were generally not party to the litigation or arbitration. As a result, decisions were often rendered that tended to diminish the status, international personality and rights of the peoples affected. See, for example, *Legal Status of Eastern Greenland*, (Denmark/Norway), (1933) 3 W.C.R. 151; *Island of Palmas Case*, (Netherlands/U.S.), (1928) 2 R. Int'l Arb. Awards 829 at 831; *Cayuga Indians Claim*, (Great Br./U.S.), (1926) 6 R. Int'l Arb. Awards 173 at 176. These cases and the injustices contained in these decisions are discussed in R.L. Barsh, *Indigenous North America and Contemporary International Law*, (1983) 62 Oregon L.Rev. 73 at 78-80.

Reliance cannot be put on the international cases of these early periods, in view of the racial discrimination and other inequities that are implied in such decisions. For example, see J. Henderson, "The Status of Indian Treaties in

with rights of self-determination[807] and self-government. Moreover, within federations such as Canada or the United States, full internal sovereignty is not possessed by the federal government.[808] Rather, there are "contending sovereignties" (federal/provincial(state[809])/ Aboriginal) within these federal states.

Can Aboriginal peoples claim "sovereignty" if, in specific cases, their own legal systems and cultural perspectives might not have integrated such concepts or terms? To deny Aboriginal peoples access to universal legal concepts in international and national law, simply because the development of the concepts themselves were influenced to a large degree by "Euro-Western"[810] societies or cultures, would be discriminatory. Moreover, it is recognized that questions of self-identity, recognition, and status are not only determined within one's own particular society but are shaped and defined in relation to others.

As P. Dane provides:

> "...even if Indian sovereignty is partly constructed from the outside, that still does not disqualify it. *All claims to sovereignty arise from a union of self-assertion and external perception*. Legal communities, much like people, constantly construct each other as they construct themselves."[811] [Emphasis added.]

In Aboriginal-state discussions on questions of sovereignty and self-determination, issues of identity and recognition of "who Aboriginal peoples are" consistently recur. The close link

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International Law" in Proceedings of the 1993 Conference of the Canadian Council on International Law, *Aboriginal Rights and International Law* (Ottawa: Canadian Council on International Law, 1992) 126 at 126-127, where it said in regard to the *Isle of Palmas Case*: "Native princes or chiefs or people, this decision hints, were the wrong kind of people for European states to enter into binding rights and obligations with, even though European states had entered into such contracts. This school of thought argued that international law does not apply to 'nomadic tribe[s], the negro tribes of Africa, and the native races of Australia, the North American Indians, and chance communities'. *My question is why does Canada rely on an acknowledged colonial and racist theory of international law?*" [Emphasis added.] See also M.E. Turpel, *Book Review*, (1990) 69 Can. Bar Rev. 828 at 831: "There is *no scholarly credibility* to an analysis of indigenous claims and 'sovereignty' when authority is blindly placed on contemporary interpretations of historical texts, often *based on clearly outmoded and socially or culturally insensitive presuppositions*." [Emphasis added.]

[807] See discussion of the right to self-determination under sub-headings 4.6.3 & 8.2.5 *infra*. See also D. Turp, "Quebec's Democratic Right to Self-Determination" in S. Hartt *et al.*, (ed.), *Tangled Web: Legal Aspects of Deconfederation* (Toronto: Renouf Publishing Co. Ltd./C.D. Howe Institute, 1992) 99 at 117: "The native nations are in a similar position to that of the Québécois when it comes to invoking international law in support of the claim that they have the right to self-determination."; and M.E. Turpel, "Does the Road to Québec Sovereignty Run Through Aboriginal Territory?" in D. Drache & R. Perrin, (ed.), *Negotiating With a Sovereign Québec* (Toronto: James Lorimer & Co., 1992) 93 at 99: "The first peoples in Canada are political entities - 'peoples' in the international legal sense. This means that as peoples (with distinct languages, cultures, territories, populations and governments), aboriginal peoples have full rights of self-determination."

[808] P. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1992), vol. 1, at 12-2 - 12-3: "[T]he federal character of Canada forced some fundamental departures from British concepts. Legislative power had to be distributed between the federal Parliament and the provincial Legislatures. This meant that each legislative body was given the power to make laws in relation to certain classes of subjects, and denied the power to make laws in relation to other classes of subjects...*It followed that there was no legislative body in Canada which was sovereign in the sense of being able to make or unmake any law whatsoever*." [Emphasis added.] See also C. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, note 804, *supra*, at 236, n. 166: "Note that not every state will have full internal and external sovereignty. For example, while the federal United States possesses full external sovereignty and international personality, the federal government does not possess full internal sovereignty; the individual states that make up the federation are still sovereign over the affairs that they have jurisdiction over. Similar comments can be made in respect of other composite states."

[809] Reference is being made here to the individual states that make up the United States of America.

[810] R.B.J. Walker & S.H. Mendlovitz, "Interrogating State Sovereignty" in R.B.J. Walker & S.H. Mendlovitz, (eds.), *Contending Sovereignties*, note 794, *supra*, at 6: "How ought we to understand the apparent contradition between the cultural parochialism of state sovereignty as a product of specifically Western experiences and the embrace of state sovereignty everywhere, not least in connection with the mobilization of nationalist resistances to Western hegemonies?"

[811] P. Dane, *The Maps of Sovereignty: A Meditation*, note 796, *supra*, at 962.

between "identity" and "recognition" and the dependence of identity on relations with others[812] is described by C. Taylor in the following terms:

> "*People do not acquire the languages for self-definition on their own.* Rather, we are introduced to them through interaction with others who matter to us...*We define our identity always in dialogue with, sometimes in struggle against, the things our significant others want to see in us*...Thus my discovering my own identity doesn't mean that I work it out in isolation, but that I negotiate it through dialogue, partly overt, partly internal, with others...*My own identity crucially depends on my dialogical relations with others.*"[813] [Emphasis added.]

A positive example of a process of dialogue pertaining to the fundamental status and rights of indigenous peoples is that provided in the United Nations Working Group on Indigenous Peoples in Geneva.[814] In developing a draft *United Nations Declaration on the Rights of Indigenous Peoples*[815], the Working Group has (to date) not countenanced any notion, such as extinguishment[816] of rights, that might deny indigenous peoples their status and rights or sever the profound relationships indigenous peoples have with their territories, resources and environment.

Yet too often, international and national notions of sovereignty and self-determination, when applied to Aboriginal peoples, have often evoked responses that fall far short of any attitude of equality, non-discrimination, and openness. Governments tend to resist any existing notions of Aboriginal sovereignty that might affect their own positions of domination and control.[817] Yet, as P. Dane indicates, the need to recognize that there exist numerous sovereignties is compelling:

> "*[The recognition of sovereignty] is not validation by permission*...On its own terms, it does not grant anything that would otherwise not exist. It does not compromise the legal landscape of the sovereign doing the recognizing. *It is only a confession that the world contains many legal landscapes.*"[818] [Emphasis added.]

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[812] P. Allott, "Self-Determination - Absolute Right or Social Poetry?" in C. Tomuschat, (ed.), *Modern Law of Self-Determination* (Boston: Martinus Nijhoff Publishers, 1993) 177 at 178-179: "When a claim to new self-determination is a claim to a new set of social relationships, then it is a claim to alter the situations of all the parties to all the social relationships involved..[E]very claim to new self-identification is an act of other-redetermination in a more profound sense. Human identity is identity-through-difference."

[813] C. Taylor, *Multiculturalism and 'The Politics of Recognition'* (1992), at 32-34, cited in C. Scott, "Dialogical Sovereignty: Preliminary Metaphorical Musings", in Proceedings of the 1992 Canadian Council on International Law, *State Sovereignty: The Challenge of a Changing World* (Ottawa: Canadian Council on International Law, 1992) 267 at 277. Scott adds at 277 that "this fundamental dialogicality describes identity formation not just of individuals but also of communities."

[814] Recent articles that take a highly positive view of the Working Group's standard-setting process include: C. Scott, "Dialogical Sovereignty: Preliminary Metaphorical Musings", in Proceedings of the 1992 Canadian Council on International Law, *State Sovereignty: The Challenge of a Changing World* (Ottawa: Canadian Council on International Law, 1992) 267 at 269,283; R. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, Duke Law J. 660 (1990) at 701.

[815] *Report of the Working Group on Indigenous Populations on its eleventh session*, U.N. Doc. E/CN.4/Sub.2/1993/29 (23 August 1993), Annex 1 at 50.

[816] Article 44 of the Draft Declaration provides: "Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire."

[817] This may in part be explained by the fundamental proposition that: "...legal relationships and systems, like the legal personalities of which they are comprised, exhibit character traits modeled on those of their human creators...[S]cholarly works...have identified legal rights as reflecting interpersonal relationships, legal argument as reflecting character, and, finally, legal doctrine as reflecting gender traits.": E.M. Morgan, "The Hermaphroditic Paradigm of International Law: A Comment on *Alvarez-Machain*", in Proceedings of the 1992 Canadian Council on International Law, *State Sovereignty: The Challenge of a Changing World* (Ottawa: Canadian Council on International Law, 1992) at 78.

[818] P. Dane, *The Maps of Sovereignty: A Meditation*, note 796, *supra*, at 970.

Further, there is a tendency to try and limit Aboriginal authority to those activities (e.g. hunting, fishing and trapping) in which Aboriginal peoples have been traditionally engaged. Such an approach runs counter to the very notion of sovereignty. As P. Dane explains:

> "*...true sovereignty is organic and self-defining. It entails the power to change - to create new realities*. The idea that one Parliament cannot bind another, or that government cannot contract away its police power, are emblems of this principle. Indian nations, too, cannot be treated as museum relics...*tribes cannot just be bearers of a set of rights minutely fixed in the concrete of history*."[819] [Emphasis added.]

Similarly, R. Barsh & J. Henderson provide:

> "*...tribal self-government should not be identified with cultural fossilization*. White self-government does not depend upon the preservation of 'pioneer culture'. Like all government, it continues to provide a process for mediating social, economic and cultural change."[820] [Emphasis added.]

The concept of sovereignty has been the subject of scholarly attention "with a view to reading more deeply into the impulses and biases driving the pronouncements of international law"[821]. In reexamining the notion of sovereignty, feminist approaches[822] have assessed some of the classical analyses that "assume an inherently competitive and adversarial relationship, in which the interests of states will at some point inevitably conflict"[823]. As C. Ku provides:

> "*Classical international relations analysis* postulates state control over clearly delineated territory and population and, indeed, *is unable to deal adequately with questions involving territory or population which do not fit assumed definitions or categories*. Cooperation among states is regarded as abnormal, usually tactical, and when it occurs, is conceived of as a specific consent by the autonomous unit to its unilateral actions."[824] [Emphasis added.]

Feminist theorists have sought to establish "a conceptual framework more reflective of the *interdependent* international system of the twentieth century."[825] Consequently, a more cooperative approach that emphasizes relationships is put forward:

> "*In contrast to [the classical] approach,...the international system [has been described] as one of relational autonomy*; identity is 'within the context of relationships rather than in opposition to them'[826]. As states increasingly require ongoing cooperation and collaboration to function effectively, *the concept of relational autonomy may help us*

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[819] Id. at 968.

[820] R. Barsh & J. Henderson, *The Road: Indian Tribes and Political Liberty* (Berkelely: University of California Press, 1980), at 118, quoted in P. Dane, *The Maps of Sovereignty: A Meditation*, note 796, *supra*, at 968, n. 30.

[821] E.M. Morgan, "The Hermaphroditic Paradigm of International Law: A Comment on *Alvarez-Machain*", in Proceedings of the 1992 Canadian Council on International Law, *supra*, note 817, at 81.

[822] See, for example, H. Charlesworth, C. Chinkin and S. Wright, *Feminist Approaches to International Law*, (1991) 85 Am. J. Int'l Law 613; J. Elshtain, *Sovereignty, Identity, Sacrifice*, (1991) 58 Social Research 545.

[823] C. Ku, "A Feminist Approach to International Relations: An Emerging Concept of Concurrent Identities" in Proceedings of the 1992 Canadian Council on International Law, *supra*, note 817, at 95.

[824] Ibid.

[825] Id. at 94.

[826] Ibid., n. 18. Feminist theorist Nancy Hirschmann is quoted in C. Sylvester, "Feminists and Realists View Autonomy and Obligations in International Relations" in V.S. Peterson, (ed.), *Gendered States: Feminist (Re)Visions of International Relations Theory* (Boulder: Lynne Rienner Publishers, 1992) at 157.

> *better understand today's international reality and develop a framework for policy-making more attuned to today's needs.*"[827] [Emphasis added.]

In this context, international relations are said to be "dynamic and concurrent rather than static and competitive"[828]. Elements of the international system are said to have "*concurrent identities* or personalities that is, they behave differently under different circumstances"[829].

The above perceptions can provide important lessons for government-Aboriginal relations and the contending sovereignties of states and Aboriginal peoples. In devising a cooperative framework, it must be recognized that Aboriginal peoples and non-aboriginal governments both have concurrent identities that respond differently to different circumstances. This is true for their respective activities and interests both in the domestic and international context.

A common objective should be to proceed on the basis of mutual respect and move from relationships based on oppression, subjugation and exploitation to those where Aboriginal peoples' status and rights are recognized. This should be done in a context of Aboriginal self-determination and not continued over-dependence on state governments. Both international and domestic dimensions will naturally arise.

C. Scott emphasizes that:

> "theorizing about domestic legal and political systems, and the pressures they face, and theorizing about international law and life *cannot continue to be as isolated from each other as they have tended to be.*"[830]

Scott reminds us that there are "social forces pushing toward increasing fluidity and complexity in the way in which both legal maps and maps of personal identity, *within and between states*,[831] are being drawn as we move into the Twenty-first Century."[832] Scott suggests that a compartmentalized debate in such a context is not what is required:

> "If statehood and human rights discourses are conjoined, they can...be approached as *intersecting and overlapping sovereignty discourses*, and, as such, offer potential insights into how we can break out of seeing 'jurisdiction' and 'rights' as two different and compartmentalized aspects of the constitutional ordering of societies and the world as a whole. Instead, we can *imaginatively re-think the way in which we, as both individuals and collectivities, relate to one another.*"[833] [Emphasis added.]

C. Scott provides for a process of "mutual recognition" as follows:

> "...the formation of sovereignty is part of a dialectical and largely horizontal *process of*

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[827] Id. at 95.

[828] Id., at 96.

[829] Id., at 94.

[830] C. Scott, *Dialogical Sovereignty: Preliminary Metaphorical Musings*, in Proceedings of the 1992 Canadian Council on International Law, *supra*, note 817, at 269.

[831] See also M.C. Bateson, "Beyond Sovereignty: An Emerging Global Civilization" in R.B.J. Walker & S.H. Mendlovitz, (eds.), *Contending Sovereignties* (Boulder/London: Lynne Rienner Publishers, 1990), 145 at 154: "It is not easy to maintain a sense of commonality based on partial and ambiguous sharing, *but that may be the only option for world order*. If this is the case, then many kinds of contemporary efforts to move toward unequivocal rules, precise language, and verification, are misguided...[new para.] *This problem is not limited to international relations, but arises within any country where the fabric of commonality is breached or has never fully developed.*" [Emphasis added.]

[832] Ibid.

[833] Ibid. Scott states on the same page that: "Perhaps the best example of such a conjoined process is almost certainly the Draft Universal Declaration on the Rights of Indigenous Peoples...". [Note: This draft instrument is now entitled "*United Nations Declaration on the Rights of Indigenous Peoples*".

> *mutual recognition* as between different actors whose various self-definitions and responses to others' self-definitions result in the formation of the identity of the various actors participating within the process. Out of such processes of recognition may emerge many different political and legal collectivities, each of whose 'international legal personality' may consist of a different bundle of legal rights and duties. *We divide such bundles into 'sovereign' and 'non-sovereign' at risk of glossing over by fiat the diversity and richness of identities and concrete responses to concrete problems in international life.*"[834] [Emphasis added.]

Aboriginal peoples possess aspects of sovereignty, both in the domestic and international sense, that increasingly are or will eventually be recognized by the international community. As C. Scott provides:

> "...this status will be a profoundly dialogical sovereignty. *Aboriginal peoples will simultaneously exist within and outside States, which is to say they will exist in relation to States.* They will have human rights not only in the classical mode of rights against States but also in the post-classical mode of rights of a jurisdictional nature such that 'human rights' become a rubric inclusive of 'powers of government'. Aboriginal peoples will be both citizens of a society at large and members, perhaps nationals, of aboriginal societies with which they identify."[835] [Emphasis in italics added.]

And in the same paragraph, Scott continues:

> "Aboriginal peoples and Aboriginal persons will have rights vis-à-vis each other as well as vis-à-vis States. Aboriginal peoples living in a transnational space 'between' the domestic-international divide, will have *not just human rights of a collective, indeed jurisdictional, nature on the domestic plane but also human rights on the international plane that amount to incidents of international personality.*"[836] [Emphasis added.]

The draft *United Nations Declaration on the Rights of Indigenous Peoples*[837], which provides for minimum[838] international standards pertaining to indigenous peoples, includes a number of basic rights that "constitute various incidents of international personality of aboriginal peoples."[839]

To arrive at a collective appreciation of the status and rights of Aboriginal peoples (including aspects of sovereignty and international personality), the dialogical process of the U.N. Working Group is particularly useful. As Scott provides:

> "Out of such a focus on intersubjective claim, counterclaim and (eventual) shared understanding, we begin to see how we should not be focussing on plenary categories like

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[834] C. Scott, *Dialogical Sovereignty: Preliminary Metaphorical Musings*, in Proceedings of the 1992 Canadian Council on International Law, *supra*, note 817, at 271.

[835] Id. at 284.

[836] Id., at 284-285.

[837] *Report of the Working Group on Indigenous Populations on its eleventh session*, U.N. Doc. E/CN.4/Sub.2/1993/29 (23 August 1993), Annex I at 50.

[838] Draft Declaration, article 42: "The rights contained herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."

[839] C. Scott, *Dialogical Sovereignty: Preliminary Metaphorical Musings*, in Proceedings of the 1992 Canadian Council on International Law, *supra*, note 817, at 288. As examples of incidents of international personality of indigenous peoples included in the Draft Declaration, Scott refers to Operative Paragraphs 26, 28, 31 and 32, Ibid., n. 48 & 49. [Note: the operative paragraphs of the Draft Declaration that Scott is referring to are contained in the *Report of the Working Group on Indigenous Populations on its tenth session*, U.N. Doc. E/CN.4/Sub.2/1992/33 (20 August 1992), Annex I at 44. The corresponding provisions in the latest version of the Draft Declaration are: 19 & 20; 32 & 33; 36; and 39 respectively.] See also M. Simon, *The Role of Inuit in International Affairs*, (1985) Études inuit 9; and J.R. Ponting, *Internationalization: Perspectives on an Emerging Direction in Aboriginal Affairs*, (1990) Canadian Ethnic Studies 23.

> 'states' but rather on cumulative, contingent and, in a sense, piecemeal construction of personality. In other words, rather than beginning with a 'status' to be recognized and working from there to the rights and duties attaching to it, *recognition can just as easily, in theory and implicitly in practice, consist of a piecemeal recognition of rights that eventually add up to represent the 'nature' of the entity in question."*[840] [Emphasis added.]

In this context of evolving recognition, it would be especially harmful to artificially limit or truncate the status and rights of indigenous peoples through broad notions of extinguishment. The ongoing reality is there exist different values and perspectives among indigenous peoples, different land tenure systems, and different notions of sovereignty and jurisdiction. To force this situation towards a single or excessively narrowed vision (reflective of the dominant legal system) would constitute unwarranted and prejudicial assimilation. It would severely underestimate the complexity of current and future conflicts affecting indigenous peoples and would not assist in the resolution of such disputes. Moreover, it would not provide a solid or durable basis for constructive relationships between Aboriginal peoples and states.

S.J. Anaya describes the "inward- and outward-looking associational patterns" of indigenous peoples as follows:

> "...indigenous groups - whether characterized as communities, peoples, nations, or other - are appropriately viewed as simultaneously distinct yet part of larger units of social and political interaction, units which may include indigenous federations, the states within which they live, and the global community itself."[841]

Despite elements of "uncertainty", it is far more beneficial and equitable to maintain a bicultural or multicultural orientation that allows for fluid relationships between Aboriginal peoples and states than to pursue a more homogeneous approach. As P. Dane provides:

> "To draw a multiplicity of maps, or recognize a multiplicity of other sovereigns, or understand the variety of ways in which sovereign selves can define their relations with each other, is complicated business. But it is not mystical or unrealistic. Indeed, I would posit that it is less mystical, *more realistic, more the ordinary stuff of legal craft, than an approach in which all reality is reduced to a single map, and all relations to one or two fixed categories, stubborn and impoverished.*"[842] [Emphasis added.]

The issue of sovereignty is not one that can or should be ignored. However, as S.J. Toope concludes, conventional views of sovereignty much undergo significant change that take into account growing interdependence[843] around the world:

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[840] C. Scott, *Dialogical Sovereignty: Preliminary Metaphorical Musings*, in Proceedings of the 1992 Canadian Council on International Law, *supra*, note 817, at 288.

[841] S.J. Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, (1994) 28 Georgia L. R. 309 at 359.

[842] P. Dane, *The Maps of Sovereignty: A Meditation*, note 796, *supra*, at 1005.

[843] J.A. Camilleri, "Rethinking Sovereignty in a Shrinking, Fragmented World" in R.B.J. Walker & S.H. Mendlovitz, (eds.), *Contending Sovereignties*, note 794, *supra*, at 39: "The basic contradiction today is not between state sovereignty and the growing interdependence of states but rather between two forms of interdependence: one that institutionalizes the principle of popular sovereignty and another that negates the principle by clinging to the *increasingly illusory notion of state sovereignty*. The net effect is a deepening contradiction between *emerging processes of decentralization and democratization within and between societies* and the intensified centralization and bureaucratization of much economic and political life." [Emphasis added.]

See also Canada 21, *Canada and Common Security in the Twenty-First Century* (Toronto: Centre for International Studies, University of Toronto, 1994) at 11: "National sovereignty, however, is no longer absolute and inviolable...*In the new era of globalization and growing interdependence, the distinction between foreign and domestic policy has little meaning*. What happens beyond our borders significantly affects what we can do at home, and what we can do at home determines what we can do abroad." [Emphasis added.]

"To deny sovereignty is to ignore the metaphorical power of connecting and belonging to a local community. Hence the broadened ambit and the emotional power of 'self-determination'. On the other hand, *to exalt sovereignty as an absolute good is to deny the factual interdependence of the world and to repress the desire to reach out, even tentatively, to other communities different from our own.*

A richer, more inclusive version of sovereignty, and not an abandonment of the concept, is the only realistic way to move forward."[844] [Emphasis added.]

Similarly, R. Falk provides:

"An emergent global civilization...does not at all imply the extinction or the obsolescence of the territorial state or the state system, but it does appear to *necessitate challenging the earlier statist monopoly over the symbols and practices of sovereignty* that has existed for the past several hundred years."[845] [Emphasis added.]

4.3 Acquisition of Territorial Sovereignty by the Crown

It is interesting to note that, under international law, states have attempted to justify their sovereignty claims in newly "acquired" territories through such theories as discovery, symbolic annexation and effective occupation.

Discovery and symbolic annexation are not accepted as self-sufficient grounds on which original acquisition of sovereignty can be based. As F. Von der Heydte states:

"*At no time was the fact of discovery alone regarded as capable of granting more than the right to later appropriation*...Whenever statesmen deduced sovereign rights from the bare fact of discovery, it was not because they were convinced of the correctness of their argumentation, but because they had no better arguments to support their political claims."[846] [Emphasis added]

And in regard to symbolic annexations, Von der Heydte adds:

"...no evidence can be found that, to acquire a region newly discovered, the symbolic act of planting crosses or marks, as performed by Columbus on his first voyage, was considered to be a sufficient title."[847]

B. Slattery indicates that, "in classic European thought, methods such as discovery, symbolic acts, or effective occupation cannot operate in territories that are already under the sovereignty of another power, no matter how small the territory or weak the incumbent power."[848] Slattery points out that it is very doubtful that European imperial powers considered Aboriginal America as vacant territory:

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[844] S.J. Toope, *State Sovereignty: The Challenge of a Changing World*, in Proceedings of the 1992 Canadian Council on International Law, *supra*, note 817, at 296.

[845] R. Falk, "Evasions of Sovereignty" in R.B.J. Walker & S.H. Mendlovitz, (eds.), *Contending Sovereignties*, note 794, *supra*, at 77.

[846] F. Von der Heydte, *Discovery, Symbolic Annexation and Virtual Effectiveness in International Law*, (1935) 29 Am. J. Int'l L. 448 at 452. See also H. Berman, "Perspectives on American Indian Sovereignty and International Law, 1600 to 1776", in O. Lyons, et al., *Exiled in the Land of the Free [:] Democracy, Indian Nations, and the U.S. Constitution*, note 743, *supra*, at 132: "Based on various voyages of 'discovery' and a complete ignorance of actual geography, [European claims] amounted to little more than imperious assertions drawn on fanciful and self-serving maps."

[847] Id. at 454.

[848] B. Slattery, *Aboriginal Sovereignty and Imperial Claims*, note 737, *supra*, at 688-689.

> "Any balanced survey of European state practice reveals that although most imperial powers indulged on occasion in lofty claims based on discovery, symbolic acts, and occupation, *these same powers often poured scorn on such claims when advanced by their European rivals*. In short, they were not prepared to grant others the benefit of principles claimed on their own behalf. *So, it may be doubted whether the supposed rules achieved true reciprocal acceptance, even among the nations that stood to benefit from them.*"[849] [Emphasis added.]

It is also worth noting that, whatever the requirements or shortcomings of international law may have been in earlier periods of history, the criteria for acquisition of territorial sovereignty under municipal law were not necessarily the same.[850] The same principle is true to a certain extent today. However, international law, especially in relation to human rights,[851] is increasingly used to inform constitutional and other legal interpretations in domestic courts.[852] Also, in cases of doubt, courts may make reference to international norms in determining the Crown's intention, "on the principle that the Sovereign is presumed not to act in violation of international rules to which it subscribes"[853] or is bound under customary international law.[854]

4.3.1 Distinctions between territorial sovereignty and title to land

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[849] Id. at 688-689.

[850] K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 111, where it is said: "...it has been held that a declaration of sovereignty by the Crown, even if inconsistent with international law, is conclusive." See also B. Slattery, *The Land Rights of Indigenous Canadian Peoples. As Affected by the Crown's Acquisition of Their Territories* (Saskatoon: Univ. of Saskatchewan Native Law Centre, 1979) at 63.

[851] See *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia), at 29 per Brennan J.: "The common law does not necessarily conform with international law, but *international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights*. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration." [Emphasis added.]

In relation to the U.S., see R. Bilder, *Integrating International Human Rights Law into Domestic Law - U.S. Experience*, (1981) 4 Hous. J. Int'l L. 1; G. Christenson, *The Uses of Human Rights Norms to Inform Constitutional Interpretation*, (1981) 4 Hous. J. Int'l L. 39; and R. Lillich, *Invoking International Human Rights Law in Domestic Courts*, (1985) 54 U. Cin. L. Rev. 367.

[852] W. Schabas, *International Human Rights Law and the Canadian Charter [:] A Manual for the Practitioner* (Toronto: Carswell, 1991) at 41: "Within the state's own jurisdiction, international human rights law also has an important influence on the construction and scope of domestic protections of human rights. In some cases, it has been *directly incorporated or adopted into domestic law*. More commonly, domestic courts are influenced in their construction of statutes and constitutional provisions by the international instruments and jurisprudence." [Emphasis added.]. See also A.F. Bayefsky, *International Human Rights Law [:] Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) at 2: "More enlightened interpretations of domestic human rights law may also be fostered through reference to international law. *The potential for such advantage is particularly evident in Canada. Canada has actively promoted the articulation of international human rights standards*." [Emphasis added.] However, the reference to and incorporation of international norms by Canadian courts still lacks consistency.

[853] B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 850, *supra*, at 63; P. Langan (ed.), *Maxwell on the Interpretation of Statutes*, 12th ed. (Bombay: Tripathi Private, 1976) at 183: "Under the presumption that the legislature does not intend to exceed its jurisdiction, every statute is interpreted, so far as its language permits, so as not to be inconsistent with the comity of nations or the established rules of international law, and the court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language. But if the language is clear, it must be followed notwithstanding the conflict between municipal and international law which results"; P. Hogg, *Constitutional Law of Canada*, note 808, *supra*, vol. 2, at 33-31, where Hogg indicates that this presumption would "presumably" apply to a constitution; P.A. Côté, *The Interpretation of Legislation in Canada* (Cowansville, Québec: Éditions Yvon Blais, 1984) at 290; *Bloxam* v. *Favre*, (1883), 8 P.D. 101 at 107 per Sir J. Hannen; *Niboyet* v. *Niboyet*, (1878) 4 P.D. 1; *Mortensen* v. *Peters*, (1906) 8 F. (J.) 93.

[854] A.F. Bayefsky, *International Human Rights Law [:] Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) at 67: "The presumption that Parliament and the legislatures do not intend to act in breach of Canada's international obligations is *as applicable to conventional as it is to customary international law...*" [Emphasis added.]

Legal discussions on Crown sovereignty often seem to slip into issues of land title without clearly distinguishing these two discrete concepts. Regardless of assertions or claims of sovereignty by the British or other European nations, questions of ownership are determined separately and according to different legal principles. In terms of international law, I. Brownlie provides:

> "The legal competence of a state includes considerable liberties in respect of internal organization and the disposal of territory. This general power of government, administration, and disposition is *imperium*, a capacity recognized and delineated by international law. *Imperium* is thus distinct from *dominium* either in the form of public ownership of property within the state or in the form of private ownership recognized as such by the law."[855]

In addition, P. Macklem indicates:

> "[S]overeignty over a particular territory does not necessarily vest title to the land in the sovereign authority. Title to land is determined not by international law principles but by reference to the relevant domestic laws governing ownership."[856]

In *Mabo* v. *State of Queensland*, Brennan J. of the High Court of Australia emphasized the importance of distinguishing between sovereignty and ownership as follows:

> "It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty."[857]

In relation to aboriginal title, Wilson J. in *Roberts* v. *Canada*, underlines that such title survived British claims of sovereignty:

> "In *Calder* v. *A.-G. British Columbia*, [1973] S.C.R. 313, this Court recognized aboriginal title as a legal right derived from the Indians' historic occupation and possession of their tribal lands. As Dickson J. (as he then was) pointed out in *Guerin*, *supra*, *aboriginal title pre-dated colonization by the British and survived British claims of sovereignty*."[858] [Emphasis added.]

Sovereignty may have accorded the British the right to acquire ownership of aboriginal lands, but it did not include ownership rights. Consistent with this principle, it has been held that, from the time of the royal charters and grants made to companies by the British Crown, the Crown could only grant rights in North America that it actually possessed. As Marshall C.J. indicated in *Worcester* v. *Georgia*:

> "Soon after Great Britain determined on planting colonies in America, the king granted charters to companies of his subjects...*The extravagant and absurd idea that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey and no more.* This was the exclusive right of purchasing such

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[855] I. Brownlie, *Principles of Public International Law*, 4th ed. (Oxford: Clarendon Press, 1990), at 108-109.

[856] P. Macklem, *First Nations Self-Government and the Borders of the Canadian Legal Imagination*, (1991), 36 McGill L. R. 382, at 399, n. 50.

[857] *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia), at 35-36. In this context, the court made reference to *Amodu Tijani* v. *Southern Nigeria (Secretary)*, [1921] 2 A.C. 399 (P.C.).

[858] *Roberts* v. *Canada*, [1989] 1 S.C.R. 322, at 340.

> lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim, nor was it so understood."[859] [Emphasis added.]

Chief Justice Marshall added that such crown grants of title could only be asserted solely against other Europeans:

> "...these grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned."[860]

J. Hurley comments on the above statements by Marshall C.J. in the following terms:

> "Even by the 'common law of European sovereigns', the crowns had not yet acquired the property of such lands. Whatever the language used in the charters, therefore, they could not vest in the grantees an absolute right of property opposable to the Indians. *In reality, these charters conferred no more than the right held by the Crowns themselves: a right of pre-emption, a contingent right of property, a right to acquire by purchase such lands as the Indians were willing to sell...*Failure to grasp this contingent character of the Crown's title has sometimes led the Canadian courts to attribute a mistakenly categorical effect to that title vis-à-vis the Indians."[861] [Emphasis added.]

What is also noteworthy is the difference in proof that is sometimes demanded by the courts in terms of Crown sovereignty and land title claims and those of Aboriginal peoples. When sovereignty over an uninhabited territory was acquired by or prior to the arrival of British settlers, possession of and title to all lands vested immediately in the Crown.[862] Why then did English law not apply the same criteria and legal analysis to the territories originally occupied by Aboriginal peoples? Why is it that Aboriginal peoples are instead required by the courts to prove aboriginal title by showing continuous possession of their lands from "time immemorial" or from the time of introduction of European sovereignty?[863] Why also has it been held by Canadian courts that aboriginal possession of their lands must be "exclusive", when an important ethic in aboriginal cultures includes the notion of sharing?[864]

Adequate responses to these types of questions are beyond the scope of this study. However, they do suggest serious problems as to the fairness and evenhandedness of the English common law. As L. Mandell describes, it is the Crown's "rights" to aboriginal lands rather than the property rights of Aboriginal peoples that appear to merit strict scrutiny:

> "...Indian elders...question why they must subject their relationship to the land to a non-Indian court's strict scrutiny: why they must explain their use of the land to obtain 'rights' abstractly defined by others. They believe that the Indians have rights because

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[859] *Worcester* v. *State of Georgia*, 31 U.S. (6 (Pet.) 515, at 544.

[860] Id., at 546.

[861] J. Hurley, *Aboriginal Rights, the Constitution and the Marshall Court*, (1982-1983) 17 R.J.T. 403, at 433.

[862] K. McNeil, *Common Law Aboriginal Title*, note 850, *supra*, at 157.

[863] See, for example, *Hamlet of Baker Lake* v. *Minister of Indian Affairs*, [1980] 1 F.C. 518 (F.C.T.D.) at 559; *A.G. for Ontario* v. *Bear Island Foundation*, (1984) 15 D.L.R. (4th) 321 (Ont. H.C.) at 354-361. The inappropriateness of such excessive time periods is discussed in B. Slattery, *Understanding Aboriginal Rights*, (1987), 66 Can. Bar Rev. 727, at 746-747, 758-759, 761; B. Ziff, *Principles of Property Law* (Toronto: Carswell, 1993) at 50, 114.

[864] It is also important that the law recognize and accommodate the fact that, in numerous instances, aboriginal territories may be subect to distinct but overlapping aboriginal claims. Consensual inter-tribal sharing and distinct but overlapping titles are discussed in B. Ziff, *Principles of Property Law*, note 863, *supra*, at 115-116; see also B. Slattery, *Understanding Aboriginal Rights*, note 863, *supra*, at 758-759. In regard to the issue of "exclusivity" of possession, Ziff, *supra*, at 115 provides: "Remember that *the idea of exclusive possession may be antithetical to notions of sharing in some cultures*. The common law is capable of being sensitive to such differences. Moreover, the exclusivity requirement may simply be designed to preclude claims based on transitory ranging, not to eliminate all potential claims except one." [Emphasis added.]

their people go back with the land for thousands of years. *What they do not understand is how the Crown acquired its 'rights' to their land.*"[865] [Emphasis added.]

4.4 Recognized Means of Acquiring Sovereignty Under English Law

In examining the early history between Aboriginal peoples and European countries, the Supreme Court of Canada in *R.* v. *Sioui* has concluded that "the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations."[866] If relations were conducted between independent or sovereign entities, then any arrangements between the parties would necessarily be based on the principle of consent.

Under international law, an essential attribute of sovereignty is said to be the principle of consent. As J.-M. Arbour confirms:

> "*Ce principle domine tout le droit des relations internationales, depuis son élaboration jusqu'à son interprétation, son application et sa modification.* Pour qu'un norme déterminée puisse être opposable à un Etat donné, il faut que ce dernier l'ait reconnue expressément ou tacitement...C'est la regle de consentement et elle seule qui explique le caractère essentiellement volontariste du règlement judiciare, puisque ce dernier ne peut pas avoir lieu sans l'accord formel des Etats en cause..."[867] [Emphasis added.]

In addition, from the viewpoint of British Imperial law, the consensual nature of Aboriginal-Crown relations was a central element of the constitutional[868] requirements under the *Royal Proclamation of 1763*.[869]

Based on the above, it would be expected that English common law would fully take into account the independence of Aboriginal nations in formulating theories of acquisition of territorial sovereignty. However, this does not appear to be the case.[870] At the same time, in regard to the territories of Aboriginal peoples, it is far from clear on what legitimate rationale (other than consent) acquisitions of sovereignty by the Crown could be based.

In any event, under the following sub-headings, the various means of acquisition of territorial sovereignty under English law are briefly discussed. These include: i) descent or inheritance; ii) conquest and cession; iii) unambiguous assertions of sovereignty; and iv)

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[865] L. Mandell, "Native Culture on Trial" in S. Martin & K. Mahoney, *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) 358 at 359.

[866] *R.* v. *Sioui*, [1990], 1 S.C.R. 1025, at 1052-1053.

[867] J.-M. Arbour, *Droit international public* (Cowansville, Québec: Éditions Yvon Blais, 1985) at 252-253: "*This principle dominates the whole law of international relations, since its elaboration until its interpretation, application and modification.* In order for a specific norm to be opposable to a given State, it is necessary for the latter to expressly or tacitly recognize it...This is the rule of consent and it alone that explains the essentially voluntary character of legal settlement, because the latter cannot take place without the formal agreement of the States involved..." [Emphasis added, unofficial translation.]

[868] See sub-heading 2.5, *supra*, for an analysis of the constitutional status of the Proclamation. While the Proclamation does not diminish Aboriginal sovereignty (except for restrictions on alienation as a means of protecting Aboriginal peoples), the instrument serves to control in the domestic context subsequent assertions of Crown sovereignty.

[869] The consensual nature of Aboriginal-Crown relations, as reflected in the method of purchases contemplated in the Proclamation, is discussed under sub-heading 1.2 *supra*. See also *The Queen* v. *Symonds*, (1847) N.Z. P.C.C. 387 at 390 per Chapman J.

[870] B. Slattery, *Understanding Aboriginal Rights*, note 863, *supra*, at 735: "Canadian law treats the question of when and how the Crown gained sovereignty over Canadian territories in a *somewhat artificial and self-serving manner*. To state a complex matter simply, the courts apparently feel bound to defer to official territorial claims advanced by the Crown, *without inquiring into the facts supporting them or their validity in international law*." [Emphasis added.]

settlement.

In discussing the modes of acquisition of territorial sovereignty, it is important to emphasize that the common law rules applied by the courts were hardly precise[871], consistent[872] or even factually correct[873]. As K. McNeil comments, "many territories acquired in the course of Britain's colonial expansion, ranging from populous and culturally sophisticated India to *sparsely populated regions inhabited by hunter-gatherers such as much of North America, do not fit readily into either category* [i.e "settled" or "conquered or ceded"]."[874] [Emphasis added.]

4.4.1 Descent or inheritance

Under English common law, at the time of *Calvin's Case*[875] in 1608, the only means of acquiring territorial sovereignty was said to be by either descent or conquest.[876] Descent or inheritance is, by its nature, a derivative[877] mode of acquisition of sovereignty. Moreover, descent is of no relevance to Aboriginal peoples since overseas colonies were not inherited territories.[878]

4.4.2 Conquest and cession

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[871] See *Third Report of the Commissioner of Inquiry into the Administration of Civil and Criminal Justice in the West Indies...*, Br. Parl. Papers 1826-7, vol. XXIV, p. 97 (Results and General Conclusions): "...the principle, upon which certain laws of [Britain] are operative and held binding in her colonies, *far from being clear and precise...is involved in considerable obscurity, and often found very difficult of application.*" [Emphasis added.] Cited in B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 850, *supra*, at 30.

[872] K. McNeil, *Common Law Aboriginal Title*, note 850, *supra*, at 110-133.

[873] See *Milirrpum* v. *Nabalco Pty.*, (1971) 17 F.L.R. 141 at 267-268, where the Aboriginal people concerned had satisfied the court that they had governed themselves under an elaborate system of law "highly adapted to the country in which [they] led their lives, which provided a stable order of society..." However, at 202-203, 242-244, Blackburn J. gives little weight to this factual evidence. Instead he concludes that where it is declared that classification of territory, once authoritatively established as a matter of law, cannot be overturned by a reconsideration of the historical evidence. In this regard, see K. McNeil, *Common Law Aboriginal Title*, note 850, *supra*, at 123: "...*while classification is a matter of law, it must surely have a factual basis*. If one adopts an established system of law approach, New South Wales would appear to have been classified as settled on the basis of erroneous factual assumptions." [Emphasis added.]

See also P. Hogg, *Constitutional Law of Canada*, note 808, *supra*, vol. 1, at 2-2: "...outside the territory now included in Ontario and Quebec (*which was indisputably acquired by either conquest or cession*), the tendency of the courts was to prefer the 'settled' classification. The settled classification entailed the automatic reception of English, not French law, a result that was congenial to the English population...The *reception of English law into [the Maritime] provinces has often been explained on the patently false basis that they were "settled" colonies.*" [Emphasis added.]

[874] K. McNeil, *Common Law Aboriginal Title*, note 850, *supra*, at 117.

[875] *Calvin's Case*, (1608) 7 Co. Rep. 1a, at 17b.

[876] B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 850, *supra*, at 13, 20; K. McNeil, *Common Law Aboriginal Title*, note 850, *supra*, at 112-113. Conquest is addressed briefly under the following sub-heading.

[877] A distinction is being made here between "derivative" and "original" modes of acquiring territorial sovereignty. Inheritance necessarily presumes that there has been an antecedent sovereign.

[878] K. McNeil, *Common Law Aboriginal Title*, note 850, *supra*, at 113.

> "That this territory is *theirs* is evident from the [Canada Jurisdiction] act[879] itself which calls it Indian Territory. It is not called *British* territory...for the most obvious of reasons, because it *never* was, in point of fact, in *our* possession, it never was conquered by *us*, and therefore could not be called other than *Indian* territory, because neither by *conquest* nor by *occupancy*, had it ever become *ours*."[880]
>
> W.S. Simpson, 1819

As indicated under the previous sub-heading, conquest was said to be a second recognized mode of acquiring territorial sovereignty.[881] Like descent, conquest is a derivative means of acquiring sovereignty. However, conquest has always been a narrowly defined concept in domestic and international law. Under modern international law, conquest is generally disapproved of as a basis for acquisition.[882]

Conquest is said to probably include cessions of sovereignty, at least by the latter part of the seventeenth century.[883] K. McNeil suggests that "cession *per se* was not envisaged because for some time (beginning around 1200) sovereignty was generally regarded as inalienable".[884]

It would be difficult to accept that the Crown in right of Britain or Canada acquired sovereignty over Aboriginal peoples or their territories based on the notion of conquest. As indicated in the *Island of Palmas Case*, conquest by one European power over another can only potentially yield such sovereignty as the conquered power possessed:

> "The *title alleged by the United States of America*...is that of *cession*, brought about by the Treaty of Paris, which cession transferred all rights of sovereignty which Spain may have possessed in the region...It is evident that Spain could not transfer more rights than she herself possessed".[885]

In regard to the issue of cession of Aboriginal sovereignty or extinguishment of Aboriginal rights by conquest, it is critical to remember that Aboriginal peoples in Canada were never conquered.[886] K. Lysyk emphasizes that the conquest must refer to the Aboriginal peoples concerned and not a European power making claims over the same territory:

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[879] *An Act for Extending the Jurisdiction of the Courts of Justice in the Provinces of Lower and Upper Canada, to the Trial and Punishment of Persons Guilty of Crimes and Offences within Certain Parts of North America Adjoining to the Said Provinces* (U.K.), 43 Geo. 3, c. 138 (referred to as the *Canada Jurisdiction Act*).

[880] W.S. Simpson, *Report at Large of the Trial of Charles De Reinhard* (Montreal: J. Lane, 1819) at 250 [emphasis in original], cited in H. Foster, *Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases*, note 741, *supra*, at 373.

[881] B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 850, *supra*, at 13, 20; K. McNeil, *Common Law Aboriginal Title*, note 850, *supra*, at 112-113.

[882] N. Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, (1980) 31 Hastings L. J. 1215 at 1224-1225, where various authorities are cited.

[883] B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 850, *supra*, at 20.

[884] K. McNeil, *Common Law Aboriginal Title*, note 850, *supra*, at 113, n. 20. On this point, the author cites P. Riesenberg, *Inalienability of Sovereignty in Medieval Political Thought* (New York: Columbia University Press, 1956); E. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton, N.J.: University Press, 1957) at 347-358.

[885] *Island of Palmas Case*, (1928), 2 U.N.R.I.A.A. 829, at 842.

[886] M. Walters, *British Imperial Constitutional Law and Aboriginal Rights: A Comment on Delgamuukw v. British Columbia*, (1992) 17 Queen's L.J. 350 at 351.

> "...the conquest that is material is, of course, conquest of the Indians. The conquest of one European country by another that had previously exercised sovereignty over Indian territory would not of itself resolve the Indian title question any more than purchase of sovereignty by one European power from another."[887]

4.4.3 Unambiguous assertions of sovereignty

According to K. Roberts-Wray, unambiguous assertions of sovereignty can be a valid means of acquiring territorial sovereignty.[888] Depending on the manner and effectiveness of the "assertion", such a rule might perhaps prove of some use in respect to uninhabited territories. However, it is uncertain whether unambiguous assertions constitute a separate and sufficient means of acquiring sovereignty.

A particular problem arises when there is a pre-existing sovereign entity (such as an Aboriginal people) in a particular territory. In such cases, it would be difficult to envision how sovereignty over Aboriginal territory could be acquired through "unambiguous assertion" by a European power. In some instances, the act of state doctrine has been invoked under English common law to prevent judicial scrutiny of unambiguous assertions of sovereignty by the Crown over colonial territories.[889] This particular aspect of the issue is examined elsewhere in this study.[890]

In the 1884 decision of the Privy Council in the *Ontario Boundaries* case (unreported),[891] the principle was upheld that assertions of sovereignty would not be accepted by English courts where in fact a pre-existing sovereign entity had claim to the territory (based on actual mastery of the territory):

> "I do not think one would be disposed to dispute the proposition that, so far as the Crown of England could give it, [the Royal Charter of 1670] gave to the Hudson's Bay Company a right, if they were able to make themselves masters of the country, to the territory up to the sources of the rivers; *but they did not make themselves masters of the whole of that country, for some other nation [i.e. France] had come in the meantime.*"[892] [Emphasis added.]

In regard to the Privy Council's decision, K. McNeil comments that "in the opinion of the British Empire's highest court, the King of England could not establish a firm claim to such

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[887] K. Lysyk, *The Indian Title Question in Canada: An Appraisal in the Light of Calder*, (1973) 51 Can. Bar Rev. 450 at 476.

[888] K. Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens & Sons, 1966) at 99-100, 107-108.

[889] See, for example, *The Fagernes*, [1927] P. 311 at 324; *R.* v. *Kent Justices*, [1967] 1 All E.R. 560, at 564; *Post Office* v. *Estuary Radio*, [1967] 3 All E.R. 663 at 680; *Adams* v. *Adams*, [1970] 3 All E.R. 572 at 583, 585. However, see K. McNeil, "Aboriginal Nations and Quebec's Boundaries: Canada Couldn't Give What It Didn't Have" in D. Drache & R. Perrin, (eds.), *Negotiating With a Sovereign Québec*, note 747, *supra*, at 261-262, n. 47, where the author cites these cases and states: "Those cases are all distinguishable, as none of them involved acquisition of sovereignty by the Crown over territory occupied by aboriginal nations where the Crown exercised no jurisdiction..."

[890] See discussion of act of state doctrine under sub-heading 6.1. The act of state doctrine is also discussed by Hall J. in *Calder* v. *A.-G. British Columbia*, [1973] S.C.R. 313 (S.C.C.) at 404-406.

[891] This case is cited and discussed in K. McNeil, "Aboriginal Nations and Quebec's Boundaries: Canada Couldn't Give What It Didn't Have" in D. Drache & R. Perrin, (eds.), *Negotiating With a Sovereign Québec*, note 747, *supra*, at 113.

[892] Ibid. At 116, McNeil adds that, in *Staples* v. *R.*, the Privy Council confirmed in 1899 that the British Crown could not acquire territorial sovereignty over a territory occupied by a non-European nation simply by issuing a royal charter. At 261, n. 41, it is indicated that the *Staples* case is reproduced in S. Scott, *The Prerogative of the Crown in External Affairs and Constituent Authority in a Commonwealth Monarchy*, (D. Phil. thesis, Oxford University, 1968), App. 1.

a vast region simply by sending a few ships into Hudson Bay and issuing a Royal Charter".[893] In relation to Aboriginal peoples, McNeil adds:

> "In the *Ontario Boundaries* case, *no one appears to have considered that the aboriginal peoples were nations with territorial rights which also had to be taken into account* in determining the extent of Rupert's Land. This is not surprising, as attitudes to the aboriginal peoples during the latter part of the nineteenth century were *notoriously ethnocentric, if not outright racist.*"[894] [Emphasis added.]

4.4.4 Settlement

Although inheritance and conquest were at first viewed as the only two methods of acquiring territorial sovereignty in new regions,[895] the colonial expansion by European powers in North America, Africa and Asia led to a new theory of acquisition by settlement. As K. McNeil describes:

> "...it was not until territories that were unclaimed and uninhabited - or virtually so - began to be colonized that the law accepted settlement as a means of acquiring *original* title to territory."[896] [Emphasis added.]

In territories occupied by a pre-existing sovereign entity, it can be strongly argued that it is not possible for a new power to claim "original" territorial sovereignty.[897] As B. Hocking indicates, title to a settled territory would necessarily be derivative where there is a local "sovereign community".[898]

G. Lester explains the notion of peaceful settlement under English common law as follows:

> "Peaceful settlement was predicated on the *assumption* that there might be territory that was either literally unoccupied, being waste and desert *or else occupied by savage and nomadic tribes who were in effect denied any sort of legal personality*. In the nineteenth century this became more refined so that a civilized power was justified in asserting a territorial sovereignty over those *people who were thought to have no settled system of law or lex loci*, and hence no international status."[899] [Emphasis added.]

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[893] Id. See also *de la Penha* v. *Newfoundland*, (1984) 135 A.P.R. 26 (Nfld. S.C.) at 35, per Hickman C.J.: "It is a firmly established principle of international law that the acquisition of sovereignty over a territory does not occur merely by making a claim, no matter how formal the manner the claim was made. Graphic illustrations in history books often show courageous and resolute adventurers firmly entrenching a flag on some barren soil, but such act, standing alone, does not necessarily constitute taking possession of the land so depicted."

[894] Id., at 113-114.

[895] *Calvin's Case*, (1608) 7 Co. Rep. 1a, at 17b.

[896] K. McNeil, *Common Law Aboriginal Title*, note 850, *supra*, at 113.

[897] See also L. Oppenheim, *International Law* (London: Allen & Unwin, 1986) at 555: "Cession...is a derivative mode of acquisition, whereas occupation is an original mode." Cited in *de la Penha* v. *Newfoundland*, (1984) 135 A.P.R. 26 (Nfld. S.C.) at 35.

[898] B. Hocking, *Aboriginal Land Rights: War and Theft*, (1985) 20 Australian Law News No. 9, 22. This author is cited on this point in K. McNeil, *Common Law Aboriginal Title*, note 850, *supra*, at 113, n. 22.

[899] G. Lester, "Primitivism versus Civilisation: A Basic Question in the Law of Aboriginal Rights to Land" in C. Brice-Bennett, *Our Footprints Are Everywhere: Inuit Land Use and Occupancy in Labrador* (Ottawa: Labrador Inuit Association, 1977) at 358.

Whatever validity such ethnocentrism and cultural superiority might have had in previous centuries, such "ancient concepts" are now being disregarded by the Supreme Court of Canada. As Hall J. provides in *Calder* v. *The Queen*:

> "The assessment and interpretation of the historical documents and enactments tendered in evidence *must be approached in the light of present-day research and knowledge[,] disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete* and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman species."[900] [Emphasis added.]

As demonstrated in *Mabo et al.* v. *State of Queensland*, the illegitimate and discriminatory aspects of ethnocentric legal theories are being revisited by the courts even in cases where these theories have been judicially accepted for centuries.[901]

4.5 Notions of Parliamentary Sovereignty

R. Dusseault and L. Borgeat describe the British origins, as well as the limitations in Canada, of parliamentary supremacy or sovereignty as follows:

> "In the United Kingdom, the Rule of Law and Parliamentary supremacy are two constitutional principles which go together. The latter principle was implemented in Canada by the *Constitution Act, 1867, with certain distinctions due to the fact that Canada has a federal type of system.*"[902] [Emphasis added.]

Similarly, B. Ryder underlines that appropriate distinctions must be made between parliamentary sovereignty in the United Kingdom and the same principle in a federal state such as Canada:

> "In the United Kingdom, Parliament has supreme and absolute legislative authority. Any and all laws are within the competence of Parliament. *In Canada, the principle of parliamentary sovereignty was altered to take account of the desire of the provinces to be 'federally united'.*"[903] [Emphasis added.]

Dussault and Borgeat elaborate on the limitations of parliamentary sovereignty in Canada and emphasize that this principle is not absolute:

> "Even if Parliament is supreme, that does not prevent it from being subject to the law in certain cases. *Thus, in Canada, the constitutional division of powers limits the scope of matters upon which Parliaments may legislate. Moreover, Parliaments are henceforth bound by the provisions of the new Canadian Charter of Rights and Freedoms.* One must add that, in legislation matters, the action of Parliament is governed by the formal framework of parliamentary procedure. This procedure imposes upon the people's

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[900] *Calder* v. *A.-G. British Columbia*, [1973] S.C.R. 313 (S.C.C.) at 346.

[901] *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 at 19 per Brennan J.: "[N]o case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system."

[902] R. Dussault and L. Borgeat, *Administrative Law [:] A Treatise*, 2nd ed. (Toronto: Carswell, 1985), vol. 1, at 232.

[903] B. Ryder, *The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations*, note 748, *supra*, at 310. See also B. Ryder, *Aboriginal Rights and Delgamuukw v. The Queen*, (1994) 5 Constitutional Forum 43 at 46: "*The British principle of parliamentary supremacy is not, and never has been, an absolute in the Canadian context.* It has had to yield, for example, to the division of powers in a federal state and the entrenchment of guaranteed rights in constitutional documents." [Emphasis added.]

representatives certain rules, and more specifically, a course to be followed outside of which they may not exercise their sovereignty.

These examples, which are by no means exhaustive, clearly demonstrate that the principle of parliamentary sovereignty is not absolute."[904] [Emphasis added.]

While the limits of parliamentary sovereignty have been questioned in some commonwealth countries,[905] the application of existing court dicta or rulings in other countries must be carefully examined to determine the degree of applicability to the Canadian constitutional context.

For example, in *Liyanage* v. *The Queen*,[906] the Privy Council declared that *ex post facto* legislation, aimed at ensuring the conviction of certain individuals and enhancing their punishment, amounted to an interference with the judiciary. On the basis of the doctrine of separation of powers, the challenged law was therefore invalid. Ceylon courts were viewed as exercising inherent judicial powers that had existed in the days when Ceylon was merely a colony. In a comment on a Canadian case,[907] R. Pepin has distinguished the *Liyanage* ruling, indicating that the doctrine of separation of powers (i.e. legislative, executive and judicial) is not "perfectly" applied in Canada[908] and the Constitution does not guarantee any exclusive jurisdiction to the courts:

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[904] Id., at 232. On the same page, note 41, the authors indicate that a limitation may be imposed by the very doctrine of separation of powers: *Liyanage* v. *The Queen*, [1967] 1 A.C. 259 (P.C.). In the Canadian context, see S.A. de Smith, *The Separation of Powers in New Dress*, (1966-67) 12 McGill L.J. 491; *M. Beauregard* v. *The Queen*, [1981] 2 F.C. 543, reversed on appeal on this question in [1984] 1 F.C. 1010 (Fed. C.A.), and case comment by R. Pépin, *Droit constitutionnel - Indépendence du pouvoir judiciare - Salaire des juges - Jusqu'où va la souveraineté du Parlement?*, (1982), 60 Can. Bar Rev. 699.

See also B. Ryder, *The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations*, note 748, *supra*, at 311, n. 4: "...the principle of parliamentary sovereignty has never been absolute in the Canadian constitution, and it is even less so since 1982. However, the limitations on government powers contained in the 1867 and 1982 *Acts* do not alter the fact that the provisions distributing power in ss. 91-95 of the 1867 *Act* ought to be interpreted in a manner consistent with the principle of exhaustiveness." See also B. Ryder, *Aboriginal Rights and Delgamuukw v. The Queen*, (1994) 5 Constitutional Forum 43 at 46: "...in past judicial decisions, the principle of exhaustiveness has been put to the service the federal ideal of co-ordinate and equal sovereign authorities. *In this sense, it is troubling to see the principle employed to maintain and justify a distinctly non-federal, colonial relationship between Aboriginal and non-Aboriginal governments.*" [Emphasis added.]

In regard to the application of the principle of exhaustiveness, considerable caution is warranted where Aboriginal peoples' powers and rights are concerned. The inherent self-government powers of Aboriginal peoples have not been extinguished and are now constitutionally protected under s. 35(1) of the *Constitution Act, 1982*. For example, see Royal Commission on Aboriginal Peoples, *Partners in Confederation[:] Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services, 1993) at 38: "...the potential Aboriginal sphere of authority under section 35(1)...has roughly the same scope as the federal head of power over 'Indians, and Lands reserved for the Indians' recognized in section 91(24) of the *Constitution Act, 1867*. Within this sphere, Aboriginal governments and the federal government have independent but overlapping legislative powers..."; see also discussion by Royal Commission at 32-33.

[905] In regard to New Zealand, see *L* v. *M*, [1979] 2 N.Z.L.R. 519 at 527 (where doubt was expressed that Parliament could "attempt to confer on a body other than the Courts power to determine conclusively whether or not actions in the Courts are barred"); *Brader* v. *Minister of Transport*, [1981] 1 N.Z.L.R. 73 at 78 ("recognition by the common law of the supremacy of Parliament can hardly be regarded as given on the footing that Parliament would abdicate its function", i.e. abandon the entire field of the economy to the Executive); *New Zealand Drivers Association* v. *New Zealand Road Carriers*, [1982] 1 N.Z.L.R. 374 at 390 ("reservations as to the extent to which in New Zealand even an Act of Parliament can take away the rights of citizens to resort to the ordinary Courts of law for the determination of their rights"); *Taylor* v. *New Zealand Poultry Board*, [1984] 1 N.Z.L.R. 394 at 398 (suggestion that "some common law rights presumably lie so deep that even Parliament could not override them", e.g. literal compulsion, by torture, to testify).

In relation to Ceylon, see *Liyanage* v. *The Queen*, [1967] 1 A.C. 259 (P.C.).

[906] [1967] 1 A.C. 259 (P.C.).

[907] *M. Beauregard* v. *The Queen*, [1981] 2 F.C. 543, subsequently reversed in [1984] 1 F.C. 1010 (Fed. C.A.).

[908] R. Pépin, *Droit constitutionnel - Indépendence du pouvoir judiciare - Salaire des juges - Jusqu'où va la souveraineté du Parlement?*, note 904, *supra*, at 707.

> "La situation est bien différente au Canada. *Il n'existe d'abord aucune juridiction exclusive garantie aux tribunaux par la constitution formelle.* Bien aux contraire, la Loi constitutionnelle de 1867 confie l''adminstration de la justice' au pouvoir législatif 'exclusif' des provinces et ne garantit même pas l'existence continue de la Cour suprême."[909] [Emphasis added.]

Without debating the merits of the doctrine of separation of powers, it is worth noting that R. Pepin emphasizes the absence of constitutional guarantees to the courts in Canada as a basis for suggesting that the principle of parliamentary supremacy would prevail in such case. However, in regard to Aboriginal peoples, there are a number of distinguishing facts to consider as well as the existence of constitutional guarantees. These include the existence of Aboriginal sovereignty, the constitutional guarantees in the *Royal Proclamation of 1763*, the terms and conditions linked to the *Rupert's Land and North-Western Territory Order*, 1870, s. 35(1) of the *Constitution Act, 1982*, the *Canadian Charter of Rights and Freedoms*, and the fiduciary duties of a constitutional nature on both the governments and legislatures in Canada.

As they relate to Aboriginal peoples, existing notions of parliamentary sovereignty or supremacy are increasingly being questioned and challenged by jurists.[910] P. Macklem indicates that the problem is a broad one and involves an inherent lack of legal understanding of "native difference":

> "Traditional notions of property, contract, *legislative supremacy*, and constitutional right must be questioned and reconceptualized so as to reshape the law's relation to native people and to permit Canada's First Nations to devise institutional arrangements that conform to and celebrate native forms of life. *Current ways of knowing are not so much part of the solution as part of the problem, and reform requires the creation of new ways of legal understanding that embrace native difference.*"[911] [Emphasis added.]

In particular, one cannot simply assume that the federal Parliament has the power to extinguish aboriginal rights, based on the principle of parliamentary sovereignty. As indicated elsewhere in this study, if such power existed, it may have resided in in the Parliament of the United Kingdom which did not in any event purport to use such power in relation to Aboriginal peoples in North America.

Further, the existence of Aboriginal sovereignty renders incongruous any reliance on the principle of parliamentary sovereignty as a legal justification for extinguishing aboriginal rights. As B. Ryder emphasizes, the principle of parliamentary sovereignty in Canada must be further modified to account for the reality of aboriginal sovereignty:

> "*...the British principle of parliamentary sovereignty has to be further adapted to the Canadian constitutional context* by taking into account not only the existence of a federal division of powers between the provinces and the federal government and of entrenched constitutional rights, but also the *existence of the unsurrendered inherent sovereignty of*

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[909] Id., at 709: "The situation is very different in Canada. *In the first place, there does not exist any exclusive jurisdiction guaranteed to the courts by the formal Constitution.* Rather to the contrary, the Constitution Act, 1867 confers the 'adminstration of justice' to the 'exclusive' legislative power of the provinces and does not even guarantee the continued existence of the Supreme Court." [Unofficial translation, emphasis added.] However, see P. Hogg, *Constitutional Law of Canada*, note 808, *supra*, vol. 1, at 8-2, n. 3: "It is possible that references to the Supreme Court of Canada in ss. 41(d) and 42(d) of the Constitution Act, 1982 have now placed the Court beyond the powers of the federal Parliament."

[910] For example, see K. McNeil, *Envisaging Constitutional Space for Aboriginal Governments*, (1993) 19 Queen's L.J. 95 at 119: "The enactment of the *Constitution Act, 1982* provided an opportunity to end the colonialism inherent in the view that legislative powers were exhaustively distributed in 1867 between the federal and provincial governments. The *Charter*, and the express provision in s. 52(1) that the 'Constitution of Canada is the supreme law of Canada,' made a reassessment of the doctrine of parliamentary sovereignty imperative, as *certain matters were clearly placed beyond the competence of either order of government. Where the Aboriginal peoples are concerned, s. 35(1) demanded a reassessment of this kind by recognizing and affirming their Aboriginal and treaty rights.*" [Emphasis added.]

[911] P. Macklem, *First Nations Self-Government and the Borders of the Canadian Legal Imagination*, (1991), 36 McGill L. R. 382, at 395.

the First Nations."[912] [Emphasis added.]

Similarly, K. McNeil provides:

"In Canada, parliamentary sovereignty therefore has to be redefined so that legislative jurisdiction is divided among the federal, provincial, and Aboriginal governments. The rule of law must also be redefined to include Aboriginal laws, as well as the common law and federal and provincial legislation. *To cling to the old notions of parliamentary sovereignty and the rule of law is to perpetuate outdated and unacceptable colonial attitudes.*"[913] [Emphasis added.]

In this context, it is sometimes pointed out that the *Statute of Westminster, 1931* strengthened the principle of parliamentary sovereignty in Canada by significantly increasing Canada's capacity to legislate independently from Britain. While this may be true, it is important to note that during these critical years appropriate consideration of the respective status and capacity of Aboriginal peoples was in effect forcibly repressed by legislation. As a result, Aboriginal aspects were ignored during the conferences leading up to the adoption of the 1931 Statute. In this regard, L. Mandell provides:

"*...the Indian Nations had, by legislation, been precluded from any participation in the conferences or on any issue involving the advancement of land claims, on pain of imprisonment.*[914] *Throughout the conferences, no mention was made of the Indian Nations.* Yet, years later, with the patriation of the Constitution, Canada and Britain successfully argued before the British Courts that with the passage of the Statute of Westminster, the treaties concluded between the Imperial Crown and the Indian Nations devolved to Canada without Indian knowledge or consent."[915] [Emphasis added.]

In light of the discussions leading up to the *Statute of Westminster, 1931* being clearly limited to a federal-provincial context, it would be difficult to conclude that Aboriginal sovereignty was validly considered and repudiated in adopting the 1931 imperial legislation.

4.6 Sovereignty of Aboriginal Peoples

"By respecting [indigenous peoples], by defending them, *by helping them take their place in the community of nations and in international life*, we are protecting the world itself, in the conception we have of the world with all its diversity. And we are protecting each of our cultures, each of our peoples..."[916]

B. Boutros-Ghali, Secretary-General of the United Nations, 1992

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[912] B. Ryder, *The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations*, note 748, *supra*, at 315.

[913] K. McNeil, *Envisaging Constitutional Space for Aboriginal Governments*, (1993) 19 Queen's L.J. 95 at 134.

[914] *Indian Act*, R.S.C. 1927, c. 28, s. 141.

[915] L. Mandell, *Indian Nations: Not Minorities*, (1986) 27 Les Cahiers de Droit 101, at 118.

[916] B. Boutros-Ghali, Statement to U.N. General Assembly, in *Living History [:] Inauguration of the "International Year of the World's Indigenous People"*, (1993) 3 Transnat'l L. & Contemp. Probs. 168 at 171.

> "...where does the source of our sovereignty, our power and our right to self-determination come from?...It was recognized by the Crown, but it didn't come from the Crown...It comes from the people, from our history, our traditions, and cultures...It comes from the Creator...That's our source of power."[917]
>
> J. Amagoalik, 1991

In determining the status and rights of Aboriginal peoples, and when considering questions of extinguishment, it is important to begin by examining their historical position as sovereign and self-determining peoples.[918]

As H. Berman points out, for reasons relating to racial concepts and colonialism, the historical record of indigenous peoples functioning at the international level has not received proper recognition:

> "...the connections between pre-colonial indigenous self-determination and contemporary status and rights have been *clouded by racial and legal concepts of the colonial era*. The Eurocentric arrogance and social Darwinism of the late nineteenth and early twentieth centuries effectively erased the memory of a centuries-old historical record of indigenous peoples functioning on the international plane, and of a definite if grudging recognition of indigenous rights in principle and state practice."[919] [Emphasis added.]

When it comes to Aboriginal peoples, there is too often the suggestion that notions of "autonomy"[920] can be discussed but the issue of sovereignty is not on the table of discussion.

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[917] Statement by J. Amagoalik in M. Cassidy, (ed.), *Aboriginal Self-Determination* (B.C./Montreal: Oolichan Books/Institute for Research on Public Policy, 1991) 34 at 35.

[918] In regard to the U.S., C. Wilkinson provides: "The original status of complete national sovereignty, not action by any European nation or the United States, is the beginning definition of modern tribalism. It is highly significant, in other words, simply that tribes were *once* sovereign in both the internal and external senses. To be sure, the sovereign status has been altered repeatedly...But in the cases of the modern era the exceptions have proved far less important than the remarkable and crucial premise - that tribal powers will be measured initially by the sovereign authority that an Indian tribe exercised, or might theoretically have exercised, in a time so different from our own as to be beyond the power or most of us to articulate.": C. Wilkinson, *American Indians, Time and the Law* (New Haven: Yale University Press, 1987), at 63. See also H. Berman, "Perspectives on American Indian Sovereignty and International Law, 1600 to 1776", in O. Lyons, et al., *Exiled in the Land of the Free [:] Democracy, Indian Nations, and the U.S. Constitution*, note 743, *supra*, at 127: "...the links between past and present are of central importance to any analysis of indigenous rights.".

In P. Dane, *The Maps of Sovereignty: A Meditation*, note 796, *supra*, at 960-961, it is provided: "Tribal sovereignty does not exist only in the contemplation of Native Americans and their friends. It is recognized by the United States. Court decisions speak of it. United States Indian policy has included expulsion, theft, murder, and forced assimilation. But it has never wholly abandoned the principle of legal recognition." Although U.S. Aboriginal jurisprudence has often been contradictory, Dane cites at 960, n. 4, the following recent U.S. cases affirming the sovereign status of Indian tribes: *Kerr-McGee Corp.* v. *Navajo Tribe of Indians*, 471 U.S. 195 (1985); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978); *U.S.* v. *Wheeler*, 435 U.S. 313 (1978); *Williams* v. *Lee*, 358 U.S. 217 (1959).

For a listing of ten central aspects of tribal sovereignty in the U.S., see Wilkinson, *supra*, at 62-63. For a critical view of the treatment of tribal sovereignty by the U.S. Supreme Court, see C. Berkey, *The U.S. Supreme Court and the Assault on Indian Sovereignty*, (1990) 2 Without Prejudice 27. These ten attributes are quoted in B. Clark, *Native Liberty, Crown Sovereignty [:] The Existing Aboriginal Right to Self-Government in Canada* (Montreal: McGill-Queen's University Press, 1990), at 24-25.

[919] H. Berman, "Perspectives on American Indian Sovereignty and International Law, 1600 to 1776", in O. Lyons, et al., *Exiled in the Land of the Free [:] Democracy, Indian Nations, and the U.S. Constitution*, note 743, *supra*, at 127. In the same paragraph, Berman adds: "Although these colonial categories have long been repudiated in virtually every other context, they have continued to exert a curious degree of influence on the debate on indigenous rights in the United States, other countries, and at the international level."

[920] In regard to "autonomy", see generally H. Hannum & R. Lillich, *The Concept of Autonomy in International Law*, (1980) 74 Am. J. Int'l L. 858.

However, a discussion of autonomy alone would solely address a part of the status and rights of indigenous peoples.

A discussion of autonomy cannot be a total substitute to addressing sovereignty. As described by S.J. Toope:

> "...the metaphor of autonomy, at least in its pure form, is not one which we should adopt, for it expresses only one half of the antimony of particularity and universality which must be encompassed within the concept of sovereignty. *Autonomy is often invoked to support protective isolation; what of the need for relations between individuals, groups and states?* If we have learned anything..., it is that while boundaries remain real and important, they can never be impenetrable. *States are only relatively autonomous, just as people are only relatively autonomous.*"[921] [Emphasis added.]

Within the context of federalism, G. Rémillard has also emphasized the distinction between "sovereignty" and "autonomy" in the following terms:

> "Il importe alors de bien distinguer les notions de souveraineté et d'autonomie. Alors que la première est 'la compétence de la compétence', c'est-à-dire l'autorité ultime, l'autonomie est la liberté d'agir dans un cadre donné et sous une autorité supérieure."[922]

Chief Joe Mathias (Squamish nation, British Columbia) describes the inherent[923] sovereignty of First Nations in Canada as follows:

> "When we express the notions of sovereignty or sovereign title to our lands we emphasize that, prior to 1763, at 1763 and up to today, *the chain of sovereign existence of our peoples has been unbroken*; it continues now, comes to us from the past and it will continue in the future. The intervention of settlement in this country these past three to four centuries has not broken that sovereign existence of our peoples. Our point of departure lies in our basic understanding that *we have no other way to relate to Canada except as sovereign peoples.*"[924] [Emphasis added.]

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[921] S.J. Toope, *State Sovereignty: The Challenge of a Changing World*, in Proceedings of the 1992 Canadian Council on International Law, *supra*, note 817, at 296-297.

[922] G. Rémillard, *Souveraineté et fédéralisme*, (1979) 20 C. de D. 237, at 244: "It is important therefore to distinguish well between the notions of sovereignty and autonomy. While the first is 'jurisdiction to define jurisdictions', that is to say ultimate authority, autonomy is the freedom to act within a given framework and under a superior authority." [Unofficial translation.] See also L.-P. Pigeon, *The Meaning of Provincial Autonomy*, (1951) 29 Can. Bar Rev. 1126, at 1132-1133: "Autonomy is nothing else than freedom under the constitution. The true concept of autonomy is thus like the true concept of freedom. *It implies limitations, but it also implies free movement within the area bounded by the limitations...*" [Emphasis added.] In this article, Pigeon speaks approvingly of the principle of provincial autonomy.

[923] For a discussion of the inherent nature of sovereignty and the right to self-determination, see C. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, note 804, *supra*, at 301-308. In relation to the inherent sovereignty of Aboriginal peoples in the U.S., see F. Cohen, *Handbook of Federal Indian Law*, 1st ed., (1942), at 122: "Perhaps the most basic principle of all Indian law...is the principle that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather *inherent powers of a limited sovereignty which has never been extinguished*. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation..." [Emphasis added.]

See also the recent joint resolution of the U.S. Congress, S.J. Res. 19, 103d Cong., (1993) 107 Stat. 1510, where the Congress apologized for the illegal overthrow of the Kingdom of Hawaii in 1893 "which resulted in the suppression of the *inherent sovereignty of the Native Hawaiian people*". [Emphasis added.] Cited in S.J. Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, (1994) 28 Georgia L. R. 309 at 310.

[924] J. Mathias, "Statement at Meeting of Ministers, Ottawa, 20-21 March 1986 on Behalf of the Assembly of First Nations", in Assembly of First Nations, *Our Land, Our Government, Our Heritage, Our Future* (Ottawa: Assembly of First Nations, 1990), at 2. Chief Mathias' statement is reproduced in J.J. Borrows, *A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government*, (1992) 30 Osgoode Hall L.J. 291, at 295, n. 10.

B. Erasmus, President of the Dene Nation, also describes Dene sovereignty in a manner consistent with an "inherent" perspective:

> "When we talk of sovereignty, the Dene have talked about it for a long time...What we mean is that we have a home in the North, that's where we're from. It belongs to us, it's always been ours, it's our place, our place of being. We're willing to share it, and all we ask, basically, is that anything that happens in our home happens with our consent."[925]

At the time of European exploration and settlement, it is clear that Aboriginal Nations[926] were regarded as independent peoples, or at least treated as such by European nations.

The status of Aboriginal peoples as "independent political communities" was recognized in the landmark case of *Worcester* v. *State of Georgia*, by Chief Justice Marshall of the U.S. Supreme Court:

> "The Indian nations had always been considered as *distinct, independent political communities*, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial..."[927] [Emphasis added.]

Moreover, Marshall C.J. emphasized that British policy recognized their "nation" status despite the protection Aboriginal peoples sought from the British Crown:

> "Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans;...*she considered them as nations capable of maintaining the relations of peace and war; of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.*"[928] [Emphasis added.]

In *R.* v. *Sioui*, the Supreme Court of Canada concluded that Aboriginal peoples were treated as independent nations and the relations maintained with them by Great Britain and France were very close to that maintained between sovereign nations:

> "...we can conclude from the historical documents that both Great Britain and France felt that the *Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.*

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[925] B. Erasmus, President, Dene Nation, in M. Cassidy, (ed.), *Aboriginal Self-Determination* (B.C./Montreal: Oolichan Books/Institute for Research on Public Policy, 1991) at 122.

[926] The term "nations" refers here to "states". However, "nations" can also refer to "cultures" in its broadest sense. See N. Duclos, *Lessons of Difference: Feminist Theory on Cultural Diversity*, (1990) 38 Buffalo L. Rev. 325 at 330: "...culture...in its broadest sense, includ[es] its more personal, psychological or symbolic aspects and its more institutional or structural aspects. *A culture which has both symbolic and structural components is often referred to as a nation...* At 331, n. 16, Duclos states: "According to my usage, the Québécois and most aboriginal communities are nations, whereas most immigrant groups constitute cultures.

See also R. Morin, "Droit international dans les causes nationales en droit des autochtones" in Proceedings of the 1993 Conference of the Canadian Council on International Law, *Aboriginal Rights and International Law* (Ottawa: Canadian Council on International Law, 1992) 29 at 33, where the author states that the term "nation" can be used today in regard to Aboriginal peoples without conferring on them any status at the strict level of international law.

[927] *Worcester* v. *State of Georgia*, 31 U.S. (6 (Pet.) 515, at 559.

[928] Id., at 548-549, cited with approval by the Supreme Court of Canada in *R.* v. *Sioui*, [1990], 1 S.C.R. 1025, at 1053-1054. In regard to the United States, see *American Indian Policy*, Statement of President Ronald Reagan, January 24, 1983: "When European colonial powers began to explore and colonize this land, they entered into *treaties with sovereign Indian nations*...Throughout our history, despite periods of conflict and shifting national policies in Indian affairs, the *government-to-government relationship* between the United States and Indian tribes has endured." [Emphasis added.] This latter statement is cited in D. Sanders, "Self-Determination and Indigenous Peoples" in C. Tomuschat, (ed.), *Modern Law of Self-Determination* (Boston: Martinus Nijhoff Publishers, 1993) 55 at 56.

> The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. *This clearly indicates that the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.* The papers of William Johnson...who was in charge of Indian affairs in British North America, demonstrate the recognition by Great Britain that nation-to-nation relations had to be conducted with North American Indians."[929] [Emphasis added.]

In relation to the *Sioui* case, where the treaty of 1760 with the Hurons was upheld, R. Boudreault emphasizes that the sovereign relations between the parties are still relevant today and provide a basis for self-government arrangements:

> "Voilà donc une perspective qui peut guider, à l'avenir, toute discussion en matière d'autonomie gouvernementale de la nation huronne-wendat. Il est logique de penser que, si la nation huronne-wendat était considerée en 1760 comme une nation indépendante pouvant entretenir des relations semblable à celles d'une nation souveraine, elle peut, aujourd'hui encore, être considerée comme telle car la relation consacrée par le traité est encore valide."[930]

Further, in *Adams* v. *The Queen*,[931] Rothman J. of the Quebec Court of Appeal, cites the doctoral thesis of J. Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquois*[932], to highlight the independent status of the Iroquois nation during the French regime in Quebec:

> "...despite the Iroquois' periodic affirmations of formal subjection to both the French and the English, and despite the latters' rival claims of sovereignty over the Iroquois vis-à-vis each other, *the two European parties actually treated with the Iroquois on a basis of mutual independence and juridical equality*...In consequence, even if, by contemporary European lights, the Iroquois nations were not 'civilized', *the conclusion of their statehood or, in any event, their international legal personality, seems inescapable.*"[933] [Emphasis added.]

Similarly, G. Havard notes that, in the early part of the eighteenth century, the Five Nations of the Iroquois were appropriately referred to as "nations" in the sovereign sense:

> "Le mot 'nation' n'est pas utilisé au hasard: il convient en effet parfaitement à la réalité historique amérindienne, en ce sens qu'*il reconnaît que les autochtones s'organisaient en groupes humains souverains et bien définis*, qu'ils vivaient sur des territoires spécifiques et déterminés et qu'ils évoluaient au sein de structures politiques élaborées et fonctionnelles."[934] [Emphasis added.]

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[929] *R.* v. *Sioui*, [1990], 1 S.C.R. 1025, at 1052-1053.

[930] R. Boudreault, *Réflexion sur une réalité moderne à "incarner"*, (1993) 23 Recherches amérindiennes au Québec 5 at 8: "Here then is a perspective that can guide, in the future, all discussions concerning the self-government of the Huron-Wendat Nation. It is logical to think that, if the Huron-Wendat Nation was considered in 1760 as an independent nation having the power to enter into relations similar to those of a sovereign nation, it can, still today, be considered as such because the relation enshrined by the treaty is still valid." [Unoffical translation.]

[931] *Adams* v. *The Queen*, [1993] R.J.Q. 1011

[932] J. Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquois*, University of Cambridge, Ph.D. dissertation.

[933] J. Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquois*, *supra*, at 317, cited by Rothman J. (dissenting for other reasons) in *Adams* v. *The Queen*, [1993] R.J.Q. 1011 at 1040.

[934] G. Havard, *La Grande Paix de Montréal de 1701 [:] Les voies de la diplomatie franco-amérindienne* (Montréal: Recherches amérindiennes au Québec, 1992), at 1, n. 3: "The word 'nation' is not used by chance: it conforms in effect perfectly with Amerindian historical reality, in the sense that *it recognizes that Aboriginal peoples organized themselves in*

Also, M.E. Turpel describes the sovereignty of the Mikmaq nation (as communicated by the Mikmaq to the U.N. Human Rights Committee[935]) as follows:

> "[The] historical relationships among the Mikmaq and the French, the British and the Holy See, reveal *a pattern of independence and special political status*, and support the assertion that Mikmakik was *never considered as one of Europe's American colonies*. Hence, they allege that the Mikmaq have enjoyed, by virtue of their history, the status of a separate and distinct commonwealth under the British Crown."[936] [Emphasis added.]

In 1869, in regard to the Metis, Canadian Prime Minister John A. Macdonald recognized the potential for the provisional government of Louis Riel and the Metis at Red River[937] to be recognized as a sovereign government under the "Law of Nations". In correspondence to W. McDougall, Commissioner of Crown Lands, the Prime Minister provides:

> "*It is quite open by the Law of Nations for the inhabitants to form a Government ex necessitate for the protection of life and property, and such a government has certain sovereign rights* by *jus gentium* which might be very convenient for the United States but very inconvenient for you. The temptation to an acknowledgement of such a Government by the United States would be very great and ought not to be lightly risked."[938] [Emphasis added.]

In relation to the recognition of the independent status of Aboriginal peoples by France in the early 1600s, B. Slattery comments:

> "Treaties with the indigenous peoples are viewed as a principal means of extending French influence and authority. *Significantly, the Crown acknowledges the present independent status of these peoples and the capacity of their rulers and leaders to conclude not only treaties of peace and friendship but also alliances.*"[939] [Emphasis added.]

In more general terms, B. Slattery provides:

> "...North America was not, of course, uninhabited when first explored and settled by Europeans. It was the domain of *a variety of independent peoples*, who possessed their

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sovereign and well-defined human groups, that lived on specific and determined territories and that evolved within elaborated and functional political structures." [Unofficial translation, emphasis added.]

[935] *Mikmaq Tribal Society Communication*, submitted January 1986, in relation to a complaint by Mikmaq under the Optional Protocol of the *International Covenant on Civil and Political Rights*.

[936] M.E. Turpel, *Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition*, 25 Cornell Int'l L. J. 579, at 587. See also *R.* v. *McCoy*, [1993] 1 C.N.L.R. 135 at 137 per Turnbull J. (N.B. Court of Queen's Bench, T.D.), where it is stated that both the Malecite and Micmac were "independent sovereign nations" in the early eighteenth century. In addition, in S. Grammond, *Les traités entre l'État canadien et les peuples autochtones* (Cowansville, Québec: Les Éditions Yvon Blais, 1994), at 179, where it is suggested that the 1752 peace treaty with the Mikmaq constituted without doubt an international treaty.

[937] Red River is now a part of the province of Manitoba.

[938] P.A.C. Macdonald Papers, vol. 516, J. A. Macdonald to W. McDougall, November 27, 1869. Cited in O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: MacLelland & Stewart, 1992) at 270; and D. Creighton, *John A. Macdonald*, 2 vols. (Toronto: Macmillan, 1966; first published in 1955), II, at 51.

[939] B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 850, *supra*, at 83. The author concludes at 90: "...the fact that most American lands were held by independent indigenous nations was acknowledged, and the capacity of such peoples to enter into treaties with France upon an apparent basis of juridical equality was also admitted." For a similar view that France recognized some form of sovereignty for Aboriginal peoples, see S. Grammond, *Les traités entre l'État canadien et les peuples autochtones* (Cowansville, Québec: Les Éditions Yvon Blais, 1994), at 26.

own territories, laws, and governmental institutions."[940] [Emphasis added.]

As T.R. Berger comments:

"It was British policy to acknowledge Indian title, then to treat for it, as with any other sovereign power. *The British process of treaty-making by imperial authority illustrates how comprehensively European and colonial governments accepted and acted on the concept of aboriginal sovereignty*...As the Native peoples of North America were progressively overwhelmed, the importance of international principles receded in the European mind. *Today, however, these principles of international law are reemerging along with the concept of Native sovereignty.*"[941] [Emphasis added.]

In relation to indigenous peoples in the various regions of the world, C. Iorns indicates:

"[A]t different times in history, indigenous peoples have been considered sovereign nations."[942]

And she adds:

"I would even go so far as to say that it is clear that indigenous peoples have historical grievances in relation to the lands they claim and can articulate theories of sovereignty in relation to them."[943]

Despite some recent judicial recognition of Aboriginal peoples as independent nations in earlier periods of their history, the issue of Aboriginal sovereignty and its implications in the contemporary context have not been adequately explored. As A. Bissonnette comments:

"...même en reconnaissant aujourd'hui aux Indiens du XVIII[e] siècle le statut de nations indépendantes, encore faut-il identifier les conséquences qui en découlent maintenant en droit public, tant canadien qu'international. Or, à cet égard, la jurisprudence demeure beaucoup moins catégorique, et les travaux qui se poursuivent sur la scène internationale n'ont pas encore fait connaître leurs conclusions définitives. À vrai dire, toute cette question constitue actuellement un enjeu majeur investi par toutes les parties concernées."[944]

4.6.1 Aboriginal sovereignty and self-government

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[940] B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" in M. Boldt and J.A. Long, *The Quest for Justice [:] Aboriginal Peoples and Aboriginal Rights*, note 738, *supra*, at 114-115.

[941] T.R. Berger, *Village Journey [:] The Report of the Alaska Native Review Commission* (New York: Hill and Wang, 1985) at 139.

[942] C. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, note 804, *supra*, at 318. And on the same page, n. 578: "Vitoria, Vattel, Gentili and Grotius attributed sovereignty to indigenous peoples at the time of contact with Western European powers; numerous other scholars continued this position into the nineteenth century...It can be argued that the making of treaties with the indigenous peoples in 'discovered' lands is evidence that the indigenous peoples were considered to have sovereignty over the territory in question."

[943] Id., at 330.

[944] A. Bissonnette, *Des alliances "fondatrices" aux traités modernes*, (1993) 23 Recherches amérindiennes au Québec 2 at 2: "...even in recognizing today the independent nations status of the Indians of the 18th century, we still must identify the consequences which now flow in public law, both Canadian and international. However, in this regard, the jurisprudence is much less categorical, and the work which continues at the international level has not made known its final conclusions. Really, this whole issue actually constitutes a major stake invested by all parties concerned." (Unofficial translation.)

> "...we have already a divided sovereignty in Canada. If we can put in place a process that would allow for peaceful negotiations, we could finally recognize that First Nations can continue to enjoy their original responsibility and sovereignty. If so, we could end up in a situation where Canada would have a number of sources of sovereignty and it could be practical - it could work."[945]
>
> Georges Erasmus, National Chief, 1990

Within any federation, sovereignty is not necessarily exercised by one entity alone and this internal dimension of sovereignty includes the right of self-government. As P. Macklem describes:

> "[I]nternational law definitions do not exhaust sovereignty's meaning, as sovereignty involves a double aspect. In addition to its external aspect, which international law expresses, *sovereignty can refer to political and legal authority within nation states*. In this internal sense, sovereignty need not be vested in a single authority. Degrees of sovereign authority, as any federalist knows, can be simultaneously wielded by a number of different entities - states, provinces, and, as the American experience demonstrates, Indian nations."[946] [Emphasis added.]

However, this does not mean that inherent Aboriginal sovereignty is simply a domestic constitutional issue. In the regard, Macklem adds:

> *"From the perspective of both formal and substantive equality of peoples, indigenous peoples of North America can advance powerful claims* for a degree of sovereignty over their individual and collective identities.
>
> Indian sovereignty is not a domestic constitutional issue. Domestic issues of constitutional interpretation should not obscure the fact that *justifications for the recognition of Indian government do not find their source in constitutional documents, but instead transcend national borders."*[947] [Emphasis added.]

The fundamental link between Aboriginal sovereignty and self-government is also emphasized by A. Bissonnette:

> "Un autre enjeu sous-jacent à la reconnaissance du droit à l'autonomie gouvernementale des peuples autochtones apparaît encore plus fondamental. À notre avis, les peuples autochtones, du moin au Canada, ne visent pas seulement à voir l'État respecter davantage les droits que celui-ci accepte de leur reconnaître ou que la communauté internationale lui intime de leur reconnaître. *Ces peuples veut également affirmer et exercer leur propre souveraineté.* Autrement dit, ils veulent eux-mêmes définir la nature et la portée de leurs droits, en se référant à leurs propres traditions."[948] [Emphasis

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[945] G. Erasmus, "Towards a National Agenda" in M. Cassidy, (ed.), *Aboriginal Self-Determination* (B.C./Montreal: Oolichan Books/Institute for Research on Public Policy, 1991) 171 at 173.

[946] P. Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, note 736, *supra*, at 1346-1347.

[947] Id. at 1367.

[948] A. Bissonnette, *Le droit à l'autonomie gouvernementale des peuples autochtones: un phénix qui renaîtra de ses cendres*, (1993) 24 Revue générale de droit 5 at 22: "Another critical issue underlying the recognition of the right to self-government of Aboriginal peoples appears even more fundamental. In our view, the Aboriginal peoples, at least in Canada, do not wish to see that the State respects more the rights which it accepts to recognize or which the international community orders it to recognize to them. *These peoples seek equally to affirm and exercise their own sovereignty*. Otherwise said, they wish themselves to define the nature and scope of their rights, in referring to their own traditions." [Unofficial translation,

added.]

Governments in Canada are acknowledging the right of Aboriginal peoples to self-government, but this right must be clearly linked to Aboriginal peoples' historical context and status as sovereign and self-determining peoples. The importance of making these links has been emphasized by S. Vincent as follows:

> "Aujourd'hui, il est admis que les Amérindiens et les Inuit ont droit à l'autonomie gouvernementale. Mais si cette acceptation ne s'appuie pas sur la reconnaissance officielle du discours tenu par les Autochtones et du sens ou des sens qu'ils donnent à cette autonomie, *si elle ne s'appuie pas sur la reconnaissance du contexte historique et politique d'où émergent les relations actuelles* entre Autochtones et non-Autochtones, *si elles ne s'appuie pas sur la reconnaissance de l'appartenance des Autochtones à des peuples et donc de leur droit à l'autodétermination, quelle signification peut-elle avoir?*"[949] [Emphasis added.]

The issue of Aboriginal sovereignty will increasingly be discussed in the context of self-government. First, it is the view of a growing number of jurists that the right to self-government is already implicitly included in section 35 of the *Constitution Act, 1982*.[950] If so, then in

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emphasis added.]

[949] S. Vincent, *Pourquoi l'autonomie gouvernementale?*, (1994) 24 Recherches amérindiennes au Québec 151 at 153: "Today, it is admitted that the Indians and Inuit have the right to self-government. But if this acceptance does not rely on official recognition of the discourse of Aboriginals and the meaning or meanings that they attribute to this autonomy, *if it does not rest on the recognition of the historical and political context from where emerge the current relations* between Aboriginals and non-Aboriginals, *if it does not rely on the recognition of the adherence of Aboriginals to peoples and therefore to their right of self-determination, what significance can it have?*" [Unofficial translation, emphasis added.]

[950] B. Ryder, *Aboriginal Rights and Delgamuukw v. The Queen*, (1994) 5 Constitutional Forum 43 at 45-46; D. Lenihan, G. Robertson, & R. Tassé, *Canada: Reclaiming the Middle Ground* (Montreal: Institute for Research on Public Policy, 1994), at 95-96; B. Slattery, *First Nations and the Constitution: A Question of Trust*, (1992) 71 Can. Bar Rev. 261 at 278 *et seq.*; Royal Commission on Aboriginal Peoples, *Partners in Confederation[:] Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services, 1993), at 35-36, 40-41. See also B. Clark, *Native Liberty, Crown Sovereignty [:] The Existing Aboriginal Right to Self-Government in Canada* (Montreal: McGill-Queen's University Press, 1990); Report of the Aboriginal Justice Inquiry of Manitoba, *The Justice System and Aboriginal People* (Winnipeg: Queen's Printer, 1991), vol. 1, at 143-144; K. McNeil, *Envisaging Constitutional Space for Aboriginal Governments*, (1993) 19 Queen's L.J. 95 at 134; D. Sanders, "Remembering Deskaheh: Indigenous Peoples and International Law" in I. Cotler & F.P. Eliadis, (eds.), *International Human Rights Law [:] Theory and Practice* (Montreal: Canadian Human Rights Foundation, 1992) 485, at 491: "...the Supreme Court could uphold rights of self-government as surviving aboriginal and treaty rights, based on pre-contact Indian sovereignty"; A. Pratt, *Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?*, (1992) 2 N.J.C.L. 163, at 164, n. 1; N. Lyon, *Book Review [:] Native Liberty, Crown Sovereignty*, (1990) 15 Queen's L.J. 361 at 362-363.

See also Liberal Party of Canada, *The Aboriginal Peoples of Canada [:] Summary* (Ottawa: Liberal Party of Canada, September 1993) at 2: "A Liberal government will act on the premise that the inherent right of self-government is an existing Aboriginal and treaty right within the meaning of section 35 of the *Constitution Act, 1982*. Recognizing the inherent right is consistent with the historical fact that Aboriginal peoples governed this land prior to the arrival of Europeans to the various regions of North America."

The Supreme Court of Canada appears to acknowledge that the rights of Aboriginal peoples, as recognized by the British Crown, have both proprietary and jurisdictional elements: see *A.G. Quebec* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1055 per Lamer J. (on behalf of the Supreme Court): "The British Crown recognized that the Indians had certain *ownership rights over their land*, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. It also allowed them *autonomy in their internal affairs*, intervening in this area as little as possible." [Emphasis added.] In addition, see *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.), at 319, per Lambert J. (dissenting): "Existing aboriginal rights, *including aboriginal title and aboriginal rights of self-government and self-regulation*, are those that were not extinguished before 1982. Rights that were dormant, suspended, or regulated, but still in existence in 1982, together with those rights which were in full force and vigour in 1982, received the constitutional protection given by s. 35." [Emphasis added.] See also A. Buchanan, *The Role of Collective Rights in the Theory of Indigenous Peoples' Rights*, (1993) 3 Transnat'l L. & Contemp. Probs. 89 at 98-99, where it is said that "land regulatory rights presuppose - or rather help constitute - rights of self-government." In regard to s. 35 reinforcing the right of Aboriginal peoples to conserve and manage resources on their traditional lands, see R. Kapashesit and M. Klippenstein, *Aboriginal Group Rights and Environmental Protection*, (1991) 36 McGill L. J. 925.

For a view that the Supreme Court of Canada is unlikely to interpret s. 35(1) as including an inherent right to self-government, see W. Binnie, *The Sparrow Doctrine: Beginning of the End or the End of the Beginning?*, (1990) 15 Queen's

Canada, Aboriginal peoples possess a sphere of sovereign or supreme authority to be exercised by their respective governments.[951] That is, it is said that under the Canadian Constitution, it is implicitly recognized that Aboriginal governments are one of three orders of government in Canada.

Second, the need to explicitly address the issue of Aboriginal sovereignty in Canada was clearly recognized by all federal, provincial and territorial governments, as well as Aboriginal peoples, during the negotiations that led to the now-defunct Charlottetown Accord in the summer of 1992.[952] The Accord specifically recognized three orders of government in Canada that exercised sovereign legislative powers. In 1983, a Special Committee of the House of Commons (chaired by Keith Penner, M.P.) also called for constitutional recognition of First Nations governments as a distinct order of government in Canada:

> "The Committee recommends that the right of Indian peoples to self-government be explicitly stated and entrenched in the Constitution of Canada. *The surest way to achieve permanent and fundamental change in the relationship between Indian peoples and the federal government is by means of a constitutional amendment.* Indian First Nation governments would form a distinct order of government in Canada, with their jurisdiction defined."[953] [Emphasis added.]

Third, Aboriginal peoples take the firm position that they have not ceded their inherent right to self-government, which right is not based on powers delegated from federal or provincial governments.[954] Again, aspects of sovereign jurisdiction of Aboriginal peoples are often stated or implied.

Also, it may be worth noting that at a meeting with tribal leaders at the White House on April 29, 1994, United States President Bill Clinton stated the following:

> "In every relationship between our people, our first principle must be to respect your right to remain who you are and to live the way you wish to live. And I believe the best way to do that is to *acknowledge the unique government-to-government relationship* we have enjoyed over time. *Today I reaffirm our commitment to self-determination for tribal*

L.J. 217 at 234. At 233, Binnie describes some arguments in favour of self-government as follows: "It would perhaps be open to the Supreme Court to say, on the basis of *Sparrow*, that *Indian Act* regulation of the exercise of powers of self-government pre-supposed the existence of a right to self-government, that the Aboriginal right to self-government was not 'merged and consolidated' with the statutory rights of a Band Council under the *Indian Act*, and that government denial of an Aboriginal right to self-government at this late date 'confuses regulation with extinguishment'."

[951] Id., at 281. See also B. Ryder, *The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations*, note 748, *supra*, at 316-317: "For First Nations people, the concept of 'aboriginal rights' entails their unsurrendered, original sovereignty as independent nations. On this view, s. 35(1) could be interpreted as an affirmation of the horizontal relationship existing between the Crown and First Nations." However, Ryder goes on to mention that this was not the orientation taken by the Supreme Court of Canada in *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075. Similarly, it can be argued that the *Royal Proclamation of 1763*, in proclaiming that the "Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed", recognized the right of Aboriginal peoples to self-government.

[952] For a legal analysis of or commentary on the Charlottetown Accord, see A. Bissonnette, *Analyse posthume d'un accord mis à mort*, (1993) 23 Recherches amérindiennes au Québec 80 at 80-87; A. Bissonnette, *Le droit à l'autonomie gouvernementale des peuples autochtones: un phénix qui renaîtra de ses cendres*, note 948, *supra*, at 6-10; M.E. Turpel, "The Charlottetown Discord and Aboriginal Peoples' Struggle for Fundamental Political Change" in K. McRoberts & P. Monahan, (eds.), *The Charlottetown Accord, the Referendum and the Future of Canada* (Toronto: Univ. of Toronto Press, 1993) 117; D. Sambo, *Indigenous Peoples and International Standard-Setting Processes: Are State Governments Listening?*, (1993) 3 Transnat'l L. & Contemp. Probs. 13; and O. Mercredi & M.E. Turpel, *In The Rapids [:] Navigating the Future of First Nations* (Toronto: Viking, 1993) at 207-228.

[953] Report of the Special Committee, *Indian Self-Government in Canada*, (Ottawa: Queen's Printer, 1983) ("Penner Report"), at 44.

[954] For example, during the negotiations leading up to the Charlottetown Accord, each of the four national Aboriginal organizations asserted that the people they represent have the inherent right to self-government, which they wanted explicitly recognized in Canada's Constitution.

governments. I pledge to fulfill the trust obligations of the Federal Government.

I vow to honour and respect tribal sovereignty based upon our unique historical relationship. And I pledge to continue my efforts to protect your right to fully exercise your faith as you wish."[955] [Emphasis added.]

At the same time, it must be recognized that there is another view that does not recognize the inherent right of Aboriginal peoples to self-government. Such rights, if they existed, are said to be extinguished. In many instances, the underlying rationale for extinguishment includes anachronistic and discriminatory doctrines and theories, such as *terra nullius*, "discovery", and primitivism, that were used to dispossess Aboriginal peoples of their fundamental human rights.[956]

Judicial decisions still partially rely on them and these same theories are utilized to deny Aboriginal sovereignty and self-government, even within the federations of Canada and the United States. As F. Jennings passionately describes in relation to self-government, "the logic is simple, faulty, and compelling as that of most other fallacies":

> "In myth, however, the Euroamerican pleads 'not guilty' to killing tribal government. He could not have committed such a crime, he says, because the victim never lived.
>
> The logic is simple, faulty, and compelling as that of most other fallacies: Civilization is that quality possessed by people with civil government: civil government is Europe's kind of government; Indians did not have Europe's kind of government; therefore Indians were not civilized. Uncivilized people live in anarchy; therefore Indians did not have any government at all. And *therefore* Europeans could not have been doing anything wrong - were in fact performing a noble mission - by bringing government and civilisation to the poor savages."[957] [Emphasis in original.]

4.6.2 Has Aboriginal sovereignty been extinguished or otherwise lost?

In response to a legal question posed by a Canadian Bar Association Committee, James Crawford has indicated that aboriginal peoples in Canada are not presently sovereign under Canadian law, *unless* their rights of self-government constitute an aboriginal or treaty right under s. 35 of the *Constitution Act, 1982*:

> "Professor Crawford replied that there could be *'no doubt that aboriginal peoples in North America exercised a sovereign right to govern themselves before European contact...'* as a matter of international law. However, this right had been lost as a matter of domestic law: (1) by the acquisition of sovereignty by Great Britain; (2) by a failure to stipulate for continuing self-government in treaties which were negotiated; and (3) by

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[955] These commitments by the President were restated by the Observer Delegation of the Government of the United States of America in a *Statement to the Working Group on Indigenous Populations*, Geneva, July 26, 1994 (at the Working Group's twelth session) (on file with the authors). Although tribal sovereignty and self-government are referred to frequently by the U.S. government and the courts, it would appear that Aboriginal sovereignty and self-government in Canada's constitutional context may prove more far-reaching. A principal reason for this view is that the U.S. plenary power doctrine has been unreasonably interpreted and applied to Aboriginal peoples by courts in the United States.

[956] See, generally, heading 5 *infra*.

[957] F. Jennings, *The Invasion of America [:] Indians, Colonialism, and the Cant of Conquest* (New York/London: W.W. Norton & Co., 1975), at 127; quoted in J.C. Mohawk, "Indians and Democracy: No one ever told us" in O. Lyons, et al., *Exiled in the Land of the Free [:] Democracy, Indian Nations, and the U.S. Constitution*, note 743, *supra*, at 55.

> the failure of Great Britain and Canada to treat the aboriginal peoples, as a matter of practice, as inherently self-governing. *As a matter of domestic law the matter of self-government would be enforceable only if it amounted to an existing aboriginal or treaty right within the meaning of the* ***Constitution Act, 1982.***"[958] [Emphasis added.]

It is the view of an increasing number of commentators that self-government continues to be a right included in s. 35 of the *Constitution Act, 1982*.[959] Nevertheless, it is worth examining the three bases given by J. Crawford for a possible loss of the sovereign right of Aboriginal peoples to be self-governing. The premises put forward are not self-evident and there is considerable room for question and doubt.

One can take issue with Crawford's first premise, since the acquisition of sovereignty by Great Britain does not necessarily mean that the sovereignty and self-government of Aboriginal nations must have been relinquished.[960] As Chief Justice Marshall of the United States Supreme Court stated in *Worcester* v. *State of Georgia*:

> "...the settled doctrine of the law of nations is, that *a weaker power does not surrender its independence - its right to self-government, by associating with a stronger, and taking its protection.* A weak state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state. Examples of this kind are not wanting in Europe. 'Tributary and feudatory states,' says Vattel, 'do not thereby cease to be sovereign and independent states, so long as self-government and independent authority are left in the administration of the state.'"[961] [Emphasis added.]

As Marshall C.J. makes clear, Aboriginal peoples seeking protection of the British Crown did not entail any "dominion of their persons" or "surrender of their national character":

> "The Indians perceived in this protection only what was beneficial to themselves - an engagement to punish aggressions on them. *It involved, practically, no claim to their lands, no dominion over their persons.* It merely bound the nation to the British crown, as a dependent ally, claiming the protection of a powerful friend and neighbour, and receiving the advantages of that protection, *without involving a surrender of their national character.*"[962]

As indicated elsewhere under this heading, the existence of non-Aboriginal or European sovereigns, did not preclude Aboriginal sovereigns from continuing to exist in Canada. Rather, there appears to have been and continues to be "contending sovereignties" in Canada, involving

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[958] Canadian Bar Association Special Committee, *Report of the Canadian Bar Association Committee on Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: Canadian Bar Association, 1988), at 33.

[959] See note 950, *supra*.

[960] For an opposing view, see R. Morin, "Droit international dans les causes nationales en droit des autochtones" in Proceedings of the 1993 Conference of the Canadian Council on International Law, *Aboriginal Rights and International Law* (Ottawa: Canadian Council on International Law, 1992) 29 at 46, where the author indicates that the establishment of French and British sovereignty did not permit an Aboriginal sovereignty to subsist.

[961] *Worcester* v. *State of Georgia*, 31 U.S. (6 (Pet.) 515, at 561. Similarly, in terms of international law, see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970). Advisory Opinion*, [1971] I.C.J. 16 at 68 (separate opinion of Vice-President Ammoun): "Sovereignty, which is inherent in every people, just as liberty is inherent in every human being, therefore did not cease to belong to the people subject to mandate. *It had simply, for a time, been rendered inarticulate and deprived of freedom of expression.*" [Official translation.] The international mandate system initially established under the League of Nations created a trust relationship in Namibia that did not result in a loss of sovereignty. Analoguously, it is argued that the act of seeking of protection from the Crown and the resulting historical fiduciary relationship between Aboriginal peoples and the Crown did not result in an implied loss or renunciation of Aboriginal sovereignty (even if the exercise of such sovereignty was in various ways disallowed).

[962] Id., at 552.

federal, provincial, and Aboriginal governments.[963]

It is also difficult to accept Crawford's second premise that Aboriginal sovereignty would have been lost on the basis that treaties between Aboriginal peoples and the Crown failed to stipulate for continuing Aboriginal self-government. There is no clear evidence that Aboriginal peoples relinquished their sovereignty and self-government by treaty or other means. As indicated in other parts of this study, it does not appear that in many treaties there was a common understanding between the parties.[964] Moreover, in some instances, there are indications of serious misrepresentation, undue influence, and even fraud on the part of the Crown's representatives.

Without clear indication that Aboriginal parties consented to relinquish their sovereignty or right of self-government in a specific treaty and without specific terms to that effect, it would be unwarranted to conclude that such a relinquishment ever occurred.

M. Asch and P. Macklem caution against assuming that there has been a transfer of sovereignty from Aboriginal peoples to the Crown:

> "...it is questionable whether treaties entered into by the Crown with native people represent formal cessions, based on the 'free will' of aboriginal nations, that cede unilateral sovereignty to the Crown...In [the aboriginal] view, treaties were produced in the spirit of 'peace and friendship' to allow for peaceful settlement of non-natives on aboriginal lands, potentially to form a political relationship between two sovereigns, perhaps even a shared form of sovereignty akin to a confederation, *but was never considered to provide for unilateral cessions of sovereignty...To speak of a meeting of the minds on the question of a formal transfer of sovereignty in this context is thus highly problematic.*"[965] [Emphasis added.]

It is worth noting that in the Alaskan case of *Johnson* v. *Chilkat Indian Village*,[966] it was held that the Chilkat Indian Village had retained its sovereignty despite the fact that the people it governed were covered by the 1971 *Alaska Native Claims Settlement Act*[967] and its purported legislative extinguishment.[968] In this regard, Von Der Heydt C.J. of the Alaska District Court provides:

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[963] A. Pratt, *Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?*, note 950, *supra*, at 192: "Aboriginal political theory typically includes the *concept of separate and parallel sovereignties of aboriginal and non-aboriginal societies*, combined with a nation-to-nation relationship, often described by analogy to the 'Two-Row-Wampum'." [Emphasis added.]

[964] One cannot conclude that mere references to "Crown sovereignty" or "subjects" of the Crown in any treaty or other instrument connotes a relinquishment of Aboriginal sovereignty by the Aboriginal peoples concerned, since it is not clear that the legal consequences of such terminology was ever explained to or agreed by such peoples. See, for example, *A.G. Quebec* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1073 per Lamer J. (on behalf of the Supreme Court): "*I readily accept that the Hurons were probably not aware of the legal consequences*, and in particular of the right to occupy to the exclusion of others, which the main European legal systems attached to the concept of private ownership." [Emphasis added.]

[965] M. Asch & P. Macklem, *Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow*, (1991) 29 Alta. L.R. 498, at 513.

[966] *Johnson* v. *Chilkat Indian Village*, (1978) 457 F. Supp. 384 (U.S. Dist. Ct., D. Alaska), per Von Der Heydt C.J.

[967] *Alaska Native Claims Settlement Act*, (1982) 43 U.S.C. §§ 1601-1628.

[968] § 1603 provides: "(a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any. (b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland an offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished. (c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished."

> "...the Chilkat Indian Village is *protected by sovereign immunity* and cannot be sued without its consent."[969] [Emphasis added.]

The Chief Justice adds that "it would be hard to imagine a more appropriate situation to apply the 'well-established policy-rule that the courts will not interfere with the internal workings of Indian tribes'[970]."[971] This case and the principles it upholds provide further support to the Aboriginal peoples' position that their sovereignty was never renounced or otherwise lost through purported surrender or extinguishment clauses.

Further, it is critical to consider the significance of treaties between Aboriginal peoples and the Crown from the perspective and understanding of the peoples concerned.[972] As A. Pratt points out, Aboriginal peoples viewed treaties as "compacts" to share sovereignty and not to cede it:

> "To [Aboriginal peoples], the legitimacy of the Crown's sovereignty and ultimate ownership remains in question until a treaty has been made which secures and defines that relationship by consent and pursuant to appropriate formalities. *The treaties are invariably seen in any event as compacts to share sovereignty and ownership, not to cede them.*"[973] [Emphasis added.]

As the following statement in the *Report of the British Columbia Task Force* might suggest, the exercise of their treaty-making capacity by Aboriginal peoples is an indication of their inherent sovereignty and not its relinquishment:

> "*First Nations, exercising their inherent sovereign authority, have a long history of concluding treaties with Canada.* But over the years, aboriginal and treaty rights have often not been honoured by the Crown."[974] [Emphasis added.]

In regard to Crawford's third premise, it cannot be said that any failure of Great Britain and Canada to treat Aboriginal peoples, as a matter of practice, as inherently self-governing would constitute a loss of Aboriginal sovereignty.[975] In other words, a denial of *de facto* sovereignty is not automatically a loss of *de jure* sovereignty. First, as the Royal Commission on Aboriginal Peoples has indicated, Aboriginal peoples have not relinquished their right of self-government.[976] Moreover, the practice of Great Britain, as reflected in the *Royal Proclamation of 1763*, is in the view of this study, to recognize and protect the liberty and autonomy of

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[969] *Johnson* v. *Chilkat Indian Village*, (1978) 457 F. Supp. 384 (U.S. Dist. Ct., D. Alaska) at 387.

[970] *Tewa Tesuque* v. *Morton*, (1974) 498 F.2d 240 at 243.

[971] *Johnson* v. *Chilkat Indian Village*, (1978) 457 F. Supp. 384 at 389.

[972] Treaties must be construed liberally "in the sense in which they would naturally be understood by the Indians": see *Jones* v. *Meehan*, 175 U.S. 1 (1899), affirmed in *Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29, at 36. See also *Simon* v. *The Queen*, [1985] 2 S.C.R. 387, at 402 (per Dickson C.J.).

[973] A. Pratt, *Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?*, note 950, *supra*, at 192.

[974] *Report of the British Columbia Claims Task Force* (Vancouver: June 28, 1991) at 17.

[975] An important distinction is made between "domination" of Aboriginal sovereignty and "supersession" or "extinguishment" in A. Pratt, *Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?*, note 950, *supra*, at 183: "...the aboriginal peoples have been colonized. Because *their sovereignty has been dominated - one need not say superseded or extinguished - by colonizing powers*, they have lost the effective use of their institutions, at least in the eyes of the dominant legal and political order." [Emphasis added.]

[976] Royal Commission on Aboriginal Peoples, *Partners in Confederation[:] Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services, 1993), at 35-36: "By entrenching Aboriginal and treaty rights in the Constitution, section 35(1) ensured that the right of self-government would henceforth enjoy a substantial degree of immunity from federal and provincial legislation, except where the legislation could be justified under a strict constitutional standard."

Aboriginal peoples in their territories. In this regard, the Royal Commission concludes:

> "In summary, the Proclamation portrays Aboriginal nations as *autonomous political units* living under the Crown's protection, *holding inherent authority over their internal affairs and the power to deal with the Crown by way of treaty and agreement*. It views the links between Aboriginal peoples and the Crown as broadly 'confederal'."[977] [Emphasis added.]

Second, when non-Aboriginal governments in Canada did "fail to treat Aboriginal peoples as self-governing, as a matter of practice", such policies or actions were consistently taken in a context of subjugation, exploitation and domination.[978] Rather, than provide the protection promised Aboriginal peoples in the *Royal Proclamation of 1763*, the *Rupert's Land and North-Western Territory Order*,[979] and their treaties, the Crown in Canada engaged in repeated policies of assimilation and colonialism[980] to the severe detriment of Aboriginal peoples.[981]

Since the assimilation of indigenous peoples has been repudiated[982] and colonialism has been severely denounced[983], practices based on these policies can hardly have legitimacy.[984]

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[977] Royal Commission on Aboriginal Peoples, *Partners in Confederation[:] Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services, 1993), at 17.

[978] See *Declaration on the Granting of Independence to Colonial Countries and Peoples*, U.N.G.A. Resolution 1514 (XV), 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684, adopted on December 14, 1960, para. 1: "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation."

[979] Reference is being made here to the terms and conditions related to the *Order*. See discussion under sub-heading 2.3 *supra*.

[980] See C. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, note 804, *supra*, at 297: "...indigenous peoples have actually been colonized and subjugated by foreign peoples, both in the traditional sense (externally) as well as in a not-so-traditional sense (internally)."; R. Stavenhagen, *The Ethnic Question: Conflicts, Development, and Human Rights* (Tokyo: United Nations University Press, 1990), at 118: "The subordination of indigenous peoples to the nation-state, their discrimination and marginalization, has historically, in most cases, been the *result of colonization and colonialism*. Within the framework of politically independent countries, the situation of indigenous and tribal peoples may be described in terms of *internal colonialism*." [Emphasis added.] In regard to internal colonialism, see also M. Somarajah, *Internal Colonialism and Humanitarian Intervention*, (1981) 11 Ga. J. Int'l & Comp. L. 45; G. Anders, *Internal Colonization of Cherokee Americans*, (1971) 10 Dev. & Change 41.

[981] In relation to Aboriginal governments, see B. Ryder, *The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations*, note 748, *supra*, at 316: "Beginning with the 1869 *Act for the Gradual Enfranchisement of Indians* [S.C. 1869, c. 6] and the *Indian Act, 1876* [S.C. 1876, c. 18], the Dominion government sought to interfere with and ultimately replace First Nations' governments by defining and imposing the band council system."

[982] See *Indigenous and Tribal Peoples Convention, 1989* (No. 169), where the preamble speaks of the appropriateness of adopting new standards "*with a view to removing the assimilationist orientation of the earlier standards*". [Emphasis added.] In *Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, Report VI (1) (Geneva: International Labour Office, 1987) at 107, para. 46, it is indicated that an I.L.O. Meeting of Experts had concluded in September 1986 that the application of integrationist principles to indigenous and tribal peoples is "*destructive in the modern world*". See also *Draft United Nations Declaration on the Rights of Indigenous Peoples*, in E.-I. Daes, Chairperson/Rapporteur, *DISCRIMINATION AGAINST INDIGENOUS PEOPLES [:] Report of the Working Group on Indigenous Populations on its eleventh session*, E/CN.4/Sub.2/1993/29, 23 August 1993, 50 (Annex 1), article 7, where acts of assimilation imposed by legislative, administrative or other measures is directly linked to ethnocide and cultural genocide.

See also *La Presse*, November 2, 1993, at B-10, where R. Dussault and G. Erasmus, Co-Chairs of the Royal Commission on Aboriginal Peoples, are quoted as having publicly declared that "Le moment est venu de bannir les principes d'assimilation et d'exploitation qui ont régi les rapports des gouvernements avec les autochtones pendant plus d'une siècle". Unofficial English translation: "The time has come to banish the principles of assimilation and exploitation which have regulated the relations of governments with Aboriginal peoples for more than a century".

[983] M. Pomerance, *Self-Determination in Law and Practice* (The Hague/Boston: Martinus Nijhoff Publishers, 1982), at 106, n. 260, where it is indicated that the assertion that colonialism was a "crime" was first made by the General Assembly in Resolution 2621 (XXV), October 12, 1970 (adopted by a vote of 86-5-15). For a discussion of the international norms prohibiting colonialism, see sub-heading 8.1 *infra*.

As a result, such practices cannot be viewed as eliminating in a legal sense the sovereign status of Aboriginal peoples.

If Aboriginal peoples did not surrender or otherwise lose their sovereignty, then efforts are required to unequivocally recognize and provide for Aboriginal sovereignty. R. Williams suggests that an understanding of the ideological bases of early government policies pertaining to indigenous peoples in the Americas, and how such policies were unjustly used, underlines the urgent need and legitimacy for reconsidering the doctrines on which aboriginal status is based today:

> "By revealing the ideological bases of our earliest conceptions of the tribe, and *how those conceptions helped rationalize the iniquitous treatment the Indian received* at the hands of his European conquerors, it may be possible to demonstrate the *urgent need to rethink the doctrinal foundations of our conceptions respecting the status of the tribe in modern society.*"[985] [Emphasis added.]

In ensuring recognition and exercise of Aboriginal sovereignty, P. Macklem indicates that the judiciary has a significant role:

> "*The judiciary must begin to construct principles that accept the fact that native people did not surrender their sovereignty or pre-existing forms of government by the mere fact of European settlement.* The law governing the distribution of legislative authority over native people ought to eliminate the interpretive obstacles currently in place that permit extensive federal regulation of native people absent native consent, and construct principles governing the distribution of authority to allow for the ability of native people themselves to pass laws governing their individual and collective lives."[986] [Emphasis added.]

It is clear that the notion of Aboriginal sovereignty has neither been fully understood nor fairly accommodated in federations such as Canada. It is also clear that negotiated solutions, based on equality and partnership, may in most instances be the most productive course to follow.

However, the results of such negotiations are only likely to be productive, if non-Aboriginal governments are prepared to shed existing notions of dominance and perceived power over Aboriginal peoples. In meeting this challenge, it is worth noting the words of B. Slattery when he states:

> "...native American peoples held sovereign status and title to the territories they occupied at the time of European contact and *that fundamental fact transforms our understanding of everything that followed.*"[987] [Emphasis added.]

In conclusion, it cannot be said that any failure of Great Britain and Canada to treat Aboriginal peoples, as a matter of practice, as inherently self-governing would constitute a loss of Aboriginal sovereignty. In other words, a denial of *de facto* sovereignty is not automatically a loss of *de jure* sovereignty.

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[984] See, for example, *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia), at 19, per Brennan J.:"[N]o case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system."

[985] R. Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, (1983) 57 So. Calif. L. Rev. 1, at 7-8.

[986] P. Macklem, *First Nations Self-Government and the Borders of the Canadian Legal Imagination*, (1991), 36 McGill L. R. 382, at 418. For a more recent statement of a similar nature, see P. Macklem, "Ethnonationalism, Aboriginal Identities, and the Law" in M. Levin, (ed.), *Ethnicity and Aboriginality: Case Studies in Ethnonationalism* (Toronto: University of Toronto Press, 1993) 9 at 19.

[987] B. Slattery, *Aboriginal Sovereignty and Imperial Claims*, note 737, *supra*, at 690.

In assessing notions of British or Canadian sovereignty, it is increasingly being recognized that there continues to exist "contending sovereignties" in Canada that include Aboriginal peoples. The notion of contending sovereignties is a necessary and positive dynamic in a federal state. If "contending sovereignties" (federal/provincial/Aboriginal) do exist in Canada, then the capacity of non-Aboriginal governments to extinguish aboriginal rights based on the principle of parliamentary sovereignty must be revisited. Further, in formulating alternative strategies to extinguishment of aboriginal status and rights, the appropriate recognition of Aboriginal sovereignty should be an important element in the overall conceptual framework.

4.6.3 Aboriginal peoples, self-determination and extinguishment in the context of Québec secession

> "...l'égalité de droit des peuples autochtones et du peuple québécois doit être établie. Leur droit respectif à disposer d'eux-mêmes, à choisir librement leur statut politique et à assurer aussi librement leur développement économique, social et culturel doit également être affirmé avec conviction et sans reserve."[988]
>
> Groupe de réflexion sur les institutions et la citoyennité (GRIC), 1994

> "The ultimate affront would be for us Canadians to deny that the Indians are a people. *They are a people, according to any standard.* They are therefore entitled to self-determination."[989] (Emphasis added.)
>
> Pierre de Bellefeuille, former Parti Québécois Member of the National Assembly, 1978

It is beyond the scope of this study to examine in detail the issue of the right of Aboriginal peoples in Québec to self-determination, in the context of Quebec secession.[990]

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[988] Groupe de réflexion sur les institutions et la citoyenneté (GRIC), "Québécois-Autochtones: il faut relever le défi de la reconnaissance mutuelle", *La Presse*, April 2, 1994, at B3: "...the equality of the right of Aboriginal peoples and the Québec people must be established. Their respective right to self-determination, to freely choose their political status and to assure as freely their economic, social and cultural development must be equally affirmed with conviction and without reservation." [Unofficial translation.]

[989]. Pierre de Bellefeuille, "If Quebec rates sovereignty, why not Indians?" in the Montreal *Gazette*, September 7, 1978, at 9.

[990] In regard to Aboriginal peoples and their right to self-determination (including issues of secession), see M.E. Turpel, "Does the Road to Québec Sovereignty Run Through Aboriginal Territory?" in D. Drache & R. Perrin, (ed.), *Negotiating With a Sovereign Québec*, note 807, *supra*; M.C. Lâm, *Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination*, note 733, *supra*; D. Turp, "Quebec's Democratic Right to Self-Determination" in S. Hartt *et al.*, (ed.), *Tangled Web: Legal Aspects of Deconfederation*, note 807, *supra*, 99; S.J. Anaya, *A Contemporary Definition of the International Norm on Self-Determination*, (1993) 3 Transnat'l L. & Contemp. Probs. 131; E.I. Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination*, (1993) 3 Transnat'l L. & Contemp. Probs. 1; C. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, note 804, *supra*; Grand Council of the Crees (of Quebec), *Submission: Status and Rights of the James Bay Crees in the Context of Quebec's Secession from Canada* (Submission to the U.N. Commission on Human Rights, February 1992) (on file with authors); M. Coon Come, "The Crees, self-determination, secession and the territorial integrity of Quebec" in *The Network*, No. 5 (May 1992) (Newsletter of the Network on the Constitution).

In regard to the specific question of Quebec session, see G. Marchildon & E. Maxwell, *Quebec's Right of Secession Under Canadian and International Law*, [1992] 32 Virginia J. Int'l L. 583; D. Turp, "Le droit de sécession: l'expression du principe démocratique" in A.-G. Gagnon et F. Rocher, *Répliques aux détracteurs de la souveraineté du Québec* (Montréal: VLB éditeur, 1992); D. Turp, "L'émergence de nouveaux états et le droit des peuples à disposer d'eux-mêmes" in

However, some discussion of this issue is warranted here because the matter has been linked to the question of extinguishment. In particular, "extinguishment and surrender clauses" pertaining to the James Bay and Northern Québec Agreement and related legislation are being invoked by some Québec politicians[991] and commentators[992] as a reason for denying Aboriginal peoples in Québec the right of self-determination.

As indicated below, the right of self-determination is not being invoked by Aboriginal peoples in Québec to claim a right to secede, but as a right to choose to remain in Canada in the event of a unilateral declaration of independence by Québec. Moreover, in the view of most jurists,[993] the right to self-determination does not include a right to secede from independent countries except under exceptional circumstances.[994]

In the view of this study, Aboriginal peoples in Québec constitute contending sovereignties under Canada's constitutional framework with guaranteed aboriginal or treaty rights. How then could the constitutional status and rights of Aboriginal peoples be altered in the context of Québec secession without their consent? Also, if any "extinguishment and surrender clauses" in land claims agreements were negotiated in a federalist context, how can it be claimed that such clauses eliminate any right of Aboriginal peoples to determine their own future? Further, there is no indication that the human right to self-determination can be denied or eliminated by a purported extinguishment clause.

Parti Québécois Member of the Québec National Assembly, Jacques Brassard, views the "surrender" clause (s. 2.1)[995] in the James Bay and Northern Québec Agreement as not excluding negotiations with Aboriginal peoples on governmental autonomy within Québec, but

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Proceedings of the 1992, Conference of the Canadian Council of International Law, *State Sovereignty: The Challenge of a Changing World* (Ottawa: Canadian Council on International Law, 1992) at 25; A. Buchanan, *Secession [:] The Morality of Political Divorce From Fort Sumpter to Lithuania and Quebec* (Boulder, Colorado: Westview Press, 1991); J. Brossard, *L'accession à la souveraineté et le cas du Québec* (Montréal: Les Presses de l'Université de Montréal, 1976); J. Brossard, *Le droit du peuple québécois à disposer de lui-même au regard de droit international*, (1977) 15 A.C.D.I. 91; D. Turp, *Le droit de sécession en droit international public*, [1982] C.Y.I.L. 24; J. Woehrling, "Les aspects juridiques de la redéfinition du statut politique et constitutionnel du Québec" in Commission sur l'avenir politique et constitutionnel du Quebec, *Éléments d'analyse institutionnelle, juridique et démolinguistique pertinents à la révision du statut politique et constitutionnel du Québec*, Document de travail, no. 2 (Québec: Assemblée nationale du Québec, 1991); S. Williams, *International Legal Effects of Secession by Quebec* (North York, Ontario: York University Centre for Public Law and Public Policy, 1992); A. Buchanan, "Quebec, Secession and Aboriginal Territorial Rights" in *The Network*, No. 3 (March 1992) (Newsletter of the Network on the Constitution); D. Cliche, "The Sovereignty and Territorial Integrity of Quebec" in *The Network*, No. 5 (May 1992) (Newsletter of the Network on the Constitution); W. Nicholls, "Who's seceding from whom?", *the Nation*, March 31, 1994, p. 10 (interview with Grand Chief Matthew Coon Come, Grand Council of the Crees (of Quebec)); M. Coon Come, "Cree will maintain control of their land" in *Ottawa Citizen*, June 5, 1994, p. A9. Many of these authors also discuss the issue of Aboriginal peoples' right to self-determination in the context of Québec secession.

[991] See, for example, the comments of Parti Québécois leader, Jacques Parizeau, on this issue in J. Parizeau, "Frontières d'un Québec souverain: la situation est 'on ne peut plus claire'" in *La Presse*, May 25, 1994, p. B3; and M. Fontaine, "Parizeau ne prévoit pas obstacle à la reconnaissance internationale du Québec" in *La Presse*, January 24, 1991, at B-1.

[992] See D. Cliche, "La souveraineté du Québec et les nations autochtones", *L'Action nationale*, vol. LXXXII, April 1992, no. 4, 465, at 467-471, where the author, a member of the Parti Québécois, claims that the right of self-determination of Québec is not in doubt under either Canadian or international law. At the same time, the "surrender" clause in the James Bay and Northern Quebec Agreement is invoked in coming to the eventual conclusion that the rights of Aboriginal peoples must be exercised within Québec and cannot affect Québec's territorial integrity. Similar arguments have been made in D. Cliche, "Quebec's existing borders will remain" in *Ottawa Citizen*, June 5, 1994, p. A9.

[993] See, for example, T. Franck, "Postmodern Tribalism and the Right to Secession" in C. Brölmann, R. Lefeber, M. Zieck, (eds.), *Peoples and Minorities in International Law* (Boston: Kluwer Academic Publishers, 1993) 3 at 16.

[994] Exceptional circumstances that may give rise to a right to secede include persistent and grave human rights violations (including denial of self-determination within existing states), intolerable discrimination and other forms of oppression.

[995] Section 2.1 provides: "In consideration of the rights and benefits herein set forth in favour of the James Bay Crees and the Inuit of Quebec, the James Bay Crees and the Inuit hereby cede, release, surrender and convey all their Native claims, rights, titles and interests, whatever they may be, in and to land in the Territory and in Quebec, and Quebec and Canada accept such surrender."

would preclude external self-determination:

> "[L'article 2.1 de la Convention] n'exclut pas les négotiations pour une certaine autonomie gouvernementale. Mais pour *qu'on puisse imaginer un État souverain autochtone, à même une partie du territoire du Québec, je pense que ça, c'est exclu.*"[996] [Emphasis added.]

However, as D. Turp[997] suggests, arguments based on "surrender and extinguishment" clauses in land claims agreements are not relevant in determining the international right of Aboriginal peoples to self-determination:

> "This argument based on territorial rights as established by domestic public law is, however, *hardly convincing insofar as the right to self-determination is claimed under international law*, which does not necessarily take domestic law into account if such law is an obstacle to the exercise of a people's right to self-determination."[998] [Emphasis added.]

Similarly, the Grand Council of the Crees provides:

> "If *JBNQA* is an internal document subject solely to the laws of Canada, the Agreement would no longer have any validity in the context of a unilateral secession by Quebec. Under these circumstances, **Quebec would be relying solely on international law for the validity or legitimacy of its action and the terms of *JBNQA* or any other internal document within the Canadian context would no longer apply.**"[999] [Emphasis in original.]

Even under domestic law, it would be most difficult to argue that s. 2.1 of the James Bay and Northern Québec Agreement takes away any right of self-determination of Aboriginal peoples. First, the Agreement was clearly negotiated in a federalist context[1000] which was agreed to continue indefinitely by all parties. In particular, the government and National Assembly of Quebec gave their explicit consent to this ongoing federal arrangement. In this regard, the Grand Council of the Crees indicate:

> "*By agreeing to the terms and conditions in JBNQA in 1975, Quebec freely opted for a*

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[996] Assemblée Nationale, *Journal des débats*, Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté, 17 Oct. 1991, No. 6, p. CEAS-162. Unofficial English translation: "[Section 2.1 of *JBNQA*] does not exclude possible negotiations with the aboriginal peoples for a certain governmental autonomy. But *that one might imagine a sovereign aboriginal State, even on a part of the territory of Quebec, I think that that is excluded.*" [Emphasis added.]

[997] Professor Turp is currently legal advisor to the Bloc Québécois (BQ), a separatist political party at the federal level that is currently acting as the Official Opposition in Parliament. It is significant that the legal opinion of this key advisor to the BQ fundamentally differs from that of BQ leader, leader Lucien Bouchard, and the BQ party in regard to Aboriginal peoples and self-determination issues.

[998] D. Turp, "Quebec's Democratic Right to Self-Determination" in S. Hartt *et al.*, (ed.), *Tangled Web: Legal Aspects of Deconfederation*, note 807, *supra*, at 119-120.

[999] Grand Council of the Crees (of Quebec), *Submission: Status and Rights of the James Bay Crees in the Context of Quebec's Secession from Canada*, note 990, *supra*, at 115. In addition, the Crees maintain at 117 - 124 that, under international law, unilateral alteration of the terms of the Agreement by Québec would violate a range of fundamental legal principles.

[1000] See, for example, House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development, *Bill C-9, James Bay and Northern Quebec Native Claims Settlement Act*, Issue No. 21, March 8, 1977, at 20. The Minister of Indian and Northern Affairs, Warren Allmand, was asked by the Standing Committee whether he and his officials "have concerned [themselves] with the hypothesis of the separation of Quebec from Canada and what the value of this Agreement would be if that were the case". The Minister responded: "I do not think as a department we have, because as the Minister I do not feel that is going to happen, and I am from Quebec. The Agreement was arrived at before, much before, the [Parti Québécois] election of November 15 [1976]..." See also N. Rouland, *Les Inuit du Nouveau-Québec et la Convention de la Baie James* (Québec: Association Inuksiutiit & Centre d'études nordiques de l'Université Laval, 1978) at 170, where the author concludes that it is certain that the federal government never envisaged the idea of the independence of Québec during all of the negotiations.

> *federalist arrangement that is intended to continue indefinitely (unless the aboriginal and other interested parties consent to other arrangements).* This free choice by the Quebec government constituted a further exercise of its right to internal self-determination, supplementing its earlier act of accepting the 1912 boundaries extension as a province in Canada.
>
> *Under Canadian law, Quebec cannot unilaterally undertake to fulfill all federal obligations when it becomes a sovereign state.*[1001] The James Bay Crees signed the Agreement in the context of federalism and we derive particular safeguards from having obligations met by two levels of government..."[1002] [Emphasis added.]

The current PQ government in Québec explicitly acknowledges that "we will not and we cannot unilaterally amend the James Bay and Northern Québec agreement nor can we modify the existing legislation applicable to the native nations" without the consent of the Aboriginal parties.[1003] However, the government seems to believe that Québec can unilaterally convert the JBNQA to a legal arrangement that excludes one of the key government parties to this land claims treaty without "modifying" the Agreement. In the event that Québec becomes an independent state, government spokesperson, D. Cliche provides:

> "Existing Canadian obligations under this treaty will be assumed and taken over by the Quebec government."[1004]

In the view of this study, it cannot be argued that the Aboriginal parties to the JBNQA would be in exactly the same position as they currently are under the Agreement, should a sovereign Quebec unilaterally assume all federal government obligations under this treaty. Clearly, the legal rights and position of the Aboriginal parties would be fundamentally different if the federal context were to be eliminated and the treaty were applied in the framework of a unitary Québec state. In other words, the Québec government cannot claim to respect the principle of Aboriginal consent[1005] to any treaty amendments, and at the same time claim that, as long as a sovereign Québec assumes the treaty obligations of the federal government party, there has been no modification of the existing terms and conditions of the treaty.

Second, the James Bay Crees maintain that the Agreement was negotiated under duress.[1006] If substantiated,[1007] this could serve to vitiate the notion of "free and informed

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[1001]. Cree rights as provided for in the JBNQA treaty can only be amended with Cree consent. See JBNQA, s. 2.15: "The Agreement may be, from time to time, amended or modified in the manner provided in the Agreement, or in the absence of such provision, with the consent of all the Parties." See also the last provision of each of the individual chapters of the Agreement, which provides for the consent of the "interested Native party" affected (i.e. Cree or Inuit).

[1002] Id., at 116.

[1003] E. Thompson, "Cliche moves to reassure aboriginals" in the Montreal *Gazette*, October 15, 1994, at A7, where D. Cliche, Premier Jacques Parizeau's parliamentary secretary for Aboriginal affairs, is quoted.

[1004] Id.

[1005] D. Cliche not only indicates that Aboriginal consent is required in respect to amendments to their treaties, but also for any constitutional amendments relating to them. In this regard, see E. Thompson, "Cliche moves to reassure aboriginals" in the Montreal *Gazette*, October 15, 1994, at A7, where D. Cliche is quoted as follows: "I agree that *native nations' consent is needed to amend any constitutional aspect or treaties related to them.*" [Emphasis added.] Any secession by Québec would constitute a significant alteration to the Canadian Constitution, including those aspects pertaining to Aboriginal peoples. Therefore, it is difficult to see how Québec could respect the principle of consent of Aboriginal peoples in regard to constitutional amendments relating to them, and yet claim that secession could be accomplished without Aboriginal consent.

[1006] Id., at 96-97. See also Grand Council of the Crees (of Quebec), *Presentation to the Royal Commission on Aboriginal Peoples*, Montreal, November 18, 1993, at 8-10; *Statement of Chief Ted Moses on behalf of the Grand Council of the Crees (of Quebec)*, delivered at the United Nations Working Group on Indigenous Populations, Geneva, Tenth Session, July 20-31, 1992, where it is declared: "It is the position of the Grand Council of the Crees that Cree rights have never been surrendered in James Bay, and that our surrender was obtained under duress."; P.A. Cumming, *Canada: Native Land Rights and Northern Development* (prepared for International Work Group for Indigenous Affairs, Copenhagen, IWGIA Document Series, No. 26, 1977), at 31-32: "The James Bay settlement is simply *a forced purchase, an 'offer that could not be refused'...*" [Emphasis added.]; and R. Mainville, *Visions divergentes sur la compréhension de la Convention de la Baie*

consent" by the Crees and put into doubt the validity of the Agreement.[1008] Third, the Crees maintain that the "surrender and extinguishment" clauses were imposed on them[1009] and such actions by the governments of Canada and Quebec constitute a violation of their respective fiduciary duties.[1010]

Fourth, it is evident that there exists no consensus on what these clauses entail. Judicial rules of interpretation require that "ambiguities in the interpretation of treaties and statutes relating to Indians...be resolved in favour of the Indians, and...aboriginal understandings of words and corresponding legal concepts in Indian treaties are to be preferred over more legalistic and technical constructions."[1011] That is, treaties must be construed liberally "in the sense in which they would naturally be understood by the Indians".[1012]

Moreover, treaties are to be interpreted so as not to bring dishonour to the Crown and "no appearance of sharp dealing should be sanctioned" by the courts.[1013] Presently, it cannot be argued that the "surrender and extinguishment" provisions relating to the James Bay and Northern Québec Agreement were intended and understood by the Aboriginal peoples concerned to apply to a secessionist context, even though the Agreement was negotiated and treaty rights subsequently guaranteed[1014] in a clearly federalist framework. Such a distorted interpretation would best be described as "sharp dealing" and would bring dishonour upon the Crown.

Fifth, the James Bay Crees take the position that the James Bay and Northern Québec

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James et du Nord québécois, (1993) 23 Recherches Amérindiennes au Québec 69, at 79.

[1007] See discussion under sub-heading 11.5 *infra*, where it is concluded that the Aboriginal parties involved in the James Bay and Northern Quebec negotiations were subjected to various forms of coercion or duress.

[1008] G.H.L. Fridman, *Restitution*, 2nd ed. (Toronto: Carswell, 1992), at 112: "...the victim has intentionally submitted to the demands of the recipient from the realisation that there is no other practical choice open to him. This is the thread of the principle that links the early law of duress (threat to life or limb) with later developments, when the law has come to recognize as duress,...the threat to property..."; G.H. Treitel, *The Law of Contract*, 8th ed. (London: Sweet & Maxwell, 1991), at 366: "As in the case of misrepresentation, it is not necessary to show that duress was the sole cause inducing the contract. It is enough if it was *an* inducement; and once the fact of duress is established the burden is on the party exerting the duress to show that it did not in fact induce the contract." In G.H.L. Fridman, *The Law of Contract in Canada*, 2nd ed. (Toronto: Carswell, 1986), at 295: "...there are indications that the ultimate scope of the concept of duress is still undetermined." See also "practical compulsion" and "economic duress" in Fridman, *Restitution*, *supra*, at 128-129.

[1009] Grand Council of the Crees (of Quebec), *Presentation to the Royal Commission on Aboriginal Peoples*, Montreal, November 18, 1993, at 10.

[1010] See discussion under sub-heading 6.4 below.

[1011] *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85, at 98 (per Dickson C.J.), affirming *Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29.

[1012] *Jones* v. *Meehan*, 175 U.S. 1 (1899), affirmed in *Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29, at 36. See also *Simon* v. *The Queen*, [1985] 2 S.C.R. 387, at 402 (per Dickson C.J.). For, a contrary view that seeks to distinguish "modern" treaties from historic ones on the basis of an absence of vulnerability of Aboriginal peoples in the contemporary context, see *A.G. Québec* v. *Eastmain Band*, [1993] 1 F.C. 501 (Fed. C.A.) at 518-519, per Décary J.A. Further, in *Howard* v. *The Queen*, [1994] 2 S.C.R. 299 (S.C.C.) at 306, Gonthier J. indicated that a 1923 Treaty involving the Hiawatha Band in Ontario "does not raise the same concerns as treaties signed in the more distant past or in more remote territories where one can legitimately question the understanding of the Indian parties".

[1013] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1107 per Dickson C.J.; see also *R.* v. *Taylor* and *Williams*, (1981), 34 O.R. (2d) 360 (C.A.); *R.* v. *Batisse*, (1977), 19 O.R. (2d) 145 (Ont. Dist. Ct.); ; *R.* v. *White* and *Bob*, (1965), 52 D.L.R. (2d) 481 (S.C.C.), affirming 52 W.W.R. 193 (per Norris J.A.); *R.* v. *George*, [1966] S.C.R. 267 (Cartwright J. dissenting). No sharp dealing on the part of the Crown's representatives is also enunciated in *Howard* v. *The Queen*, [1994] 2 S.C.R. 299 (S.C.C.) at 305, per Gonthier J. In *A.G. Québec* v. *Eastmain Band*, [1993] 1 C.F. 501 (Fed. Ct. C.A.) at 518-519, Décary J.A. cites with approval *New Zealand Maori Council* v. *Attorney-General*, [1987] 1 N.Z.L.R. 641 (N.Z. C.A.) at 644, where it is said that "the duty to act reasonably and in the utmost good faith is not one-sided" and applies to the Aboriginal parties to a treaty as well as the Crown.

[1014] Treaty rights were subsequently guaranteed in the *Constitution Act, 1982*, s. 35(1).

Agreement constitutes in key respects a "denial of Cree self-determination"[1015] and, in at least in the case of future hydroelectric projects, permits the cultural genocide of the Aboriginal peoples affected[1016]. If Aboriginal self-determination has been or is in fact being denied, this reinforces the claims of Aboriginal peoples to external self-determination under international law.[1017]

Generally, the right of Aboriginal peoples to self-determination is explicitly recognized in the draft *United Nations Declaration on the Rights of Indigenous Peoples*.[1018] At the U.N. Meeting of Experts in Nuuk, Greenland on September 24-28, 1991, the preamble of the "Conclusions and Recommendations" provides in part as follows:

> "The Meeting of Experts shares the view that *indigenous peoples constitute distinct peoples and societies, with the right to self-determination*, including the right to autonomy, self-government, and self-identification."[1019] [Emphasis added.]

In Canada, the 1991 Report of the Aboriginal Justice Inquiry of Manitoba concludes:

> "It is our assessment that *Aboriginal rights to self-determination must be acknowledged openly and freely by all levels of government*..."[1020] [Emphasis added.]

P. Macklem states:

> "...aboriginal nations have an 'inherent' right to self-determination and self-government, and that this inherent right must find both practical and constitutional recognition by the

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[1015] Grand Council of the Crees (of Quebec), *Submission: Status and Rights of the James Bay Crees in the Context of Quebec's Secession from Canada*, note 990, *supra*, at 103-114. See also *Grand Council of the Crees* v. *Government of Canada et al.*, decision of the International Water Tribunal, Amsterdam, February 20, 1992 (on file with the authors), para. 1: "...The jury recognizes the James Bay and Northern Quebec Agreement, *but it doubts whether such a contract adequately reflects the aspirations of the Crees to self-determination and control over resources*." This decision is reproduced in Second International Water Tribunal, *Dams* (Utrecht, The Netherlands: International Books, 1994) (Casebook), at 294 *et seq.*

[1016] Grand Council of the Crees (of Quebec), *Submission: Status and Rights of the James Bay Crees in the Context of Quebec's Secession from Canada*, note 990, *supra*, at 108, where reference is made to s. 8.1.3 of the Agreement prohibiting Cree and Inuit opposition to such projects based on sociological factors or impacts. See also Grand Council of the Crees (of Quebec), *Response to Dartmouth College Council on Investor Responsibility [:] James Bay Hydroelectric Project*, November 1992, (on file with authors) at 42-44.

[1017] S.J. Anaya, *A Contemporary Definition of the International Norm on Self-Determination*, (1993) 3 Transnat'l L. & Contemp. Probs. 131, at 161: "...sovereignty principles and human rights precepts, including the right to self-determination, work in tandem to promote a stable and peaceful world. *Where there is a trampling of self-determination, however, the presumption in favour of non-intervention, territorial integrity, or political unity of existing states may be offset to the extent required by an appropriate self-determination remedy*." And at 162: "*An extreme form of such denial is where a government has extended its rule over an inhabited territory without regard for the wishes of the people already living in the territory*. In such a situation, whether or not there was a prior sovereignty in the territory is not necessarily a controlling factor; what matters is that human beings, however organized (or not organized), were not sufficiently consulted. This...is...characteristic of the past of other groups now denominated in international discourse as 'indigenous'..." [Emphasis added.] See also D. Turp, "Quebec's Democratic Right to Self-Determination" in S. Hartt *et al.*, (ed.), *Tangled Web: Legal Aspects of Deconfederation*, note 807, *supra*, at 118.

[1018] Draft *United Nations Declaration on the Rights of Indigenous Peoples*, in E.-I. Daes, Chairperson/Rapporteur, *DISCRIMINATION AGAINST INDIGENOUS PEOPLES [:] Report of the Working Group on Indigenous Populations on its eleventh session*, E/CN.4/Sub.2/1993/29, 23 August 1993, 50 (Annex I), article 3. For a contrary view on the right to self-determination of Aboriginal peoples, see N. Finkelstein & G. Vegh, *The Separation of Quebec and the Constitution of Canada* (North York, Ontario: York University Centre for Public Law and Public Policy, 1992). However, it would appear at p. 63 that their position is at least partially premised on the view that "international law does not provide indigenous peoples, as a class, with a right to self-determination."

[1019]. United Nations Meeting of Experts, *The Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government*, Nuuk, Greenland, September 24-28, 1991.

[1020]. Report of the Aboriginal Justice Inquiry of Manitoba, *The Justice System and Aboriginal People* (Winnipeg, Manitoba: Queen's Printer, 1991), vol. 1, at 143-144.

Canadian state."[1021]

J. Woodward provides:

> "It is notable that the International Covenant addresses the rights of 'peoples', just as s. 35(1) of the Constitution Act, 1982 guarantees rights for Canada's aboriginal 'peoples'. Canada should consider the possibility that, *by signing the International Covenant, it has made a commitment to recognize the right of self-determination of the aboriginal peoples of Canada.*"[1022] (Emphasis added.)

S. Williams states:

> "*It must not be forgotten that Québec's claim to self-determination would most certainly be met by similar claims by the Inuit and First Nations peoples within Québec.* From a historical territorial perspective, they were and are living in the territory that was transferred to Québec by Acts of the federal Parliament in 1898 and 1912. 'Self-determination' means choosing how to be governed. *The Inuit and First Nations peoples living in what is now Québec could decide to remain in Canada, or, alternatively, could seek separate statehood.* Thus, the portions of present-day Québec inhabited traditionally by these peoples and only transferred to Québec in 1898 and 1912, would not become part of the new Québec."[1023] [Emphasis added.]

In reference to Aboriginal peoples' right to self-determination, D. Turp has declared in his 1991 testimony before the Quebec National Assembly's Committee on Sovereignty:[1024]

> "Et à mon avis, le fait que [les autochtones] constituent des peuples qui se sont *autoqualifiés comme peuples*...leur donnerait un *droit à l'autodétermination au méme titre que le Québec*..."[1025]

> "Et le droit à la sécession, le Québec ne peut pas prétendre... que les peuples autochtones n'avaient pas, eux, le droit à la sécession. *Les mêmes règles sont applicables aux peuples autochtones qu'au peuple québécois.*"[1026] [Emphasis added.]

S. Paquerot, writing on behalf of the board of directors of la Ligue des droits et libertés, provides:

> "Le droit à l'autodétermination, pour les peuples autochtones comme pour le Québec d'ailleurs, n'implique pas nécessairement la sécession complète mais reconnaît à ces peuples la liberté de décider eux-mêmes de la manière de se gouverner."[1027]

[1021] P. Macklem, "Ethnonationalism, Aboriginal Identities, and the Law" in M. Levin, (ed.), *Ethnicity and Aboriginality: Case Studies in Ethnonationalism* (Toronto: University of Toronto Press, 1993) 9 at 31-32.

[1022]. J. Woodward, *Native Law* (Toronto: Carswell, 1989), at 83.

[1023] S. Williams, *International Legal Effects of Secession by Quebec* (North York, Ontario: York University Centre for Public Law and Public Policy, 1992), at 7.

[1024]. See Assemblée Nationale, *Journal des débats*, Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté, 9 Oct. 1991, No. 5, p. CEAS-137.

[1025] Id., at CEAS-137: "And in my opinion, the fact that [aboriginal peoples] constitute peoples who are *self-identified as peoples*...this would confer on them a *right to self-determination at the same level as Quebec.*" [Unofficial translation, emphasis added.]

[1026] Id., at CEAS-137: "And as to the right to secession, Quebec cannot claim...that aboriginal peoples do not have the right to secession. *The same rules apply to aboriginal peoples as to Québécois.*" [Unofficial translation, emphasis added.]

[1027] S. Paquerot, "Les droits fondamentaux sont universels et indivisibles: ils doivent tous être respectés" in *La Presse*, May 6, 1994, at B3: "The right of self-determination, for Aboriginal peoples as for Québec elsewhere, does not necessarily imply complete secession but recognizes to these peoples the freedom to decide themselves the manner of governing themselves." [Unofficial translation.]

H. Brun and G. Tremblay take the following view:

> "...le droit international est d'une grande pertinence parce que s'est d'abord lui qui le reconnaît le droit à l'autodétermination ou, selon les termes de la Charte des Nations unies, le 'droit des peuples à disposer d'eux-mêmes'. Il ne semble pas, pourtant, qu'on puisse invoquer a priori ce principe au bénéfice des *peuples qui ne sont pas colonisés au sens traditionnel*. De ce point de vue *les autochtones du Canada pourraient avoir de meilleures justifications à faire valoir que le peuple du Québec*."[1028] [Emphasis added.]

In addition, A. Dubuc, editor of *La Presse*, has most recently stated:

> "Les souverainistes, s'ils veulent faire avancer leur cause, n'ont d'autre choix que de reconnaître le droit des autochtones à l'autodétermination."[1029]

It is also worth noting one of the principal recommendations of the Commission des droits de la personne du Québec to the Royal Commission on Aboriginal Peoples:

> "la reconnaissance du droit à l'autodétermination et à l'autonomie politique[1030] des nations autochtones doit être explicite dans les lois fondamentales du Canada and des provinces".[1031]

It is generally recognized that indigenous peoples in Canada and elsewhere are not seeking to secede from the states in which they currently find themselves and their territories.[1032] As Grand Chief Matthew Coon Come, on behalf of the James Bay Crees, has

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[1028] H. Brun & G. Tremblay, *Droit constitutionnel*, 2e édition (Cowansville, Québec: Les Éditions Y.Blais, 1990), at 236: "...international law is of great relevance because it is above all the one that recognizes the right to self-determination.....It does not appear, however, that one could invoke a priori this principle for the benefit of *peoples who are not colonized in the traditional sense*. From this point of view the *aboriginal peoples of Canada could have better justifications to assert such right than the people of Quebec*." [Unofficial translation, emphasis added.]

[1029] A. Dubuc, "Le triangle infernal", in *La Presse*, October 12, 1994, at B2. Unofficial English translation: "The sovereignists, if they wish they wish to advance their cause, do not have any choice but to recognize the right of Aboriginal peoples to self-determination."

[1030] See also S. Vincent, *Pourquoi l'autonomie gouvernementale?*, (1994) 24 Recherches amérindiennes au Québec 151 at 152: "...si les Autochtones ne forment pas des peuples ayant droit à l'autodétermination, au nom de quel principe leur reconnaîtrait-on le droit à l'autonomie gouvernementale?" An unofficial translation reads: "...if the Aboriginals do not constitute peoples having the right of self-determination, in the name of which principle would we recognize their right of self-government?"

[1031] Commission des droits de la personne du Québec, *Mémoire de la Commission des droits de la personne présenté à la Commission royale sur les peuples autochtones* (Montréal: November 1993) at 43. An unofficial translation reads: "the recognition of the right to self-determination and to political autonomy of the Aboriginal nations must be explicit in the fundamental laws of Canada and the provinces."

[1032] E.-I. Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination*, note 990, *supra*, at 9-10: "[I]ndigenous peoples have overwhelmingly expressed their preference for constitutional reform within existing States, as opposed to secession"; G. Nomura, Statement to U.N. General Assembly, in *Living History [:] Inauguration of the "International Year of the World's Indigenous People"*, (1993) 3 Transnat'l L. & Contemp. Probs. 195 at 197: "[The Ainu people] do not perceive this right of self-determination as being a threat to the national unity and territorial integrity of states"...We do not seek to create new states..."; M.C. Lâm, *Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination*, note 733, *supra*, at 609-610. See also A. Buchanan, *The Role of Collective Rights in the Theory of Indigenous Peoples' Rights*, (1993) 3 Transnat'l L. & Contemp. Probs. 89 at 99: "Due in part to past injustices perpetrated by colonizers and their heirs, many indigenous groups would lack the resources to sustain complete political independence, given the realities of today's economy."; G. Erasmus, "Towards a National Agenda" in M. Cassidy, (ed.), *Aboriginal Self-Determination* (B.C./Montreal: Oolichan Books/Institute for Research on Public Policy, 1991) 171 at 173-174: "...aboriginal people - are not separatist. [The federal government] now realize[s] that *we are not talking about separate nation-states*. They now realize that we are talking about trying to work out, within one nation-state, the recognition of Aboriginal Nations."; O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: MacLelland & Stewart, 1992) at 419: "...the rise of political activism and the campaign for self-determination and self-government...is the opposite of a separatist movement; what Indians are asking for is full and equal participation in the Canada of today and of the future."; P. Macklem, "Ethnonationalism, Aboriginal Identities, and the Law" in M. Levin, (ed.), *Ethnicity and Aboriginality: Case Studies in Ethnonationalism* (Toronto: University of Toronto Press,

recently stated in Washington, D.C.:

> "*We Crees are not nationalists, and we are not contemplating secession or insurrection. We have never and will never use violence.* We ask ourselves however, in the face of the potential breakup of Canada: Who is it that is really threatening these things?"[1033] [Emphasis added.]

Moreover, in the view of a majority of jurists, it is still far from certain that the right to self-determination includes a right to secede from existing states, save for exceptional circumstances.[1034]

The critical issue in the current political context facing Aboriginal peoples in Canada does not appear to be that their right to secede be presently recognized. Rather, *it is the need for assurance that, in the event Québec takes steps to accede to sovereignty, the principle of self-determination (including secession) will be equally applied to Aboriginal peoples in Québec without discrimination.*[1035]

The *Indigenous and Tribal Peoples Convention, 1989* (No. 169) provides that "[i]ndigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination."[1036] The necessity for consistent application of the right of self-determination under international law is increasingly being made by both

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1993) 9 at 51: "...aboriginal peoples are looking for means to enter, not destroy, confederation." See also C. Emanuelli, *Droit international public [:] Les fondements, les sources, les États*, 2ième éd. (Montréal: Éditions Wilson & Lafleur Ltée, 1993), tome 1, at 154-155; C. Bernier, *La négotiation de l'autonomie politique des Autochtones du Québec et le droit international*, (1984) 1 R.Q.D.I. 359.

Secession is not necessarily a panacea: see L. Henkin, "The Mythology of Sovereignty" in Proceedings of the 1992 Conference of the Canadian Council of International Law, *State Sovereignty: The Challenge of a Changing World*, note 800, *supra*, at 20: "A right to self-determination, however, is not necessarily a claim to political independence and need not lead to 'sovereignty'. There is nothing in our international system surely, and not in our contemporary ideology generally, that makes a virtue of separation, rather than of unity, of being an independent 'sovereign' rather than to being part of a larger 'sovereignty'...Human values, societal values might be better realized within a larger entity or in a smaller one; with political independence or some lesser autonomy."

[1033] Grand Chief Matthew Coon Come, *The status and rights of the James Bay Crees in the context of Quebec secession from Canada*, Speaking Notes, Centre for Strategic and International Studies, Washington, September 19, 1994, (on file with authors) at 13.

[1034] J. Crawford, *The Creation of States in International Law*, note 773, *supra*, at 257-268; L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law [:] Historical Development, Criteria, Present Status*, note 767, *supra*, at 373; T. Franck, *Post Modern Tribalism and the Right to Secession*, at 20 (draft of a chapter for the General Course in Public International Law to be given at the Hague Academy of International Law, 1993), cited in S.J. Anaya, *A Contemporary Definition of the International Norm on Self-Determination*, (1993) 3 Trans'l L. & Contemp. Probs. 131, at 148; C. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, note 804, *supra*, at 264; E.-I. Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination*, note 990, *supra*, at 7; L. Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, (1991) 16 Yale J. Int'l L. 177, at 178; P. Thornberry, "The Democratic or Internal Aspect of Self-Determination With Some Remarks on Federalism" in C. Tomuschat, (ed.), *Modern Law of Self-Determination* (Boston: Martinus Nijhoff Publishers, 1993) 101 at 132; C. Emanuelli, *Droit international public [:] Les fondements, les sources, les États*, 2ième éd. (Montréal: Éditions Wilson & Lafleur Ltée, 1993), tome 1, at 155; L.C. Green, *Aboriginal Peoples, International Law and the Canadian Charter of Rights and Freedoms*, (1983) 61 Can. Bar Rev. 339, at 341.

[1035] In regard to the James Bay Crees, it is said in P. Thornberry, "The Democratic or Internal Aspect of Self-Determination With Some Remarks on Federalism" in C. Tomuschat, (ed.), *Modern Law of Self-Determination* (Boston: Martinus Nijhoff Publishers, 1993) 101 at 103-104: "Self-determination is on the international agenda and the desired acts of self-determination would 'externalize' the groups from existing sovereignties in many cases, *or future sovereignties in the case of the Crees who claim the right of secession from Quebec in the event of the secession of Quebec from Canada.*" [Emphasis added.] This is not quite the whole issue, since the Crees and other Aboriginal peoples in Québec would likely seek to exercise their own rights of self-determination during the same period that Québec takes steps to accede to independence and not simply after Quebec secession might be achieved. In this regard, see W. Nicholls, "Who's seceding from whom?", *the Nation*, March 31, 1994, p. 10 (interview with Grand Chief Matthew Coon Come, Grand Council of the Crees (of Quebec)), where it is said by the Grand Chief: "It is not a question of Crees seceding from Quebec but rather Quebec seceding from Canada and the Crees".

[1036] Article 3, para. 1.

indigenous peoples and jurists. In this regard, E.-I. Daes, Chairperson/Rapporteur of the Working Group on Indigenous Peoples, emphasizes:

> "It would be *strange, and arguably racist*, for the United Nations to recognize the break-up of a historical union of European peoples, but to condemn the break-up of a union elsewhere in the world simply because indigenous peoples were involved."[1037] [Emphasis added.]

In regard to Aboriginal peoples and Québec secession, M.C. Lâm provides:

> "Indeed, if now Quebec, whose ethnic 'depth' as Quebecois (as opposed to French) is *chronologically* shallower than that of any other cultural group presently claiming self-determination, also receives a hushed response from both Canada and the interstate system to its secession threat, what then remains of the prohibition against secession other than the selective and arbitrary exercise of raw power? Indigenous representatives from Canada attending last summer's Working Group session in Geneva passionately argued that *a self-respecting international law cannot apply as lofty a principle as self-determination in a racially discriminatory manner: 'yes' for whites in Quebec, 'no' for indigenous peoples throughout Canada.*"[1038] [Emphasis added.]

Similarly, C. Iorns states:

> "The argument relating to consistent application of the law is even more relevant in the case of Canada and the proposed secession of Quebec. *If Quebec is allowed to secede from Canada without objection from the international community then an argument can be made that consistent application demands that at least the indigenous peoples within Canada similarly be entitled to secede.* This argument is stronger than in the European examples, particularly because of the lack of history of oppression[1039] of Quebec by Canada (it thereby does not fit the existing criteria for colonial or racist domination) or of imposed union with the other Canadian states, and because of the satisfaction of these criteria by the indigenous peoples."[1040] [Emphasis added.]

Gordon Robertson (former Secretary of the Privy Council of Canada), has highlighted the principle of equal recognition in regard to claims of self-determination of Aboriginal peoples as with the people of Québec:

> "If [Aboriginal peoples in northern Québec] claimed that they too had a right of self-determination, *there is no clear principle in international law and there is no clear definition in any of the United Nations covenants - of which I am aware - that would say that there is a right of self-determination by the people of Quebec as a whole, but no right of self-determination by an Aboriginal people.*[1041] (Emphasis added.)

In conclusion, there is no justification for governments in Canada to invoke "surrender and extinguishment" clauses relating to land claims agreements or other treaties for the purposes

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[1037] E.-I. Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination*, note 990, *supra*, at 6 and 9.

[1038] M.C. Lâm, *Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination*, note 733, *supra*, at 618-619.

[1039] See, for example, J. Hébert, "Wet blanket [:] Claude Castonguay has a lot of nerve to complain of 'humiliation', Hébert says" in *The Gazette*, Montreal, July 30, 1994, at B5: "...Québec and its differences have been accepted since 1867 within a federation that is the most decentralized in the world - precisely to accommodate Quebec's differences, its distinctive language and education system, its Civil Code, etc. [new para.] This very complacent federation has given itself a prime minister from Quebec for 35 of the last 46 years."

[1040] C. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, note 804, *supra*, at 267, n.325.

[1041]. See Assemblée Nationale, *Journal des débats*, Commission d'étude sur toute offre d'un nouveau partenariat de nature constitutionnelle, 22 January 1992, No. 15, at CEOC-491.

of denying Aboriginal peoples in Québec equal recognition of their right to self-determination in the context of Québec secession. Such arguments are wholly erroneous, are an abuse of the treaty-making process, and demonstrate a lack of respect for the solemn commitments made between Aboriginal peoples and non-Aboriginal governments. Further, extinguishment clauses should not be used to erode or deny the sovereign status of Aboriginal peoples under Canada's Constitution. In addition, it has been briefly demonstrated above that, in the view of the United Nations Working Group on Indigenous Populations as well as a growing number of jurists, Aboriginal peoples have the right of self-determination which must be recognized without discrimination.[1042]

Should the government or people of Québec take steps to accede to the creation of an independent state, the likely impacts of denying Aboriginal peoples the full and equal exercise of their right to self-determination would include the following:

i) Aboriginal peoples would be forcibly included in the definition of a "Quebec people"[1043], contrary to international law.[1044] Aboriginal peoples would be denied the right to self-identify as distinct "peoples"[1045] for the purpose of self-determination[1046];

ii) Aboriginal peoples would be denied the right to choose which countries[1047] they

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[1042] In 1992, the Canadian government proposed the following wording to the U.N. Working Group on Indigenous Populations in Geneva for insertion in the draft Declaration: "All peoples have the right of self-determination in accordance with established principles of international law. This right applies to indigenous and non-indigenous peoples on the same basis and without discrimination." See D. Marantz, "Aboriginal Rights and International Law Development of Indigenous Peoples' Rights in International Organisations" in Proceedings of the 1993 Conference of the Canadian Council on International Law, *Aboriginal Rights and International Law* (Ottawa: Canadian Council on International Law, 1992) 64 at 70.

[1043] The potential problems that Quebec faces in defining a "Quebec people" has been highlighted in Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté, *L'accession à la souveraineté [:] le processus* (Québec: Quebec National Assembly, 1991) at 5: "...la ligne de démarcation entre un peuple, une minorité importante qui détient des droits historiques comme la communauté anglophone du Québec, et les nations autochtones qui réclame un nouvel élargissement du droit à l'autodétermination, n'est pas facile à déterminer avec précision." An unofficial translation would read: "...the line of demarcation between a people, an important minority that possesses historic rights such as the anglophone community of Quebec, and the Aboriginal nations who claim a new enlarged right of self-determination is not easy to determine with precision."

[1044] Under international law, there is no agreed definition as to what constitutes a "people". However, it would appear that any acceptable definition of a "people" would be based on the *free will* of the nationals included. In this regard, see J. Brossard, *L'accession à la souveraineté et le cas du Québec* (Montréal: Les Presses de l'Université de Montréal, 1976) at 89. For purposes of self-determination at the international level, Canada cannot force Quebecers to be a part of the "Canadian people", any more than Quebecers can compel Aboriginal peoples to be a part of a "Quebec people".

[1045] L. Pilette, *La Constitution canadienne* (Montréal: Les Éditions du Boréal, 1993) at 103: "...la garantie [dans l'art. 35(1) de la *loi constitutionnelle de 1982*] fait mention des *peuples* autochtones, une notion qui constitue l'un des ingrédients du droit à l'autodétermination en droit international." Unofficial English translation: "...the guarantee [in s. 35(1) of the *Constitution Act, 1982*] makes mention of aboriginal *peoples*, a notion which constitutes one of the elements of the right to self-determination in international law." [Emphasis in original.]

[1046] See P. Russell, *Constitutional Odyssey [:] Can Canadians Be a Sovereign People?* (Toronto: University of Toronto Press, 1992) at 6: "...there is no evidence that the aboriginal or English minorities in Quebec have agreed to be part of a Quebec people whose constitutional destiny lies in the hands of a majority of the people in the province."

However, it is understandable why Quebecers would wish to include all people within the boundaries of the province in a definition of a "Quebec people" for purposes of self-determination (rather than assert the right of self-determination of the French-Canadian nation). As pointed out in the Special Joint Committee of the Senate and House of Commons on the Constitution of Canada ("Molgat-MacGuigan Committee"), *Final Report* (Ottawa: Queen's Printer, 1972) at 13: "[T]here are within the Province of Quebec other groups which would possess an equal claim with Francophones to self-determination." The conclusions of the Molgat-MacGuigan Committee are referred to in P. Russell, *Constitutional Odyssey [:] Can Canadians Be a Sovereign People?*, *supra*, at 93 as follows: "The committee pointed out that self-determination of a people is not the same as self-determination of a province...The French-Canadian people is not coextensive with the boundaries of Quebec..."

[1047] It is conceivable that at least some Aboriginal nations in Quebec would seek some form of association with both Canada and a separate Quebec state.

wish to be associated with and in what manner;[1048]

iii) the traditional or historical territories of Aboriginal peoples would be included within the new Québec state, without the consent of the Aboriginal peoples affected;

iv) existing treaty guarantees would at best be assumed by the new Québec state, despite the fundamental trilateral nature of the rights and benefits negotiated[1049];

v) the level of constitutional protection, available and operative through the amending formulas of the Canadian federation, of Aboriginal and treaty rights would no longer be possible in a unitary state[1050];

vi) in cases where the traditional or historical territories of Aboriginal peoples transcend the current provincial boundaries of Québec, such peoples would be arbitrarily cut off from their historical lands and people (remaining within Canada); and

vii) if the governments of Canada and the province of Quebec failed to respect the rights of self-determination of Aboriginal peoples in Quebec, the fiduciary duty of the Crown in regard to these peoples would be violated. Since the fiduciary obligation is of a constitutional nature, Canada's Constitution would also be contravened.

As indicated above, the effects of a denial of exercise of the right to self-determination by Aboriginal peoples in the context of Québec secession would have far-reaching consequences for those directly affected. Specific issues such as any referendum on accession of Québec to sovereignty[1051] and critical boundary questions[1052] are likely to have tremendous

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[1048] Aboriginal peoples in Québec could also be forcibly deprived of their Canadian nationality (at least for those peoples who recognize such nationality), if they are compelled to be part of an independent Québec. The right to nationality is provided in the *Universal Declaration of Human Rights*, art. 15; and the *International Convention on the Elimination of All Forms of Racial Discrimination*, art. 5(d)(iii).

[1049] Reference is being here to the James Bay and Northern Québec Agreement (involving Crees and Inuit) and the Northeastern Québec Agreement (involving Naskapis), in which a careful balance between federal and provincial obligations was sought in the negotiations by the Aboriginal parties to these treaties.

[1050] In addition, there may be less checks and balances within the judicial system of a unitary state. While the Supreme Court of Canada, as the highest court within the Canadian federation, is composed of judges from different regions across Canada, the equivalent court in a separate Quebec state would only come from Quebec.

[1051] M.E. Turpel, "Does the Road to Québec Sovereignty Run Through Aboriginal Territory?" in D. Drache & R. Perrin, (ed.), *Negotiating With a Sovereign Québec*, note 807, *supra*, at 105: "What question will be put to voters, who will vote, and the weighing of the results are all unclear at this point. For aboriginal peoples in Québec, the ambiguity of the referendum is threatening because if a vote is registered in favour of sovereignty, it could legitimize the appropriation of aboriginal territories and the assumption of authority over them...[new para.] *Is a simple 50-plus-1 majority enough in these circumstances? If it was, this could mean that aboriginal peoples' self-determination rights would be overridden*, as aboriginal peoples may simply be outvoted by larger populations in non-aboriginal regions of Québec. *This kind of refererendum could not be upheld internationally as supporting accession to sovereignty because of its implications for aboriginal peoples.* Referendums are number games and aboriginal peoples would be set up for exclusion unless double majorities or separate referendums are employed. Aboriginal peoples will have to insist on double majorities, or independent (traditional) means for expressing their views on accession to full sovereignty. *They cannot be lumped into a general referendum if the result is to be accepted for any purposes as a legitimate mandate for statehood.*" [Emphasis added.]

Gordon Robertson, former Secretary of the Privy Council, has also testified before Québec's Bélanger-Campeau Commission that Aboriginal groups living in Quebec could also demand one or more referendums with a view to determining, as distinct peoples, what will be their future: see "Extraits de témoinages présentés devant la Commission Bélanger-Campeau et le Comité Beaudoin-Edwards (text prepared by Yves Le Bouthillier and Richard Goulet) in Canadian Council on International Law, *Bulletin*, vol. 16, no. 1, August 16, 1991, p. 11. See also N. Rouland, *Les Inuit du Nouveau-Québec et la Convention de la Baie James* (Québec: Association Inuksiutiit & Centre d'études nordiques de l'Université Laval, 1978) at 170, where the author indicates that the federal government, based on its constitutional responsibility for Indians and Inuit, could organize a referendum (following a Québec referendum on independence) among these peoples. In the event of a positive response, the federal government could then detach northern Québec from the rest of the province. In the view of this present study, such federal action could only be initiated if Québec unilaterally declared itself an independent state and repudiated the Canadian Constitution.

For purposes of self-determination, Aboriginal peoples can no more be included as a part of a "Quebec people"

implications for Aboriginal peoples.

In light of the significance of the right of self-determination,[1053] particularly in a secession scenario, the resulting discrimination against Aboriginal peoples would likely be far-ranging, severe and ongoing. The prohibition against racial discrimination is not only a

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against their will, than Quebecers included as a part of a "Canadian people" where a single majority vote determines everyone's future. In this regard, see P. Russell, *Constitutional Odyssey: Can Canadians Be a Sovereign People?*, note 1046, *supra*, at 6: "Those who say that Canada's constitution should be determined simply by a majority of the Canadian people must explain how those like the Quebecois or the aboriginal nations came to be bound by the will of this majority. If a constitution derives its legitimacy from the consent of the people, then those who share our constitution must first agree to be a people. *There is no evidence that either the Quebecois or the aboriginal nations have agreed to be part of a Canadian people sharing a constitution determined simply by a majority rule.*" [Emphasis added.] And at 170, P. Russell adds: "With few exceptions, aboriginal peoples in Quebec wish to enjoy their right to self-government within Canada - not within a sovereign Quebec. *They are not nations that can be yanked out of Canada against their will by a provincial majority.* By the fall of 1991, Ovide Mercredi, the new chief of the Assembly of First Nations, was making that point perfectly clear..." [Emphasis added.] See also W. Nicholls, "Who's seceding from whom?", *the Nation*, March 31, 1994, p. 10 (interview with Grand Chief Matthew Coon Come, Grand Council of the Crees (of Quebec)) at 11: "...if Quebec was to hold [a referendum], I don't think the Crees should be lumped within the general referendum, where their wishes would be submerged by the Quebec majority. This isn't an approach Quebec would tolerate if proposed by Canada. Why should we?"

[1052] D. Turp, "Quebec's Democratic Right to Self-Determination" in S. Hartt *et al.*, (ed.), *Tangled Web: Legal Aspects of Deconfederation*, note 807, *supra*, at 119: "Yet even if one agrees that both the Québécois and the native nations have the right to self-determination and to democratic secession, one must still have the territorial question, which could cause problems from the standpoint of international law...If [Aboriginal peoples] wished to secede from Quebec to become sovereign states or to remain within Canada, these problems would become more complex. *The territorial borders of the secessionist native nations would have to be determined, and the divergent views on the very existence of a territory belonging to a native nation, as well as on its boundaries, would have to be reconciled.*" [Emphasis added.]

For a detailed analysis of boundary issues in northern Québec, see K. McNeil, "Aboriginal Nations and Quebec's Boundaries: Canada Couldn't Give What It Didn't Have" in D. Drache & R. Perrin, (eds.), *Negotiating With a Sovereign Québec*, note 747, *supra*. See also A. Buchanan, *Secession [:] The Morality of Political Divorce From Fort Sumpter to Lithuania and Quebec* (Boulder, Colorado: Westview Press, 1991), at 64: "...at most, the Canadian Federation's lack of clear title to Quebec would support secession on grounds of cultural preservation only for those parts of Quebec that are not subject to whatever valid territorial claims existing Indian groups may have and were not part of the territory ceded to Quebec by the English."

The doctrine of *uti possidetis* is sometimes invoked by Québec sovereignists to justify maintaining Québec's existing borders in the event of accession to sovereignty and the decision of the EC Arbitration Commission (the Badinter Commission) in regard to Yugoslavia is cited in support (Opinion No. 2., (1992) 3 European J. of Int'l Law 183, 184). However, this decision has been strongly criticized in J. Frowein, "Self-Determination as a Limit to Obligations Under International Law" in C. Tomuschat, (ed.), *Modern Law of Self-Determination* (Boston: Martinus Nijhoff Publishers, 1993) 211 at 216-217. At 217, the author remarks: "At the time of the opinions on these matters, Bosnia-Herzegovina was certainly not a State recognized by the member States of the European Community, nor were Croatia and Slovenia at that time. The Committee, for very good reasons, tried to preserve the existing territorial boundaries *although they were certainly not yet international frontiers. To simply apply uti possidetis without any underlying justification is hardly convincing.* According to the principle of self-determination,...one would probably have had to organize plebiscites in many frontier areas of Croatia and Bosnia-Herzegovina...[O]ne wonders whether lawyers should automatically declare, as *legally* prescribed, what they consider to be the most appropriate solution in *political* terms." [Emphasis added.] See also H. Hannum, *Self-Determination, Yugoslavia, and Europe: Old Wine in New Bottles?*, (1993) 3 Transnat'l L. & Contemp. Probs. 57 at 66: "This opinion [of the Arbitration Commission] is dubious if it purports to identify a rule of international law which requires the maintenance of existing administrative borders *outside the colonial context*..." [Emphasis added.] The opinion on *uti posseditis* referred to is Conference on Yugoslavia Arbitration Commission, Opinion No. 3, (Jan. 11, 1992), reprinted in 31 I.L.M. 1499.

It is beyond the scope of this study to provide an in-depth analysis of the principle of *uti possidetis*. However, for a description of its non-mandatory nature and other limitations, see I. Brownlie, *Principles of Public International Law*, 4th ed. (Oxford: Clarendon Press, 1990) at 135; M. Whiteman, *Digest of International Law* (Washington, D.C.: Department of State Publication, 1963) at 1086; L.C. Green, *International Law: A Canadian Perspective*, 2nd ed. (Toronto: Carswell, 1988) §247 at 245, §119 at 154; M. Pomerance, *Self-Determination in Law and Practice* (The Hague: Matinus Nijhoff Publishers, 1982) at 11-12. See also *Frontier Dispute (Burkina Faso/Mali)*, [1986] I.C.J. Rep. 554, 80 I.L.R. 440 at 445, 554; *Beagle Channel Arbitration (Argentina v. Chile)*, 52 I.L.R. 93 at 125.

[1053] See H.G. Espiell, Special Rapporteur, *The Right to Self-Determination: Implementation of United Nations Resolutions*, Study for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, (New York: United Nations, 1980), U.N. Doc. E/CN.4/Sub.2/405/Rev.1, at 10, para. 59: "...human rights can only exist truly and fully when self-determination also exists. Such is the fundamental importance of self-determination as a *human right* and as a *prerequisite for the enjoyment of all the other rights and freedoms.*" [Emphasis added.]

constitutional standard in Canada, but a peremptory international norm.[1054] The outlawing of racial discrimination gives rise to obligations incumbent upon all states and these obligations are owed to the international community as a whole.[1055]

Arguments of extinguished aboriginal rights do not provide Québec separatists or others with any colour of right to deny Aboriginal peoples their fundamental right to self-determination. The self-determination of Québeckers in a secessionist[1056] or other context cannot be based on a denial of the same right for Aboriginal peoples. The secession debate in Québec illustrates how extinguishment clauses can be abused. In this way, it provides further reason to eliminate the prejudicial policies and practices of extinguishment of the rights of Aboriginal peoples.

5. THEORIES OF DISPOSSESSION LINKED TO EXTINGUISHMENT[1057]

"It is a waste of time to hate a mirror
or its reflection
instead of stopping the hand
that makes glass with distortions..."[1058]

A. Lorde, 1970

[1054] I. Brownlie, 4th ed., *Principles of Public International Law* (Oxford: Clarendon Press, 1990) at 513, indicates that there are certain "overriding principles of international law" as follows: "The major distinguishing feature is their relative indelibility. They are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect. The least controversial examples of the class are the prohibition of the use of force, the law of genocide, *the principle of racial discrimination*, crimes against humanity, and the rules prohibiting trade in slaves and piracy." [Emphasis added.] In regard to the principle of non-discrimination, see *Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, I.C.J. Reports, 1970, at 3, paras. 33 & 34.

[1055] L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law [:] Historical Development, Criteria, Present Status*, note 767, *supra*, at 480: "The international community of States has engaged in emphatic efforts to prohibit unjustified discrimination against natural and social groups of human beings. The equality of human beings before the law, together with the prohibition of discrimination, has been central to the international instruments regarding human rights...*It is evident that the prohibition of unjustified discrimination gives rise to obligations incumbent upon all States, and these obligations are owed to the international community of States.*" [Emphasis added.]

In regard to intervention by the international community in the event of human rights violations, see J. Frowein, "Self-Determination as a Limit to Obligations Under International Law" in C. Tomuschat, (ed.), *Modern Law of Self-Determination* (Boston: Martinus Nijhoff Publishers, 1993) 211 at 215: "...the right to self-determination creates an obligation *erga omnes*. Although many of the texts are to a certain extent ambivalent it can hardly be doubted that the right of self-determination creates such an obligation. This must mean, I propose, that third States may apply peaceful reprisals in cases *where there exists a pattern of complete denial of the right to self-determination, especially on racial grounds.* In that respect South Africa has created a rule of international law." [Emphasis added.] See also M. Levin, "Ethnicity and Aboriginality: Conclusions" in M. Levin, (ed.), *Ethnicity and Aboriginality: Case Studies in Ethnonationalism* (Toronto: University of Toronto Press, 1993) 168 at 171: "Sovereignty, in the sense of the right of a state to manage its own internal affairs, has also been challenged by the international involvement of governments and independent bodies in issues which are of broad human concern, most notably the environment and human rights."

[1056] It is important to note that the Quebecers cannot rely on any right to self-determination under international law, in order to claim a right to secede from Canada: see T. Franck, R. Higgins, A. Pellet, M. Shaw & C. Tomuschat, "L'intégrité territoriale du Québec dans l'hypothèse de l'accession à la souveraineté" in Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté, *Les Attributs d'un Québec souverain* (Québec: Bibliothèque nationale du Québec, 1992), Exposés et études, vol. 1, 377, at 425.

[1057] A detailed draft background paper on dispossession doctrines was prepared by Dick Spaulding in conjunction with this heading. This document was of assistance in the preparation of our work and is intended to be published independently by the Royal Commission on Aboriginal Peoples.

[1058] A. Lorde, "Good Mirrors Are Not Cheap" in *Undersong [:] Chosen Poems Old and New* (New York: W.W. Norton & Co., 1992) at 85.

At the time of European exploration and settlement, it has been documented that Aboriginal nations were regarded as independent peoples, or at least treated as such by European nations.[1059] Since these early times, the status and rights of Aboriginal peoples have often been misunderstood, misinterpreted, devalued, or denied by governments and courts. On what legal bases could this have occurred?

Under English and Canadian law, theories of dispossession evolved based on the "act of state" doctrine and other questionable rationales such as the "recognition doctrine", *terra nullius*, or that indigenous peoples were either too primitive, aliens, or heathens and infidels. In many instances, the doctrines or theories on which the diminution or denial of Aboriginal peoples' status and rights were founded were of doubtful validity and are now viewed as anachronistic, discriminatory[1060] or otherwise unsupportable. As provided in the draft *United Nations Declaration on the Rights of Indigenous Peoples*:

> "...all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust".[1061]

However, these doctrines of dispossession have not yet been fully discarded. In numerous situations, the theories themselves or the Eurocentric views on which they are based have survived. Since these doctrines continue to inform policy- and decision-making by governments and the courts, they still impede full and fair legal recognition of Aboriginal peoples' status and rights.

In a recent editorial in *Le Devoir*, J.-R. Sansfaçon commented in general terms that Aboriginal peoples still face persistent inequalities and the ways of the past are not working:

> "Il n'y a pas de solution facile ou universelle à la réduction des inégalités qui persistent entre la majorité blanche et les communautés autochtones, mais il apparaît évident que

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[1059] *R.* v. *Sioui*, [1990], 1 S.C.R. 1025, at 1052-1053; B. Slattery, *Aboriginal Sovereignty and Imperial Claims*, (1991) 29 Osgoode Hall L.J. 681; M. Asch & P. Macklem, *Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow*, (1991) 29 Alta. L.R. 498; G. Erasmus & J. Sanders, "Canadian History: An Aboriginal Perspective" in D. Engelstad & J. Bird, *Nation to Nation [:] Aboriginal Sovereignty and the Future of Canada* (Concord, Ontario: House of Anansi Press, 1992) at 3; R. Boudreault, *Réflexion sur une réalité moderne à "incarner"*, (1993) 28 Recherches Amérindiennes au Québec 5; H. Berman, "Perspectives on American Indian Sovereignty and International Law, 1600 to 1776", in O. Lyons, et al., *Exiled in the Land of the Free [:] Democracy, Indian Nations, and the U.S. Constitution* (Santa Fe: Clear Light Publishers, 1992), at 125.

[1060] H. Berman, "Perspectives on American Indian Sovereignty and International Law, 1600 to 1776", in O. Lyons, et al., *Exiled in the Land of the Free [:] Democracy, Indian Nations, and the U.S. Constitution* (Santa Fe: Clear Light Publishers, 1992), at 347, n. 3, provides: "Social Darwinism and race theory played a major role in the legitimization of colonialism and in the political and juridical invisibility of indigenous peoples on a global basis." Authorities cited by Berman in this regard include: R. Horseman, *Race and Manifest Destiny: The Origins of American Racial Anglo-Saxonism* (Cambridge, Mass.: Harvard University Press, 1981); R. Drinnon, *Facing West: The Metaphysics of Indian-Hating and Empire-Building* (Minneapolis: Univ. of Minnesota Press, 1980); and H. Reynolds, *Frontier: Aborigines, Settlers and the Land* (Boston: Allen & Unwin, 1987) at 108-130.

See also B. Richardson, *People of Terra Nullius [:] Betrayal and Rebirth in Aboriginal Canada* (Vancouver: Douglas & McIntyre, 1993) at 30: "To assert that the rights of all aboriginal [North] Americans were outweighed by the needs of Europeans implies that European lives were more valuable than those of aboriginals. Thus, since the beginning, all European claims to ownership of North America have been based on an essentially racist argument." At 289, the author adds: "...ever since the law was first applied to relations between aboriginal people and Europeans occupying their lands, its assumptions could be summarized by the catch-phrases: 'We're civilized, you're savage,' and 'We've arrived, now you move over.'"

[1061] Draft Declaration, third preambular para.

les moyens du passé se sont révélés totalement inadéquats."[1062]

A significant portion of these inequalities would appear to have their roots in English and Canadian law. It is for this reason that it is imperative to reconsider these doctrines and assess their validity in terms of historical fact, as well as human rights and other fundamental norms. For the purposes of this study, a brief evaluation of these doctrines is undertaken in the sub-headings below in relation to Aboriginal peoples. In particular, the question of the purported extinguishment of the sovereignty of Aboriginal peoples and their jurisdictional and property rights is examined.

5.1 Act of State Doctrine[1063]

In the leading case of *A.G.* v. *Nissan*,[1064] Lord Morris of Borth-y-Gest emphasizes that the "phrase ['act of state'] has a variety of meanings"[1065]. However, when it is invoked "as a defence" so as to oust the jurisdiction of the domestic courts to examine the propriety of the state action complained of and deny recourse to others, then the act of state takes on a particular significance:

> "The making of a treaty may be an act of state: the recognition of a foreign sovereign or of a foreign state may be: so may a conquest or an annexation. *But when pleaded as a defence it may be used in many ways, such as, for example, to denote acts of the Crown which once the court has so held them to be it has no jurisdiction to examine*, or the phrase may be used to assert that a plaintiff has no claim which he can advance as against a defendant or to assert that a defendant has an immunity and is not one against whom a claim can be proved."[1066]

When pleaded as a defence, the act of state doctrine can have far-reaching effects. This is the case when courts determine that they have no authority to adjudicate actions complained of, so as to determine their validity, or to provide appropriate compensation for aggrieved parties. In regard to Aboriginal peoples, the act of state doctrine has been utilized in the courts not only to extinguish or otherwise deny their rights, but also their sovereignty. Consequently, it is important to ascertain what are the limitations of this doctrine and whether it is even appropriate to apply it to Aboriginal peoples.

The most often-quoted definition[1067] of "act of state" in English law provides:

[1062] J.-R. Sansfaçon, "Autochtones: Québec prend les devants" in *Le Devoir*, November 1, 1994 at A6. Unofficial English translation: "There is no easy or universal solution to the reduction of inequalities that persist between the white majority and Aboriginal communities, but it appears evident that the methods of the past have revealed themselves as totally inadequate."

[1063] In regard to the "act of state" doctrine, see generally E.C.S. Wade, *Act of State in English Law*, (1934) 15 Br. Yrbk. Int'l L. 103; W.S. Holdsworth, *The History of Acts of State in English Law*, (1941) 41 Colum. L. Rev. 1313; J. Collier, *Act of State as a Defence Against a British Subject*, [1968] Camb. L. J. 102. In regard to the doctrine's application in the United States, see A. Dolar, *Act of State and Sovereign Immunity Doctrines: The Need to Establish Congruity*, (1982)17 U. San Francisco L. Rev. 91. A leading case on the act of state doctrine in English law is *A.G.* v. *Nissan*, [1970] A.C. 179 (H.L.).

[1064] *A.G.* v. *Nissan*, [1970] A.C. 179 (H.L.)

[1065] Id. at 216.

[1066] Id.

[1067] This definition is quoted by the various judges in *A.G.* v. *Nissan*, [1970] A.C. 179 (H.L.). However, Lord Wilberforce indicates at 231 "[t]his is less a definition than a construction put together from what has been decided in various cases; it covers as much as they do, no less, no more."

> "An act of the executive *as a matter of policy* performed *in the course of its relations with another state* including its relations with the subjects of that state, *unless they are temporarily within the allegiance of the Crown*, is an act of state."[1068] [Emphasis added.]

The limitations to the act of state doctrine are not always clear or unanimously agreed upon[1069] and can be highly dependent on the factual context in each particular situation. Nevertheless, it is important to describe briefly some of the constraints that have been identified by courts in English law. These limitations include:

i) **Must be expressly pleaded as a defence.** It would appear that, unless act of state is pleaded as a defence, it is not for the courts to determine whether or not an act was an "an act of state" that ousts the jurisdiction of the municipal courts.[1070] In cases concerning Aboriginal peoples, it is not always clear in judicial decisions whether act of state has been raised by the government as a defence, or if the court is invoking this aspect. Moreover, even if act of state is expressly pleaded as a defence, it is up to the courts to determine if such act constitutes a valid defence to a claim. As indicated by Lord Morris of Borth-y-Gest in *A.G.* v. *Nissan*: "There might still have been something that might be called an act of state but not in the sense of being a defence to a claim."[1071]

ii) **Cannot be used as a defence against British subjects within British realm.**[1072] As Lord Reid concludes in *A.G.* v. *Nissan*, "a British subject - at least if he is also a citizen of the United Kingdom and Colonies - can never be deprived of his legal rights to redress by any assertion by the Crown or decision of the court that the acts of which he complains were acts of state."[1073] This rule has important implications for Aboriginal peoples, as K. McNeil points out:

> "If the Crown wanted to acquire title to occupied lands along with sovereignty, *it would have had to seize those lands into its own hands by act of state before annexing the territory to its dominions*. After that, the indigenous people would be British subjects, and the Crown would be bound by English law."[1074] [Emphasis added.]

For purposes of act of state, the issue is not whether Aboriginal peoples viewed themselves as "subjects" of the British Crown. From a British viewpoint, Aboriginal peoples were considered as British subjects upon the assertion of sovereignty by Britain in regard to

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[1068] *Halsbury's Laws of England*, 3rd ed., vol. VII, para. 593, at 279, quoting the definition in E.C.S. Wade, *Act of State in English Law*, (1934) 15 Br. Yrbk. Int'l L. 103.

[1069] *A.G.* v. *Nissan*, [1970] A.C. 179 (H.L.) at 207, per Lord Reid: "'Act of state' is a phrase which has often been used, but by no means always with the same meaning."

[1070] *A.G.* v. *Nissan*, [1970] A.C. 179 (H.L.) at 212, per Lord Reid: "It is true that the court must determine, on such facts as are available, whether the act was done in purported exercise of a legal right: if it was done in purported exercise of any legal right: if it was it cannot be regarded as an act of state. But *if it was not done in purported exercise of any legal right and was done by an officer of the Crown apparently in the course of his duty, then it appears to me that it must be for the Crown to say whether it claims that the act was an act of state.*" [Emphasis added.] See also Lord Morris of Borth-y-Gest, at 216.

[1071] Id. at 220.

[1072] In regard to this point, see B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories* (Saskatoon: Univ. of Saskatchewan Native Law Centre, 1979), at 47-48; and K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989), at 164, n. 13.

[1073] Id. at 213. Lord Reid immediately adds: "It seems to me no useful purpose is served by inquiring whether an act in respect of a British subject claims legal redress is or is not an act of state, because a decision of that question can make no difference to the result." And at 207: "Where an act of a servant of the Crown in this country infringes the rights of a British subject *it has been settled law for centuries that it is no defence to plead that the act was ordered or ratified by the Crown or the Government.*" [Emphasis added.] See also *Johnstone* v. *Pedlar*, [1921] 2 A.C. 262, where it is said that friendly aliens are in the same position as British subjects.

[1074] K. McNeil, *Common Law Aboriginal Title*, note 1072, *supra*, at 299-300.

territory in North America.[1075] Consequently, in relation to any actions by the British Crown subsequent to the date of acquisition of British sovereignty in a particular territory, Britain was precluded from invoking act of state as a defence against the claims of Aboriginal peoples.

Since the lands of Aboriginal peoples were not expressly seized by the British Crown prior to annexation of territory to its colonies or dominions, it cannot be said that the land rights of Aboriginal peoples were ever extinguished or denied by valid act of state.

iii) **Defence not available against those temporarily within the allegiance of the Crown.** In the definition of "act of state" quoted above, it is indicated that acts of state are not invoked against those that are "temporarily within the allegiance of the Crown". Also, in *Halsbury's Laws of England*, it is said: "There can be no act of state against anyone who owes allegiance to the Crown."

It may not be totally clear what the term "allegiance"[1076] includes or how to fully describe the complex and ambiguous relations between Aboriginal peoples and the British Crown. However, in regard to the period preceding the conquest of France[1077] in 1760 and the resulting assertion of British sovereignty, it is arguable that those Indian nations that formed alliances[1078] with the British or sought British protection through treaties or other means, were at least in temporary allegiance with the Crown. As D. Johnston describes:

> "Owing to their influence in trade and defence, the First Nations were much sought after as allies. In forging their alliances, the British were conciliatory and respectful of First Nations customs and usages, and they acknowledged their independence."[1079]

Moreover, the intentions[1080] of the British at that time do not appear to indicate with any certainty that the sovereignty or autonomy of Aboriginal peoples were to be extinguished or taken away.[1081]

[1075] In addition, the *Royal Proclamation of 1763* refers to Indian tribes as "subjects".

[1076] See, for example, *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing Co., 1990) at 74, where "allegiance" is defined as: "Obligation of fidelity or obedience to government in consideration for protection that government gives."

[1077] See also D. Delâge, *Epidemics, Colonization, Alliances: Natives and Europeans in the Seventeenth and Eighteenth Centuries*, Draft report submitted to the Royal Commission on Aboriginal Peoples, August 18, 1994, at 31: "Whatever the rationalizations through which the French juggled the contradictions of their overall conduct, it should be noted that the relationships they maintained with the aboriginal people in the wake of the alliances reached at the outset of the *French regime bore the stamp of equality, and this applies to diplomacy, war and land occupancy alike.*" [Emphasis added.]

[1078] See, for example, *R. v. Sioui*, [1990], 1 S.C.R. 1025, at 1052-1053: "The mother countries [Great Britain and France] did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality."

[1079] D. Johnston, "First Nations and Canadian Citizenship" in W. Kaplan, (ed.), *Belonging: The Meaning and Future of Canadian Citizenship* (Montreal: McGill-Queen's University Press, 1993) 349 at 352. See also K. Coates, "Lord Durham Revisited: the Cultural Struggle of Nations and Peoples Within the Canadian State" in H.P. Glenn & M. Ouellette, (eds.), *Culture, Justice and Law/La culture, la justice et le droit 1992* (Montreal: Les Éditions Thémis, 1994) 1 at 5.

In regard to the extensive alliances that were formed by Aboriginal peoples in relation to the French and British, see D. Delâge, *Epidemics, Colonization, Alliances: Natives and Europeans in the Seventeenth and Eighteenth Centuries*, Draft report submitted to the Royal Commission on Aboriginal Peoples, August 18, 1994; and A. Lajoie & P. Verville, *Treaties of Alliance Between the French and the First Nations Under the French Regime*, Draft report submitted to the Royal Commission on Aboriginal Peoples, August 31, 1994 (translation of French original version).

[1080] As to the relevance of government intention, see *A.G. v. Nissan*, [1970] A.C. 179 (H.L.) at 238, per Lord Pearson: "...whether some governmental act was an act of state depends on the *nature of the act* and (sometimes at any rate) upon the *intention with which it was done*, and the intention is to be inferred from words and conduct and surrounding circumstances." [Emphasis added.]

[1081] See, for example, M. Jackson, *A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements*, Report submitted to the Royal Commission on Aboriginal Peoples, February 1994, at 1: "In the eighteenth century, enlightenment conceptions of *Aboriginal peoples as political equals and sovereign nations*, underpinned by Aboriginal military and strategic power, were reflected in 'the Covenant Chain', the remarkable treaty arrangements

iv) **Must be acts advanced "as a matter of policy" by executive and "in the course of relations with another state".** These qualifications are included in the above-quoted definition of "act of state". For example, in *A.G.* v. *Nissan*, the seizure of a hotel by British troops was not viewed as an act of state. As Lord Morris of Borth-y-Gest states: "...I would be surprised if the contention were advanced that it was 'a matter of policy' on the part of the executive to take food or shelter and not to make payment. I think that the suggested definition does reflect the consideration that an act of state denotes some act or course of action done or embarked upon as a result of a positive decision of the Sovereign or the executive."[1082] In addition, the learned Judge indicates: "If there was no firm contract but if an *assurance* was given by a responsible Minister that payment or compensation would be made then any notion that there was a decision of the executive (as a matter of policy) to take the hotel and not to pay must be ruled out."[1083] [Emphasis added.]

In the context of Aboriginal peoples, regardless of repeated breaches by colonial governments, official British policy has consistently and uniformly been to safeguard Aboriginal peoples and respect their rights.[1084] Therefore, it would be most difficult to claim, based on act of state arguments, that the rights of Aboriginal peoples have been extinguished or denied. Further, whether through treaties or other diplomatic means, there has been a pattern historically of the Queen's representatives giving "assurances" that Aboriginal peoples and their rights would be protected. It would not be appropriate to subsequently suggest that, despite such representations, rights have been extinguished based on acts of state.

v) **Strong evidence required to prove act of state.** In *A.G.* v. *Nissan*, Lord Pearson of the House of Lords indicates why "strong evidence" is required in regard to purported acts of state: "An act of state is something not cognizable by the court: if a claim is made in respect of it, the court will have to ascertain the facts but if it then appears that the act complained of was an act of state the court must refuse to adjudicate upon the claim...*This is a very unusual situation and strong evidence is required to prove that it exists in a particular case.*"[1085]

vi) **Constitutional status of Crown's territorial acquisitions determined by its domestic courts.** K. McNeil provides: "although the Crown can proceed as it likes in extending its sovereignty over new territory, *it does not have legal authority to determine the constitutional status of its acquisitions. That is for the courts to decide* based upon the Crown's conduct and any other relevant circumstances."[1086] [Emphasis added.] Consequently, in regard to Aboriginal peoples, the pre-existing aboriginal title in such territories that survives British assertions of sovereignty[1087] would be determined by the courts as to their constitutional status and nature. The act of state doctrine does not have the legal effect of precluding domestic courts in Canada from adjudicating on such constitutional questions. This has potentially far-reaching implications for Aboriginal peoples and will be further examined under the next sub-heading.

Based on the above, it would appear that the act of state doctrine is inapplicable as a

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negotiated over the course of a century by the Six Nations of the Iroquois Confederacy with the British Crown." [Emphasis added.] In addition, following on the heels of the French Conquest in 1760, the *Royal Proclamation of 1763* indicated British policy that Aboriginal peoples "should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded or purchased by Us, are reserved to them..."

[1082] *A.G.* v. *Nissan*, [1970] A.C. 179 (H.L.) at 218.

[1083] Id. at 219.

[1084] See, for example, the provisions relating to Aboriginal peoples in the *Royal Proclamation of 1763* and the terms and conditions attached to the *Rupert's Land and North-Western Territory Order*, 1870.

[1085] *A.G.* v. *Nissan*, [1970] A.C. 179 (H.L.) at 237. At 231-232, Lord Wilberforce adds: "[C]ourts are not bound to accept the ipse dixit of the executive but have the right to decide for themselves whether the act is...an act of state."

[1086] K. McNeil, *Common Law Aboriginal Title*, note 1072, *supra*, at 131.

[1087] See, for example, *Roberts* v. *Canada*, [1989] 1 S.C.R. 322 at 340, per Wilson J.: "...aboriginal title pre-dated colonization by the British and survived British claims of sovereignty."

defence to and as a means of denial of the assertion by Aboriginal peoples of their aboriginal rights. At the time of acquisition of British sovereignty in the various regions of what are now Canada, there were no express seizures of Aboriginal lands or territories. Once British sovereignty was established, English law precluded any and all application of the act of state doctrine against British subjects within the British realm.

In addition, during the various periods of acquisition of British sovereignty in North America, the relations between Aboriginal nations and the British Crown or its representatives were not such as to suggest that there was, "as a matter of policy" an intention on the part of the British to dispossess Aboriginal peoples of their status and rights. Should non-Aboriginal governments seek to invoke act of state arguments in this regard, the courts have indicated that strong evidence would be required to prove the existence of actual acts of state, in order to oust the jurisdiction of the courts in such matters.

While the pre-existing rights of Aboriginal peoples are generally viewed as surviving the assertion of British sovereignty, judicial distinctions are sometimes being made between Aboriginal peoples' sovereignty and rights. Similarly, some courts are differentiating between Aboriginal peoples' rights pertaining to property and those of self-government. In respect to questions relating to Aboriginal sovereignty, jurisdiction or self-government, some courts are using act of state arguments to deny the continued existence of such constitutional status and rights. These aspects are examined under the following sub-heading, where the inappropriateness of applying the act of state doctrine to the Aboriginal context is further described.

5.1.1 Act of state doctrine in the Aboriginal context

In *Calder* v. *A.G. British Columbia*, Hall J. comments on the inappropriateness of applying the act of state doctrine to cases involving aboriginal title, as follows:

> "The Act of State doctrine has no application in the present appeal for the following reasons: (a) It has never been invoked in claims dependent on aboriginal title. *An examination of its rationale indicates that it would be quite inappropriate for the Courts to extend the doctrine to such cases*; (b) It is based on the premise that an Act of State is an exercise of Sovereign power which a municipal Court has no power to review..."[1088] [Emphasis added.]

This study shares the view, expressed by Hall J., as to the unsuitability of the act of state doctrine in aboriginal cases. However, there are still aspects of the doctrine that require further examination.

An important matter to address in terms of the act of state doctrine is the issue of sovereignty. As indicated elsewhere in this study,[1089] sovereignty has two primary aspects - external and internal. While the former includes such international concerns as the establishment of independent states, the latter addresses matters of internal self-government.

Although Aboriginal peoples have at least a number of aspects of international personality

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[1088] *Calder* v. *A.G. British Columbia*, [1973] S.C.R. 313 (S.C.C.) at 405. At 405-406, Hall J. adds: "In all the cases referred to by the Court of Appeal the *origin* of the claim being asserted was a grant to the claimant from a previous Sovereign. In each case the claimants were asking the Courts to give judicial recognition to that claim. In the present case the appellants are not claiming that the origin of their title was a grant from any previous Sovereign..." [Emphasis in original.]

[1089] See discussion under sub-heading 4.2 *supra*.

and are increasingly viewed as subjects of international law,[1090] they have not indicated intentions in the Canadian context to establish an independent state. Nor are Aboriginal peoples in Canada challenging the independent statehood of Canada. Consequently, judicial statements pertaining to the British Crown's acquisition of external sovereignty over what is now Canada[1091] (or Australia[1092]) is not being dealt with here.[1093] However, purported acts of state and their impact on matters of internal sovereignty are worth examining in the Aboriginal context.

As already indicated, acts of state pertaining to acquisition of territory by the British Crown do not prevent domestic courts from determining the constitutional status of these acquisitions. However, in regard to Aboriginal peoples, a constitutional determination of their status and rights would involve more than an interpretation of English law or application of its conventional legal concepts. As Dickson C.J. states in *Sparrow* v. *The Queen*, "it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake."[1094] In regard to "intersocietal" disputes,[1095] B. Slattery emphasizes the importance of not relying on the precepts of one of the legal systems alone:

> "*If the standards of one legal system are chosen over those of another without explanation, the solution is arbitrary. If reasons are supplied, they must be founded on principles that transcend the competing domestic systems involved*, for to draw reasons from just one system or another is both circular and arbitrary. The question of which system of law should govern cannot be resolved by reference to principles secreted by one of the competing systems without assuming the supremacy of that system, which is the very question that is to be resolved."[1096] [Emphasis added.]

Under English law, it is common to make a distinction for constitutional purposes between territories that were acquired by "conquest" or "cession" and those acquired by "settlement". It is also common to differentiate between the private and public law aspects of any given legal matter. In relation to these issues, K. McNeil indicates:

> "...whatever the constitutional status of a colony (whether conquered, ceded, or settled), pre-existing private property rights would continue by virtue of...the 'doctrine of

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[1090] Id.

[1091] See, for example, *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) at 198, per Wallace J.A.: "The plaintiffs in the present case did not contest Canadian sovereignty over any part of the territory over which they claim aboriginal rights. To do so successfully would have been difficult since the certainty of Canadian sovereignty in British Columbia, which has as its root the sovereignty of the British Crown, was confirmed by the Supreme Court of Canada in *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 at 1103...[new para.] *In any event, it is beyond the competence of a municipal court to question the validity of the acquisition of sovereignty over new territory which is an act of state*..." [Emphasis added.]

[1092] See *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia) at 20, per Brennan J.: "The Crown's acquisition of sovereignty over the several parts of Australia cannot be challenged in an Australian municipal court."

[1093] Any people (Aboriginal or non-Aboriginal) who seek to secede unilaterally from an independent state would not be concerned with municipal courts or the act of state doctrine, but rather would be compelled to meet international criteria relating to external self-determination and secession.

[1094] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 (S.C.C.) at 1112.

[1095] See also draft *United Nations Declaration on the Rights of Indigenous Peoples*, art. 39: "Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. *Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous peoples concerned.*" [Emphasis added.]

[1096] B. Slattery, *Aboriginal Sovereignty and Imperial Claims*, note 1059, *supra*, at 691. See also P. Hutchins, "International Law and Aboriginal Domestic Litigation" in Proceedings of the 1993 Conference of the Canadian Council on International Law, *Aboriginal Rights and International Law* (Ottawa: Canadian Council on International Law, 1992) 11 at 18: "The fact is that the interrelationship between Europeans and aboriginal peoples should be examined not through the looking glass of the common law or civil law exclusively but rather through a legal prism of a number of legal systems - domestic, civil and common law, First Nation customary law and, not the least, international law."

> continuity', in the absence of seizure of privately-held lands by act of state during the course of acquisition of territorial sovereignty by the Crown..."[1097]

Further, in regard to acts of state and public property rights, K. McNeil states:

> "The Crown has a prerogative power to acquire new territory by act of state. Where an acquisition was derivative (that is, where a territory was acquired by conquest or cession from another ruler) the *public property rights held by him* would generally pass to the Crown along with the sovereignty."[1098] [Emphasis added.]

Yet, when such conventional legal categories under English law are applied to the Aboriginal context, a number of problems arise. First, as this study has already indicated,[1099] the distinctions between territories acquired by conquest or cession and those acquired by settlement are often historically inaccurate and make little or no sense when applied to Aboriginal peoples and their territories. In any event, the aboriginal titles of Aboriginal peoples are said to have survived the assertion of British sovereignty[1100] and, whatever the constitutional status of previous colonies, pre-existing property rights continued in favour of the peoples concerned.

Second, English law distinctions between "private" and "public" rights cannot be simply applied to Aboriginal peoples and their inherent status and rights. As described elsewhere in this study,[1101] Aboriginal peoples have an inherent sovereignty, including self-government, that has never been relinquished or lost. In other words, there continue to exist contending sovereignties[1102] (federal/provincial/Aboriginal) that should be further elaborated in Canada's constitutional framework. As B. Slattery provides:

> "*...Canada and the United States have more complicated constitutional structures than is sometimes assumed...Under these structures, Aboriginal nations continue to hold a residue*[1103] *of the sovereignty they once possessed.* This conclusion has been broadly accepted in the United States, although its significance has been underestimated.[1104] In Canada, the concept of internal sovereignty should come as no great novelty, for it has long been held that the provinces are autonomous within their own constitutional spheres."[1105] [Emphasis added.]

Further, the pre-existing rights of Aboriginal peoples cannot be neatly separated from their jurisdictional aspects. In reality, aboriginal rights embrace both collective and individual rights dimensions and include rights to self-government and self-regulation. What are ordinarily "private" or "public" rights distinctions under English law are profoundly intertwined in the

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[1097] K. McNeil, *Common Law Aboriginal Title*, note 1072, *supra*, at 3. See also analysis at 162-164. In addition, in *Coe* v. *Commonwealth of Australia*, [1979] 53 A.L.J.R. 403 at 412, Jacobs J. provides: "Whether the territory is treated as having been acquired by conquest or peaceful settlement, the plaintiff is entitled to argue that the sovereignty acquired by the British Crown did not extinguish 'ownership rights' in the aborigines and that they have certain proprietary rights (at least in some lands) and are entitled to declaration and enjoyment of their rights or compensation."

[1098] Id. at 162.

[1099] See discussion under sub-heading 4.4 *supra*.

[1100] *Roberts* v. *Canada*, [1989] 1 S.C.R. 322 at 340, per Wilson J.

[1101] See discussion under sub-heading 4.6 *supra*.

[1102] See generally discussion under heading 4 *supra*.

[1103] In the view of this study, repressive and discriminatory policies throughout Canada's history have led to a small "residue" of sovereignty actually being exercised by Aboriginal peoples on a *de facto* basis. However, from a *de jure* viewpoint, the sovereignty of Aboriginal peoples is most significant and extensive, and should be so interpreted under Canada's constitutional framework.

[1104] *Worcester* v. *Georgia*, (1832) 6 Pet. 515.

[1105] B. Slattery, *Aboriginal Sovereignty and Imperial Claims*, note 1059, *supra*, at 701.

concept of aboriginal rights. Consequently, to suggest that the pre-existing rights of Aboriginal peoples survived the assertion of British sovereignty in North America insofar as their property rights are concerned, but not in regard to jurisdictional aspects, would make little sense from an Aboriginal perspective. Nor is there sufficiently strong evidence of such a drastic outcome.

Yet, it would appear that some recent judicial decisions in Canada are resorting to these types of conceptual divisions regardless of Aboriginal perspectives and understandings. For example, in *Delgamuukw* v. *British Columbia*, Wallace J.A. provides:

> "The description of aboriginal title in *St. Catherine's Milling*,[1106] and in other decisions such as *Amodu Tijani*[1107] ('native title') and *Re Southern Rhodesia*, [1919] A.C. 211 (P.C.) ('rights of property') strongly suggest that only those aboriginal practices which relate to occupation and use of land were recognized and protected by the common law. Judicial powers or powers to legislate for instance are quite different from the concepts of 'title' or 'rights of property', or a 'usufructuary interest'."[1108]

Wallace J.A. seems to give little weight to the inherent nature of pre-existing aboriginal rights and instead provides for a "common law" perspective of "rights of jurisdiction":

> "...it is the common law which recognized and protected pre-sovereignty aboriginal activities and practices[1109] and gives them their force as aboriginal rights. Thus, any claim to aboriginal jurisdiction would require that rights of jurisdiction, that is, governmental powers such as legislative and judicial powers, were recognized and became enforceable by the common law...[1110]
>
> ...Prior to the acquisition of sovereignty over British Columbia, the Indians exercised jurisdiction in the territory to the extent made possible by their social organization. However, once sovereignty was asserted, the Indians became subjects of the Crown and the common law applied throughout the territory and to all inhabitants."[1111]

Also, the trial judge at first instance in the *Delgamuukw* case refused to fathom that jurisdiction and sovereignty can be shared concepts within Canada's constitutional framework:

> "...at the time of union of the colony with Canada in 1871, all legislative jurisdiction was divided between Canada and the province, and there was no room for aboriginal jurisdiction or sovereignty which would be recognized by the law or the courts...
>
> .....
>
> After much consideration, I am driven to find that jurisdiction and sovereignty are such

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[1106] *St. Catherine's Milling and Lumber Co.* v. *The Queen*, (1888) 14 A.C. 46 (P.C.), affirming (1887) 13 S.C.R. 577.

[1107] *Amodu Tijani* v. *Southern Nigeria (Secretary)*, [1921] 2 A.C. 399 (P.C.).

[1108] *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) at 206.

[1109] The notion of aboriginal "practices" is viewed differently by Lambert J.A. (dissenting) at 351: "...the trial judge was in error when he concluded that the claim to 'jurisdiction' must fail because the nature of aboriginal self-government and self-regulation was such that it does not produce a set of binding and enforceable 'laws'. Aboriginal rights of self-government and self-regulation do not rest on 'laws'. They rest on the customs, traditions, and practices of the aboriginal people to the extent that those customs, traditions and practices formed and form an integral part of their distinctive culture." Aboriginal peoples do have their own traditional systems of laws, but these laws are most often not in written form.

[1110] Contrast this with the dissenting opinion of Lambert J.A. at 351: "In my opinion, the trial judge was in error in imposing standards from the common law on the aboriginal rights of self-government and self-regulation. The aboriginal rights of self-government and self-regulation are sui generis, just as the aboriginal title is sui generis." See also B. Slattery, *Aboriginal Sovereignty and Imperial Claims*, note 1059, *supra*, at 702, where the author takes the view that "colonial law" or "imperial constitutional law" applicable to Canada includes inter-societal customs relevant to Aboriginal peoples and this body of law forms part of the "common law".

[1111] Id. at 224.

> *absolute concepts* that there is no half-way house. No court has authority to make *grants* of constitutional jurisdiction in the face of such clear and comprehensive statutory and constitutional provisions."[1112] [Emphasis added.]

With respect, the above analyses from the *Delgamuukw* case are not convincing.[1113] If the common law in the United States has always recognized a notion of Aboriginal sovereignty within the constitutional framework of the United States,[1114] it is difficult to fathom how that would be impossible within the context of Canada.[1115] Such conclusion is especially surprising given that explicit constitutional provisions in favour of Aboriginal peoples are more prevalent in Canada than in the U.S.[1116] Moreover, to describe sovereignty and jurisdiction as "absolute concepts" is not consistent with the constitutional distribution of powers and sovereignty found in both the Canadian and U.S. federations.[1117]

In addition, the division of powers between federal and provincial governments in the Constitution of Canada (and the U.S.) is not surprising. From the time of the *Royal Proclamation of 1763*, the British policy and orientation to Crown/Aboriginal relations was a uniform one that instructed that Aboriginal peoples not be "molested" or "disturbed" in the possession of their lands. Such a policy of respect and co-existence was expressed in the Royal Proclamation and had legal effect at the time that the *Constitution Act, 1867* was adopted, as well as subsequently. Since the *Royal Proclamation* is also a constitutional instrument,[1118] the *Constitution Act, 1867* should be read in conjunction with the provisions of the Proclamation (and other constitutional instruments[1119]) that reflect a fiduciary duty to safeguard Aboriginal peoples and their territorial rights.

Given that "strong evidence" is required by the courts when acts of state are invoked as a defence to claims by others, it cannot be said that "as a matter of policy" the intention of the British Crown was solely to recognize Aboriginal property rights and extinguish Aboriginal peoples' sovereignty and jurisdiction in relation to their territories.[1120] The fact that s. 91(24) of the *Constitution Act, 1867* provides for the federal Parliament (as opposed to provincial

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[1112] *Delgamuukw* v. *B.C.*, [1991] 3 W.W.R. 97 (B.C. S.C.) at 386, per McEachern C.J.

[1113] See also H. Foster, *It Goes Without Saying: Precedent and the Doctrine of Extinguishment by Implication in Delgamuukw et al. v. The Queen*, (1991) 49 The Advocate 341.

[1114] Recent U.S. cases affirming the sovereign status of Indian tribes include: *Kerr-McGee Corp.* v. *Navajo Tribe of Indians*, 471 U.S. 195 (1985); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978); *U.S.* v. *Wheeler*, 435 U.S. 313 (1978); *Williams* v. *Lee*, 358 U.S. 217 (1959). For a critical view of the treatment of tribal sovereignty by the U.S. Supreme Court, see C. Berkey, *The U.S. Supreme Court and the Assault on Indian Sovereignty*, (1990) 2 Without Prejudice 27.

[1115] It is also worth noting that there is a growing number of jurists that share the view that the right to self-government, as an existing aboriginal right, is implicitly included in s. 35(1) of the *Constitution Act, 1982*: see note 950, *supra*.

[1116] Further, in the view of this study, the recognition of Aboriginal sovereignty and rights faces less legal impediments in Canada than in the United States, since Canadian courts have not embraced such prejudicial notions as the "plenary power" doctrine or the "political questions" doctrine still evident in U.S. decisions. In regard to the U.S. plenary power doctrine, see discussion under sub-heading 6.2.2.4 *infra* and, in relation to the political questions doctrine, see *Operation Dismantle* v. *The Queen*, [1985] 1 S.C.R. 441 (S.C.C.), per Wilson J.

[1117] In regard to the relative nature of sovereignty, see discussion under sub-heading 4.1 *supra*.

[1118] See discussion under sub-heading 2.5 *supra*.

[1119] See, for example, the terms and conditions attached to the *Rupert's Land and North-Western Territory Order*, 1870 that pertain to Aboriginal peoples.

[1120] See, for example, K. McNeil, *Common Law Aboriginal Title*, note 1072, *supra*, at 181: "The extent to which English law was received and local law preserved would depend on the particular circumstances of the territory in question...But indigenous peoples who had their own systems of law would not be in need of English law to regulate their internal affairs. As long as they were not integrated into the settler society, their laws respecting civil matters...would evidently be more appropriate for that purpose." For a view that the jurisdiction of Aboriginal peoples over criminal matters was also to be safeguarded, see H. Foster, *Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases*, (1992) 21 Man. L.J. 343.

legislatures) to legislate in regard to "Indians, and Lands reserved for the Indians" does not mean that Aboriginal peoples were intended to be deprived of any jurisdiction to govern themselves and their lands. Rather, in view of the historical fiduciary relationship the Crown had with Aboriginal peoples, it made sense that some provision was made in the Constitution for federal legislative authority in regard to the Aboriginal peoples concerned.[1121]

5.2 Recognition Doctrine

The recognition doctrine is linked to the notion of act of state and, for many years, served to dispossess people of their pre-existing rights. This doctrine is described by Lord Dunedin in *Vajesingji Joravarsingji* v. *Sec. of State for India* as follows:

> "...when a territory is acquired by a sovereign state for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognized ruler. In all cases the result is the same. *Any inhabitant can make good in the municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognized. Such rights as he had under the rule of his predecessors avail him nothing.*"[1122] [Emphasis added.]

As K. McNeil points out,[1123] this ruling in *Vajesingji Joravarsingji* relied upon three previous decisions. Two of these cases, *Sec. of State of India* v. *Kamachee Boye Sahaba*[1124] and *Cook* v. *Sprigg*[1125] do not appear to support the ruling in *Vajesingji Joravarsingji* and the third case, *Sec. of State for India* v. *Bai Rajbai*,[1126] relied solely on the first two authorities in reaching its conclusion.[1127]

McNeil concludes that "the recognition doctrine as laid down in *Bai Rajbai* and *Vajesingji Joravarsingji* is not just wrong in law, but unworkable as well.[1128] Moreover, there exists a line of cases[1129] that support a countervailing notion, sometimes referred to as the "doctrine of continuity".[1130] According to this latter doctrine, there is a legal presumption that private

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[1121] See sub-heading 5.3 *infra*, for additional arguments as to the inappropriateness of applying the act of state doctrine to questions of Aboriginal sovereignty.

[1122] *Vajesingji Joravarsingji* v. *Sec. of State for India*, (1924) L.R. 51 I.A. 357 (P.C.) at 360.

[1123] K. McNeil, *Common Law Aboriginal Title*, note 1072, *supra*, at 166-171.

[1124] *Sec. of State of India* v. *Kamachee Boye Sahaba*, (1859) 7 Moo. I.A. 476 (P.C.).

[1125] *Cook* v. *Sprigg*, [1899] A.C. 572 (P.C.).

[1126] *Sec. of State for India* v. *Bai Rajbai*, (1915) L.R. 42 I.A. 229 (P.C.).

[1127] K. McNeil, *Common Law Aboriginal Title*, note 1072, *supra*, at 166-171.

[1128] Id. at 177. The author explains that "unless recognition was quickly and clearly accorded, this means that all titles would be uncertain for some indefinite period. In the meantime, the inhabitants would be presumed trespassers, and all property transactions - other than the Crown - would be of doubtful validity...It appears, therefore, that the recognition doctrine postulates a state of affairs which, if taken seriously, would be potentially chaotic."

[1129] *Amodu Tijani* v. *Sec. Southern Nigeria*, [1921] 2 A.C. 399 (P.C.) at 407-410; *Re Southern Rhodesia*, [1919] A.C. 211 (P.C.) at 233, 235; *Oyekan* v. *Adele*, [1957] 2 All E.R. 785 (P.C.) at 788, per Lord Denning; *Calder* v. *A.G. British Columbia*, [1973] S.C.R. 313 (S.C.C.) at 401-406, per Hall J.; *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia) at 41, per Brennan J., at 143-144 per Toohey J.

[1130] See B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 1072, *supra*, at 50-59; K. McNeil, *Common Law Aboriginal Title*, note 1072, *supra*, at 171-174.

rights continue following a change in sovereignty.

In *Mabo et al.* v. *State of Queensland*,[1131] the High Court of Australia rejected the recognition doctrine as applying to aboriginal title. As Brennan J. indicates:

> "The preferable rule, supported by the authorities cited, is that a mere change in sovereignty does not extinguish native title to land."[1132]

In addition, the recognition doctrine was rejected by the Supreme Court of Canada in *Guerin* v. *The Queen*.[1133] Dickson J. (as he then was) provides:

> "The principle that a change of sovereignty over a particular territory does not in general affect the presumptive title of the inhabitants was approved in *Amodu Tijani* v. *Secretary, Southern Nigeria*, [1921] 2 A.C. 399. That principle supports the assumption implicit in *Calder* that Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, none the less predates it...*[The Indians'] interest in their lands is a pre-existing legal rights not created by Royal Proclamation, by s. 18(1) of the Indian Act, or by any other executive order or legislative provision.*"[1134] [Emphasis added.]

Although the recognition doctrine lacks any credibility and has been rejected by the courts, it is worth noting that such a doctrine is especially unworkable in a federal state. In view of the fact that sovereignty is divided in a federation, such as Canada, how could recognition possibly work? Would recognition of aboriginal title by the Crown in right of Canada, or alternatively by a province alone, be binding on all parties? Would the power of recognition be apportioned according to legislative authority and the division of powers in the Canadian Constitution? How could the recognition doctrine be used against Aboriginal peoples if they constitute, as this study suggests, one of the contending sovereignties under Canada's constitutional framework?

In reality, the recognition doctrine is a most unjust and arbitrary means of dispossessing people of their fundamental rights. Discretionary doctrines that purport to operate above the law have no place in any legal system.

5.3 Doctrine of *Terra Nullius*

In the *Western Sahara Case*,[1135] the International Court of Justice gives a restrictive definition as to what kind of territory would constitute *"terra nullius"* over which one might claim original "occupation":

> "The expression '*terra nullius*' was a legal term of art employed in connection with 'occupation' as one of the accepted legal methods of acquiring sovereignty over territory.

[1131] *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia).

[1132] Id. at 41. In addition, Brennan J. indicates at 40. "Despite his judgment in *Vajesingji Joravarasingji*, Viscount Dunedin subsequently accepted [in *Oshodi* v. *Dakolo*, [1930] A.C. 667 at 668] that the decision in *Amodu Tijani* laid down that the cession of Lagos in 1861 'did not affect the character of the private native rights'."

[1133] *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 (S.C.C.).

[1134] Id. at 336. To the same effect, see also Dickson J.'s comments at 335 and 341.

[1135] *Western Sahara*, Advisory Opinion, [1975] I.C.J. 12 at 39.

> 'Occupation' being legally an original means of peaceably acquiring sovereignty over territory otherwise than by cession or succession, *it was a cardinal condition of a valid 'occupation' that the territory should be terra nullius - a territory belonging to no one - at the time of the act alleged to constitute 'occupation'*...In the view of the Court, therefore, a determination that Western Sahara was a '*terra nullius*' at the time of colonization of Spain would be possible only if it were established that at that time the territory belonged to no-one in the sense that it was then open to acquisition through the legal process of 'occupation'."[1136] [Emphasis added.]

The International Court then indicates:

> "Whatever the differences of opinion there may have been among jurists, the State practice of the relevant period indicates that *territories inhabited by tribes or peoples having a social and political organization were not regarded as terrae nullius.*"[1137] [Emphasis added.]

In the same case, Judge Gros provides that "the independent tribes travelling over the territory, or stopping in certain places, exercised a *de facto* authority which was sufficiently recognized for there to have been no *terra nullius.*"[1138] Judge Dillard also spoke of "independent tribes with a degree of political and social organization" and highlighted that the fact of conclusion of treaties with such peoples is relevant since "you do not *protect* a *terra nullius.*"[1139]

J. Crawford comments on this ruling in *Western Sahara*, indicating that the criterion of "civilization"[1140] is no test for *terra nullius*:

> "...the Court held, unanimously, that the presence of nomadic tribes with a degree of political and social organization precluded the territory from being regarded as *terra nullius*. The *Western Sahara Case* thus *provides a decisive refutation of the criterion of 'civilization' as a test for terra nullius.*"[1141] [Emphasis added.]

Under English and Canadian law, it is possible in certain situations to ignore international criteria in acquiring new territory[1142] - especially if the relevant international norms have not been incorporated in the domestic legal system concerned.[1143] However, when racial discrimination is a factor, international[1144] and national[1145] legal prohibitions tend to be

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[1136] Id. at 39.

[1137] Id.

[1138] Id. at 75.

[1139] Id. at 124.

[1140] In regard to misconceived notions or tests of "civilization", it is worth noting the views expressed in M. Asch & C. Bell, *Definition and Interpretation of Fact in Canadian Aboriginal Litigation: An Analysis of Delgamuukw*, (1994) 19 Queen's L.J. 503 at 524: "There can be no people so primitive that they have no social organization or system of rules regulating behaviour"; and in A. Allott, *Aboriginal Rights and Wrongs: The Mabo Land Case*, [1993] Law & Justice 84 at 100: "...there is no society, however small and even if appearing to lack some of the organs of government such as courts and police, which is without law or a legal system. Indeed, it is my contention that it is in principle logically impossible for an organised society, as all must be, to be without law."

[1141] J. Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 1979) at 181. At 182, the author adds: "It follows from what has been said that *a necessary condition for valid acquisition* of nearly all inhabited territory was the *consent of the native chiefs or peoples* involved." [Emphasis added.]

[1142] K. McNeil, *Common Law Aboriginal Title*, note 1072, *supra*, at 133. The author adds at 176 and 179, n. 70 that there is a common law presumption that the Crown does not intend to break international norms.

[1143] See discussion under sub-heading 8.2.1.1 *infra*.

[1144] Under international law, non-discrimination on the basis of race is viewed as a principle of customary international law as well as a peremptory norm: see discussion under sub-heading 8.2.2 *infra*.

similar or converge.[1146]

In *Mabo et al.* v. *State of Queensland*,[1147] the application of the doctrine of *terra nullius* to Aboriginal people, who were the original occupiers of the territory in question, was viewed as racially discriminatory. In this regard, Brennan J. cites[1148] the definition of "*terra nullius*" in *Western Sahara* and then reaches the following conclusions:

> "If the international law notion that inhabited land may be classified as terra nullius no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be 'so low in the scale of social organization' that it is 'idle to impute to such people some shadow of the rights known to our law'[1149] can hardly be retained. *If it were permissable in past centuries to keep the common law in step with international law ... it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.*
>
> The *fiction* by which the rights and interests of indigenous inhabitants in land were treated as *non-existent* was justified by a policy which has no place in the contemporary law of this country."[1150] [Emphasis added.]

Brennan J. explicitly denounces the "unjust[1151] and discriminatory doctrine" as a violation of human rights standards:

> "Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, *an unjust and discriminatory doctrine of that kind can no longer be accepted*. The expectations of the international community accord in this respect with the contemporary values of the Australian people...*It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.*"[1152] [Emphasis added.]

Deane and Gaudron JJ. in *Mabo* come to similar conclusions. They underline the role of "dispossession and oppression of the Aboriginals"[1153] played by the two fictious propositions of *terra nullius* (in the sense of unoccupied or uninhabited for legal purposes) and of full legal and beneficial ownership of all the lands of the Colony vested in the Crown. Moreover, the

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[1145] The *Canadian Charter of Rights and Freedoms*, s. 15, in the *Constitution Act, 1982* prohibits discrimination on the basis of race (among other factors): see discussion under sub-heading 8.3.3 *infra*.

[1146] *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia) at 29, per Brennan J.: "The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration."

[1147] *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia).

[1148] Id. at 27.

[1149] *Re Southern Rhodesia*, [1919] A.C. 211 (P.C.) at 233-234.

[1150] *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia) at 28.

[1151] In B. Slattery, *Aboriginal Sovereignty and Imperial Claims*, note 1059, *supra*, at 700, the injustice of applying the doctrine of *terra nullius* to Aboriginal peoples and their territories is also emphasized:"[T]hat North America was legally vacant when Europeans arrived cannot be justified by reference to positive or natural law. Attempts to justify it on either basis are afflicted by arbitrariness or circularity, or they conflict with basic principles of justice."

[1152] *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia) at 29.

[1153] Id. at 82.

learned judges recognize the role of governments and the courts in this tragic deception:

> "Those propositions provided a legal basis for and justification of the dispossession. They constituted the legal context of the acts done to enforce it and, while accepted, rendered unlawful acts done by the Aboriginal inhabitants to protect traditional occupation or use. *The official endorsement, by administrative practice and in judgments of the courts, of those two propositions provided the environment in which the Aboriginal people of the continent came to be treated as a different and lower form of life whose very existence could be ignored for the purpose of determining the legal right to occupy and use their traditional homelands.*"[1154] [Emphasis added.]

In view of the seriousness of such discrimination against Aboriginal peoples, Deane and Gaudron JJ. conclude that there is a "clear duty" judicially to re-examine these propositions and ensure their rejection:

> "The acts and events by which that dispossession in legal theory was carried into practical effect constitute the *darkest aspect of the history of this nation*. The nation as a whole must remain diminished unless and until there is an acknowledgement of, and retreat from, those past injustices. In these circumstances, *the court is under a clear duty to re-examine the two propositions. For the reasons, which we have explained, that re-examination compels their rejection.* The lands of this continent were not terra nullius or 'practically unoccupied' in 1788."[1155] [Emphasis added.]

In a similar vein, D. Sanders describes how both the doctrines of *terra nullius* and "discovery"[1156] have fallen into disrepute:

> "United States has used the doctrine of 'discovery' to justify the takeover of Indian people and territory. In the same way Australian law has used the concept of 'terra nullius', the legal myth that Australia had no previous owners. *Today it is easy to see that both doctrines are racist. Both are inconsistent with modern international law.* The United Nations Working Group on Indigenous Populations'[1157] rejects both doctrines."[1158]

[1154] Id.

[1155] Id. at 82-83.

[1156] See *Johnson* v. *M'Intosh*, (1823) 8 Wheat. 543, where Chief Justice Marshall determined that the original thirteen colonies of the U.S. could be claimed on the basis of discovery. For critical commentary, see K.. McNeil, *Common Aboriginal Title*, note 1072 at 228, 245-246, 252-253, 265; G. Lester, "Primitivism versus Civilisation: A Basic Question in the Law of Aboriginal Rights to Land" in C. Brice-Bennett, *Our Footprints Are Everywhere: Inuit Land Use and Occupancy in Labrador* (Ottawa: Labrador Inuit Association, 1977); H. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, (1978) 27 Buffalo L.R. 637 at 651-3; F. Von der Heydte, *Discovery, Symbolic Annexation and Virtual Effectiveness in International Law*, (1935) 29 Am. J. Int'l L. 448 at 452-453.

See also S.J. Anaya, *The Rights of Indigenous Peoples and International Law in Historical and Contemporary Perspective*, 1989 Harvard Indian Law Symposium 191 (1990) at 195: "Vitoria maintained that discovery of the Indians' lands alone could not confer title in the Spaniards 'anymore than if it had been they would had discovered us.'" [F. Vitoria, *De Indis et de Ivre Belli Reflectiones* (Classics of International Law ed. 1917) (translation based on Boyer ed. 1557, Muñoz ed. 1565 & Simon ed. 1696)]. In H. Berman, "Perspectives on American Indian Sovereignty and International Law, 1600 to 1776", *supra*, at 133, it is indicated: "'Papal donation' and 'discovery' provided the weakest and most tenuous claims, in large measure because they were abstract and unilateral. they amounted to little more than a naked declaration on the part of the asserting European state that its rivals should desist"; and F. Jennings, *The Invasion of America [:] Indians, Colonialism, and the Cant of Conquest* (New York/London: W.W. Norton & Co., 1975) at 39: "The word *contact* properly suggests the reciprocity of discovery that followed upon European initiatives of exploration; *as surely as Europeans discovered Indians, Indians discovered Europeans.*" In addition, see R. Boivin, *Le droit des autochtones sur le territoire québécois et les effets du régime français*, (1995) 55 R. du B. 135 at 149, where it is said that modern doctrine in international law rejects "discovery" as a mode of territorial acquisition and the theory of *terra nullius*.

[1157] In referring to the U.N. Working Group in Geneva, Sanders is alluding to the norms provided in the draft *United Nations Declaration on the Rights of Indigenous Peoples*. See, especially, the third preambular para.: "...all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust".

[Emphasis added.]

Also, in regard to the early theories that were used to "acquire" Aboriginal territories, the 1989 U.N. Seminar on racism and racial discrimination has concluded:

> "The concepts of '*terra nullius*', 'conquest' and 'discovery' as modes of territorial acquisition are *repugnant, have no legal standing, and are entirely without merit or justification* to substantiate any claim to *jurisdiction or ownership* of indigenous lands and ancestral domains, and the legacies of these concepts should be eradicated from modern legal systems."[1159] [Emphasis added.]

Although it has been judicially recognized in *Mabo* and other cases that the pre-existing land rights of Aboriginal peoples have survived the acquisition of territory by the British Crown, the courts have stopped short of applying the same analysis to Aboriginal sovereignty. In the view of this study, to recognize solely the assertion of British sovereignty over Aboriginal territories is an oversimplification and does not appear to be historically or legally accurate. In particular, such an approach based on act of state doctrine seems to offend the very principles of justice and non-discrimination that are being invoked by the courts in support of the continued existence of Aboriginal land rights.

The assertion of British sovereignty in what is now Canada was not done through the conquest of Aboriginal peoples[1160] or through cessions of Aboriginal sovereignty pursuant to treaties.[1161] As indicated by the Supreme Court of Canada in *R.* v. *Sioui*,[1162] "the Indian nations were regarded in their relations with the European nations which occupied North America as independent nations".[1163] The situation in North America was not one where Aboriginal peoples relinquished their sovereignty in favour of another ruler. There were no such clear and unambiguous acts.

In asserting British sovereignty in present-day Canada, what was in essence communicated to Indian nations was not that Britain would assume complete sovereignty and control over them and their territories. Rather, Aboriginal peoples were assured that, in return for peaceful relations and a sharing of their lands and resources, they would receive the protection and assistance of the British Crown. That British intentions were oriented towards a fluid arrangement of co-existence, non-interference[1164] and mutual respect is evidenced by the

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[1158] D. Sanders, *The Supreme Court of Canada and the "Legal and Political Struggle" Over Indigenous Rights*, (1990) 22 Can. Ethnic Studies 122, at 122.

[1159] *Report on the United Nations Seminar on the effects of racism and racial discrimination on the social and economic relations between indigenous peoples and States, Geneva, Switzerland, 16-20 January 1989*, U.N. Doc. E/CN.4/1989/22, 8 February 1989, para. 40(b), at 10.

[1160] See discussion under sub-heading 4.4.2 *supra*.

[1161] See discussion under sub-heading 4.6.2 *supra*.

[1162] *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 (S.C.C.).

[1163] Id. at 1052-1053. See generally discussion under sub-heading 4.6 *supra*.

[1164] It has been said that the British policy towards Aboriginal peoples of independence and non-interference was a continuation of what had occurred under the French regime. See C. Jaenen, "French Sovereignty and Native Nationhood during the French Régime" in J.R. Miller, (ed.), *Sweet Promises [:] A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991) 19 at 36: "There was some recognition that under the French régime [Aboriginal peoples] had enjoyed a generous measure of *independence and non-interference with their indigenous system of internal order*. [Governor] Murray was instructed [by the British in December 1763] as follows: 'And *you are on no Account to molest or disturb them in the Possession of such Parts of the said Province, as they at present occupy or possess*; but to use the best means You can for conciliating their Affections, and uniting them to our Government.'" [Emphasis added.]

See also *R.* v. *Sioui*, [1990] 1 S.C.R. 1025 (S.C.C.) at 1055: "The British Crown recognized that the Indians had certain ownership rights over their land...*It also allowed them autonomy in their internal affairs, intervening in this area as little as possible*." Consequently, it can be said that British recognition of Aboriginal peoples' rights was not limited to property rights but also included rights to jurisdiction and self-government.

constitutional instruments and uniform policies that followed soon after the assertion of British sovereignty. In particular, constitutional instruments, such as the *Royal Proclamation of 1763* and the *Rupert's Land and North-Western Territory Order*, 1870, served to limit the Crown's powers in favour of Aboriginal peoples and create duties to safeguard Aboriginal peoples and their rights.

It is fair to state that the assertion of British sovereignty was apparently unambiguous vis-a-vis France and other European nations. However, it cannot be concluded that British actions or intentions at that time were in any way similar in regard to the Aboriginal peoples concerned. At the time of British sovereignty, there were no "seizures" of Aboriginal peoples' territories or conquests of these peoples who possessed original occupation of their lands. Nor were there any manifest denials of Aboriginal sovereignty or fundamental rights by the British. As B. Slattery points out, there were two "divergent streams of state practice, one inter-European, the European-Aboriginal":

> "...there is a wealth of historical evidence that some imperial powers, notably Great *Britain and France, followed quite different practices in their dealings with native American peoples. In effect, there were divergent streams of state practice, one inter-European, the other European-Aboriginal.* One way of reconciling these differences is to say that the inter-European practice gave rise to a local rule which bound European states among themselves and, yet, had no effect on native American peoples, whose territorial rights were unimpaired."[1165] [Emphasis added.]

It is true that, subsequent to the assertion of British sovereignty, the Crown in right of Canada and the provinces often derogated in practice from British policies and instructions. At different periods of history, federal and provincial governments experimented with and manipulated Aboriginal peoples through colonial policies of assimilation, subjugation, repression and coercion.[1166] In addition, over the years, the Crown in right of Canada has sought to exercise sovereignty and dominion over Aboriginal peoples. However, these actions and policies were undertaken well after the assertion of British sovereignty.[1167] Consequently, they are irrelevant in terms of the act of state doctrine.

Given the complex and ambiguous relationship that existed between Aboriginal peoples and the British Crown at the time of British sovereignty in North America, the historic assurances made to Aboriginal peoples, and human rights considerations that cannot be ignored, it would be most inappropriate to invoke act of state or related doctrines of dispossession such as "recognition" or "*terra nullius*". In particular, the "clear duty" of the courts to alter the common law and eliminate past discrimination and injustice, articulated by the Australian High Court in *Mabo*, should be applied not only to questions concerning the land rights of Aboriginal peoples, but to their sovereignty as well.

[1165] B. Slattery, *Aboriginal Sovereignty and Imperial Claims*, note 1059, *supra*, at 689. See also R. Boivin, *Le droit des autochtones sur le territoire québécois et les effets du régime français*, note 1156, *supra*, at 152, where it is stated that French territorial claims had effect only among the European powers and not Aboriginal peoples since the negation of their rights would have been illegal under international law.

[1166] See, generally, A. Armitage, *Comparing the Policy of Assimilation: Australia, Canada, and New Zealand* (Vancouver: University of British Columbia Press, 1994); J.R. Miller, (ed.), *Sweet Promises [:] A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991); and J.R. Miller, *Skyscrapers Hide the Heavens [:] A History of Indian-White Relations in Canada*, revised edition (Toronto: University of Toronto Press, 1989); R. Savard & J.-R. Proulx, *Canada [:] derrière l'épopée, les autochtones* (Montréal: L'hexagone, 1982).

[1167] Moreover, whether these actions and policies were consistent with the fiduciary and other constitutional duties of non-Aboriginal governments in Canada can be seriously questioned.

5.4 Notions of Primitivism and the Freezing of Aboriginal Rights

> "...words have weighted values...We [Whites] migrate or travel. Indian nomads wander. We are defrauded. Indians are victims of superior intelligence and cunning. We recognize the power of the presidency. Indians subject themselves to one-man domination. We practice a religion. Indians tend to superstition. We have made a bad deal. Indians are thriftless. We spend money. Indians squander it. In sum, we are superior. Indians are inferior."[1168]
>
> I. Harvey, 1982

> "The assessment and interpretation of the historical documents and enactments tendered in evidence *must be approached in the light of present-day research and knowledge[,] disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete* and when they were thought to be wholly without cohesion, laws or culture, in effect a *subhuman species*."[1169] [Emphasis added.]
>
> Hall J., *Calder* v. *A.-G. British Columbia*, Supreme Court of Canada, 1973

Although wholly rejected by the High Court of Australia in *Mabo et al.* v. *State of Queensland*,[1170] a commonly used rationale to dispossess Aboriginal peoples of their land rights was to claim they were too "primitive" to be able to possess property rights.[1171] This attitude of deep-rooted prejudice is illustrated by Lord Sumner's dictum in *Re Southern Rhodesia*[1172] in 1919:

> "*Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged.* It would be idle to impute to such people some shadow of the rights known to our law and then transmute it into the substance of transferable rights of property as we know them."[1173] [Emphasis added.]

Similarly, in *Calder* v. *A.G. B.C.*, Davey C.J. provided:

> "*[The Nishga] were at the time of settlement a very primitive people with few of the*

[1168] I. Harvey, *Constitutional Law: Congressional Plenary Power Over Indian Affairs - A Doctrine Rooted in Prejudice*, (1982) 10 Am. Indian L. Rev. 117 at 137.

[1169] *Calder* v. *A.-G. British Columbia*, [1973] S.C.R. 313 (S.C.C.) at 346, per Hall J.

[1170] *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia).

[1171] See, for example, G. Lester, "Primitivism versus Civilisation: A Basic Question in the Law of Aboriginal Rights to Land" in C. Brice-Bennett, *Our Footprints Are Everywhere: Inuit Land Use and Occupancy in Labrador*, note 1156, *supra*, at 356-358; and K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 210.

[1172] *Re Southern Rhodesia*, [1919] A.C. 211 (P.C.).

[1173] Id. at 233-234.

> *institutions of civilized society*...I have no evidence to justify a conclusion that the aboriginal rights claimed by the successors of these *primitive peoples* are of a kind that it should be assumed the Crown recognized them when it acquired the mainland of British Columbia by occupation."[1174] [Emphasis added.]

D. Sanders describes how primitivism has been used by the lower courts in Canada, both before and after Confederation, to deny Aboriginal peoples their fundamental rights:

> "In *Sheldon* v. *Ramsay*[1175] in 1852 an Ontario court held that the Six Nations Indians has no legal rights to their reserve lands, because the common law could not be 'part savage and part civilized'. In 1921 in *Sero* v. *Gault*,[1176] an Ontario court quoted the Attorney-General as saying that treaties with the Mohawk made as much sense as treaties 'with the Jews in Duke street'. In *Regina* v. *Syliboy*[1177] in 1929, a Nova Scotia Court ruled that a treaty between the Mic Mac and England was a nullity. Indians were 'uncivilized' and 'savages'. The treaty had been made with a 'handful of Indians'...These cases were all racist lower court decisions. *Yet for decades the Government of Canada referred to the Syliboy decision as defining the status of treaties in Canadian law.*"[1178]

In *Johnson* v. *M'Intosh*, Marshall C.J. of the U.S. Supreme Court invoked a savagery rationale as follows:

> "The tribes of Indians inhabiting this country were *fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest.* To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high-spirited as they were fierce, and were ready to repel by arms every attempt on their independence."[1179] [Emphasis added.]

F. Jennings elaborates on the reason for "inventing" a legal notion of savagery as follows:

> "To invade and dispossess the people of an unoffending civilized country would violate morality and trangress the principles of international law, but *savages were exceptional. Being uncivilized by definition, they were outside the sanctions of both morality and law.* The condition of savagery therefore involved more than aesthetic sensibilities, and the chief justice espousing separation of church and state could show no official concern about Indians' lack of Christianity as criterion of legal status. For Justice Marshall the *fundamental criteria of legal savagery were two: subsistence 'from the forest' and the 'occupation' of war.* Since it could hardly be argued that civilized societies eschewed war or withheld honor from professional soldiers, the critical factor in being savage reduced to a mode of subsistence."[1180] [Emphasis added.]

In addition, Hall J. of the Supreme Court of Canada in *Calder* v. *The Queen* has flatly denounced Chief Justice Marshall's war-mongering characterization of Aboriginal peoples as follows:

[1174] *Calder* v. *A.G. B.C.*, (1970), 13 D.L.R. (3d) 64 (B.C.C.A.) at 66.

[1175] *Sheldon* v. *Ramsay*, (1852) 9 U.C.R. 105 (Q.B.).

[1176] *Sero* v. *Gault*, (1921) 50 O.L.R. 27.

[1177] *Regina* v. *Syliboy*, [1929] 1 D.L.R. 307 (N.S. Co. Ct.).

[1178] D. Sanders, *The Supreme Court of Canada and the "Legal and Political Struggle" Over Indigenous Rights*, (1990) 22 Can. Ethnic Studies 122 at 123-124.

[1179] *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) at 589.

[1180] F. Jennings, *The Invasion of America [:] Indians, Colonialism, and the Cant of Conquest* (New York/London: W.W. Norton & Co., 1975) at 60.

> "Chief Justice Marshall...in *Johnson* v. *McIntosh*...[has said:] 'But the tribes of Indians inhabiting this country were fierce savages whose occupation was war...' *We now know that that assessment is ill-founded.* The Indians did in fact engage in some tribal wars but *war was not their vocation and it can be said that their preoccupations with war pales into insignificance when compared to the religious and dynastic wars of 'civilized' Europe of the 16th and 17th centuries.*"[1181] [Emphasis added.]

Primitivism, as a doctrine of dispossession, is no longer accepted by Canadian (or Australian) courts. Yet, judicial attitudes or approaches still prevail in Canada that serve to incorporate notions of primitivism in the analysis of aboriginal rights. Two principal cases that illustrate in varying degrees this continuing tendency are *Hamlet of Baker Lake* v. *Minister of Indian Affairs*[1182] and *Delgamuukw* v. *British Columbia*.[1183] The result of such analyses appears to in effect "freeze" the types of land and resource uses that may be included in the legal interpretation of aboriginal rights.

In *Hamlet of Baker Lake* v. *Minister of Indian Affairs*,[1184] Mahoney J. lists four elements or criteria for proof of aboriginal title at common law.[1185] Of particular interest here is the first element of proof by the Aboriginal peoples concerned, namely "[t]hat they and their ancestors were members of an organized society." In applying this criterion, Mahoney J. does not simply conclude that the Inuit and their ancestors were an organized society. The Federal Court trial judge also appears to freeze aboriginal rights, by examining the "level" of organization in the early years to determine the nature of the aboriginal title or rights at common law that Inuit can assert:

> "The fact is that the aboriginal Inuit had an organized society. It was not a society with very elaborate institutions but it was a society organized to exploit the resources available to sustain human life there. *That was about all they could do: hunt and fish and survive. The aboriginal title asserted here encompasses only the right to hunt and fish as their ancestors did.*"[1186] [Emphasis added.]

In *Delgamuukw*, Macfarlane J.A. of the British Columbia Court of Appeal quotes Mahoney J.'s four criteria for proof of aboriginal title at common law and comments on the view in *Hamlet of Baker Lake* as follows:

> "Mahoney J. held that specific aboriginal practices (hunting and fishing) were protected. *Obviously he did not regard proof of occupation as encompassing a broad, unrestricted aboriginal title, extending to all possible uses of the land. Instead the focus was on specific traditional activities* recognized by the aboriginal society as integral to its

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[1181] *Calder* v. *A.-G. British Columbia*, [1973] S.C.R. 313 (S.C.C.) at 346-347.

[1182] *Hamlet of Baker Lake* v. *Minister of Indian Affairs*, (1979) 107 D.L.R. (3d) 513 (Fed. Ct. T.D.).

[1183] *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.). For a critical view of the "primitivism" focus in *Delgamuukw* by the trial judge at first instance, see R. Ridington, "Fieldwork in Courtroom 33: A Witness to *Delgamuukw*" in F. Cassidy, (ed.), *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, B.C.: Oolichan Books, 1992) 206.

[1184] *Hamlet of Baker Lake* v. *Minister of Indian Affairs*, (1979) 107 D.L.R. (3d) 513 (Fed. Ct. T.D.).

[1185] Id. at 542. Mahoney J.'s four elements are: "1. That they and their ancestors were members of an organized society. 2. That the organized society occupied the specific territory over which they assert the aboriginal title. 3. That the occupation was to the exclusion of other organized societies. 4. That the occupation was an established fact at the time sovereignty was asserted by England."

It is worth noting that the validity of the last two criteria, namely that occupation must be to the "exclusion of other organized societies" and must be "an established fact at the time sovereignty was asserted by England, are questioned in note 493, *supra*. Since application of the first criterion is also potentially problematic (see discussion in text following this note), there is, with respect, little left of value in Mahoney J.'s four elements for proof of aboriginal title.

[1186] Id. at 544.

distinctive culture."[1187] [Emphasis added.]

Macfarlane J.A. explains that, in his view, "[a]ctivities may be regarded as aboriginal if they formed an integral part of traditional Indian life prior to [British] sovereignty".[1188] This judicial perspective would in effect suggest that three elements have to be proved by a particular Aboriginal people: i) The activity must be of a "traditional" nature;[1189] ii) the activity must have been "integral" to traditional Indian life; and iii) this essential attachment must have been present "prior to [British] sovereignty". The learned judge suggests additional limitations in determining what are aboriginal rights when he elaborates on their nature:

> "*...not all practices in existence in 1846*[1190] *were necessarily to be regarded as aboriginal rights*. To be so regarded those practices must have been integral to the distinctive culture of the aboriginal society from which they are said to have arisen. A modernized form of such a practice would be no less an aboriginal right: see *Sparrow*. *A practice which had not been integral to the organized society and its distinctive culture, but which became prevalent as a result of European influences would not qualify for protection as an aboriginal right.*"[1191] [Emphasis added.]

In the view of this study, it would be absurd to attempt to weed out from the definition of aboriginal rights those land uses or practices that "became prevalent as a result of European influences". To varying degrees, every society is influenced in the exercise of its rights by other societies and cultures. In regard to Aboriginal peoples, what degree of "European influence" would be fatal in terms of inclusion as an aboriginal right? How would such an irrelevant factor be determined with any accuracy?

In *Mabo et al.* v. *State of Queensland*,[1192] Toohey J. rejects the view that an Aboriginal people can be dispossessed of their aboriginal rights "by modifying its way of life":

> "An argument to the effect that, regardless of the state of things at the time of annexation, [Aboriginal] people do not have title because they no longer exercise 'traditional' rights and duties and have adopted European ways also fails. *There is no question that indigenous society can and will change on contact with European culture...*
>
> *...Traditional title arises from the fact of occupation, not the occupation of a particular kind of society or way of life*. So long as occupation by a traditional society is established now and at the time of annexation, traditional rights exist. *An indigenous society cannot, as it were, surrender its rights by modifying its way of life.*"[1193] [Emphasis added.]

With respect, Macfarlane J.A.'s overall approach is conspicuously Eurocentric and would impose standards to determine the content of aboriginal rights that are not applied to the land rights of non-Aboriginal people. Obviously, Aboriginal peoples did not seek to freeze or permanently limit, through their own customs or systems of law, their use and occupation of

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[1187] *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) at 129.

[1188] Id.

[1189] In *Delgamuukw*, see also Wallace J.A. at 209, where he states: "...Mahoney J. [in *Baker Lake*] was of the view that only traditional activities can give rise to aboriginal rights."

[1190] This is the date that assertion of British sovereignty is said to have taken place in regard to the territory concerned in British Columbia.

[1191] Id. at 125-126.

[1192] *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia).

[1193] Id. at 150.

their lands, resources and territories.[1194] Their land-related "activities" at any point in their respective histories simply reflect the needs, priorities and circumstances that existed at such time. Surely no society in the world can be defined in such a manner as to inherently incapacitate itself in the exercise of its land-related fundamental rights.

Original occupation of a territory by an Aboriginal people includes, in a broad sense, essential rights of use and control. These elements include an inherent and ongoing discretion on the part of the people concerned as to how it will exercise these rights. No court can arbitrarily freeze the content of these rights to solely those exercised prior to the assertion of British sovereignty. While it is acknowledged by Macfarlane J.A. that Aboriginal peoples could, for example, hunt and fish in a "contemporary" manner, it would still be discriminatory to restrict aboriginal rights to those "traditional" rights actually exercised centuries ago. If only traditional uses of the land are recognized as being included in the legal concept of aboriginal rights, then it is likely that the concept itself (as defined by the courts) could be unjustly headed for extinction as Aboriginal peoples alter their uses of their territories.

B. Slattery emphasizes that aboriginal rights cannot be frozen or otherwise restricted to any specific mode of land use that an Aboriginal people may have engaged in at a particular point in time:

> " Aboriginal title imported full rights of possession and use. Native groups were not confined in law to any particular mode of land use, much less to 'traditional' uses. An Indian band that originally lived by hunting or fishing might turn to farming when wild game became depleted, or to ranching, lumbering, or mining. *To hold that native peoples were permanently wedded to certain historical practices would in some cases have been to sentence them to slow starvation; in any case it would have denied them the right to adapt to new conditions or exploit their lands more productively.*"[1195] [Emphasis added.]

In addition, K. McNeil indicates that "...Aboriginal and treaty rights...include all aspects of Aboriginal life"[1196] and states:

> "Aboriginal rights encompass the use of other natural products of lands and waters covered by Aboriginal title, as well as an interest in the land itself. They may also include any other uses to which Aboriginal lands can be put..."[1197]

In *Sparrow* v. *The Queen*,[1198] Dickson C.J. quotes B. Slattery in rejecting the notion of "frozen [aboriginal] rights":

> "[T]he phrase 'existing aboriginal rights'[1199] must be *interpreted flexibly so as to*

[1194] B. Slattery, *Understanding Aboriginal Rights*, (1987), 66 Can. Bar Rev. 727, at 746: "Some courts, however, have expressed the view that a native 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...The difficulty with this conception, of course, is that native 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 ancient practices must be regarded with scepticism." However, see *R.* v. *Vanderpeet*, [1993] 5 W.W.R. 459 (B.C.C.A.) at 507-510, and *R.* v. *N.T.C. Smokehouse Ltd.*, [1993] 5 W.W.R. 542 at 590, where in both cases Lambert J.A. (dissenting) indicates that aboriginal rights are not frozen for the purpose of defining the "scope" of the right in modern times, but does not extend aboriginal rights to cover new forms of land uses.

[1195] B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" in M. Boldt and J.A. Long, *The Quest for Justice [:] Aboriginal Peoples and Aboriginal Rights* (Toronto: Univ. of Toronto Press, 1985) 114 at 123-124.

[1196] K. McNeil, *Envisaging Constitutional Space for Aboriginal Governments*, (1993) 19 Queen's L.J. 95 at 134.

[1197] Id. at 123.

[1198] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 (S.C.C.).

[1199] Dickson C.J. is referring here to the recognition and affirmation of existing aboriginal rights under s. 35(1) of the *Constitution Act, 1982*.

> *permit their evolution over time*. To use Professor Slattery's expression, in 'Understanding Aboriginal Rights',[1200]...at p. 782, the word 'existing' suggests that those rights are 'affirmed in a contemporary form rather than in their primeval simplicity and vigour'. Clearly, then, *an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate 'frozen rights' must be rejected.*"[1201] [Emphasis added.]

In *Sparrow*, the Supreme Court did not have to determine whether all or only certain land uses are included in the legal concept of aboriginal rights. Therefore, it is difficult to say with certainty how far the Court's rejection of the notion of "frozen rights" should be interpreted. However, it is worth noting that, in the same legal article by B. Slattery that was quoted by the Supreme Court, the author clearly discards the view that "native societies are essentially static in nature":

> "*We must guard against the notion that native societies are essentially static in nature, that the only true aboriginal land uses are those that were practised 'aboriginally'*. In fact, of course, native societies have never been static, and have often been characterized by an ability to adapt to shifting circumstances in a highly flexible manner. Without this flexibility, they would have had little chance of survival."[1202] [Emphasis added.]

Slattery also explicitly rejects the "theory restricting aboriginal title to historically-based practices":

> "The better view, then, is that *aboriginal title gives native people the right to exclusive use and possession of their land, and the right 'to use it according to their own discretion'*. The latter words were adopted in the *Guerin* case,[1203] and should be taken as a rejection of the theory restricting aboriginal title to historically-based practices...So far as the doctrine of aboriginal rights is concerned, a native group that in the past lived mainly by hunting, fishing, and gathering may now turn its lands to farming, ranching, tourism, or mineral development."[1204] [Emphasis added.]

The freezing of aboriginal rights appears, at least in part, to be motivated by the erroneous view that Aboriginal peoples and their "aboriginality" can be fully separated or distinguished from those aspects in their own cultures that they have derived from others. However, each distinct people does not establish and maintain its identity and culture in isolation. As the following comments by C. Taylor would suggest, the identity and cultures of Aboriginal peoples are dependent on their particular relations with others:

> "...*We define our identity always in dialogue with, sometimes in struggle against, the things our significant others want to see in us*...Thus my discovering my own identity doesn't mean that I work it out in isolation, but that I negotiate it through dialogue, partly overt, partly internal, with others. That is why the development [in modern times] of an ideal of inwardly generated identity gives a new importance to recognition. *My own identity crucially depends on my dialogical relations with others.*"[1205] [Emphasis added.]

[1200] B. Slattery, *Understanding Aboriginal Rights*, note 1194, *supra*.

[1201] Id. at 1093.

[1202] B. Slattery, *Understanding Aboriginal Rights*, note 1194, *supra*, at 747.

[1203] *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 (S.C.C.) at 336.

[1204] B. Slattery, *Understanding Aboriginal Rights*, (1987), 66 Can. Bar Rev. 727, at 747-748.

[1205] C. Taylor, *Multiculturalism and 'The Politics of Recognition'* (1992), at 32-34, cited in C. Scott, "Dialogical Sovereignty: Preliminary Metaphorical Musings", in Proceedings of the 1992 Canadian Council on International Law, *State Sovereignty: The Challenge of a Changing World* (Ottawa: Canadian Council on International Law, 1992) 267 at 277. Scott adds at 277 that "this fundamental dialogicality describes identity formation not just of individuals but also of communities."

5.5 Disqualification as Aliens, Heathens or Infidels

According to English law, common law aboriginal title should generally constitute, from a property rights viewpoint,[1206] "ownership" or a fee simple estate. As K. McNeil indicates:

> "[Common law aboriginal title] would cover all lands occupied by indigenous people at the time the Crown acquired sovereignty, and would include the subsurface and any minerals[1207]...It would entitle the indigenous possessors to fee simple estates[1208]...Since no other estate could have existed at the time the Crown acquired sovereignty, the estate vested in the indigenous possessors would have to be the fee."[1209]

Under the previous sub-heading, it was briefly described how arguments based on primitivism were used to deny or at least diminish the property rights of Aboriginal peoples. Elsewhere in this study,[1210] the issue of "inalienability" is discussed in terms of how it is used to deny there exist "real property" aspects to aboriginal title.

In addition, there have been other arguments that have been used to disqualify people from having recognized property rights. As K. McNeil describes, alien status and heathenism or infidelity have been suggested "without foundation" as a rationale for property dispossession:

> "First, it might be contended that indigenous people were aliens, and therefore disqualified by the common law from holding land within the Crown's dominions.[1211] *This contention is without foundation because the inhabitants of a settled territory became British subjects the moment it was annexed to the Crown's dominions.*"[1212] [Emphasis added.]
>
> Second, it has been suggested that indigenous people were disqualified from landholding by virtue of their heathenism or infidelity. This notion is supported to some extent by Lord Coke's dictum in *Calvin's Case*[1213] that infidels were perpetual enemies...But...Coke's views on infidels were rejected in later decisions[1214]...Infidelity is...not a valid reason for denying possession and title to indigenous occupiers."[1215]

[1206] As indicated in this study, the rights of Aboriginal peoples include both rights of property and jurisdiction. In addition, determination of the status and rights of Aboriginal peoples should not be based solely on conventional legal concepts in English law, but include an "intersocietal" approach that ensures equal respect for Aboriginal perspectives.

[1207] The author indicates that such minerals would exclude precious metals, to which the Crown has a prerogative right.

[1208] Under English law, possession can be rebutted by proof that the possessors in fact hold a lesser estate.

[1209] K. McNeil, *Common Law Aboriginal Title*, note 1072, at 208.

[1210] See discussion under sub-heading 1.5.2.1 *supra*.

[1211] The author cites W.S. Holdsworth, *The History of the Law as to the Status of British Subjects and Aliens*, (1921) 3 Revue d'Histoire du Droit 175 at 200-208. The rule on "aliens" was held to be inapplicable in India in *Mayor of Lyons* v. *East India Co.*, (1836-7) 1 Moo. P.C. 175.

[1212] K. McNeil, *Common Law Aboriginal Title*, note 1072, at 208-209.

[1213] *Calvin's Case*, (1608) 7 Co. R. 1a at 17.

[1214] See, for example, *Campbell* v. *Hall*, (1774) Lofft 655; and G. Lester & G. Parker, *Land Rights: The Australian Aborigines Have Lost a Legal Battle, But...*, (1973) 11 Alberta L. Rev. 189 at 197-200.

[1215] K. McNeil, *Common Law Aboriginal Title*, note 1072, at 209-210.

Further elaboration on these latter grounds for dispossession is not warranted. First, it does not appear that these grounds had any lasting legal validity (if any at all). Second, it would not appear that disqualification based on alien status, heathenism or infidelity could withstand human rights considerations relating to principles of equality and non-discrimination, as well as freedom of religion. In view of these human rights aspects, it can be strongly argued that the courts have a "clear duty" (as determined in *Mabo*)[1216] to alter the common law if necessary to conform to universal human rights norms.

5.6 Supersession by Law

When the federal government in Canada announced its land claims policy in 1973, it introduced the notion of "superseded by law" in the following terms:

> "The present statement is concerned with claims and proposals for the settlement of long-standing grievances. These claims come from groups of Indian people who have not entered into Treaty relationship with the Crown...*In essence, these claims relate to the loss of traditional use and occupancy of lands in certain parts of Canada where Indian title was never extinguished by treaty or superseded by law.*"[1217] [Emphasis added.]

Since the 1973 federal policy did not explain what it meant by "superseded by law", it is not clear what the government intended the expression to cover. According to *Black's Law Dictionary*,[1218] "supersede" is defined as:

> "Obliterate, set aside, annul, replace, make void, inefficacious or useless, repeal. To set aside, render unnecessary, suspend, or stay."[1219]

This definition does not indicate whether the intention to "set aside", "annul" or "repeal" must be expressly indicated or can be inferred simply by implication. In any event, in the context used by the federal government, "supersession" appears to strongly suggest that an extinguishment of aboriginal rights would occur through unilateral action.

In the 1985 Report of the Task Force To Review Comprehensive Claims Policy, the federal policy of "superseded by law" is taken as including "implicit" and unilateral annulment. Consequently, the Task Force Report concludes that "supersession" runs counter to "the firmly established practice of acquiring aboriginal title lands with aboriginal consent"[1220]:

> "*The proposition that aboriginal title can be implicitly superseded by law lacks a solid legal basis...*
> .....

[1216] *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia) at 82-83, per Deane and Gaudron JJ.

[1217] Indian and Northern Affairs Canada, *Statement Made by the Honourable Jean Chretien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People* (Ottawa: Indian Affairs and Northern Development, August 8, 1973), at 3.

[1218] *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing Co., 1990).

[1219] Id. at 1437.

[1220] Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy* (Ottawa: Department of Indian Affairs and Northern Development, 1985), at 45. At iv, the Report provides: "We cannot accept that aboriginal peoples should have their land rights taken or superseded without their consent."

> *The superseded-by-law concept should no longer be applied* to exclude from the comprehensive claims process those aboriginal societies that have not been a party to a treaty or the subjects of extinguishment legislation. Nor should it exclude those aboriginal societies that have engaged in treaty relations, but that have not specifically dealt with lands in those treaties."[1221] [Emphasis added.]

While the Task Force generally recommends above against applying the superseded-by-law concept in the comprehensive claims process, it leaves the door open for certain exceptions. The first exception pertains to those aboriginal peoples who have been party to a treaty that addresses the issue of lands. It is said, however, as to whether such treaties must have been entered into with the free and informed consent of the aboriginal people concerned, or whether there was a common understanding or meeting of the minds on purported land cession provisions.[1222]

The second exception envisaged by the Task Force Report relates to situations where aboriginal peoples were the subjects of extinguishment legislation. No qualification is explicitly made for those aboriginal peoples who, as third parties, had their aboriginal rights extinguished by legislation in their absence and without their consent.[1223] However, later in the Report, it is stated that "any aboriginal group claiming rights to land across a provincial or territorial boundary, regardless of its place of residence, should not have its rights altered without its consent."[1224]

Despite the concerns raised and recommendations made by the 1985 Task Force Report in regard to the issue of "supersession", the federal government did not alter its policy on this controversial question. In its March 1993 *Federal Policy for the Settlement of Native Claims*, the government indicated that since the *Sparrow* case Ottawa "has undertaken a review of claims which have been rejected on the basis of supersession by law":

> "The application of the the claims acceptance criteria derived from *Baker Lake* has been amended in response to the 1990 Supreme Court judgement in the *Sparrow* case. This decision established a test for the unilateral ending of Aboriginal rights by lawful means. In order to establish that such lawful elimination has occurred, it must be demonstrated that the Crown exercised a *clear and plain intention* to do so. *In response to the court's guidance, the federal government has undertaken a review of claims which have been rejected on the basis of supersession by law to determine if the Sparrow test leads to different conclusions concerning acceptability. New claims submissions are being reviewed in accordance with the Sparrow decision.*"[1225] [Emphasis added.]

It would appear that "supersession by law" is not an independent doctrine, but rather describes the legal effect of other doctrines or actions. For example, it has been suggested that supersession (i.e. extinguishment) can result from the assertion of British sovereignty or from its subsequent exercise according to the doctrine of parliamentary supremacy.

According to the majority decision of the British Columbia Court of Appeal in *Delgamuukw* v. *The Queen*,[1226] supersession of "any indigenous system of laws" or "powers

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[1221] Id.

[1222] See discussion under sub-heading 10.4.5.1 *infra*.

[1223] In regard to the extinguishment of rights of Aboriginal third parties, see discussion under heading 7 *infra*. For a specific example where unilateral extinguishment of Aboriginal third party rights has purportedly occurred, see the Case Study on the James Bay and Northern Quebec Agreement under heading 11 *infra*.

[1224] Id., at 52.

[1225] Indian and Northern Affairs Canada, *Federal Policy for the Settlement of Native Claims* (Ottawa: Indian Affairs and Northern Development, 1993), at 6.

[1226] *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.).

of government" took place either when Britain established its own sovereignty in the territory in British Columbia in 1846, or else in 1871 when British Columbia joined Confederation. First, in regard to Britain's assertion of sovereignty in British Columbia, Wallace J.A. appears to analyze the situation in the context of an act of state:

> "As a settled colony, the common law in British Columbia automatically came into force in 1846 when the *Oregon Boundary Treaty* established *Britain's exclusive sovereignty*[1227] north of the 49th parallel. *It thereby superseded any indigenous system of laws.*"[1228] [Emphasis added.]

As already described,[1229] there are a number of reasons why the act of state doctrine is inapplicable or otherwise inappropriate to the Aboriginal context. In particular, it cannot be presumed that the unambiguous assertion of British sovereignty in relation to other European countries was intended to be directed in the same unequivocal manner towards the Aboriginal peoples concerned. In fact, British policy immediately following such sovereignty indicates a policy of co-existence, non-interference and protection.[1230]

Second, in regard to the "exhaustive distribution of powers" between the federal government and the province of British Columbia in 1871, Wallace J.A. seems to evaluate the situation in accordance with the doctrine of parliamentary supremacy:

> "[U]pon the exercise of sovereignty,[1231] any powers of government of the indigenous people were *superseded by the introduction of the common law and the jurisdiction of the Imperial Parliament...*
>
> Any possibility that aboriginal powers of self-government remained unextinguished was eliminated in 1871 by the *exhaustive distribution of powers between the Province and the Government of Canada when British Columbia joined Confederation* pursuant to the *Terms of Union, 1871*. Sections 91 and 92 have been repeatedly interpreted as distributing all legislative jurisdiction between Parliament and the provincial legislatures."[1232] [Emphasis added.]

In 1871, as in 1867, it appeared consistent[1233] for the British Crown to address the constitutional situation in Canada by focussing solely on the federal and provincial governments. The uniform policy that Britain had applied since the time of the *Royal Proclamation of 1763*

[1227] The use of the term "sovereignty" here by Wallace J.A. appears to be in the context of an act of state.

[1228] Id. at 200. Wallace J.A. relies here on Brennan J.'s statement in *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia), at 25-26: "Thus the Meriam people in 1879, like Australian Aboriginals in earlier times, became British subjects owing allegiance to the Imperial Sovereign entitled to such rights and privileges and subject to such liabilities as the common law and applicable statutes provided." However, Brennan J.'s statement does not constitute proof of Britain's intentions at that time vis-a-vis Aboriginal peoples in Australia. Although Britain may have sought to assert unambiguous and exclusive sovereignty in relation to other European nations, Britain's relationship with Aboriginal nations was much more nuanced and complex.

[1229] See previous sub-headings pertaining to act of state, recognition and *terra nullius*.

[1230] This point is elaborated under sub-headings 5.1.1 and 5.3 *supra*.

[1231] In 1871, the exercise of sovereignty by Britain could not possibly constitute an act of state. Rather, the use of the term "sovereignty" in the present context appears to refer to the doctrine of parliamentary supremacy.

[1232] Id. at 225.

[1233] While such an approach by the British Crown may have been pragmatic and consistent with the Royal Proclamation's enunciated policy to not "molest or disturb" Aboriginal peoples in the possession of their lands, it was not necessarily the most balanced or fair way of addressing constitutional concerns in Canada in regard to all parties concerned.

was to ensure autonomy[1234] and non-interference in the internal affairs of Aboriginal peoples, while adopting constitutional protections for Aboriginal peoples and limiting the authority of non-Aboriginal governments in British colonies or dominions.[1235] It is in this overall constitutional context that interpretation of the specific provisions of the *British Columbia Terms of Union*, 1871[1236] or the *Constitution Act, 1867* should necessarily take place.

There does not appear to be any compelling historical evidence of the British Crown attempting to strip Aboriginal peoples of their rights to their lands and jurisdiction, without their knowledge and consent.[1237] Yet, if one were to accept Wallace J.A.'s interpretation of what occurred in distributing federal and provincial powers in 1867 and 1871, the conclusion to be reached is that the British Crown engaged in a unilateral dispossession of the self-government rights of Aboriginal peoples in their absence. In addition, since "strict proof"[1238] is required of a purported extinguishment of aboriginal and treaty rights, it cannot be said wholesale supersession of Aboriginal peoples' jurisdictional rights took place in 1867 or 1871.

In any event, there are other compelling reasons as to the inappropriateness of invoking "supersession by law" in an Aboriginal context. These reasons include:

i) **Need for justice and respect for the rule of law**. The essential element of justice would be arbitrarily excluded. If on a purely technical reading of English or Canadian law, a court could conclude that there had been a "clear and plain intention" to unilaterally extinguish aboriginal rights relating to property or jurisdiction, justice would be unnecessarily sacrificed. Such an approach would severely undermine respect for the rule of law.

Unilateral extinguishment of aboriginal rights would have serious and far-reaching impacts not only on Aboriginal individuals, but on whole societies and cultures. Therefore, it would be inappropriate to assess the issue solely from a clinical viewpoint of "clear and plain intention".

ii) **"Contending sovereignties" and need for an intersocietal approach**. Consistent with the principle of equal rights and self-determination of peoples[1239] and with Canada's

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[1234] See Royal Commission on Aboriginal Peoples, *Partners in Confederation[:] Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services, 1993), at 16, where it is said that the aboriginal provisions in the Royal Proclamation (as reflective of British policy) "portrays Indian nations as autonomous political units living under the Crown's protection and *retaining their internal political authority and their territories. These territories should not be granted or appropriated without Indian consent.*" [Emphasis added.] And at 33, in relation to the inherent Aboriginal right to self-government: "...even if the *Constitution Act, 1867* distributed comprehensive powers between the federal and provincial governments, as the standard view maintains, it did not necessarily extinguish the governmental powers of First Peoples, any more than previous colonial constitutions had done."

[1235] A most important example of British constitutional initiatives to safeguard Aboriginal peoples and their rights is found in the terms and conditions attached to the *Rupert's Land and North-Western Territory Order*, 1870. While the Order does not apply to British Columbia, it represented the most recent example at the time of British Columbia's joining Confederation of the nature of British constitutional policy in regard to Aboriginal peoples. For a discussion of the terms and conditions in favour of Aboriginal peoples that were tied to the Rupert's Land Order, see sub-heading 2.3 *supra*.

[1236] For further discussion of the *British Columbia Terms of Union*, 1871, in relation to Aboriginal peoples, see discussion under note 325, *supra*.

[1237] For an analysis as to why supersession by law was not a constitutionally valid means of extinguishing aboriginal rights to self-government, see B. Clark, *Native Liberty, Crown Sovereignty [:] The Existing Aboriginal Right to Self-Government in Canada* (Montreal: McGill-Queen's University Press, 1990), especially at 149-150, 159-166. For discussion of the constitutional or legal capacity of the Crown in right of Canada or in right of the provinces to extinguish aboriginal rights, see generally heading 6 *infra*.

[1238] *Simon* v. *The Queen*, [1985] 2 S.C.R. 387 (S.C.C.), at 405-406. Cited with approval in *A.G. Quebec* v. *Sioui*, [1990] 1 S.C.R. 1025 (S.C.C.) at 1061. In addition, the onus of proving extinguishment of aboriginal or treaty rights is generally on the party claiming such extinguishment (i.e. the Crown): see *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1099 per Dickson C.J.

[1239] See discussion under sub-heading 8.2.5 *supra*.

constitutional history, the notion of contending sovereignties should prevail.[1240] It would be presumptious to apply English or Canadian law in a literal or technical manner when dealing with a critical situation, such as extinguishment, that calls for a consensual and "intersocietal" approach. On what bases other than cultural superiority or other Eurocentric doctrines can it be assumed that a non-Aboriginal sovereignty should automatically prevail over the inherent[1241] sovereignty of Aboriginal peoples?

iii) **Federal land claims policy should promote reconciliation.** It makes little sense for Canada's land claims policy to base itself on technical legalities, such as "supersession", with a view to limiting the access of Aboriginal peoples to land claims agreements or treaties. Reconciliation with and healing[1242] among Aboriginal peoples can best be achieved through an open, sensitive and flexible land claims policy. As indicated in the *Report of the British Columbia Claims Task Force*, "['supersession by law'] must not bar...First Nations from the negotiations".[1243]

iv) **Federal policy should be consistent with fiduciary role.** Federal fiduciary responsibility of a constitutional nature did not begin with the entrenchment of s. 35(1) of the *Constitution Act, 1982*. As described in this study, federal fiduciary duties have existed in a constitutional context since the time of the *Royal Proclamation of 1763*.[1244] Consequently, it would be inadequate and unconstitutional for the federal government to rely solely on "clear and plain intention" in revising its current policy of "supersession by law".

v) **Importance of human rights[1245] dimensions.** As described in this study,[1246] aboriginal rights are human rights. Human rights may in some cases be subjected to certain limits and override, but there is no specific authority to extinguish or otherwise destroy human rights.[1247] Appropriate consideration of the human rights aspects underlines the seriousness of eliminating aboriginal rights through "supersession by law" or other theories of dispossession. In reassessing federal claims policy, the human rights dimensions should be highlighted rather than not even considered or mentioned.

Based on all of the above considerations, it cannot be concluded that "act of state", "recognition", "*terra nullius*", or other such doctrines can be validly used to dispossess Aboriginal peoples of their status and rights. Aside from essential considerations of justice and human rights, these doctrines often show total disregard for Aboriginal perspectives and understandings or historical fact. Instead, they depend on one-sided and Eurocentric views that virtually ignore the welfare of Aboriginal peoples and their cultures and societies. Some of these theories do have validity under certain non-Aboriginal circumstances. However, they are inappropriate to apply to or impose on Aboriginal peoples.

In particular, these doctrines of dispossession cannot legitimately be used to rationalize

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[1240] In regard to the existence of contending sovereignties under Canada's constitutional framework, see discussion under heading 4 *supra*.

[1241] See discussion under sub-heading 4.6 *supra*.

[1242] See Royal Commission on Aboriginal Peoples, *Focusing the Dialogue [:] A Summary* (Ottawa: RCAP, 1993), at 2: "Reconciliation between Aboriginal and non-Aboriginal people will elude us unless conspicuous progress is made toward self-determination, self-sufficiency and healing for all First Peoples."

[1243] *Report of the British Columbia Claims Task Force* (Vancouver: June 28, 1991), at 48.

[1244] See discussion under sub-heading 6.4.1 *infra*.

[1245] See, for example, the draft *United Nations Declaration on the Rights of Indigenous Peoples*, fifth preambular para.: "Concerned that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting inter alia, in their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests". [Emphasis in original.]

[1246] See discussion under sub-heading 8.2.1.3 *infra*.

[1247] See discussion under sub-heading 8.2.1.5 *infra*.

the devaluation or extinguishment of Aboriginal peoples' status and rights. In this regard, it is submitted that there is a duty on the part of the courts to reassess the common law, where necessary, so as to repudiate such doctrines in the Aboriginal context. If the rule of law is to be respected, the common law must conform to universal standards of equality and non-discrimination,[1248] dignity, and other human rights. Moreover, since these theories cannot justify past dispossessions, they reinforce the view that appropriate measures should be taken, in conjunction with the Aboriginal peoples affected, to ensure adequate restitution or redress for past and ongoing injustices.[1249]

6. CAPACITY TO EXTINGUISH ABORIGINAL RIGHTS

There are abundant statements in both jurisprudence[1250] and doctrine[1251] that refer to the capacity of Parliament or the Crown to extinguish aboriginal rights.[1252] For example, P. Hogg provides:

> "Aboriginal rights can be extinguished in three ways: (1) by surrender, (2) by legislation, and (3) by constitutional amendment. The surrender of aboriginal rights must be voluntary and must be to the Crown..."[1253]

However, too often, statements on the capacity to extinguish aboriginal or treaty rights fail to substantiate on what bases this conclusion was reached. In many other instances, constitutional and other limitations do not appear to be fully taken into account.

Yet, extinguishment of aboriginal rights cannot be assumed, nor be deemed to have been effected, on a casual basis. In *Simon* v. *The Queen*, Dickson C.J. emphasizes:

> "Given the serious and far-reaching consequences of a finding that a treaty right has been extinguished, ***it seems appropriate to demand strict proof of the fact of extinguishment in each case where the issue arises***. As Douglas J. said in *United States* v. *Santa Fe*

[1248] See R. Boivin, *Le droit des autochtones sur le territoire québécois et les effets du régime français*, note 1156, *supra*, at 146, where it is said that, over several centuries, the dispossession or non-recognition of the territorial rights of Aboriginal peoples was justified by a discriminatory argument: the superiority of the European civilization.

[1249] In regard to the isssue of restitution, see generally sub-heading 10.4 *infra*.

[1250] Prior to 1982, see *R.* v. *Derriksan*, (1976) 71 D.L.R. (3d) 159 (S.C.C.). As to whether extinguishment of aboriginal rights has taken place in British Columbia, see generally *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.).

[1251] See, for example, H. Foster, *Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases*, (1992) 21 Man. L.J. 343 at 344: "...even inherent (or pre-existing) title may be subject to unilateral extinguishment by a competent legislative authority. The conventional view is that from Confederation until s. 35(1) of the *Constitution Act, 1982* came into force that authority was Parliament." See also K. Lysyk, *The Indian Title Question in Canada: An Appraisal in the Light of Calder*, (1973) 51 Can. Bar Rev. 450 at 475.

[1252] Canadian Bar Association Special Committee, *Report of the Canadian Bar Association Committee on Aboriginal Rights in Canada: An Agenda for Action* (Ottawa: Canadian Bar Association, 1988), at 18: "Unilateral extinguishment could occur (at least prior to 1982), but required competent legislation or possibly an executive act by the federal Crown." See also Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy* (Ottawa: Department of Indian Affairs and Northern Development, 1985) at 14, where it is said that unilateral extinguishment of aboriginal rights was within the power of Parliament prior to the entrenchment of aboriginal and treaty rights in the *Constitution Act, 1982*: "This entrenchment of aboriginal rights represents a turning point in Canada's treatment of its aboriginal peoples. *No longer can the Parliament of Canada unilaterally extinguish or modify aboriginal rights*. Changes in existing aboriginal rights require the consent of the aboriginal groups concerned or a constitutional amendment." [Emphasis added.] It is the view of this study that, neither of these two reports adequately examined the constitutional capacity of the Parliament or government of Canada, prior to 1982, to extinguish aboriginal rights.

[1253] Generally, see P. Hogg, *Constitutional Law of Canada*, (Toronto: Carswell, 1992), vol.1, at 27-19 and 27-20.

Pacific Ry. Co....extinguishment cannot be lightly implied."[1254] [Emphasis added.]

Moreover, the onus of proving extinguishment of aboriginal or treaty rights is generally on the party claiming such extinguishment (which is generally non-Aboriginal governments or the Crown).[1255] Therefore, should there be any doubts as to capacity of a "government", "Parliament" or "Crown" to extinguish aboriginal rights in a specific period of Canada's history, it cannot be concluded that the criterion of "strict proof" has been met.[1256]

The capacity of Parliament or the Crown (whether Imperial or Canadian) to extinguish aboriginal rights is often examined in a context that does not take into account many of the fundamental considerations that pertain to Aboriginal peoples and their status and rights. Moreover, it is not clear that a people may in all circumstances agree to extinguish their fundamental rights. For example, improvident bargains or agreements that would deprive an Aboriginal people of their means of subsistence, even with the consent of the people concerned, might not signify valid agreement.

Basic factors or aspects that are not properly taken into account when considering the capacity of Parliament or the Crown to extinguish aboriginal rights include: i) constitutional and legal requirements emanating from the *Royal Proclamation of 1763* and other constitutional instruments; ii) contending sovereignties of Aboriginal peoples; iii) human rights characterizations of aboriginal rights; and iv) requirements of the Crown and Parliament to act in a manner consistent with their constitutional and other legal responsibilities of a fiduciary nature.

As indicated in other portions of this study, judicial precedents pertaining to Aboriginal peoples were shaped in many instances in a less than informative and equitable framework. Key precedents directly affecting Aboriginal peoples and their rights were developed in a repressive historical context in Canada. In particular, unacceptable notions of European superiority over Aboriginal peoples served to perpetuate discriminatory concepts and situations that resulted in questionable surrenders, extinguishments, and land dispossessions. Consequently, what is urgently required is appropriate reassessment of the assumptions and concepts on which such doctrines and precedents were based.

In regard to the question of capacity to extinguish aboriginal title, an example of the far-reaching consequences that result from different characterizations of Aboriginal rights is found in the U.S. Supreme Court decision in *Fletcher* v. *Peck*[1257]. As P. Macklem describes:

> "Marshall C.J. held that the native interest in land was to be *a title of occupancy only*. Though 'certainly to be respected by the courts'. Marshall C.J. added that *such an interest could be 'legitimately extinguished'*[1258]...Justice Johnson wrote a vigorous dissent in which he argued that native peoples in North America retained *'absolute proprietorship of their soil' which could only be extinguished by conquest or*

[1254] *Simon* v. *The Queen*, [1985] 2 S.C.R. 387, at 405-406. Cited with approval in *A.G. Quebec* v. *Sioui*, [1990] 1 S.C.R. 1025 (S.C.C.) at 1061.

[1255] See *Calder* v. *A.G. British Columbia*, [1973] S.C.R. 313, at 404 (per Hall J.): "It would, accordingly, appear to be beyond question that the onus of proving that the Sovereign intended to extinguish the Indian title lies on the [Crown] and that intention must be 'clear and plain'." This statement was cited with approval in *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1099 per Dickson C.J. See also B. Slattery, *Understanding Aboriginal Rights*, (1987), 66 Can. Bar Rev. 727, at 731.

[1256] Of course, "capacity" is not sufficient in itself to prove extinguishment, since the Supreme Court of Canada has indicated that "clear and plain intention" is also required: *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1099 per Dickson C.J.

[1257] *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87 (1810).

[1258] Id., at 142-143.

purchase'[1259]."[1260] [Emphasis added.]

Since Aboriginal peoples in Canada were not conquered,[1261] it would appear that, in conformance with the view of Johnson J., extinguishment of aboriginal rights might only be a consequence of purchase. Purchase would necessarily entail aboriginal consent and would have to be consistent with relevant human rights considerations. In addition, purchase would have had to conform to certain legal and equitable principles governing such transactions.

On the other hand, the view of Marshall C.J. of the U.S. Supreme Court has been construed as opening the door in certain instances to unilateral extinguishment.[1262] In *Johnson* v. *M'Intosh*[1263], Marshall C.J. indicated that the right of occupancy of Aboriginal peoples was subject to the power of the Crown to extinguish that right.[1264] However, nine years later, Marshall C.J. strengthened his judicial pronouncements on Aboriginal status and rights in *Worcester* v. *Georgia*[1265]. As a result, the corresponding capacity and role of the Crown was characterized by the Chief Justice in terms of a guardian with a duty to provide protection for a "weak state", and not a non-aboriginal government with unilateral powers.[1266]

The convoluted and questionable arguments that support a purported capacity of the British government to extinguish Aboriginal title to land is vividly illustrated in *Johnson* v. *M'Intosh*. Marshall C.J. indicates that British claims to a right of extinguishment "have been maintained and established as far west as the river Mississippi, *by the sword*"[1267]. However, as H. Berman remarks, the reference here is "to the war with the French, and does not provide a basis for a theory of conquest of the Indian nations."[1268]

Marshall C.J. states that this theory of conquest can find its source from the simple act of discovery:

[1259] Id., at 146.

[1260] P. Macklem, *First Nations Self-Government and the Borders of the Canadian Legal Imagination*, (1991), 36 McGill L. R. 382, at 398.

[1261] J. Woodward, *Native Law* (Toronto: Carswell, 1989), at 209: "With respect to Canadian Indians, it is generally agreed that as a matter of fact they were not conquered." See also K. Lysyk, *The Indian Title Question in Canada: An Appraisal in the Light of Calder*, (1973) 51 Can. Bar Rev. 450 at 476; B. Slattery, *Understanding Aboriginal Rights*, note 1255, *supra*, at 733; L. Mandell, *Indian Nations: Not Minorities*, (1986) 27 Les Cahiers de Droit 101, at 111; *R.* v. *McCoy*, [1993] 1 C.N.L.R. 135 at 137 per Turnbull J. (N.B. Court of Queen's Bench, T.D.), where it is concluded that there was no symbolic conquest of Indian title during the Seven Years War (1756-1763).

For a discussion of the "myth of conquest" as applied to Aboriginal peoples by the U.S. courts, see H. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, (1978) 27 Buffalo L.R. 637 at 644-656, where it is said that the concept of conquest was repudiated in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832).

[1262] See H. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, note 1261, *supra*, at 647: "In the middle of the opinion Marshall restated the doctrine of discovery, but with an important addition. He stated that 'discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or conquest; *and gave also a right to such a degree of sovereignty as the circumstances of the people would allow them to exercise.*' While this assertion of sovereignty is given without explanation and is otherwise left undefined, it hints at a political standard that would make Indian lands vulnerable to forced extinguishment." [Emphasis added.]

[1263] *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823).

[1264] Id., at 588.

[1265] *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832).

[1266] Id., at 561.

[1267] *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), at 588.

[1268] H. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, note 1261, *supra*, at 648. Similarly, in regard to Aboriginal peoples in Canada, see K. Lysyk, *The Indian Title Question in Canada: An Appraisal in the Light of Calder*, (1973) 51 Can. Bar Rev. 450 at 476.

> "*However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear*, if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned."[1269] [Emphasis added.]

Since Aboriginal lands alienated in the United States (and Canada[1270]) were generally acquired by purchase and not conquest, H. Berman criticizes Marshall's reasoning in the following terms:

> "Marshall provided *no historical context* for the derivation of the conquest theory. He simply characterized the status quo, without analysis, as resulting from a conquest incident to discovery; *a characterization rooted solely in the pretentious rhetoric of European notions of empire*."[1271] [Emphasis added.]

If a people is allegedly "conquered", Marshall C.J. confirms that "humanity demands, and a wise policy requires, the rights of the conquered to property rights should remain unimpaired" and "the new subjects should be governed as equitably as the old".[1272] However, the Chief Justice refrained from applying this consequential effect of the conquest theory based on the following rationale:

> "...the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high-spirited as they were fierce, and were ready to repel by arms every attempt on their independence."[1273]

The overall effect of the above Eurocentric and discriminatory reasoning was that a capacity of the British and U.S. governments to extinguish Aboriginal title to territory was rationalized on the basis of a judicial theory of conquest. Yet, at the same time, the rights of Aboriginal peoples to their property rights, as a consequence of "conquest" was denied to the same peoples because of their "savage" qualities and lifesyles.

It is critical to note that Marshall C.J. rejected his own theory of conquest nine years later in *Worcester* v. *Georgia* in unequivocal terms as follows:

> "America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. *It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the*

[1269] 21 U.S. (8 Wheat.) 543, at 591.

[1270] See W. Pentney, *The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982 Part II [-] Section 35: The Substantive Guarantee*, (1988) 22 U.B.C. Law Rev. 207, at 249: "Extinguishment by military conquest probably does not apply in Canada, since we have no history of Indian wars comparable to that of the United States." See also R. Barsh & J. Henderson, *Aboriginal Rights, Treaty Rights, and Human Rights: Indian Tribes and 'Constitutional Renewal'*, (1982) 17 J. of Can. Studies 55 at 65: "There was no pretence that Britain's defeat of French Canada had been a 'conquest' of the tribes allied with France. On the contrary, Article 40 of the 1760 Articles of Capitulation guarantee that the Indian 'allies of His Most Christian Majesty...shall not be molested on any pretence whatsoever, for having carried arms, and served His Most Christian Majesty.'"

[1271] H. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, note 1261, *supra*, at 648-649.

[1272] 21 U.S. (8 Wheat.) 543, at 589.

[1273] Id., at 590.

> *discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors."* [1274] [Emphasis added.]

However, governments and courts in North America have to a significant degree followed Marshall's earlier pronouncements in the *Johnson* case and have presumed a capacity of governments to extinguish aboriginal title as an incidence of their own sovereignty. In so doing, the sovereignty of Aboriginal peoples, as well as their independence and distinct societies, were effectively ignored.

6.1 Imperial Crown

In making reference to the "Crown", it is essential to distinguish between the Crown in right of the United Kingdom, the Crown in right of Canada, and the Crown in right of the province. In each case, the powers and obligations[1275] that may attach to the Crown can be very different. While the "Crown" generally refers to the state,[1276] it may well refer to the executive government depending on the context.

These distinctions are especially significant in the context of surrenders and extinguishment, since at different periods of Canada's history it is clear that the Crown in right of Canada did not have equivalent powers to the Crown in right of the United Kingdom. In addition, the executive did not have the same powers as the legislative branch of government. Consequently, it is critical to be clear as to which Crown is being referred to, as well as whether reference is being made to the executive or legislative branch.

In regard to the Imperial Crown, it is said that under English law the British Parliament was supreme. Unlike the federal and provincial legislatures in Canada, there were none of the limitations inherent in a federation based on a distribution of powers. Nor were there constitutional limitations that colonial and other non-Aboriginal governments were subjected to in Canada, particularly during the relevant period of 1763 - 1931.

The question as to whether the Imperial Crown could extinguish aboriginal rights appears to be of theoretical interest, since the Imperial Parliament never purported to use its powers in such a manner.[1277] For this reason, this study will not devote further consideration to this question.[1278]

Nevertheless, it is worth leaving the reader with some enduring questions: i) If Aboriginal peoples in Canada possessed an inherent sovereignty and were treated as such by the British

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[1274] *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), at 542-543. See H. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, note 1261, *supra*, at 656, 660.

[1275] See, for example, *R.* v. *Secretary of State for Foreign and Commonwealth Affairs; ex parte Indian Assn. of Alberta*, [1982] Q.B. 892 (C.A.), where it was held that obligations to Aboriginal peoples that had been undertaken by the Imperial Crown in treaties had been transferred to Canada and such obligations were enforceable only against the Crown in right of Canada. In this respect, the Crown in right of Canada and the Crown in right of the United Kingdom were considered as two separate legal entities. See also P. Hogg, *Constitutional Law of Canada*, note 1253, *supra*, vol. 1, at 10-3.

[1276] P. Hogg, *Constitutional Law of Canada*, note 1253, *supra*, vol. 1, at 10-2.

[1277] See Royal Commission on Aboriginal Peoples, *Partners in Confederation[:] Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services, 1993), at 16, where it is said that the aboriginal provisions in the Royal Proclamation (as reflective of British policy) "portrays Indian nations as autonomous political units living under the Crown's protection and *retaining their internal political authority and their territories. These territories should not be granted or appropriated without Indian consent.*" [Emphasis added.] And at 33, in relation to the inherent Aboriginal right to self-government: "...even if the *Constitution Act, 1867* distributed comprehensive powers between the federal and provincial governments, as the standard view maintains, it did not necessarily extinguish the governmental powers of First Peoples, any more than previous colonial constitutions had done."

[1278] See also discussion under sub-heading 5.6 *supra*.

Crown, on what basis could it be justified that British sovereignty would take precedence over Aboriginal sovereignty?; ii) Is it not based on cultural superiority or other Eurocentric doctrines to assume that English sovereignty should prevail over the sovereignty of Aboriginal peoples (especially in a manner that would enable the unilateral extinguishment of aboriginal rights)?; and iii) Have not such doctrines been discredited as invalid and discriminatory, thereby meriting thorough reassessment (even if such doctrines may have had limited acceptance among the community of nations in the past)?

6.2 Crown in Right of Canada

In relation to the capacity of the Crown in right of Canada to extinguish aboriginal rights, there are two principal aspects that need to be examined. The first relates to the capacity of the federal government (executive branch); the second concerns the powers of Parliament.

6.2.1 By royal prerogative[1279] or other executive act

The issue to be examine here is whether the Crown (executive government) would have the capacity to extinguish Aboriginal rights in the absence of any legislative authority.[1280] This question is especially relevant in respect to the historic treaties in Canada.

The Task Force To Review Comprehensive Claims confirms that:

> "*Neither the pre-Confederation treaties nor the numbered treaties were authorized originally through legislation, but rather by order in council.* Specific reference to the extinguishment of aboriginal rights is found in the pre-Confederation legislation that dealt with the Indian title of the Métis in Manitoba."[1281] [Emphasis added.]

Constitutional or legal capacity to extinguish aboriginal rights through *legislation* will be examined in the next sub-heading. In regard to orders in council not emanating from legislation,[1282] it is not clear that, in the absence of full and informed Aboriginal consent, such orders in council provided governments with the legal capacity to eliminate or restrict the rights or liberties of Aboriginal peoples through treaties.

As A. Lajoie describes what constitutes valid orders-in-council:

[1279] The royal prerogative is said to consist of powers and privileges uniquely accorded by the common law to the Crown: see P. Hogg, *Constitutional Law of Canada*, note 1253, *supra*, vol. 1, at 1-11. At 1-13, Hogg indicates that prerogative powers are quite limited today, since statutes now occupy the ground formerly occupied by the prerogative. See also H. Evatt, *The Royal Prerogative* (Sydney: The Law Book Company, 1987); *Reference as to the Effect of the Royal Prerogative of Mercy Upon Deportation Proceeding*, [1933] S.C.R. 269, at 272-273; S. Aronson, *The Authority of the Crown to Make Treaties With Indians*, [1993] 2 C.N.L.R. 1, at 1-4.

[1280] If there exists any executive capacity to extinguish aboriginal rights, such power could only be exercised since 1867 by the federal Crown: see M. Patenaude, *Le droit provincial et les terres indiennes* (Montréal: Les Éditions Yvon Blais, 1986) at 83.

[1281] Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy*, note 1252, *supra*, at 38.

[1282] In regard to the Rupert's Land and the North-Western Territory, it would appear that the Governor in Council was empowered to deal with settling the "claims of Indians" through orders in council or other means. See *Rupert's Land and North-Western Territory Order*, R.S.C. 1985, App. II, No. 7, para. 15: "The Governor in Council is authorized and empowered to arrange any details that may be necessary to carry out the above terms and conditions." A similar provision is found in Schedule (B) of the Order. However, any arrangements by the Governor in Council would still have to be in full conformance with the constitutional terms and conditions in the Order that are in favour of Aboriginal peoples. In other words, the government must still act in conformity with "equitable principles" and "for the protection of Indian tribes".

> "*To be valid and in force*, an Order-in-Council must be authorized by an express legislative provision or in theory by the Cabinet's general powers."[1283] [Emphasis added.]

R. Dussault and L. Borgeat also confirm that, within certain limits defined by the Crown's prerogative, orders-in-council may be valid in the absence of statutory authority:

> "[Orders in council]...are granted the same status as statute law before the courts. Although the Order-in-Council is usually adopted pursuant to a statute which provides expressly for it, it may occur that the Cabinet, on its own authority, makes a decision by Order-in-Council without any resort to an enabling statute, pursuant to 'the theory of its general powers'[1284]...Since these powers arise by virtue of [the Crown's] prerogative, it does not necessarily need a statute in order to act.[1285]

In particular, the royal prerogative includes a treaty-making power. As A. Jacomy-Millette provides:

> "While the development of Parliamentary supremacy diminished the scope of the royal Prerogative, the latter still includes the treaty-making power."[1286]

While treaty-making is a prerogative power, the Crown could not infringe the liberty of persons or people in the absence of statutory authority. As P. Hogg provides:

> "...the prerogative was further limited by the doctrine that most executive action which infringed the liberty of the subject required the authority of a statute."[1287]

Therefore, in regard to the pre-Confederation treaties and "numbered" treaties, no extinguishment of rights could have taken place by order-in-council in the absence of consent of the Aboriginal peoples affected. As indicated in this study, it is highly questionable that free and informed consent was actually obtained from Aboriginal peoples in the case of the historic treaties.

Generally, the Crown prerogative cannot be validly used to unilaterally extinguish aboriginal title to land. As B. Slattery provides:

> "[Aboriginal title] is not held at the Crown's pleasure, and cannot be extinguished normally by a unilateral exercise of Crown prerogative without recourse to Parliament."[1288]

Similarly, G. Lester provides:

[1283] A. Lajoie, *Les Structures administratives régionales, déconcentration et décentralisation au Québec* (Montréal: Presses de l'Univ. de Montréal, 1968) at 29, cited and quotation translated by R. Dussault and L. Borgeat, *Administrative Law [:] A Treatise*, 2nd ed. (Toronto: Carswell, 1985), vol. 1, at 61, n. 65.

[1284] A. Lajoie, *Les Structures administratives régionales, déconcentration et décentralisation au Québec* (Montréal: Presses de l'Univ. de Montréal, 1968), at 29, cited by R. Dussault and L. Borgeat, *Administrative Law [:] A Treatise*, note 1283, *supra*, vol. 1, at 61.

[1285] R. Dussault and L. Borgeat, *Administrative Law [:] A Treatise*, note 1283, *supra*, vol. 1, at 61.

[1286] A. Jacomy-Millette, *Treaty Law in Canada* (Ottawa: Univ. of Ottawa Press, 1975) at 52, para. 10. Similarly, see P. Hogg, *Constitutional Law of Canada*, note 1253, *supra*, vol. 1, at 1-13. At 11-2, Hogg indicates "Canada's achievement of full independence would necessarily carry with it the power to enter into treaties, and in the absence of any constitutional provision the power would be located with the executive branch of the government which represents the country as a whole, namely, the federal government."

[1287] P. Hogg, *Constitutional Law of Canada*, note 1253, *supra*, vol. 1, at 1-12, where the author cites as authority *Entick* v. *Carrington*, (1765) 19 St. Tr. 1030, 95 E.R. 807 (K.B.). Hogg indicates that the only exceptions to this rule pertain to wartime.

[1288] B. Slattery, *Understanding Aboriginal Rights*, note 1255, *supra*, at 748.

> "...in a peaceful settlement (and in a conquest into which the common law has been introduced) there are definite limits on the prerogative legislative power imposed by the common law. These limits amount, in essence, to the proposition that *the pre-existing rights of the inhabitants can only be abrogated with their consent, or under competent legislative authority, but not the prerogative.*"[1289] [Emphasis added.]

In addition, it is clear that such prerogative power by the Crown in right of Canada could not prevail over the provisions of the Royal Proclamation of 1763, which has at least[1290] the force of a statute in Canada.[1291] Generally, prerogative powers must be "exercised in conformity with the Charter of Rights and other constitutional norms".[1292] This would also mean that the exercise of prerogative powers could not derogate from the fiduciary relationship of the Crown that is constitutionally entrenched in s. 35(1) of the *Constitution Act, 1982*, as well as in the *Royal Proclamation*[1293] and other constitutional instruments.

It has been suggested by the Privy Council in *St. Catherine's Milling and Lumber Co.* v. *The Queen* that aboriginal title is "a personal and usufructuary right, dependant upon the good will of the Sovereign".[1294] Judson J. has also made reference to this notion of the "goodwill of the Sovereign".[1295]

J. Woodward, among other jurists,[1296] has criticized the "good will" characterization as follows:

> "In my view, there has generally been legal sloppiness associate with this concept. Neither the authority nor the rationale for this concept is identified in the cases. Surely if such an important limitation on aboriginal land rights exists, it deserves careful justification."[1297]

Woodward notes that the Privy Council's description of title has been "criticized by Canadian courts and restated almost beyond recognition"[1298]. In *Guerin* v. *The Queen*, Dickson J. described aboriginal title in the following terms without referring in any way to the "good will of the Sovereign":

[1289] G. Lester, "Primitivism versus Civilisation: A Basic Question in the Law of Aboriginal Rights to Land" in C. Brice-Bennett, *Our Footprints Are Everywhere: Inuit Land Use and Occupancy in Labrador* (Ottawa: Labrador Inuit Association, 1977) at 359.

[1290] It is a conclusion of this study that the Royal Proclamation of 1763 was and continues to be a constitutional instrument.

[1291] For example, see *R.* v. *Lady McMaster*, [1926] Ex. C.R. 68, at 72-73.

[1292] P. Hogg, *Constitutional Law of Canada*, note 1253, *supra*, vol. 1, at 1-13 - 1-14. The author also points out that adminstrative-law norms such as the duty of fairness must be observed.

[1293] If the Royal Proclamation of 1763 is a constitutional instrument (as this study contends), then the fiduciary relationship of the Crown in regard to Aboriginal peoples would be a constitutional norm reflected in the Proclamation that the Crown was and continues to be bound to observe since 1763.

[1294] *St. Catherine's Milling and Lumber Co.* v. *The Queen*, (1888), 14 A.C. 46, at 54 (per Lord Watson).

[1295] *Calder* v. *A.G. British Columbia*, [1973] S.C.R. 313, at 328 (per Judson J.): "What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right had never been lawfully extinguished. *There can be no doubt that this right was 'dependent on the goodwill of the Sovereign'.*" [Emphasis added.] See also *A.G. Ontario* v. *Bear Island Foundation*, [1985] 1 C.N.L.R. 1, at 28, 32 (per Steele J. of the Ontario High Court); aff'd [1989] 2 C.N.L.R. 73 (Ont. C.A.).

[1296] See, for example, M. Jackson, *The Articulation of Native Rights in Canadian Law*, (1984), 18 U.B.C. Law Rev. 255, at 266; B. Clark, *Indian Title in Canada* (Toronto: Carswell, 1987), at 25-35. See also B. Slattery, *Understanding Aboriginal Rights*, note 1255, *supra*, at 748, where the author indicates that the Privy Council statement "was not explained and was not necessary to the decision."

[1297] J. Woodward, *Native Law*, note 1261, *supra*, at 202, n. 53.

[1298] Id., at 203.

> "The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. *Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading.*[1299] [Emphasis added.]

The lack of any reference (in *Guerin* or any other case addressing aboriginal title) by the Supreme Court of Canada to the concept of "good will of the Sovereign" strongly suggests that it is not supported by the Court.[1300] Moreover, in *Guerin*, Dickson J. describes aboriginal title not as some type of license held at the discretion or good will of the Sovereign, but as a "legal right derived from the Indians' historic occupation and possession of their tribal lands".[1301] He adds that, in *Calder*, "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*)...".[1302]

In addition, in *Mabo et al.* v. *State of Queensland*,[1303] Deane and Gaudron JJ. refer to the "ambiguous reference to 'dependent upon the goodwill of the Sovereign' in the Privy Council's judgments in the *St. Catherine's Milling* case"[1304] and flatly reject

> "any proposition to the effect that the common law native title recognized by the law of a British Colony was no more than a *permissive occupancy* which the Crown was lawfully entitled to revoke or terminate at any time regardless of the wishes of those living on the land or using it for their traditional purposes. *Acceptance of that, or any similar, proposition would deprive the traditional inhabitants of any real security since they would be liable to be dispossessed at the whim of the Executive, however unjust...[T]he weight of authority...and considerations of justice seem to us to combine to compel its rejection.*"[1305] [Emphasis added.]

A related point is that the Crown cannot extinguish aboriginal title to lands by simply granting such lands to third parties. If aboriginal rights were to exist merely at the pleasure of the Crown, then such grants would appear to have been possible. However, as K. McNeil indicates:

> "...the Crown could [not] derogate from vested property rights in a settlement..."[1306]

[1299] *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321, at 339, per Dickson J.

[1300] For a similar view, see J. Woodward, *Native Law*, note 1261, *supra*, at 203. However, see *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) per Macfarlane J.A., at 126: "Aboriginal rights were not regarded by common law as absolute. They were subject to regulation. They could be impaired, diminished or extinguished by a valid exercise of governmental power: *Calder* at pp. 333-334 and 402-405. *In that sense they were held at the pleasure of the Crown.* That does not mean that they are to be regarded as only personal in nature." [Emphasis added.]

[1301] *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321, at 335.

[1302] Id. Cited on the same point in B. Slattery, *Understanding Aboriginal Rights*, note 1255, *supra*, at 749.

[1303] *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia).

[1304] Id. at 67.

[1305] Id.

[1306] K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989), at 283; see also McNeil, *supra*, ch. 5, n. 25 and ch. 7, n. 174. Also, in *Mitchel* v. *United States*, (1835) 9 Peters 711 (U.S.S.C.), at 734, Baldwin J. provides: "That a treaty of cession was a deed or grant by one sovereign to another, which transferred nothing to which he had no right of property, and only such right as he possessed and could convey to the grantee."

See also K. McNeil, "Aboriginal Nations and Quebec's Boundaries: Canada Couldn't Give What It Didn't Have" in D. Drache & R. Perrin, (ed.), *Negotiating With a Sovereign Québec* (Toronto: James Lorimer & Co., 1992) 107, at 109. In relation to cessions in North America by France to Great Britain, see J. Hurley, *Aboriginal Rights, the Constitution and the Marshall Court*, (1982-1983) 17 R.J.T. 403, at 411: "Although [the Treaty of Paris, 1763] has been interpreted as vesting Great Britain with absolute sovereignty over and title to Canada, its very language clearly indicates that France ceded only

Similarly, B. Slattery elaborates:

> "At common law, a Crown grant of land burdened by aboriginal title will not extinguish it, but will take effect subject to the title or else be void. This rule applies to the Federal and Provincial Crowns, and also to the Imperial Crown and local colonial governments before Confederation."[1307]

In conclusion, the Crown prerogative cannot be validly used to unilaterally extinguish aboriginal title to land. Moreover, the prerogative power of the Crown could not prevail over constitutional and statutory instruments, including the *Royal Proclamation of 1763*. This would also mean that the Crown cannot derogate from its fiduciary obligations that are entrenched in these instruments. It would appear that the Supreme Court of Canada does not accept the notion that aboriginal title is subject to the "good will of the Sovereign". Since aboriginal title does not exist at the pleasure of the Crown, the Crown cannot extinguish Aboriginal title to lands simply by granting such lands to third parties.

6.2.2 By legislative enactment

At first glance, one might say that extinguishment of aboriginal or treaty rights by legislative enactment can theoretically occur with the consent of the Aboriginal people concerned,[1308] as for example in land claims agreements[1309], or through unilateral action.

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such rights over her North American claims as she herself possessed. This was merely the application of the basic principle *nemo dat quod non habet*."

[1307] B. Slattery, *Understanding Aboriginal Rights*, note 1255, *supra*, at 767.

[1308] It should be restated that any voluntary and valid purchase of land entails, as a legal consequence, an "extinguishment" of existing rights. This is true for both aboriginal and non-aboriginal title alike. However, in the case of Aboriginal peoples, alienations of land have to be made solely to the Crown.

In view of the Crown's distinctive constitutional and fiduciary obligations in relation to surrenders, such purchases should only occur if: i) the people concerned are so inclined (Royal Proclamation of 1763: "if at any Time any of the Said Indians should be inclined to dispose of the said Lands"); ii) the sale of such land would be in their short- and long-term interests; iii) the impacts or consequences of the sale of land has been clearly understood by the people affected; and iv) the public procedures for approval of land alienations have been fully complied with (as required in the Royal Proclamation). Based on existing legal principles, land alienations should not constitute an improvident or other arrangement to the present or future detriment of the people affected.

[1309] It is sometimes suggested that voluntary cessions or surrenders have taken place in land claims agreements or other treaties. However, in virtually every instance, Aboriginal peoples were not given any choice but to concede some form of surrender. It was only on the basis of such pre-condition that they were to be accorded the opportunity by non-Aboriginal governments to have specific recognition of some of their land and other rights and to improve their socio-economic positions. In a majority of instances, there is no record that the "land cession" provisions in their treaties were adequately explained to the people concerned or that such people expressed their approval through appropriate processes. None of these policies or actions appear to be consistent with the Crown's constitutional role as fiduciary.

For example, in the case of the James Bay and Northern Quebec Agreement, legislative extinguishment of the rights of Aboriginal peoples was expressly contemplated in the text of the Agreement. However, the Aboriginal parties take the position that they were permitted no choice.

In regard to land claim agreements or other treaties, it is inappropriate and unconstitutional for the federal and provincial governments to continue to "insist" upon the surrender of Aboriginal title. It is contrary both to the provisions in the Royal Proclamation and to s. 35(1) of the *Constitution Act, 1982* for governments to be insisting on the surrender or extinguishment of aboriginal rights. Such insistence violates the fiduciary obligation of the Crown. Insistence is also inconsistent with the principle of free and informed consent of Aboriginal peoples, which should be a central aspect of any matters pertaining to surrender or extinguishment of aboriginal title.

As indicated in *Apsassin* v. *Canada*, [1993] 2 C.N.L.R. 20 (Fed. C.A.), at 66 per Marceau J.A., in any period before a surrender, the government as fiduciary should be acting in the capacity of "advisor" or "guardian", and not seeking to persuade Aboriginal peoples that they should surrender their rights.

Where desirable and beneficial to Aboriginal peoples, options of sharing lands and resources should be explored.

However, even if extinguishments are obtained with the free and informed consent of an Aboriginal people, there are compelling constitutional[1310] and human rights considerations that would limit such practices.[1311] In addition, concepts of Aboriginal sovereignty should be a recognized impediment to unilateral extinguishment.

The primary focus in the following paragraphs is on unilateral extinguishment.

6.2.2.1 Section 91(24) of the *Constitution Act, 1867* and the principle of contending sovereignties

If there exists any legislative jurisdiction, on the part of non-Aboriginal governments, to address the questions of surrender and extinguishment of aboriginal rights on the lands of Aboriginal peoples, that jurisdiction is exclusively[1312] federal under s. 91(24) of the *Constitution Act, 1867.*

In *St. Catherine's Milling and Lumber Co.* v. *The Queen*, Lord Watson spoke of the broad nature of "lands reserved for the Indians" in s. 91(24) as follows:

> "...the words actually used are, according to their natural meaning, sufficient to include all lands reserved, upon any terms and conditions, for Indian occupation. *It appears to be the plain policy of the Act that, all such lands, and Indian affairs generally, shall be under the legislative control of one central authority.*"[1313] [Emphasis added.]

This "policy" aspect in the *Constitution Act, 1867* reflects the British policy in the *Royal Proclamation of 1763* to address and protect aboriginal rights under one central authority, and to carefully control voluntary purchases or cessions of Indian lands through alienations solely to the British Crown.

In *Delgamuukw* v. *British Columbia*, Macfarlane J.A. of the British Columbia Court of

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It is incompatible with the duties of a fiduciary to insist upon such a radical option as surrender or extinguishment of aboriginal rights, without exploring and recommending alternatives beneficial to the aboriginal principals concerned.

In regard to land claims and other treaties, no form of duress should be exerted on Aboriginal peoples to compel them to give up their lands or resources. Governments must not continue to take advantage of the impoverished social and economic conditions of Aboriginal peoples, by suggesting that if they surrender their aboriginal rights in a land claims or other treaty-making process, the government will be prepared to provide them with wide-ranging benefits. The consequences of legislative extinguishment are potentially extremely far-reaching and raise serious questions about the legitimacy of such practices.

[1310] See, for example, B. Slattery, *Understanding Aboriginal Rights*, note 1255, *supra*, at 764: "[Section 35(1)] does not prohibit voluntary cessions to the Crown. Nevertheless, *the section arguably imports strict constitutional standards safeguarding the interests of the native groups concerned and ensuring the essential fairness of a cession.*" [Emphasis added.]

[1311] In particular, the alienation of land must not deprive an Aboriginal people of their means of subsistence. See, generally, discussion under sub-heading 6.5 *infra.*

[1312] The use of the terms "exclusive" and "exclusively", as found in ss. 91 and 92 respectively of the *Constitution Act, 1867*, refers to the exercise of the specified classes of powers of federal and provincial legislatures *vis-a-vis each other.* In other words, "exclusive" as used in the *Constitution Act, 1867* does not mean that inherent Aboriginal self-government powers do not exist or that such powers cannot be exercised in a paramount manner, concurrently or in overlapping fashion with any federal power under s. 91(24). See Royal Commission on Aboriginal Peoples, *Partners in Confederation[:] Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services, 1993), at 32-33, 38-39.

In establishing the federal Dominion of Canada, the Imperial Parliament was required to "confer" and distribute powers to the federal and provincial legislatures in Canada through the *Constitution Act, 1867.* However, in light of the inherent nature of Aboriginal peoples' self-government powers, the same Act did not have to grant or otherwise confer such powers in order for them to exist. Not all constitutional principles and powers derive their source from written Imperial or other constitutional instruments. See Royal Commission, *supra*, at 8.

[1313] *St. Catherine's Milling and Lumber Co.* v. *The Queen*, (1888), 14 A.C. 46, at 59.

Appeal, explains why s. 91(24) must be accorded a broad interpretation of exclusive federal competence (as opposed to provincial jurisdiction) in relation to the territorial rights of "Indians":

> "...it is a sensible result which places the power to block improvident dispositions, or outright expropriation, of Indian lands in the hands of the legislature which was made responsible for Indian welfare generally. *Indeed, if the division of powers did not remove the power to extinguish aboriginal title from provincial hands, the federal government could find itself unable to protect this crucial native interest and forced to guarantee Indian welfare by other means. It would be an absurd result* to find the provinces with the competence to make the federal obligation to Indians more onerous."[1314] [Emphasis added.]

Legislative capacity to address Aboriginal issues does not necessarily mean that the Crown in right of Canada has sovereignty over Aboriginal peoples. R. Barsh & J. Henderson challenge the notion that s. 91(24) is intended to constitute some kind of plenary power over Aboriginal peoples:

> "...the [*Constitution Act, 1867*] empowered Canada to enforce tribal treaties and to implement the Crown's duty of protection, *but it was not an independent source of authority over tribes or their citizens* - any more than s. [132], empowering Canada to enforce Imperial treaties generally, was a grant of power to interfere with the internal affairs of the United Kingdom's other allies."[1315] [Emphasis added.]

In the 1837 Report of the Imperial House of Commons' Select Committee on Aborigines (British Settlements), it is recommended:

> "The protection of the Aborigines should be considered as a duty peculiarly belonging and appropriate to the Executive Department Government, as administered either in this country or by the Governors of the respective Colonies. *This is not a trust which could conveniently be confided to the local Legislatures...*
>
> Whatever may be the legislative system of any Colony, we therefore advise that, as far as possible, the Aborigines be withdrawn from its control. *In the formation of any new colonial constitution, or in the amendment of any which now exist, we think the initiative of all enactments affecting the Aborigines should be vested in the officer administering the Government...*"[1316] [Emphasis added.]

Barsh & Henderson comment on the above recommendation in the 1837 Report of the Select Committee:

> "...the Committee urged preserving a direct trust in the Sovereign over all native peoples, *even where no such connection had been established by treaty*, and removing natives from the legislative authority of all colonies. It would be strange indeed had [the Imperial] Parliament subsequently intended to invest Canada with unlimited legislative power over Indians, whose relationship to the Crown is, in most instances, formalized by Imperial treaties."[1317]

N. Lyon also rejects the view that the Canadian Parliament was conferred with unfettered jurisdiction over Aboriginal peoples through s. 91(24):

[1314] *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.), at 168.

[1315] R. Barsh & J. Henderson, *Aboriginal Rights, Treaty Rights, and Human Rights: Indian Tribes and 'Constitutional Renewal'*, (1982) 17 J. of Can. Studies 55 at 68.

[1316] Quoted in R. Barsh & J. Henderson, *Aboriginal Rights, Treaty Rights, and Human Rights: Indian Tribes and 'Constitutional Renewal'*, (1982) 17 J. of Can. Studies 55 at 68.

[1317] Id., at 68.

"We have arrived at a new understanding of section 91(24) of the 1867 document. The old vision led us to believe that the Parliament of Canada could enact any law in relation to Aboriginal peoples, however oppressive or destructive of their lives and communities...[However], *the power conferred by section 91(24) is surrounded by a rich texture of imperial laws whose purpose and effect we can now understand* because the *Charter* provides a model that we lacked in the past. *So it turns out that constitutional protection of fundamental rights is, after all, a part of our tradition.*"[1318] [Emphasis added.]

In addition, M. Asch & P. Macklem provide:

"...nowhere in the *Constitution Act, 1867* does it actually state that the Canadian state enjoys sovereignty over its indigenous population...*If one removes the underlying assumption of Canadian sovereignty over native people from the interpretive picture, s. 91(24) could just as easily be read as not authorizing Parliament to pass laws in relation to native people absent their consent*, but simply providing that, as between Parliament and the provincial legislatures, Parliament has the exclusive authority to negotiate with Canada's indigenous population and to regulate Indian affairs if and when negotiations have resulted in treaties of mutual consent."[1319] [Emphasis added.]

Asch and Macklem indicate that the assertion of Canadian sovereignty over Aboriginal peoples "rest[s] on unacceptable notions about the inherent superiority of European nations" and, if true, "does violence to fundamental principles of justice and human rights in the modern world, such as the assumed equality of peoples".[1320] Regardless of how long a doctrine or theory has had standing in the common law, it has been judicially determined that a common law concept should be reconsidered if it "seriously offends the values of justice and human rights (especially equality before the law)".[1321]

In addition, if full and fair consideration is given to the fact that the sovereignty of Aboriginal peoples continues to exist,[1322] then it cannot be assumed that another order of government in Canada (i.e. federal) has the power to unilaterally extinguish the rights and jurisdiction of Aboriginal peoples. In other words, the principle of contending sovereignties must be a circumscribing or limiting factor in relation to s. 91(24). Such a conclusion would apply not only after 1982 (when s. 35(1) was entrenched in the Constitution), but also since European contact.

6.2.2.2 Limitations based on the Royal Proclamation

Even if Canadian courts continue to assume that s. 91(24) provides Parliament with the capacity to extinguish aboriginal and treaty rights, such capacity would necessarily be subject to any existing constitutional limitations. In *Mabo et al.* v. *State of Queensland*, Toohey J. provides:

"The Crown has the power, *subject to constitutional, statutory or common law*

[1318] N. Lyon, *Book Review [:] Native Liberty, Crown Sovereignty*, (1990) 15 Queen's L.J. 361 at 363.

[1319] M. Asch & P. Macklem, *Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow*, (1991) 29 Alta. L.R. 498 at 510.

[1320] Id.

[1321] *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia), at 19, per Brennan J.

[1322] See "Contending Sovereignties" under heading 4 of this study.

> *restrictions*, to terminate any subject's title to property by compulsorily acquiring it."[1323] [Emphasis added.]

In regard to the Canadian Parliament's capacity to override the terms of the *Royal Proclamation* prior to 1931, B. Slattery provides:

> "...there is some doubt as to whether Canadian legislatures were competent to override the proclamation's terms prior to 1931, when the Statute of Westminster was enacted. So aboriginal peoples may today hold subsisting aboriginal rights to large tracts of Canadian land."[1324]

The historical or "numbered" treaties were all entered into prior to 1931. Any purported extinguishment by government, if contrary to the terms of the Royal Proclamation, would be of questionable validity. As R. Dussault & L. Borgeat point out:

> "Apparently, until the enactment of the *Statute of Westminster, 1931*, the rights conferred by the *Proclamation* could be neither amended nor revoked except by an Imperial statute."[1325]

However, if the Royal Proclamation is a constitutional instrument (as concluded by this study), then Canada's Parliament could neither amend nor revoke it, nor derogate from its terms. This conclusion would apply as much today as it did prior to 1931.[1326]

Further, as indicated earlier in this study,[1327] the notion of "cession" under the Royal Proclamation of 1763 is not simply limited to obtaining surrenders of aboriginal title to land with the consent of the "Nations and Tribes" concerned. When "cessions" are referred to in the Proclamation, they are circumscribed in an overall regime of confirming and safeguarding

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[1323] *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 at 151. It is the view in this study that constitutional and common law restrictions, as well as human rights considerations, would also limit Parliament's capacity or power to extinguish Aboriginal rights.

[1324] B. Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" in M. Boldt and J.A. Long, *The Quest for Justice [:] Aboriginal Peoples and Aboriginal Rights* (Toronto: Univ. of Toronto Press, 1985), at 123. At note 28 (p. 385), Slattery cites the following in support of his view: *R.* v. *Secretary of State for Foreign and Commonwealth Affairs*, [1982] 2 All E.R. 118 (C.A.), at 124-125, per Lord Denning, that the Proclamation 'was equivalent to an entrenched provision in the constitution of the colonies in North America' and continued to be constitutionally binding on the dominion and provincial legislatures even after Confederation; *R.* v. *White* and *Bob*, [1964] 50 D.L.R. (2d) 613 (B.C.C.A.), per Norris J.A., at 662, cited in *R.* v. *Isaac*, (1975) 13 N.S.R. (2d) 460 at 485 (N.S.S.C. App. Div.); B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories* (Saskatoon: Univ. of Saskatchewan Native Law Centre, 1979), at 315-319.

[1325] R. Dussault and L. Borgeat, *Administrative Law [:] A Treatise*, note 1283, *supra*, vol. 3, at 76. For an opposing view, see M. Patenaude, *Le droit provincial et les terres indiennes* (Montréal: Les Éditions Yvon Blais, 1986) at 66-69, where it is suggested that the Royal Proclamation was not a law envisaged by the *Colonial Laws Validity Act, 1865*. The author argues that this latter legislation was intended to extend and not restrict colonial law-making powers and Imperial laws were only to apply if expressly made applicable to the colonies.

With respect to M. Patenaude, it is the view of this study that her arguments are not convincing. First, the 1865 imperial act did limit the powers of colonial legislatures, which limitations were lifted (at least in part) by the *Statute of Westminster, 1931*. Second, the Proclamation did specifically apply to British-claimed territories in North America. Third, the royal prerogative power was at that time the principal mode by which colonies were constituted. The Proclamation, therefore, was a constitutional instrument that could not be derogated from by colonial legislatures. In this regard, the Proclamation was of greater significance than other imperial legislation that dealt with less important matters and which were also safeguarded from derogation by the 1865 law. Third, in constituting the legislative assemblies in Quebec and other colonies, the Proclamation simultaneously limited their authority through the aboriginal provisions. These provisions specifically safeguarded Aboriginal peoples and their territories and put the control over alienations of aboriginal lands in the hands of a central British authority (and not in colonial legislatures). For an elaboration of the constitutional status of the Royal Proclamation, see sub-heading 2.5 *supra*.

[1326] See B. Slattery, *Understanding Aboriginal Rights*, note 1255, *supra*, at 774, where he states that "the provisions of several important *constitutional* documents, including the *Royal Proclamation of 1763*,...shield aboriginal rights from legislative intrusion." [Emphasis added.]

[1327] See sub-heading 1.2, *supra*.

Aboriginal peoples and their territorial rights. This entrenched British policy effectively precludes any unilateral extinguishment of aboriginal or treaty rights by Canada's Parliament since 1867 to the present day. In addition, unilateral extinguishment runs completely counter to the procedural requirements in the Proclamation that call for Aboriginal approval of any alienation of aboriginal lands to the Crown in a public meeting or assembly held for that purpose.[1328]

In view of the broad constitutional powers included in the royal prerogative at the time of the Royal Proclamation, the Proclamation is judicially considered to have the force of a statute in Canada.[1329] Consequently, the same liberal rules of interpretation in favour of Aboriginal peoples must be applied to the Proclamation (at least the Aboriginal provisions) as are generally applicable to statutes relating to Aboriginal peoples.[1330] If the same rules of judicial interpretation were not applied, the Proclamation would be denied the full effect of a statute in Canada.

As already indicated in this study, the same equitable principles of British policy (as reflected in the Royal Proclamation) apply in the vast regions of Canada contemplated by the *Rupert's Land and North-Western Territory Order*.[1331] Therefore, the constitutional terms and conditions attached to this Order would also constitute limits on Parliament's legislative capacity under s. 91(24).

6.2.2.3 No extinguishment through regulation

In regard to government regulation, the courts have made it clear that, since the

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[1328] The relevant paragraph of the Royal Proclamation, R.S.C. 1985, App. II, No. 1, provides at 6: "...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 public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie..." In *Bear Island Foundation* v. *The Queen*, [1991] 127 N.R. 147, [1991] 3 C.N.L.R. 79, the Supreme Court of Canada failed to take into account the procedural requirements of the Royal Proclamation in relation to the purported surrender of aboriginal lands, when the Indians in question allegedly adhered to the Robinson-Huron Treaty of 1850. For a scathing criticism of this case, see K. McNeil, *The High Cost of Accepting Benefits From the Crown: A Comment on the Temagami Indian Land Case*, [1992] 1 C.N.L.R. 40 (procedural requirements of the Proclamation are discussed at 45-46, 55, 60 and 69).

[1329] See *R.* v. *Lady McMaster*, [1926] Ex. C.R. 68, at 72-73; *Easterbrook* v. *The King*, [1931] S.C.R. 210 at 214-215, 217-218, affirming [1929] Ex. C.R. 28, at 29-30; *R.* v. *White and Bob*, (1964), 50 D.L.R. (2d) 613 (B.C.C.A.), per Norris J.A., at 636, 644; *R.* v. *Isaac*, (1975), 13 N.S.R. (2d) 460, per MacKeigan C.J., at 478, per Cooper J.A., at 496; *Calder* v. *A.-G. British Columbia*, [1973] S.C.R. 313, per Hall J. at 394-395; *R.* v. *George*, [1964] 1 O.R. 24 (Ont. High Court), where McRuer C.J.H.C. held: "Since the Proclamation of 1763 has the force of a statute, I am satisfied that whatever power the Parliament of Canada may have to interfere with the treaty rights of the Indians, *the rights conferred on them by the Proclamation cannot in any case be abrogated, abridged or infringed upon by an order-in-council passed under the Migratory Birds Convention Act.*" [Emphasis added.] This statement is cited by Cartwright J. (dissenting) in *R.* v. *George*, [1966] S.C.R. 267, at 274, when the Supreme Court of Canada reversed on other grounds the decision of McRuer C.J.H.C.

[1330] Judicial rules of interpretation require that "ambiguities in the interpretation of treaties and statutes relating to Indians...be resolved in favour of the Indians...": *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85, at 98 (per Dickson C.J.), affirming *Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29.

However, La Forest J. of the Supreme Court in *Mitchell*, *supra*, at 143, distinguishes judicial interpretation of treaties from that of statutes relating to Aboriginal peoples as follows: "...somewhat different considerations must apply in the case of statutes relating to Indians. Whereas a treaty is the product of bargaining between two contracting parties, statutes relating to Indians are an expression of the will of Parliament. Rather, I think the approach must be to read the Act concerned with a view to elucidating what it was that Parliament wished to effect in enacting the particular section in question. *This approach is not a jettisoning of the liberal interpretive method.* [new para.] At the same time, I do not accept that this salutary rule that statutory ambiguities must be resolved in favour of the Indians implies automatic acceptance of a given construction simply because it may be expected that the Indians would favour it over any other competing interpretation. *It is also necessary to reconcile any given interpretation with the policies the Act seeks to promote.*" [Emphasis added.] In *A.G. Québec* v. *Eastmain Band*, [1993] 1 F.C. 501 (Fed. C.A.), at 516, Décary J.A. adopts the above view of La Forest J., in regard to interpretation of statutes relating to Aboriginal peoples.

[1331] *Rupert's Land and North-Western Territory Order*, R.S.C. 1985, App. II, No. 7, confirmed as part of the Constitution of Canada in Item 3 of the Schedule to the *Constitution Act, 1982*.

recognition and affirmation of aboriginal and treaty rights in the *Constitution Act, 1982*, "extinguishment by regulation" has no merit. In *R.* v. *Sparrow*, the British Columbia Court of Appeal stated:

> "In our view, the 'extinguishment by regulation' proposition has no merit. The short answer to it is that regulation of the exercise of a right presupposes the existence of the right. If Indians did not have a special right in respect of the fishery, there would have been no reason to mention them in the regulations. The regulations themselves, which have consistently recognized the Indian right to fish, are strong evidence that the right has not been extinguished, either expressly (as Hall J. would require) or by implication (as Judson J. held)."[1332]

In the ruling of the Supreme Court of Canada in *Sparrow*, the above view in the Court of Appeal was reinforced as follows:

> "...the [Crown's] argument confuses regulation with extinguishment. That the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished."[1333]

The Supreme Court of Canada stated that discretionary federal "permits were simply a manner of controlling the fisheries, not defining underlying rights."[1334] The Court of Appeal's holding that, the Aboriginal people concerned have an existing right to fish, was explicitly upheld. The Supreme Court emphasized that aboriginal rights should not be defined by past regulations, and the exercise of aboriginal rights can evolve with contemporary aboriginal use:

> "This approach is consistent with ensuring that an aboriginal right should not be defined by incorporating the ways in which it has been regulated in the past...
>
> ...As we stated earlier, the right [to fish] may be exercised in a contemporary manner."[1335]

The purpose of government regulation is neither to extinguish nor define the content of aboriginal rights. In this regard, the Supreme Court provided:

> "The nature of *governmental regulation cannot be determinative of the content and scope of an existing aboriginal right*. Government policy <u>can</u> however regulate the exercise of that right, but such regulation must be in keeping with s. 35(1)."[1336] [Emphasis added.]

It is important to underline here, that while the Supreme Court of Canada may have been specifically addressing a "regulation" (i.e. subordinate legislation) as opposed to a "statute" in the *Sparrow* case, the Court was referring to government regulation in the broadest sense of the term. That is, any curtailments or limitations on the exercise of aboriginal rights in pre-1982 government regulation - whether through a statute or subordinate legislation - could not constitute

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[1332] *R.* v. *Sparrow*, (1986) 36 D.L.R. (4th) 246 (B.C.C.A.) at 266. Other cases that have upheld the rule that extinguishment by regulation has no merit include: *R.* v. *Agawa*, (1988) 65 O.R. (2d) 505 (Ont. C.A.) per Blair J.A.; *Denny, Paul & Syliboy* v. *The Queen*, decision of March 5, 1990 (N.S.C.A.), cited and described in W. Binnie, *The Sparrow Doctrine: Beginning of the End or the End of the Beginning?*, (1990) 15 Queen's L.J. 217 at 242, n. 3.

[1333] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 at 1097. This view is questioned in W. Binnie, *The Sparrow Doctrine: Beginning of the End or the End of the Beginning?*, note 1332, *supra*, at 226: "...extinguishment by regulation has for many years been a premise of the federal Indian claims policy. If the doctrine has 'no merit', which is certainly the view for the time being of the Supreme Court of Canada, then a substantial chunk of the governmental defences against Aboriginal rights claims across Canada (except for areas covered by 'extinguishment' treaties) may collapse."

[1334] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 at 1099.

[1335] Id.

[1336] Id., at 1101.

an extinguishment of aboriginal rights.

That the Supreme Court was referring to both statutes and subordinate legislation is made clear when it stated in *Sparrow*:

> "There is nothing in the *Fisheries Act* or its detailed regulations that demonstrates a clear and plain intention to extinguish the Indian aboriginal right to fish."[1337]

The same broad interpretation of the Supreme Court's ruling in *Sparrow* is taken by the Royal Commission on Aboriginal Peoples:

> "...in the Court's view, an Aboriginal or treaty right that had merely been *regulated by legislation* did not cease to exist, even if the right had been confined to a very narrow compass. So long as the right survived in some form, however slight, it qualified as an 'existing' right under the section and received constitutional protection. Moreover, section 35(1) did not 'freeze' an Aboriginal or treaty right in the form it held in 1982. *Legislation that limited the scope or operation of a protected right could be challenged under the section, even if the legislation was already in force in 1982.*"[1338] [Emphasis added.]

In regard to subordinate legislation, the judicial view that there could be no extinguishment through regulation (even prior to 1982) is especially appropriate. Reasons include: i) Regulations, as compared to statutes, are intended to be more of a temporary nature and more flexible, so as to be able to be easily modified with changing circumstances; ii) even if a specific regulation were to "prohibit" the exercise of hunting rights in a certain area for conservation[1339] reasons, such a regulation is not intended to have perpetual effect and would likely be abrogated or substantially altered once the rationale for such a measure was no longer justifiable; iii) regulations, especially those pertaining to conservation, are often site- or region-specific and therefore could lead to an arbitrary patchwork of existing aboriginal and treaty rights if construed as an instrument for extinguishment; iv) in view of the countless regulations on all types of matters, there would be an increased likelihood that aboriginal or treaty rights might be deemed extinguished "by necessary implication", even if there had never been any conscious intent or awareness of such consequences when the regulations were adopted. Such casual extinguishments would be totally antithetical to the recognition and respect for aboriginal and treaty rights and run counter to the notion of a uniform policy in Canada on these fundamental matters.

It has been suggested[1340] that the Supreme Court in *Sparrow* may have left the door open to extinguishment by government regulation when it provided:

> "...federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation[1341] that

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[1337] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 at 1099.

[1338] Royal Commission on Aboriginal Peoples, *Partners in Confederation[:] Aboriginal Peoples, Self-Government, and the Constitution*, note 1312, *supra*, at 31. See also K. McNeil, *The Constitutional Rights of the Aboriginal Peoples of Canada*, [1982] 4 Supreme Ct. L. Rev. 255 at 258: "Aboriginal or treaty rights to hunt, trap and fish that have been *limited by federal or provincial legislation*...continue to exist even though their exercise has been restricted." [Emphasis added.]

[1339] In the case of conservation of endangered and threatened species, it is possible that curtailments in harvesting or even a moratorium might become necessary under legitimate and urgent circumstances. Such action, preferably carried out through Aboriginal self-regulation, could benefit the species in question as well as the interests of Canadians and the Aboriginal peoples themselves. However, these curtailments can be achieved through effective regulation of aboriginal rights and need not entail an extinguishment of the rights themselves.

[1340] K. McNeil, *Envisaging Constitutional Space for Aboriginal Governments*, (1993) 19 Queen's L.J. 95 at 102.

[1341] The term "government regulation", as used by the Court in this paragraph is ambiguous. It could refer to "an act of governmental control" (such as in a statute), or it could be specifically be referring to a "regulation" (as opposed to a statute).

infringes *or denies* aboriginal rights."[1342]

In this regard, K. McNeil comments:

> "As the Court did not expressly state that these rights could still be *extinguished* by federal legislation as well, this issue has been left in doubt."[1343]

The phrase under question is "government regulation that infringes or denies". Was the Supreme Court specifically contemplating some use of federal legislative power, such as expropriation,[1344] or does "denies" have some lesser connotation in the context in which it was used?

Although the Supreme Court in *Sparrow* makes passing reference to "a situation of expropriation"[1345] in a subsequent portion of its decision, it would appear that the Court is contemplating here a different situation. First, the term "government regulation" is making reference to regulations and not statutes (in which an expropriation power might be exercised). Second, the Court explicitly expressed support for the rule that there be no extinguishment of aboriginal rights through regulation, particularly since this was not the function or purpose of regulations under a statute.[1346]

Third, the phrase "government regulation that...denies aboriginal rights" does not appear to be referring at all in this context to extinguishment. In determining if a *prima facie* "infringement" of aboriginal rights has taken place, the Court poses certain questions that use the term "deny" in a very different sense:

> "First, is the limitation unreasonable? Second, does the regulation impose undue hardship? Third, *does the regulation deny to the holders of the right their preferred means of exercising that right?*" [Emphasis added.]

In other words, "denial" is directed by the Court towards the "preferred means of exercising" aboriginal rights and not to extinguishment.[1347]

6.2.2.4 Pre-1982 capacity of Parliament to extinguish aboriginal and treaty rights

It is sometimes presumed that, prior to the coming into force of the *Constitution Act, 1982*, the Parliament of Canada had virtually an unfettered capacity to extinguish aboriginal rights. Such a position would mean that there were no pre-1982 constitutional instruments that

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[1342] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 at 1109 per Dickson C.J.

[1343] K. McNeil, *Envisaging Constitutional Space for Aboriginal Governments*, note 1340, *supra*, at 102, n. 22.

[1344] For a view that s. 35(1) of the *Constitution Act, 1982* allows for unilateral extinguishments of aboriginal rights to take place through expropriation, see W. Binnie, *The Sparrow Doctrine: Beginning of the End or the End of the Beginning?*, note 1332, *supra*, at 238-239. The issue of extinguishment by expropriation is discussed in a sub-heading below. See also P. Hogg, *Constitutional Law of Canada*, note 1253, *supra*, vol. 1, at 27-30, n.149: "The example [of expropriation] does, however, show the difficulty of distinguishing justified regulation (valid) from expropriation (invalid)." Neither Binnie nor Hogg raise their comments on expropriation based on the phrase cited in the text above (i.e. "government regulation that infringes or denies").

[1345] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1119.

[1346] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 at 1097-1101. At 1101, the Court states: "The nature of government regulations cannot be determinative of the content and scope of an existing aboriginal right. Government policy can however regulate the exercise of that right, but such regulation must be in keeping with s. 35(1)."

[1347] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 at 1110: "The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized *so as to ensure recognition and affirmation.*" [Emphasis added.]

safeguarded the aboriginal rights of Aboriginal peoples or created fiduciary or other obligations in this regard.

However, as indicated in this study,[1348] the *Royal Proclamation of 1763*, as a constitutional instrument applicable in Canada, limited the legislative capacity of Canada's Parliament since its inception in 1867. In particular, the Proclamation provides for a protective regime in regard to Aboriginal peoples and their territorial rights that precludes unilateral extinguishments. Other constitutional instruments, such as the Imperial *Rupert's Land and North-Western Territory Order*[1349], contain terms and conditions that require the Crown to take protective measures and apply equitable principles in relation to Aboriginal peoples and their territorial interests.[1350] In addition, in regard to the Metis, the *Manitoba Act of 1870*[1351] created constitutional obligations[1352] that were subject to the strict standards applied to fiduciaries. These fiduciary norms of a constitutional nature serve to restrict Parliament's legislative capacity to extinguish or otherwise infringe upon Metis land rights.

In *Delgamuukw* v. *British Columbia*, Macfarlane J.A. provides:

> "Although treaty-making is the best way to respect Indian rights there is no doubt, based on the authorities, that the interest of aboriginal peoples in or in respect of land could, prior to 1982, be extinguished by *a clear exercise of constitutionally valid sovereign power*. This could be done without the consent of the Indians."[1353] [Emphasis added.]

Since Macfarlane J.A. did not believe that the Royal Proclamation applies in British Columbia,[1354] he did not consider the status of this instrument or its effect on Parliament's legislative capacity to extinguish aboriginal rights. If the Royal Proclamation applies, then a "clear exercise of constitutionally valid sovereign power" would be subject to Aboriginal consent.

In *Sparrow*, the Supreme Court of Canada indicated that the Crown has "the burden of proving extinguishment" and that "[t]he test of extinguishment to be adopted...is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right."[1355] These principles apply to both aboriginal and treaty[1356] rights.

[1348] See discussion under sub-heading 2.5 *supra*.

[1349] R.S.C. 1985, App. II, No. 7, confirmed as part of the Constitution of Canada in Item 3 of the Schedule to the *Constitution Act, 1982*.

[1350] See discussion under sub-heading 2.3 *supra*. See also K. McNeil, *Envisaging Constitutional Space for Aboriginal Governments*, note 1340, *supra*, at 102, n.21: "...Aboriginal rights may be protected in at least some parts of Canada by constitutional provisions in place before 1982" and the author makes reference to K. McNeil, *Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations* (Saskatoon: University of Saskatchewan Native Law Centre, 1982); and, in regard to "the Royal Proclamation and other constitutional instruments", see B. Clark, *Native Liberty, Crown Sovereignty [:] The Existing Aboriginal Right to Self-Government in Canada* (Montreal: McGill-Queen's University Press, 1990).

[1351] *An Act to Amend and Continue the Act 32 and 33 Victoria, Chapter 3; and to Establish and Provide for the Government of the Province of Manitoba*, 33 Vict., c. 3 (Canada, 1870), renamed the *Manitoba Act, 1870* and found in Item 2 of the Schedule of the *Constitution Act, 1982*.

[1352] See s. 31 of the *Manitoba Act*.

[1353] *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) at 154.

[1354] Id., at 153-154.

[1355] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 at 1099.

[1356] See K. McNeil, *The High Cost of Accepting Benefits From the Crown: A Comment on the Temagami Indian Land Case*, note 1328, *supra*, at 68, where the author cites *R.* v. *Horseman*, [1990] 3 C.N.L.R. 95 at 102; and *A.G. of Quebec* v. *Sioui*, [1990] 3 C.N.L.R. 127 at 151. See also *Simon* v. *The Queen*, [1986] 1 C.N.L.R. 153 at 170 per Dickson C.J.: "Given the serious and far-reaching consequences of a finding that a treaty right has been extinguished, it seems appropriate to demand strict proof of the fact of extinguishment in each case where the issue arises."

A most confusing dimension of the "clear and plain intention"[1357] requirement is that it was stipulated by Hall J. in *Calder* v. *A.-G. British Columbia*[1358] in the context of referring to the U.S. cases of *Lipan Apache Tribe* v. *United States*[1359] and *U.S.* v. *Santa Fe Pacific Railroad Co.*,[1360].[1361] In *Lipan Apache Tribe*, Davis J. quoted the U.S. Supreme Court decision in *Santa Fe Pacific Railroad* where reference is made not only to "clear and plain indication", but also the U.S. plenary power[1362]:

> "Extinguishment can take several forms; it can be effected 'by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise...'. *United States v. Santa Fe Pac. R.R., supra*, 314 U.S. at 347. While the selection of a means is a governmental prerogative, the actual act (or acts) of extinguishment must be plain and unambiguous. *In the absence of a 'clear and plain indication' in the public records that the sovereign 'intended to extinguish all of the [claimants'] rights' in their property, Indian title continues.* Id. at 353."[1363]

However, the U.S. plenary power doctrine has been severely criticized by jurists[1364] as being

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[1357] In regard to *statutory* interpretation and the safeguarding of existing status and vested rights, the following rule of construction has been reiterated by the Supreme Court of Canada in *Spooner Oils Ltd.* v. *Turner Valley Gas Conservation Board*, [1933] S.C.R. 629 at 638 per Duff C.J.: "*A legislative enactment is not to be read as prejudicially affecting accrued rights, or 'an existing status'* (*Main* v. *Stark*, [(1890) 15 App. Cas. 384, at 388]), unless the language in which it is expressed requires such a construction. The rule is described by Coke as a 'law of Parliament' (2 Inst. 292), meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, *when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference.*" [Emphasis added.]

In addition, see *A.G. for Canada* v. *Hallet & Carey Ltd.*, [1952] A.C. 427 at 450: "...there is a well-known general principle that statutes which encroach upon the rights of the subject, whether as regards person or property, are *subject to a 'strict' construction*. Most statutes can be shown to achieve such an encroachment in some form or another, and the general principle means no more than that, *where the import of some enactment is inconclusive or ambiguous, the court may properly lean in favour of an interpretation that leaves private rights undisturbed.*" [Emphasis added.] Both of the above cases and canons of statutory construction are cited in *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) at 155-156, per Macfarlane J.A.

[1358] *Calder* v. *A.-G. British Columbia*, [1973] S.C.R. 313, at 393, 404.

[1359] *Lipan Apache Tribe* v. *United States*, (1967) 180 Ct. Cl. 487 per Davis J.

[1360] *U.S.* v. *Santa Fe Pacific Railroad Co.*, (1941) 314 U.S. 339.

[1361] In the U.S., the requirement of a "plain and unambiguous act" to extinguish Indian title is discussed in J. Lowndes, *When History Outweighs Law: Extinguishment of Abenaki Aboriginal Title*, (1994) 42 Buffalo L. Rev. 77 at 99-100.

[1362] The U.S. plenary power doctrine has been established by U.S. courts to justify virtually total Congressional control over Aboriginal peoples, based on the rationale that there is an obligation to protect them. The lack of a source for this Congressional power in the U.S. Constitution is described by one author in the following terms: "...whereas discovering authority in the Constitution for plenary power is a futile effort, locating the source of the doctrine *in bias* is a productive work. *A search for the source of plenary power essentially established that the [U.S. Supreme] Court's interpretation of Indian conditions from a prejudicial point of view dictated the Court's discriminatory response: Indians, being a race inferior to white Americans, need protection and pupilage.* And there being the obligation, there is the power." [Emphasis added.]": I. Harvey, *Constitutional Law: Congressional Plenary Power Over Indian Affairs - A Doctrine Rooted in Prejudice*, (1982) 10 Am. Indian L. Rev. 117 at 119. Congressional plenary power is also challenged in D. Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, (1994) 80 Virginia L. Rev. 403.

At 148, Harvey depicts the plenary doctrine as a basis for land dispossession of Indians and not for their protection: "The doctrine has propounded white America as the protector of the true interests of Indians during times when the doctrine's effects were anything but protective. The [Supreme] Court's own admission distinguished the purpose of administering property for the benefit of its inhabitants from the purpose motivating white treatment of Indians in America 'where the 'dominant purpose of the whites...was to occupy the land.'' [*Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955) at 284, quoting *Carino* v. *Insular Government of the Philippine Islands*, 212 U.S. 449 (1909) at 458.]"

[1363] Cited in *Calder* v. *A.-G. British Columbia*, [1973] S.C.R. 313, at 393, 404 per Hall J.

[1364] The defects in the U.S. approach are addressed in Note, *Rethinking the Trust Doctrine in Federal Indian Law*, (1984) 98 Harv. L. Rev. 422. See also J. Singer, *Sovereignty and Property*, (1991) 86 Nw. U. L. Rev. 1 at 14-15.

"rooted in prejudice"[1365] and "unconstitutional".[1366] Moreover, the Supreme Court of Canada has never indicated that the U.S. plenary power doctrine is applicable to Canada's constitutional system. Rather, the Crown's duty to protect Aboriginal peoples and their territories in Canada is circumscribed by the strict conduct required of a fiduciary.[1367] Nevertheless, it would be useful if Canadian courts[1368] (and jurists[1369]) would in future refer more judiciously to U.S. jurisprudence[1370] that rely on discriminatory and unjust doctrines, such as the Congressional plenary power.[1371]

Putting aside constitutional considerations, the Supreme Court of Canada has not specified precisely what is required under the criteria of "clear and plain intention".[1372] Some lower court decisions have required that specific indication of intention to extinguish aboriginal or treaty rights be demonstrated.[1373]

In *Delgamuukw* v. *British Columbia*,[1374] Macfarlane J. compares the clear and plain test enunciated by the Supreme Court to the common law presumptions in relation to statutory interpretation, existing in favour of vested rights and property rights.[1375] He takes the view that the same presumptions of statutory interpretation should apply to aboriginal title:

> "...like vested rights and property rights, [aboriginal rights] may be impaired or extinguished with or without compensation by a clear and plain exercise of competent

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[1365] I. Harvey, *Constitutional Law: Congressional Plenary Power Over Indian Affairs - A Doctrine Rooted in Prejudice*, note 1362, *supra*; N. Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, (1980) 31 Hastings L. J. 1215; D. Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, note 1362, *supra*.

[1366] Note, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, (1987) 22 Harv. C.R.-C.L. L. Rev. 507 at 529, 535-547; I. Harvey, *Constitutional Law: Congressional Plenary Power Over Indian Affairs - A Doctrine Rooted in Prejudice*, note 1362, *supra*, at 118-119, 149.

[1367] Legitimate exercise of the Crown's powers as a fiduciary would include: i) to facilitate full recognition of and respect for the status and rights of Aboriginal peoples; ii) to safeguard their status and rights; and iii) to conduct its own relations with Aboriginal peoples, and undertake its own policies and actions, in a manner consistent with these overall objectives.

[1368] *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) at 154 per Macfarlane J.A.

[1369] W. Binnie, *The Sparrow Doctrine: Beginning of the End or the End of the Beginning?*, note 1332, *supra*, at 227-228.

[1370] U.S. cases are applicable in Canada in many instances, but distinguishing aspects should be highlighted by Canadian courts to a greater extent when required. See also K. McNeil, *Common Law Aboriginal Title*, note 1306, *supra*, at 245, where reasons are provided as to why it should not always be assumed that U.S. decisions involving aboriginal land rights are generally applicable in other jurisdictions. In addition, the Royal Proclamation of 1763 is said to have only remained in force in the U.S. until the 1776 revolution when the American colonies became independent states: *Halloway* v. *Doe d. Buck*, (1823) 4 Littell 293; 14 Kentucky R. 293 at 294. Cited in B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories*, note 1324, *supra*, at 311.

[1371] A notable exception is found in *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) at 302-305 per Lambert J. (dissenting), where portions of the *Santa Fe* case that are inapplicable to or distinguishable in Canadian law are mentioned (namely, extinguishment by adverse dominion). However, no mention was made by Lambert J.A. as to the possible unconstitutionality or discriminatory nature of the U.S. plenary doctrine underlying the decision in *Santa Fe*.

[1372] The Supreme Court of Canada does say in *Simon* v. *The Queen*, [1985] 2 S.C.R. 387 at 405-406: "It seems appropriate to demand strict proof of the fact of extinguishment in each case...'extinguishment cannot be lightly implied'." Also, in *R.* v. *Horseman*, [1990] 1 S.C.R. 901 at 930 per Cory J.: "...the onus of proving either express or implicit extinguishment lies upon the Crown."

[1373] See, for example, *R.* v. *White* and *Bob*, (1964) 52 W.W.R. 193 (B.C.C.A.); *R.* v. *Wesley*, (1975) 62 D.L.R. (3d) 305 (Ont. Dist. Ct.); *R.* v. *Isaac*, (1976) 13 N.S.R. (2d) 460 (N.S.C.A.); *R.* v. *Taylor* and *Williams*, (1981) 34 O.R. (2d) 360 (C.A.). These cases are cited in W. Pentney, *The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982 Part II [-] Section 35: The Substantive Guarantee*, (1988) 22 U.B.C. Law Rev. 207 at 251, nn. 221 & 222.

[1374] *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.).

[1375] Id., at 155-158.

legislative power. However, the legislative intention to do so will be so implied only if the interpretation of the statute permits no other result."[1376]

With respect to Macfarlane J., there are a number of reasons not to simply apply the statutory rules of interpretation as to whether aboriginal or treaty rights have been extinguished by legislation. These include the following:

i) The Supreme Court of Canada has used different words and phrases to describe the appropriate tests. If the Court intended to apply the existing common law rules of statutory interpretation, it would have simply said so.

ii) The Supreme Court has made clear that "the onus of proving express or implicit[1377] extinguishment lies upon the Crown."[1378] Therefore, it cannot be said that the clear and plain test includes an *objective* interpretation of a specific statute to determine whether "by necessary implication...the only possible interpretation of the statute is that aboriginal [or treaty] rights were intended to be extinguished."[1379] As will be discussed below, a different and more subjective test appears to be required.

iii) In light of the profound relationship of Aboriginal peoples with their territories, aboriginal and treaty rights to lands and resources signify a great deal more to these peoples than simply vested or property rights. Since the Supreme Court has stated that aboriginal title is sui generis[1380] in nature, there is certainly judicial flexibility and additional rationale for not applying ordinary rules of statutory construction to these fundamental human rights.

iv) The historic relationship between the Crown and Aboriginal peoples, the resulting fiduciary obligations,[1381] and the distinctive status and rights of Aboriginal peoples provide further indication of the inappropriateness of simply inferring by implication that the wording of a statute is inconsistent with the existence of aboriginal or treaty rights.

In *Hamlet of Baker Lake* v. *Minister of Indian Affairs*, Mahoney J. provides for a simple "necessary effect" test:

"Once a statute has been validly enacted, it must be given effect. If its *necessary effect* is to abridge or entirely abrogate a common law right, then that is the effect that the

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[1376] Id., at 157.

[1377] The notion of "implicit" extinguishment is closely examined in *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) at 299-301 per Lambert J. (dissenting). At 300, Lambert J.A. cautions: "...I do not think that implicit extinguishment is compatible with the clear and plain intention test unless no other conclusion than implicit extinguishment is possible."

[1378] *R.* v. *Horseman*, [1990] 1 S.C.R. 901 at 930 per Cory J.

[1379] *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) at 157, per Macfarlane J.A.

[1380] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 at 1078 per Dickson C.J.: "Courts must be careful to avoid the application of traditional common law concepts of property as they develop an understanding of the '*sui generis*' nature of aboriginal rights. While it is impossible to give an easy definition of fishing rights, *it is crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake.*" [Emphasis added.]

[1381] In *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia), at 160, Toohey J. concludes that although extinguishment of aboriginal title is possible by "clear and plain legislation", such extinguishment would constitute a violation of the Crown's fiduciary duty towards Aboriginal peoples: "It is convenient...to summarise the conclusions so far reached in this judgement...that the title is capable of extinguishment by clear and plain legislation or by an executive act authorised by such legislation; that extinguishment would involve a *breach of the fiduciary obligation owed by the Crown* to the [Aboriginal] people." [Emphasis added.]

For a contrary view, see *A.G. Ontario* v. *Bear Island Foundation*, (1985), 49 O.R. (2d) 353, at 481, 15 D.L.R. (4th) 321, at 449 (Ont. H.C.), where Steele J. stated that unilateral extinguishment of aboriginal title was not prevented by the ruling on fiduciary duties in *Guerin*, since the latter case only addressed damages for breach of a fiduciary duty and not extinguishment of aboriginal rights.

> Court must give it. That is as true of an aboriginal title as of any other common law right."[1382] [Emphasis added.]

However, this test does not satisfy the "clear and plain intention" criteria of the Supreme Court. As W. Binnie provides, the Supreme Court appears to be moving towards a more "subjective" analysis:

> "Apparently a 'necessary effect' may not satisfy the 'clear and plain' test, though the judgement is not entirely clear about this. Perhaps the Court is inching away from the sort of objective test proposed by Mahoney J. into a more subjective analysis, where the alleged act of extinguishment must be shown to be clear, plain and *conscious.*"[1383]

B. Ryder indicates that it is not just the subjective intention that ought to be relevant, but that the intention be explicitly conveyed to the Aboriginal peoples affected:

> "The 'clear and plain intention' test is closely related to the 'honour of the Crown:' *if the Crown has not explicitly conveyed its intention to Aboriginal Peoples, how can it be said that its intention is either honourable or 'clear and plain'?* Clear and plain to whom? Surely it is *not just the subjective intention of non-Aboriginal authorities* that ought to be relevant."[1384] [Emphasis added.]

Should the Supreme Court of Canada unequivocally indicate that, prior to 1982, express words in a statute were not the only means of extinguishing aboriginal or treaty rights by legislative enactment, then it is submitted that any "necessary implication" would have to be strictly proved by the Crown by demonstrating a "conscious" intention by Parliament.

Constitutional, fiduciary and human rights considerations aside, it is hardly possible to show "clear and plain intention"[1385] by Parliament, if the legislature never consciously and deliberately considered extinguishing such rights and decided to proceed with such abrogation. As a very minimum, this is what the Supreme Court's requirements of "strict proof" and "clear and plain intention" must mean. Parliamentary "intention" must directly relate to the extinguishment of rights and not simply to proceed with some other legislative objective, without being aware of or considering its potential to conflict with aboriginal or treaty rights.

For the above reasons, the objective test of interpreting conflicting words in a statute cannot satisfy the criteria of the Supreme Court. In addition, conscious legislative intention would be imperative, if Parliament's fiduciary obligations[1386] are to have any opportunity of being fulfilled and not bring dishonour[1387] to the Crown.

[1382] *Hamlet of Baker Lake* v. *Minister of Indian Affairs*, (1979) 107 D.L.R. (3d) 513 at 568. Mahoney J.'s view was adopted in *A.G. Ontario* v. *Bear Island Foundation*, (1984) 15 D.L.R. (4th) 321 (Ont. H.C.), at 407-408 per Steele J.

[1383] W. Binnie, *The Sparrow Doctrine: Beginning of the End or the End of the Beginning?*, note 1332, *supra*, at 228.

[1384] B. Ryder, *Aboriginal Rights and Delgamuukw v. The Queen*, (1994) 5 Constitutional Forum 43 at 45.

[1385] In *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) at 301, per Lambert J. (dissenting), it is emphasized that the intention is that of the competent legislature and not a person carrying out an authorized act: "...the clear and plain intention to extinguish by the administrative or executive act, whether that intention is express or implied, remains *the intention of the Sovereign Power, acting legislatively*, and is not merely the intention of the person carrying out the authorized administrative or executive act." [Emphasis added.]

[1386] Fiduciary obligations arise on the part of the government and Parliament, based on the common law, the historical Aboriginal-Crown relationship (as reflected in part in the Royal Proclamation of 1763 and other constitutional instruments), and existing treaties.

[1387] "The honour of the Crown is always involved": see, for example, *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 at 1107 per Dickson C.J. See also B. Ryder, *Aboriginal Rights and Delgamuukw v. The Queen*, (1994) 5 Constitutional Forum 43 at 45: "...a stricter understanding of the requirement of 'clear and plain intention' than that adopted by the [British Columbia Court of Appeal in *Delgamuukw*] would be more consistent with the twin goals of upholding the honour of the Crown and promoting a just settlement for Aboriginal Peoples that the Supreme Court has said should guide the interpretation of section 35."

In the U.S., "actual" consideration of potential conflicts and a deliberate choice by Congress to abrogate treaty rights has been said by the U.S. Supreme Court in *U.S.* v. *Dion* to be "essential":

> "What is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty."[1388]

6.2.2.5 Extinguishment by expropriation - an exception?

With the entrenchment of s. 35 in Canada's Constitution in 1982, it is generally recognized that aboriginal and treaty rights are protected from unilateral extinguishment.[1389] However, the question has been raised as to whether the Supreme Court has left the door open to such a consequence through expropriation.

In *Sparrow* v. *The Queen*, it is said that, depending on the circumstances, analysis of "justification" of government action that *prima facie* infringes on aboriginal rights would include such factors as:

> "whether, in a situation of expropriation, fair compensation[1390] is available".[1391]

The Supreme Court clarifies that the factors it has set out are not "an exhaustive list", but are "factors to be considered in the assessment of justification". The Court did not indicate that the government's expropriation powers would prevail over aboriginal rights. Nowhere is it said that unilateral extinguishment of aboriginal or treaty rights by expropriation is any type of exception under s. 35(1) of the *Constitution Act, 1982*. Nor was this a case where expropriation of aboriginal rights was being considered.

In regard to the federal expropriation power, it is not the intention here to do an in-depth

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[1388] *U.S.* v. *Dion*, 476 U.S. 734 (1985) at 739-740 per Marshall J. This case is cited in W. Binnie, *The Sparrow Doctrine: Beginning of the End or the End of the Beginning?*, note 1332, *supra*, at 228.

[1389] P. Hogg, *Constitutional Law of Canada*, note 1253, *supra*, vol. 1, at 27-30. See also K. McNeil, *Envisaging Constitutional Space for Aboriginal Governments*, note 1340, *supra*, at 100, n. 20 and the cases cited by the author.

[1390] In W. Binnie, *The Sparrow Doctrine: Beginning of the End or the End of the Beginning?*, note 1332, *supra*, at 239, it is said: "The Supreme Court [in *Sparrow*] has held that ultimately the value of existing Aboriginal and treaty rights can be measured in money." However, it is far from clear what the Supreme Court intended to include in the notion of "fair compensation". In regard to Aboriginal peoples, fair compensation can often signify replacement of their lands with those of equal size, quality and legal status from an aboriginal perspective. For similar minimum international standards in regard to indigenous peoples, see draft *United Nations Declaration on the Rights of Indigenous Peoples*, in E.-I. Daes, Chairperson/Rapporteur, *DISCRIMINATION AGAINST INDIGENOUS PEOPLES [:] Report of the Working Group on Indigenous Populations on its eleventh session*, E/CN.4/Sub.2/1993/29, 23 August 1993, 50 (Annex I), art. 27; and *Indigenous and Tribal Peoples Convention, 1989* (No. 169), art. 16, para. 3). Note that neither international instrument specifically recognizes the right of states to expropriate indigenous peoples' lands. In regard to aboriginal title being a compensable right, see B. Slattery, *Understanding Aboriginal Rights*, note 1255, *supra*, at 751-752. For a discussion of the meaning of the term "compensation" as used in constitutional instruments pertaining to Aboriginal peoples in Canada, see note 1390 *supra*.

See also A. Buchanan, *The Role of Collective Rights in the Theory of Indigenous Peoples' Rights*, (1993) 3 Transnat'l L. & Contemp. Probs. 89 at 101, n. 14: "...it would be a serious mistake - and would compound the original injustice - to assume that any piece of land of equivalent *market value* must be accepted as compensation by the indigenous group. This assumption fails utterly to take into account that indigenous peoples typically have special attachments to particular territories. *Any adequate theory of rectificatory justice must accommodate the special spiritual relationship which indigenous peoples typically have to the land they have occupied.*" [Emphasis added.]; G. Nettheim, "'Peoples' and 'Populations' - Indigenous Peoples and the Rights of Peoples" in J. Crawford, (ed.), *The Rights of Peoples* (Oxford: Clarendon Press, 1988) 107 at 123, where it is said in regard to indigenous peoples: "Claims to compensation can seek alternative *land* or money or services."

[1391] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1119.

examination. However, it is important to note that there are a number of considerations which would suggest that unilateral extinguishment through the federal expropriation power would be wholly unjustifiable under s. 35(1) of the *Constitution Act, 1982*.

It is difficult to imagine how a unilateral extinguishment though expropriation can be viewed as consistent with the fiduciary obligations owed by the Crown to Aboriginal peoples.[1392] Extinguishment of aboriginal title serves to sever the profound relationship Aboriginal peoples have with their territories. Unilateral extinguishment cannot be said to be an act for the benefit of the Aboriginal peoples affected. Nor can it be said to be in the short- and long-term interest[1393] of Aboriginal peoples.[1394]

Based on *Sparrow*, exercise of the expropriation power[1395] (like other federal powers) would be subject to, and limited by, the Crown's fiduciary obligation in regard to Aboriginal peoples. To the extent that exercise of the expropriation power was of a regulatory nature *not tantamount to an extinguishment*[1396] of aboriginal rights, the same justification tests would apply. However, use of the expropriation power to unilaterally extinguish aboriginal or treaty rights appears to squarely contradict the spirit and intention of s. 35(1).[1397] In addition, other existing constitutional limitations, such as the requirement of consent in the *Royal Proclamation of 1763*,[1398] would be equally applicable in expropriation matters.

In particular, unilateral extinguishment through expropriation would be wholly inconsistent with the Supreme Court decision in *Sparrow* in the following ways:

- The significance of s. 35(1) "extends beyond [such] fundamental effects" as providing "a solid constitutional base upon which subsequent negotiations can take place".[1399] "Section 35 calls for a just settlement for aboriginal peoples"[1400] (which presupposes agreement and not unilateral action).

[1392] Unilateralism is contrary to the principle of consent, so that the fiduciary would be acting against the wishes of the Aboriginal people concerned.

[1393] See also *Blueberry River Indian Band et al.* v. *Canada (Minister of Indian Affairs and Northern Development)*, [1988] 1 C.N.L.R. 73 at 93, where Addy J. likens the fiduciary obligation to a trust and provides: "...where a trustee is in any way interested in the subject matter of the trust, there rests upon him a special *onus of establishing that all of the rights and interests both present and future of the beneficiary are protected and are given full and absolute priority and the subject matter is dealt with for the latter's benefit* and to the exclusion of the trustee's interest to the extent there might be a conflict. A similar obligation rests on the Crown in the case at bar..." [Emphasis added.] This statement by the Trial Judge was referred to on appeal by Stone J.A. in *Apsassin* v. *Canada*, [1993] 2 C.N.L.R. 20 (Fed. C.A.), at 45, and the Federal Court of Appeal affirmed the decision of the Trial Judge.

[1394] In Aotearoa-New Zealand, the Waitangi Tribunal has declared that the extinguishment of Maori rights is "inconsistent with the [Waitangi] Treaty and prejudicial to Maori": see T. Reedy, Statement to U.N. General Assembly, in *Living History [:] Inauguration of the "International Year of the World's Indigenous People"*, (1993) 3 Transnat'l L. & Contemp. Probs. 204 at 206.

[1395] In regard to Indian reserve lands, s. 35 of the *Indian Act* provides for expropriation through either federal or provincial expropriation laws, subject to federal Cabinet authorization. It is not clear that such an expropriation power can be exercised to extinguish aboriginal rights. This would certainly not be the case, in the absence of meeting the justification tests set out by the Supreme Court of Canada in *Sparrow* v. *The Queen*.

[1396] If an expropriation were of a temporary nature (e.g. with a right to reversion of the land) and solely resulted in some form of regulation over the exercise of aboriginal rights, perhaps it could qualify for consideration under the *Sparrow* tests.

[1397] B. Slattery, *Understanding Aboriginal Rights*, note 1255, *supra*, at 766: "Since the enactment of section 35 of the Constitution Act, 1982, the federal power to expropriate aboriginal lands is defunct, except perhaps in cases of necessity."

[1398] See, for example, J. Woodward, *Native Law*, note 1261, *supra*, at 209: "The Royal Proclamation of 1763, however, does not allow for any method of depriving Indians involuntarily of their title." See also B. Slattery, *Understanding Aboriginal Rights*, note 1255, *supra*, at 766: "...it can be argued that the Royal Proclamation of 1763 imposed strict constitutional limitations on the power of local Canadian legislatures to expropriate aboriginal land rights."

[1399] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1105.

[1400] Id., at 1106.

- Interpreting the meaning of s. 35(1) is more than balancing different sections of the Constitution. The interpretive approach is "derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and *the purposes behind the constitutional provision itself.*"[1401] [Emphasis added.]

- To allow unilateral extinguishment would also be contrary to the judicial rules of interpretation reiterated in *Sparrow*. "When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded."[1402]

- Unilateral action does not "uphold the honour of the Crown" and extinguishment would violate the guarantee in s. 35(1). "The extent of legislative or regulatory impact on an existing aboriginal right may be scrutinized *so as to ensure recognition and affirmation.*"[1403]

From the perspective of Aboriginal peoples, unilateral extinguishment is considered to be a most radical measure with far-reaching adverse consequences. Considering that the courts have taken the view that surrenders of aboriginal title are irreversible,[1404] it could hardly be said that a unilateral extinguishment through expropriation constitutes action that causes "as little infringement as possible"[1405]. In addition, unilateral extinguishment is not consistent with meaningful "consultation"[1406] with respect to the measures being implemented which, by definition, are intended to be forcibly imposed.

Generally, the expropriation power (in the absence of consent by the interested Aboriginal people) appears to be an inappropriate power to apply to aboriginal and treaty rights.[1407] First, expropriation of collective rights has far-reaching implications that go well beyond a specific act of expropriation affecting individual rights. Second, expropriation assumes a certain subordination of the peoples affected, which is contrary to the notion of contending sovereignties involving Aboriginal peoples. Third, it runs counter to the essential rights of Aboriginal peoples to self-determination, including rights of self-government and consent[1408]. Fourth, aboriginal and treaty rights include not only proprietary but also jurisdictional dimensions that would be destroyed in the event of expropriation.[1409]

[1401] Id.

[1402] Id.

[1403] Id., at 1110.

[1404] *Smith* v. *The Queen*, (1984) 147 D.L.R. (3d) 237 (S.C.C.). In the view of this study, the *Smith* case was wrongly decided in this regard: see discussion under sub-heading 1.5.1 *supra*.

[1405] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1119. See also *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) at 319, per Lambert J.A. dissenting: "The reason why an aboriginal right can not be extinguished in its entirety is because such an extinguishment *would not meet the minimum impairment test in Sparrow.*" [Emphasis added.]

[1406] Id.

[1407] It is interesting to note here the approach taken in respect to Metis lands in Alberta. The *Constitution of Alberta Amendment Act, 1990*, R.S.A., c. C.-22.2, s. 3 provides: "The fee simple estate in Metis settlement land, or any interest in it less than fee simple, *may not be acquired through expropriation by Her Majesty in right of Alberta or any person*, but an interest less than fee simple may be acquired in that land in a manner permitted by the *Metis Settlements Land Protection Act.*" [Emphasis added.]

[1408] As indicated in this study, the consensual nature of Aboriginal-Crown relations is constitutionally entrenched through the Royal Proclamation of 1763.

[1409] Generally, under ordinary situations, valid federal legislative powers of expropriation may affect proprietary rights of individuals and those of a provincial government. See *A.G. Quebec* v. *Nipissing Central Railway*, [1962] A.C. 715 at 724 per Viscount Cave L.C.: "...the power to legislate in respect of any matter must necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights; and it may be added that where...the legislative power cannot be effectually exercised without affecting the proprietary rights both of individuals in a Province and of the Provincial Government, the power so to affect those rights is necessarily involved in the legislative power." However, this study demonstrates that there are additional constitutional considerations that distinguish the fundamental status and rights of

Fifth, in light of the importance of lands and resources to Aboriginal peoples and their ongoing position of vulnerability, it generally would constitute an act of injustice and dispossession to expropriate aboriginal lands and resources. Moreover, the identity of Aboriginal peoples is inextricably linked to their lands and resources. Sixth, it is counterproductive to the Crown-Aboriginal relationship to exert unilateral powers of expropriation. Seventh, it is a harsh instrument that does not foster "sensitivity" and "respect" for the fundamental rights of Aboriginal peoples as the Supreme Court indicated was required in *Sparrow*.[1410]

6.2.3 By constitutional amendment

In regard to the extinguishment of aboriginal rights through constitutional amendment, P. Hogg provides:

> "Needless to say, aboriginal rights could also be extinguished by constitutional amendment."[1411]

This is likely the dominant view, but it leaves unanswered what procedural or other requirements might be necessary for an amendment to be legally and politically valid.

In view of the fact that Aboriginal peoples have participated in First Ministers Conferences on the Constitution between 1983 and 1987 and in the Charlottetown constitutional process in 1992, the question can be posed whether Aboriginal peoples have a right to be directly involved in constitutional amendment processes that affect them.[1412] It is possible that at least a "constitutional convention"[1413] has been established in regard to both aboriginal

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Aboriginal peoples from those of private individuals and provincial governments.

[1410] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1119: "We do not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that *recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.*" [Emphasis added.]

[1411] P. Hogg, *Constitutional Law of Canada*, note 1253, *supra*, vol. 1, at 27-20. Hogg adds that "only a 'clear and plain' intention to extinguish would be accepted by the courts as having that effect."

[1412] Aboriginal peoples were excluded from participating in the Meech Lake constitutional process that was initiated in 1987. However, federal and provincial governments purportedly justified such exclusion on the basis that the Meech Lake constitutional accord did not affect them.

[1413] Constitutional conventions are discussed in P. Hogg, *Constitutional Law of Canada*, note 1253, *supra*, vol. 1, at 1-15 - 1-24. See *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753 at 888 *et seq.*: "The requirements for establishing a convention bear some resemblance with those which apply to customary law. Precedents and usage are necessary but do not suffice. They must be normative. We adopt the following passage of Sir W. Ivor Jennings in The Law and the Constitution, 5th ed. (1959), p. 136:

> 'We have to ask ourselves three questions: first, what are the precedents; secondly, did the actors in the precedents believe that they were bound by the rule; and thirdly, is there a reason for the rule? *A single precedent with a good reason may be enough to establish a rule. A whole string of precedents without such a reason will be of no avail, unless it is perfectly certain that the persons concerned regarded them as bound by it.*'"

See also *Re Objection by Quebec to Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793 at 815 et seq.

A constitutional convention is said to differ from mere "usage" in that a convention (although not enforceable in the courts) is "a rule which is regarded as obligatory by the officials to whom it applies": see P. Hogg, *supra*, at 1-19. Usage is "merely a governmental practice which is ordinarily followed, although it is not regarded as obligatory.": Hogg, *supra*, at 1-19. However, usage may develop into a convention over a long period of time.

participation and consent[1414]. In all of the above-mentioned constitutional processes, existing amending formulas were followed but no amendments were put forward for adoption without first obtaining the participation and consent of the aboriginal peoples concerned.[1415]

In addition, P. Hogg makes the point that s. 35(1) of the *Constitution Act, 1982* ensures that Aboriginal peoples have at least some role in the constitutional amendment process:

> "Section 35.1 declares that the federal and provincial governments 'are committed to the principle' that before any amendment is made to s. 91(24) or to s. 35 or to s. 25, a constitutional conference will be convened to which representatives of the aboriginal peoples of Canada will be invited to participate in discussions of the proposed amendment. *Through s. 35.1, the aboriginal peoples have gained entry to the constitutional amendment process. This privilege is accorded to no other group outside government, which emphasizes that the special status of the aboriginal peoples is now firmly accepted in Canada.* "[1416] [Emphasis added.]

Although there exist different points of view,[1417] it has been argued that s. 35.1 is not an amendment to the amending formulas in Part V of the *Constitution Act, 1982*, since it was not adopted with unanimous consent.[1418] Regardless of whether s. 35(1) is an amendment to the amending formulas and is enforceable in the courts, the provision still reinforces the existence of a constitutional convention since the federal government and all provincial governments were in agreement with its adoption.[1419] As P. Hogg provides:

[1414] It is worth noting that provision was included in the Charlottetown Accord for obtaining the consent of Aboriginal peoples in relation to constitutional amendments relating to Aboriginal peoples. The Charlottetown Accord was agreed to by eleven first ministers, territorial leaders, and the leaders of the four national aboriginal organizations on August 28, 1992. A Draft Legal Text was issued on October 9, 1992. On October 26, 1992, the Charlottetown Accord was submitted for approval to voters throughout Canada and the Accord was rejected. The Charlottetown Accord and the Draft Legal Text are reproduced in appendices in K. McRoberts & P. Monahan, (eds.), *The Charlottetown Accord, the Referendum and the Future of Canada* (Toronto: Univ. of Toronto Press, 1993).

In relation to the existence of a constitutional convention of Aboriginal consent to amendments pertaining to Aboriginal peoples, see N. Finkelstein & G. Vegh, *The Separation of Quebec and the Constitution of Canada* (North York, Ontario: York University Centre for Public Law and Public Policy, 1992), at 25: "Although any conclusion in this regard is qualified by the inherent uncertainty of the doctrine, *there are reasonable grounds to argue that, in light of the practice since patriation, a constitutional convention of Native consent has been established in relation to the amendment of the sections concerning Aboriginal peoples.*" [Emphasis added.] See also N. Zlotkin, *The 1983 and 1984 Constitutional Conference: Only the Beginning*, (1984) 3 C.N.L.R. 3 at 20.

[1415] N. Finkelstein & G. Vegh, *The Separation of Quebec and the Constitution of Canada*, note 1414, *supra*, at 29.

[1416] P. Hogg, *Constitutional Law of Canada*, note 1253, *supra*, vol. 1, at 27-33.

[1417] For example, see N. Finkelstein & G. Vegh, *The Separation of Quebec and the Constitution of Canada*, note 1414, *supra*, at 16-17 takes the view that s. 35.1 was legally passed and is enforceable: "...the amendment was legally passed. *There are three reasons why we reach this conclusion.* First, Part V requires unanimity in an amendment 'to this Part'. Section 35.1 is an amendment to Part II of the *Constitution Act, 1982*, not Part V. Secondly, section 35.1 does not relate at all to the formal procedure by which the constitution is amended, that is, by Proclamation of the Governor-General following the appropriate number of resolutions by the legislatures. The terms of section 35.1 do not detract from this procedure. It explicitly applies to the situation occurring 'before any amendment is made.' Finally, the substantive commitments in section 35.1 are owed by the Prime Minister; the amending formulae contemplate only legislatures and the Governor-General. *An action brought to enforce the commitment would seek to compel the Prime Minister to meet them, not the legislatures.*" [Emphasis added.]

[1418] B. Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples Constitutional Reform and Canadian Statecraft* (Montreal: Institute for Research of Public Policy, 1986) at 16 argues that s. 35.1 purported to be an amendment to the amending formula which requires unanimous consent. Since only nine of the ten legislatures approved the amendment, Schwartz contends that the amendment is illegal. However, even if s. 35.1 were held not to constitute a modification to the amending procedures, it does not necessarily follow that the constitutional provision is illegal. At the very least, it can constitute a valid constitutional principle that may not be justiciable. Alternatively, s. 35.1 may be a constitutional provision that is justiciable but is not viewed as an amendment to the amending formulae in the *Constitution Act, 1982*, Part V; see N. Finkelstein & G. Vegh, *The Separation of Quebec and the Constitution of Canada*, note 1414, *supra*, at 15-17.

[1419] The federal government and Parliament, as well as nine of the provincial governments and their legislatures, were in agreement and participated in the process of including s. 35.1 in Canada's Constitution. Although the Quebec government chose not to participate directly at the 1983 First Ministers Conference, it did attend as an observer and Premier Lévesque

> "If all the relevant officials agree to adopt a certain rule of constitutional conduct, then that rule may immediately become to be regarded as obligatory...It should be noticed too that conventions established by agreement will normally be written down by the officials concerned in precise and authoritative terms. Conventions are not necessarily unwritten rules..."[1420]

Hogg indicates that s. 35.1 probably does not apply to constitutional amendments that make no direct change to any of the identified constitutional provisions but which do impair aboriginal or treaty rights. However, in this regard, he views the Crown's fiduciary obligation as a critical and limiting factor:

> "...the fiduciary duty of the Crown recognized in *Sparrow* would, in my view, preclude such action without aboriginal participation."[1421]

It may well be that the strongest argument against unilateral extinguishment of aboriginal or treaty rights by Parliament and provincial legislatures lies within s. 35(1). The Supreme Court of Canada has ruled in *Sparrow* that s. 35(1) incorporates a general fiduciary obligation of a constitutional nature,[1422] and such obligation can apply to federal and provincial governments and legislatures according to the circumstances. As N. Finkelstein and G. Vegh conclude, this fiduciary obligation applies to the amending formulas with respect to proposed amendments pertaining to Aboriginal peoples:

> "In conclusion, the fiduciary obligation owed by the central government to the Aboriginal peoples may be a general duty applying to all of their relations. *This general duty likely applies in the amendment process with respect to sections concerning Aboriginal peoples and it is examinable by the courts*. The government is required to act in a way in keeping with the honour of the Crown and with the unique relationship between the Crown and the Aboriginal peoples."[1423] [Emphasis added.]

Therefore, in order to ensure compliance with their constitutional fiduciary obligations, the governments and legislatures would be subjected by Canadian courts to the principles and justification tests laid down in *Sparrow*. While this does not necessarily guarantee that the courts would require aboriginal consent (as opposed to consultation[1424]) to every amendment of any

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did indicate that his government was not opposed to the adoption of all the aboriginal-related amendments at that time. See also *Manuel* v. *A.G.*, [1982] 3 W.L.R. 821, where various Indian Chiefs from Canada unsuccessfully sought declarations to the effect that the U.K. Parliament had no power to amend the constitution of Canada so as to prejudice Indian nations without their consent. It does not appear that a "constitutional convention" in regard to Aboriginal consent was alternatively argued in this case.

[1420] P. Hogg, *Constitutional Law of Canada*, note 1253, *supra*, vol. 1, at 1-21 - 1-22.

[1421] P. Hogg, *Constitutional Law of Canada*, note 1253, *supra*, vol. 1, at 27-33, n. 161. See also N. Finkelstein & G. Vegh, *The Separation of Quebec and the Constitution of Canada*, note 1414, *supra*, at 25: "This general [fiduciary] duty likely applies in the amendment process with respect to sections concerning Aboriginal peoples and it is examinable by the courts. The government is required to act in a way in keeping with the honour of the Crown and with the unique relationship between the Crown and the Aboriginal Peoples...the fiduciary obligation mirrors the obligation in section 35.1. It does not, however, extend that obligation so as to prohibit the government from acting without the consent of the Aboriginal peoples in the amendment process."

[1422] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 at 1108 per Dickson C.J. This study also concludes that a fiduciary duty of a constitutional nature arises from the terms and conditions of the *Rupert's Land and North-Western Territory Order*, 1870.

[1423] N. Finkelstein & G. Vegh, *The Separation of Quebec and the Constitution of Canada*, note 1414, *supra*, at 25.

[1424] It is worth noting that in the *Indigenous and Tribal Peoples Convention, 1989* (No. 169), "consultation" on legislative and other measures must be "undertaken, in good faith and in a form appropriate to the circumstances, *with the objective of achieving agreement or consent to the proposed measures*." (article 6, para. 2) A stronger minimum standard is found in draft *United Nations Declaration on the Rights of Indigenous Peoples*, in E.-I. Daes, Chairperson/Rapporteur, *DISCRIMINATION AGAINST INDIGENOUS PEOPLES [:] Report of the Working Group on Indigenous Populations on its eleventh session*, E/CN.4/Sub.2/1993/29, 23 August 1993, 50 (Annex 1), article 20 (para. 2): "States shall obtain the free and informed consent of the peoples concerned before adopting and implementing [legislative and adminstrative] measures."

kind affecting s. 35(1),[1425] it is highly conceivable that consent would be required in the event of an amendment that purported to extinguish aboriginal or treaty rights. In the absence of aboriginal consent, it is highly doubtful that governments and legislatures could justify to the courts such a draconian[1426] and far-reaching measure.

Like the *Canadian Charter of Rights and Freedoms*, s. 35(1) is amendable under the general amending procedure (s. 38) in the *Constitution Act, 1982*.[1427] In regard to the *Charter*, the courts have ruled that the it does not apply to the amending procedures in Canada's Constitution.[1428] However, s. 35(1) (Part II) is distinguishable from the Charter (Part I) in that a general fiduciary duty attaches to the actions of federal and provincial governments and legislatures. This is especially the case in a situation of extinguishment of aboriginal or treaty rights.[1429]

Based on all of the above, it can be said that existing practice, past precedent, s. 35.1 and the fiduciary obligation of the Crown would at least ensure that Aboriginal peoples have direct participation in any constitutional process to amend s. 35(1). Further, in the event that a constitutional amendment were adopted to unilaterally abrogate s. 35(1), Aboriginal peoples could possibly mount a successful judicial challenge to oppose this action. Under these circumstances, the Crown's fiduciary obligation to Aboriginal peoples could result in a judicially-imposed requirement of aboriginal consent to any such constitutional amendment.

While the above conclusions will remain uncertain until such time that these questions are put to and ruled upon by the Supreme Court, it can be said that a wholly unilateral action by non-Aboriginal governments and legislatures in Canada would likely not be valid.

6.3 Crown in Right of the Province

In regard to each of the ten provincial Crowns in Canada, it is said that the executive government of each province enjoys prerogative powers.[1430] As in the case of the Crown in right of Canada, such powers would have to be exercised within the respective jurisdiction of

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[1425] See N. Finkelstein & G. Vegh, *The Separation of Quebec and the Constitution of Canada*, note 1414, *supra*, at 25, where the authors provide that the fiduciary obligation "probably requires consultation with Aboriginal peoples before amending any of the Aboriginal Peoples Section, but this does not *necessarily* require consent to any such amendment." [Emphasis added.]

[1426] The term "draconian" is also used to describe the implications of unilateral extinguishment in H. Foster, *Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases*, note 1251, *supra*, at 389.

[1427] P. Hogg, *Constitutional Law of Canada*, note 1253, *supra*, vol. 1, at 4-12.

[1428] *Penikett* v. *Canada*, (1987) 45 D.L.R. (4th) 108 (Y.T.C.A.); and *Sibbeston* v. *Canada*, (1989) 48 D.L.R. (4th) 691 (N.W.T.C.A.). See also P. Hogg, *Constitutional Law of Canada*, note 1253, *supra*, vol. 1, at 4-12 - 4-13. At 4-13, Hogg explains: "This conclusion is reinforced by s. 32 of the Charter of Rights, which makes the Charter applicable to the Parliament of Canada and the Legislatures of each province, but which makes no reference to the combinations of legislative resolutions that are required to operate three of the five amending procedures [namely, the general amending procedure (s. 38), the unanimity procedure (s. 41), and the some-but-not-all provinces procedure (s. 43)]." Hogg indicates that the amending procedures in relation to the federal executive and Houses of Parliament (s. 44) and the "constitution of the province" (s. 45) are subject to the *Charter*. In this regard, see *Re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 at 179; and *MacLean* v. *A.G.N.S.*, (1987) 35 D.L.R. (4th) 306 (N.S.S.C.). Hogg states that this result follows, since the governments of Canada and the provinces are "caught by the literal words of s. 32 in the *Charter*."

[1429] See, generally, *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321, where the situation of surrender of aboriginal title was explicitly said to give rise to a distinctive fiduciary duty.

[1430] P. Hogg, *Constitutional Law of Canada*, note 1253, *supra*, vol. 1, at 10-3; *Maritime Bank* v. *Receiver General of New Brunswick*, [1898] A.C. 437 (P.C.).

the provinces.[1431] Should provinces not have legislative or other jurisdiction to extinguish aboriginal or treaty rights (as this study concludes below), then extinguishments cannot be effected by the provincial governments or legislatures.

It is clear that provincial legislative powers under s. 92 of the *Constitution Act, 1867* do not provide provinces with the capacity to legislate in regard to aboriginal and treaty rights (let alone extinguish these rights). As B. Slattery explains:

> "Under [s. 91(24)], the *Federal Parliament* has the exclusive authority (as among non-Aboriginal governments) to deal with Indians and lands reserved for the Indians. By inference, *it alone has the power to pose justified limits to the Aboriginal and treaty rights protected by section 35*. Under section 92, the Provinces do not possess the power to legislate in relation to Aboriginal and treaty rights, and so the question of justification under section 35 simply does not arise."[1432] [Emphasis added.]

In addition, P. Hogg indicates that provincial laws of general application cannot affect "Indians and lands reserved for the Indians":

> "A provincial law that affects 'an integral part of primary federal jurisdiction over Indians and lands reserved for the Indians'[1433] will be inapplicable to Indians and lands reserved for the Indians, even though the law is one of general application that is otherwise within provincial competence. This vague exception...has been framed as precluding laws that impair the 'status or capacity' of Indians,[1434] or that affect 'Indianness'[1435]."[1436]

In *Delgamuukw* v. *British Columbia*, Macfarlane J.A. elaborates on the far-reaching consequences of allowing a provincial law of general application to extinguish aboriginal title "by incidental effect", which he determines is "impermissable":

> "The proposition that provincial laws could extinguish Indian title by incidental effect must be examined in light of an appropriate understanding of the federal immunity relating to Indians and of the aboriginal perspective. *The traditional homelands of aboriginal people are integral to their traditional way of life and their self-concept*. If the effect of provincial land legislation was to strip the aboriginal people of the use and occupation of their traditional homelands, it would be an impermissible intrusion into federal jurisdiction. Any provincial law purporting to extinguish aboriginal title would

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[1431] *Bonanza Creek Gold Mining Company* v. *The King*, [1916] A.C. 566 (P.C.), at 579: "It is to be observed that the *British North America Act* has made a distribution between the Dominion and the provinces which extends not only to legislative but to executive authority"; and at 587: "...executive power is in many situations which arise under the statutory Constitution of Canada conferred by implication in the grant of legislative power, so that where such situations arise the two kinds of authority are correlative." These statements are quoted in S. Aronson, *The Authority of the Crown to Make Treaties With Indians*, [1993] 2 C.N.L.R. 1, at 4. See also J.E. Côté, *The Reception of English Law*, (1977), 15 Alta. L. Rev. 29 at 61: "...the Crown in each rights [i.e. Canada or a province] receives the prerogatives and duties appropriate to its property and legislative competence"; *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick*, [1892] A.C. 437 (P.C.); *A.-G. B.C.* v. *A.-G. Canada*, (1889) 14 App. Cas. 295 at 302.

[1432] B. Slattery, *First Nations and the Constitution: A Question of Trust*, (1992) 71 Can. Bar Rev. 261 at 285. See also *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1109: "[S. 35)] also affords aboriginal people constitutional protection against provincial legislative power". See P. Hogg, *Constitutional Law of Canada*, note 1253, *supra*, vol. 1, at 27-31, where the Supreme Court of Canada's statement is interpreted as follows: "This should probably be read as meaning that a provincial law cannot impair aboriginal or treaty rights, even if the law could pass the justificatory tests stipulated by the Court for federal laws."

[1433] *Four B Manufacturing* v. *UGW*, [1980] 1 S.C.R. 1031, at 1047 per Beetz J.

[1434] Hogg indicates that this is the phraseology used by Dickson J. in *Kruger and Manuel* v. *The Queen*, [1978] 1 S.C.R. 104, at 110.

[1435] Similarly, this is the phraseology used by Laskin C.J. in *Natural Parents* v. *Superintendant of Child Welfare*, [1967] 2 S.C.R. 751, and by Beetz J. in *Dick* v. *The Queen*, [1985] 2 S.C.R. 309, at 326.

[1436] P. Hogg, *Constitutional Law of Canada*, note 1253, *supra*, vol. 1, at 27-10 - 27-11.

trench on the very core of the subject matter of s. 91(24)."[1437] [Emphasis added.]

At the same time, provincial "laws of general application" must also be considered in the context of s. 88 of the *Indian Act* which provides:

> "Subject to the terms of any treaty and any other Act of the Parliament of Canada, all *laws of general application* from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that such laws make provision for any matter for which provision is made by or under this Act."

P. Hogg indicates that the phrase "laws of general application" would certainly exclude provincial laws that "single out Indians for special treatment".[1438] However, what if a provincial law did not single out Indian lands for special treatment, but had the effect (prior to 1982[1439]) of extinguishing aboriginal[1440] rights on Indian lands?

In *Kruger and Manuel* v. *The Queen*,[1441] the Supreme Court held that s. 88 did not render provincial laws affecting Indianness applicable to Indians.[1442] Subsequently, a very different view was taken in *Dick* v. *The Queen*,[1443] where it was held that s. 88 did validate provincial laws that affected Indianness by impairing the status or capacity of Indians.

Despite these subsequent rulings, which have been seriously questioned[1444], it is critical to note that s. 88 refers solely to provincial laws of general application in respect of "Indians" and not "lands reserved for the Indians".[1445] As W. Pentney concludes:

[1437] *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) at 169.

[1438] P. Hogg, *Constitutional Law of Canada*, note 1253, *supra*, vol. 1, at 27-13 - 27-14.

[1439] Following the coming into effect of s. 35(1) of the *Constitution Act, 1982* on April 17, 1982, aboriginal and treaty rights are safeguarded from extinguishment by unilateral legislative action. In the view of this study, the *Royal Proclamation of 1763* and other constitutional instruments precluded unilateral extinguishment prior to 1982.

[1440] Treaty rights of aboriginal peoples are explicitly safeguarded by s. 88 of the *Indian Act*.

[1441] *Kruger and Manuel* v. *The Queen*, [1978] 1 S.C.R. 104, at 110.

[1442] This aspect is discussed in P. Hogg, *Constitutional Law of Canada*, note 1253, *supra*, vol. 1, at 27-14.

[1443] *Dick* v. *The Queen*, [1985] 2 S.C.R. 309, at 326-327 per Beetz J. This view has been reaffirmed in *Derrickson* v. *Derrickson*, [1986] 1 S.C.R. 285, at 297; *R.* v. *Francis*, [1988] 1 S.C.R. 1025, at 1030.

[1444] P. Macklem, *First Nations Self-Government and the Borders of the Canadian Legal Imagination*, note 1260, *supra*, at 418-423; B. Ryder, *The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations*, (1991) 36 McGill L.J. 308, at 347, 369-380; L. Little Bear, "Section 88 of the Indian Act and the Application of Provincial Laws to Indians" in M. Boldt and J.A. Long, *The Quest for Justice [:] Aboriginal Peoples and Aboriginal Rights* (Toronto: Univ. of Toronto Press, 1985) 175, at 183; D. Pothier, *Developments in Constitutional Law: The 1987-88 Term*, (1989) Sup. Ct. L. Rev. 41, at 107-110.

See also *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) at 318, per Lambert J.A. dissenting: "...if a law regulating conduct generally regulates non-aboriginal rights for everyone but also regulates aboriginal rights for aboriginal people, then that law does not apply generally to everyone but *applies in a different way to the rights of aboriginal people and is, accordingly, in my opinion, not a law of general application.*" [Emphasis added.]

[1445] In this regard, see *R.* v. *Dennis* and *Dennis*, (1974) 56 D.L.R. (3d) 379 (B.C. Prov. Ct.) per O'Connor J., at 394: "To hold that s. 88 of the *Indian Act* incorporates referentially provincial legislation restricting or extinguishing the hunting rights of non-treaty Indians would be to encourage the practice of doing so without negotiation or consultation. [new para.] I conclude, therefore, that if s. 88 operates to referentially incorporate provincial legislation, *legislation restricting or extinguishing Indian hunting rights is not legislation of general application as the phrase is used in that section.* The result of so concluding may be that that no provincial legislation not otherwise competent is added to the federal legislative scheme dealing with Indians." [Emphasis added.] O'Connor J. indicates at 395 that such legislation is arguably legislation in respect of "Indian lands" and is therefore not covered by s. 88 of the *Indian Act*, but in light of the conclusions reached, he did not feel it necessary to address this point.

"... such a law cannot be effective to extinguish [Indian] title at all, because the act of extinguishment is in relation to 'Indian lands' within s. 91(24) of the *Constitution Act, 1867* while s. 88 falls under the head 'Indians' within this section. On this view of the matter, s. 88 could not be effective to 'trigger' extinguishment of aboriginal title."[1446]

Moreover, putting aside the likely unconstitutionality of s. 88 at least since 1982,[1447]

[1446] W. Pentney, *The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982 Part II [-] Section 35: The Substantive Guarantee*, (1988) 22 U.B.C. Law Rev. 207, at 247-248. For the view that both provincial and federal governments have the power to extinguish aboriginal rights, Pentney cites W. Henderson, *Indian Reserves: The Usufruct in Our Constitution*, (1980) 12 Ottawa L. Rev. 167, at 173, n. 31; M. Patenaude, *Le droit provincial et les terres indiennes* (Montréal: Les Éditions Yvon Blais, 1986); *A.G. Ontario* v. *Bear Island Foundation*, (1984) 15 D.L.R. (4th) 321 (Ont. H.C.), at 442.

[1447] Section 88 of the *Indian Act* has served to expose Aboriginal peoples to impairment of, infringement of, or interference with their rights through provincial regulation. The very real potential of s. 88 interfering with aboriginal rights is apparent in recent Supreme Court of Canada cases, since this provision has been interpreted to referentially incorporate provincial law as federal law rather than be declaratory of otherwise valid provincial legislation: see *Dick* v. *The Queen*, [1985] 2 S.C.R. 309; *Derrickson* v. *Derrickson*, [1986] 1 S.C.R. 285; *R.* v. *Francis*, [1988] 1 S.C.R. 1025. See also P. Hogg, *Constitutional Law of Canada*, note 1253, *supra*, vol. 1, at 27-14, in regard to the implications of these recent cases: "It means that s. 88 is not merely declaratory of the existing constitutional position. On the contrary, *s. 88 expands the body of provincial law that is applicable to Indians*. Provincial laws affecting Indianness, which do not apply to Indians of their own force, are made applicable by s. 88." [Emphasis added.]

Section 88 is likely unconstitutional for the following reasons:

1) As mandatory since 1982 (with the entrenchment of aboriginal and treaty rights in s. 35(1) of the *Constitution Act, 1982*), s. 88 cannot meet the tests required by s. 35(1) as laid down in *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075. Section 88 is excessively open-ended, general and uncertain, in that it allows for a wide range of provincial laws to adversely affect or otherwise interfere with aboriginal rights without being able to know in advance what the nature and effect of such laws might entail for Aboriginal peoples. In this regard, see B. Slattery, *First Nations and the Constitution: A Question of Trust*, (1992) 71 Can. Bar Rev. 261, at 285-286.

2) In particular, the generality of s. 88 flies in the face of the "importance of context and a case-by-case approach to s. 35(1)" and the requirement in *Sparrow*, at 1111, that the "contours of a justificatory standard must be defined in the *specific factual context of each case*".

3) Further, it is hardly possible to discern if there is a "valid legislative objective" that "must uphold the honour of the Crown and must be in keeping with the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's aboriginal peoples" (*Sparrow*, at 1110) or if there is "as little infringement as possible in order to effect the desired result" (*Sparrow*, at 1119), if it is unknown what the specific purpose is in each potential case involving s. 88. As indicated in *Sparrow*, *supra*, at 1114, "the 'presumption' of validity [of a legislative enactment] is now out-dated in view of the constitutional status of the aboriginal rights at stake".

4) It is inconsistent with the fiduciary responsibility of the federal Crown, as entrenched in s. 35(1), to expose the aboriginal rights of Aboriginal peoples to undetermined infringements by provincial legislatures. As Dickson C.J. emphasizes in *Sparrow*, at 1114, "[t]he special trust relationship and the responsibility of the government vis-à-vis aboriginals must be *the first consideration* in determining whether the legislation or action in question can be justified. Further, if the *Royal Proclamation of 1763* is a constitutional instrument (as this study concludes), then the fiduciary obligations of the federal government were not respected in 1951 when s. 88 was enacted and the provision was unconstitutional at that time. Similarly, since 1870 the Canadian government had, and continues to have, constitutional fiduciary obligations to safeguard Aboriginal peoples and employ equitable principles under the terms and conditions attached to the *Rupert's Land and North-Western Territory Order* (see discussion under sub-heading 6.4.1 *infra*).

5) Section 88 does not allow for "consultation" with the Aboriginal group in question with respect to the specific measures being implemented in each case (*Sparrow*, at 1119). In view of the trust relationship that has existed between Aboriginal peoples and the Crown since at least the time of the Royal Proclamation, a process for the adequate "consultation" with and consent of the Indian peoples in Canada should have been carried out prior to enacting s. 88 in 1951.

6) The uncertainty and open-endedness inherent in s. 88 is wholly inconsistent with "the sensitivity to and respect for the rights of aboriginal peoples" required by s. 35(1) (*Sparrow*, at 1119).

7) It is far from clear that s. 88 is consistent with the equality rights guarantees in the *Canadian Charter of Rights and Freedoms*. In light of s. 35(1) protection for the aboriginal and treaty rights of all Aboriginal peoples, it would seem to be discriminatory to continue to subject Indians to provincial laws through s. 88 when the same provincial powers of interference have obviously been deemed not to be necessary in relation to Inuit and Metis. The existence of the federal *Indian Act* in itself does not justify such a broad and intrusive provision as s. 88.

For a contrary view that upholds the constitutionality of s. 88, see *R.* v. *Alphonse*, [1993] 5 W.W.R. 401 (B.C.C.A.) at 421-423, per Macfarlane J.A.

s. 88 does not indicate a "clear and plain intention"[1448] by Parliament to confer provincial legislatures with a power to extinguish aboriginal rights. In *Delgamuukw* v. *British Columbia*, Macfarlane J.A. directly addresses this aspect as follows:

> "In my opinion, for s. 88 of the *Indian Act* to have the effect of giving provincial laws or acts of adverse dominion the authority to extinguish aboriginal right, it must show a clear and plain intention to do so. *In my view, there is nothing in s. 88, or its accompanying provisions which evinces the clear and plain intention of Parliament to authorize the extinguishment of aboriginal rights.*"[1449] [Emphasis added.]

Based on the above analysis, provincial governments and legislatures have no capacity to extinguish aboriginal rights. This conclusion is not altered by the enactment by Parliament of s. 88 of the *Indian Act*.

A remaining question to consider is whether provincial governments could acquire the capacity to obtain surrenders of Aboriginal land rights through an explicit statutory delegation by Parliament. This matter is examined under the following sub-heading.

6.3.1 Constitutionality of statutory delegations to obtain land surrenders

A further issue to consider is that, in regard to Aboriginal peoples, the Parliament of Canada has delegated, on at least two occasions, to provincial governments a self-created[1450] statutory "duty" to obtain surrenders of Aboriginal land rights. Such delegations have occurred in the context of boundaries extension legislation in 1912 involving both Québec and Ontario.[1451]

The following discussion will focus primarily on the delegation to the Québec government (and not Ontario), although the analysis of the statutory provisions would apply equally in both cases. A prinicipal reason for this approach is that, pursuant to the relevant boundaries extension acts, the Québec government took a leading and dominant role[1452] in the negotiations leading

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[1448] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1099 per Dickson C.J. Moreover, for Parliament to confer provincial legislatures with a power to extinguish aboriginal rights would be inconsistent with its fiduciary obligations to Aboriginal peoples.

[1449] *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) at 172. Macfarlane J.A. discusses the meaning of "clear and plain intention" at 154-158. See also Lambert J.A. dissenting at 315, where he states that "there can be no extinguishment, express or implicit, through the use of s.88."

[1450] There is no indication in the *Royal Proclamation of 1763* or any other Imperial instrument that "surrender" of the land rights of Aboriginal peoples had to be the *quid pro quo* for any satisfaction of claims of Aboriginal peoples. As is described below, the Canadian Parliament enacted this pre-condition through boundaries extension legislation relating to Québec and Ontario in 1912.

[1451] In regard to the province of Québec, see *Quebec Boundaries Extension Act, 1912*, S.C. 1912, c. 45, ss. 2(c), (d) & (e); *An Act respecting the extension of the Province of Quebec by the annexation of Ungava*, S.Q. 1912, c. 7. In relation to the province of Ontario, see *Ontario Boundaries Extension Act*, S.C. 1912, c. 40, ss. 2(a), (b), & (c).

[1452] See, for example, the testimony of P.M. Ollivier, Associate Deputy Minister, federal Department of Justice, in House of Commons Standing Committee on Indian Affairs and Northern Development, *Bill C-9, James Bay and Northern Quebec Native Claims Settlement Act*, March 10, 1977, Issue No. 23, at 22: *The agreement in principle between the Crees, the Inuit and Quebec was negotiated and then the federal government was approached.* We sat down with all the parties; Quebec, the Inuit and the Crees, and we spent a full week discussing the terms of this agreement in principle and suggesting changes, and changes were made." [Emphasis added.] Even in this limited context, there is no indication whether the changes requested by federal representatives were to safeguard the rights and interests of the Aboriginal peoples or those of the federal government itself.

In addition, in regard to the legislative extinguishment of the rights of third party Aboriginal peoples, it is confirmed by the federal government that this was being done upon the written insistence of the government of Quebec and that the

up to the signing of the *James Bay and Northern Quebec Agreement* (JBNQA) in 1975[1453] and the *Northeastern Quebec Agreement* in 1978[1454]. The role assumed by the federal government in regard to land claims negotiations in Québec has been described as one of "alert neutrality".[1455] The Ontario government, on the other hand, did not assume a similar predominant role (as Québec) in the negotiations of treaties in northern regions within its provincial boundaries.[1456]

In relation to aboriginal peoples in northern Quebec, it is worth noting that the *Quebec*

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province will not alter its position: see House of Commons, *Debates*, April 28, 1977, vol. 120 at 5090 (testimony of Hon. Warren Allmand, Min. of Indian Affairs and Northern Development). The insistence of the Québec government (J. Ciaccia) is made clear in its testimony before the Standing Committee that considered the James Bay and Northern Quebec Agreement in 1975 prior to its signature: see Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 7, 1975, No. 177, at B-6071 and B-6074: "...nous allons insister, si l'entente est signée, pour que les droits soient éteints. [new para.] C'est le moins qu'on puisse faire pour le Québec." Unofficial English translation: "...we are going to insist, if the Agreement is signed, that the rights are extinguished. [new para.] That is the least that one could do for Québec."

A further example of the secondary role played by the federal government during the JBNQA negotiations relates to the establishment of a national park in Inuit territory in northern Québec. The federal government was not even present for such discussions during the negotiations and the Inuit request for such a park was rejected by Québec government representatives. See Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 11, 1975, No. 178, at B-6093 (J. Ciaccia): "Nous avons refusé catégoriquement cette proposition...[new para.]...Les Inuit nous l'ont soumise et ce n'était même pas en présence des fédéraux." Unofficial English translation: "We categorically refused this proposal...[new para.]...The Inuit submitted it to us and it was not even in the presence of the federal representatives." See also P. Cumming, "Canada's North and Native Rights" in B. Morse (ed.), *Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada* (Ottawa: Carleton, 1989), 695 at 723: "The federal government was not prepared, and indeed was politically unable, to exert any pressure upon the Quebec government. *It was the provincial government that negotiated this settlement.*" [Emphasis added.]

[1453] This land claims agreement directly concerns the Crees and Inuit in northern Quebec, although the rights of third party Aboriginal peoples living both in and outside the territory were extinguished by federal legislation approving the agreement.

[1454] This land claims agreement directly pertains to the Naskapis in Québec.

[1455] See House of Commons, *Debates*, December 14, 1976, vol. 120, no. 44, at 2002, for comments by the Right Honourable Joe Clark (then Leader of the Opposition) on the federal government's policy of "alert neutrality" in relation to the James Bay and Northern Quebec Agreement: "*It is not acceptable for us to have the government of Canada abandon its responsibility and retreat to a position of alert neutrality. We owe more to the native people of Canada; we owe more to the concept of social justice*; we owe more to any minority which could be the next victim of a government that is prepared to abandon its responsibilities in the name of alert neutrality. For that reason,...*my colleagues and I cannot accept the process which has led to the agreement which is enshrined in the bill before us today.*" (Emphasis added.) See also House of Commons, *Debates*, December 7, 1976, vol. 120, no. 39, at 1759 (comments of J.R. Holmes, M.P.).

For the James Bay Crees' reaction to the role assumed by the federal government in regard to their land claims agreement, see Grand Council of the Crees (of Quebec), *Status and Rights of the James Bay Crees in the Context of Quebec's Secession from Canada* (Submission to the U.N. Commission on Human Rights, February 22, 1992) (on file with authors): "During these negotiations, the federal government totally abdicated its constitutional and fiduciary responsibility to protect First Nations' rights and territories, by adopting a position of "alert neutrality" in regard to Quebec's actions and their impact on indigenous peoples' status and rights. Despite the conditions of annexation set out in the 1912 *Quebec Boundaries Extension Acts*, the government of Canada never supported the assertion of aboriginal rights. Nor did the federal government insist to Quebec that the aboriginal peoples had pre-existing territorial rights."

[1456] Subsequent to the adoption of the *Ontario Boundaries Act* in 1912, the Adhesion to Treaty No. 9 was carried out in northern Ontario in 1929-1930. In regard to the two treaty commissioners involved, one was a representative of the province of Ontario. However, the initiative for the Adhesion and the responsibility for the treaty-making process itself remained at all times with the federal government and not Ontario. The James Bay Treaty No. 9 (made in 1905 and 1906) and Adhesions made in 1929 and 1930 to Treaty No. 9 are reproduced in House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development, *Bill C-9, James Bay and Northern Quebec Native Claims Settlement Act*, Issue No. 20, March 3, 1977, at Appendix "IAND -20", at 20A *et seq.*

In relation to Treaty No. 9 itself, see N. Zlotkin, "Post-Confederation Treaties" in B. Morse, (ed.), *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (Ottawa: Carleton University Press, 1985) 272 at 276: "Treaty No. 9 follows the standard model of the other numbered treaties, except for the fact that one of the three commissioners was selected by the provincial government. Like the others, it was drafted in its entirety by the federal government."

Boundaries Extension Act, 1912[1457] delegated federal authority pertaining to land surrenders to the Quebec government provides in s. 2 as follows:

> "(c) That the province of Quebec will recognize the rights of the Indian inhabitants in the territory...to the same extent, and *will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights and has obtained surrender thereof*, and the province shall bear and satisfy all charges and expenditures in connection with or arising out of such surrenders;
>
> (d) That no such surrender shall be made or obtained except with the *approval of the Governor in Council*;
>
> (e) That the *trusteeship of the Indians in the said territory*, and the *management of any lands now or hereafter reserved for their use*, shall remain in the Government of Canada subject to the control of Parliament."[1458] [Emphasis added.]

Generally, the Supreme Court of Canada has determined that there cannot be any direct inter-delegation of legislative authority between federal and provincial governments.[1459] However, it would appear that no delegation of *legislative* authority was involved in these statutory instructions to the provinces to obtain surrenders. In addition, in both Québec and Ontario, the legislation concerned provided that surrenders could only be made or obtained by the provinces with the approval of the Governor in Council.[1460]

Nevertheless, jurists in Québec and elsewhere have indicated that s. 2 is of "questionable constitutionality",[1461] in view of this delegation of federal authority to the province.[1462]

[1457] S.C. 1912, c. 45, s. 2(c).

[1458] The exact same provisions as ss. 2(c) (duty to obtain surrenders), 2(d) (approval of surrenders by Governor in Council), & 2(e) (continuation of federal trusteeship of the Indians) of the federal *Quebec Boundaries Extension Act*, S.C. 1912, c. 45 is found in the *Ontario Boundaries Extension Act*, S.C. 1912, c. 40, ss. 2(a), 2(b), & 2(c) respectively. However, these same provisions are not included in the *Manitoba Boundaries Extension Act, 1912*, S.C. 1912, c. 32, adopted in the same year.

[1459] *A.G. Nova Scotia* v. *A.G. Canada (Interdelegation case)*, [1951] S.C.R. 31. However, see comments on federal interdelegation of legislative authority in P. Hogg, *Constitutional Law of Canada*, note 1253, *supra*, vol. 1, at 14-29.

[1460] The legislative texts of section 2(d) of the *Quebec Boundaries Extension Act, 1912* and s. 2(b) of the *Ontario Boundaries Extension Act* were both identical in this regard.

[1461] W. Pentney, *The Rights of the Aboriginal Peoples of Canada in the Constitution Act, 1982 Part II [-] Section 35: The Substantive Guarantee*, note 1446, *supra*, at 242. For a similar view, see also H. Brun, *Le Territoire du Québec* (Québec: Les Presses de l'université Laval, 1974), at 83 and 86, n. 197; and R. Pugh, *Are Northern Lands Reserved for the Indians?*, (1982) 62 Can. Bar Rev. 36 at 57-59. In this regard, Pugh highlights the constitutional responsibility of the Canadian government under the *Rupert's Land and North-Western Territory Order*, R.S.C. 1985, App. II, No. 9, art. 14: "Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of *by the Canadian Government in communication with the Imperial Government*; and the Company shall be relieved of any responsibility in respect of them." [Emphasis added.] Also, in art. 15 of the Order, it is specifically provided: "The Governor in Council is authorized and empowered to arrange any details that may be necessary to carry out the above terms and conditions."

[1462] See B. Slattery, *Understanding Aboriginal Rights*, (1987), 66 Can. Bar Rev. 727 at 763: "The Federal Crown has the exclusive power to negotiate land cession agreements with Indians under section 91(24) of the Constitution Act, 1867"; and J. Woodward, *Native Law*, note 1261, *supra*, at 212: "[Privy Council] decisions clarify that only Canada can negotiate and take a surrender from the Indians, but that such a surrender is a windfall for the province". See also *St. Catherine's Milling and Lumber Co.* v. *The Queen*, (1888), 14 A.C. 46 (P.C.); *A.G. Canada* v. *A.G. Ontario*; *A.G. Quebec* v. *A.G. Ontario*, [1897] A.C. 199 (P.C.); *Ont. Mining Co.* v. *Seybold*, [1903] A.C. 73 (P.C.); *Dom. of Can.* v. *Ontario*, [1910] A.C. 637 (P.C.).

For an contrary view, see M. Patenaude, *Le droit provincial et les terres indiennes* (Montréal: Les Éditions Yvon Blais, 1986) at 64-65, where it is concluded that the delegation under s. 2 of the *Quebec Boundaries Extension Act* merely constitutes an administrative delegation which is constitutionally permissable and valid. Similarly, see S. Grammond, *Les traités entre l'État canadien et les peuples autochtones* (Cowansville, Québec: Les Éditions Yvon Blais, 1994), at 98-100. See also P. Cumming & N. Mickenburg, *Native Rights in Canada* (Toronto: General Publishing, 1972) at 91, where it is provided: "...it may be argued that the 1912 legislation is merely the delegation of administrative powers since no treaty is effective without the approval of the Federal Government. The Federal Government has not abdicated its powers, it has

In this regard, H. Brun emphasizes the unconstitutionality of s. 2(c) as follows:

> "...il est rien d'autre qu'une délégation inconstitutionnelle de pouvoir. Le gouvernement fédéral ne pouvait pas, ni de lui-même ni avec l'accord du Québec, transférer ainsi au Québec son pouvoir et sa responsabilité constitutionnels en ce qui regarde les autochtones et les terres sur lesquelles ceux-ci ont des droits. Pour ce faire, il eût fallu, à l'époque, une loi de Parlement du Royaume-Uni."[1463]

As already indicated, the same delegation concerning surrenders was made in 1912 to Ontario in the *Ontario Boundaries Extension Act*.[1464] In *Howard* v. *A.-G. Canada*,[1465] in regard to a 1923 treaty in Ontario, the Supreme Court has recently indicated that:

> "...the Treaty process for the surrender of the lands in Canada is *federal in nature*[1466] and it was the Government of Canada which was ultimately responsible for...the Treaty..."[1467] [Emphasis added.]

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merely required that the Quebec government recognize and extinguish, subject to Federal approval, Indian title to certain lands in Quebec. The failure of Quebec, then, to make these treaties and properly extinguish aboriginal rights within the extensions of the Quebec boundaries is arguably a failure as an agent on behalf of the Federal Government for the failure to perform these delegated obligations, and the responsibility of the Federal Government to the native peoples remains."

With respect, the theory of "adminstrative delegatee" or "administrative agent" does not appear tenable under closer scrutiny. First, the delegation or mandate would alter the express constitutional duty of the Canadian government to satisfy Aboriginal claims (see *Rupert's Land and North-Western Territory Order*). Second, s. 2(c) of the *Quebec Boundaries Extension Act, 1912* is not drafted in terms that Québec is a mere agent of the federal government. Third, if Québec were acting solely as an "administrative delegatee" or "administrative agent", it could hardly sign the James Bay and Northern Quebec Agreement as a separate and independent party, but would sign the Agreement on behalf of the federal government (if at all). Fourth, there is no indication whatsoever that either the federal or Québec government ever interpreted their respective responsibilities as mandator (principal) and mandatory (agent), or delegator and delegatee.

Moreover, when the House of Commons Standing Committee that considered approval of the Agreement was informed that Québec "insisted" on the extinguishment of the rights of Aboriginal third parties, Parliament did not treat Québec's position as merely the preference or recommendation of an "agent" or "delegatee". See also R. Pugh, *Are Northern Lands Reserved for the Indians?*, (1982) 62 Can. Bar Rev. 36 at 57-58, where it is said: "The terms of the section [2c)] appear too broad to be construed as authorizing Quebec to act only as an administrative agent of the Dominion."

[1463] H. Brun, "L'intégrité territoriale d'un Québec souverain" in A.-G. Gagnon & F. Rocher, (eds.), *Répliques aux détracteurs de la souveraineté du Québec* (Montreal: VLB éditeur, 1992) 69 at 78. Unofficial English translation: "...it is nothing other than an unconstitutional delegation of power. The federal government could not, either by itself or with the consent of Québec, transfer in this way to Québec its constitutional power and responsibility concerning Aboriginal peoples and lands on which the latter had rights. To do this would require, in that period, a law of the Parliament of the United Kingdom." Brun then states that the James Bay and Northern Quebec Agreement (JBNQA) would have been a nullity had the federal government not been a full party to the negotiations and to the Agreement. However, in the view of this Study, the federal authorities did not assume their appropriate constitutional role during the JBNQA negotiations. Moreover, the negotiations were carried out within a framework that was unconstitutional and detrimental to the Aboriginal peoples concerned.

[1464] *Ontario Boundaries Extension Act*, S.C. 1912, c. 40, ss. 2(a).

[1465] *Howard* v. *A.-G. Canada*, decision rendered by the Supreme Court of Canada, May 12, 1994, No. 22999.

[1466] Although a provincial government can be a party to a treaty with Aboriginal peoples, it is the federal government that is the "treaty maker" (as are Aboriginal peoples). See *Dominion of Canada* v. *Province of Ontario*, [1910] A.C. 637 at 645, where in relation to the North West Angle Treaty, it is said: "...this case ought to be regarded as if what was done by the Crown in 1873 had been done by the *Dominion Government*, as in substance it was in fact done...When differences arise between the two Governments in regard to what is due to the Crown as *maker of treaties* from the Crown as *owner of public lands* they must be adjusted as though the two Governments were separately invested by the Crown with its rights and responsibilities as treaty maker and as owner respectively." [Emphasis added.]

[1467] Id. at 10. See also *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85 at 105, per Dickson C.J.: "...the cession of Indian rights has historically been accomplished by way of treaty or agreement with the *federal* Crown." [Emphasis added.]; *Smith* v. *The Queen*, (1983) 147 D.L.R. (3d) 237 at 244: "There is no question but that the reference to 'Our Sovereign Lady the Queen', to whom the release and surrender were therein made, was a reference to the *Crown in right of Canada*...This creates no difficulty because *it is with respect to the legislative interest of the Parliament of Canada that the surrender is related*, and consequently the surrender was obtained by the executive branch of the national government." [Emphasis added.]; *Dominion of Canada* v. *Province of Ontario*, [1910] A.C. 637 at 646: "The Dominion Government were indeed, on behalf of the Crown, guardians of the Indian interest and empowered to take a surrender of it..."

In the *Howard* case, the question of constitutionality was not explicitly addressed in respect to the statutory delegation to Ontario to obtain surrenders from Indians. However, the Court's conclusion was unequivocal as to the federal nature of any surrender of the Indians' pre-existing rights to hunt and fish.

It is the view of the authors to the present extinguishment study that the grounds for challenging the constitutionality of s. 2(c) of the *Quebec Boundaries Extension Act, 1912* appear to be numerous and cannot be rebuffed simply by pointing to the fact that any surrenders obtained by the province had to be approved by the Governor in Council.

Reasons for concluding that the delegation in ss. 2(c) of the *Quebec Boundaries Extension Act* was unconstitutional include:

i) The government of Canada, and not any of the provinces in Canada, had a specific constitutional obligation[1468] to satisfy Aboriginal land claims under the Imperial *Rupert's Land and North-Western Territory Order*, 1870. In this regard, Term 14 of the *Order* provides: "Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the *Canadian Government* in communication with the Imperial Government..." [Emphasis added.];

ii) As Term 14 of the *Order* also makes clear, there is a constitutional obligation to carry out this duty "in communication with the Imperial Government". The authors of the present study are not aware of any of the compulsory communications taking place in connection with the adoption of s. 2(c) of the *Quebec Boundaries Extension Act, 1912*;

iii) The specific constitutional obligation in regard to Aboriginal claims was, and still is, that of the Canadian government. This view is reinforced further by Term 15 of the *Order*: "The *Governor in Council is authorized and empowered* to arrange any details that may be necessary to carry out the above terms and conditions." [Emphasis added.] Therefore, the federal Cabinet is the sole entity authorized to carry out the details of the constitutional duty of the Canadian government specified in Term 14. The Canadian Parliament did not have the legislative capacity to delegate responsibilities concerning the satisfaction of Aboriginal claims to Québec;

iv) That the Canadian government and Parliament did not have unfettered constitutional capacity to deal with Aboriginal claims in 1912 is not only clear from Term 14 of the *Order*, but also from the paragraph immediately following Term 15: "And the Right Honourable Earl Granville, one of Her Majesty's principal Secretaries of State, is to give the necessary directions herein accordingly." In other words, the Canadian government not only had a constitutional duty to carry out its obligations in respect to Aboriginal claims "in communication with the Imperial Government", but also to comply "with the necessary directions" from one of the Queen's Secretaries of State, once such communications had been made;

v) The delegation to a provincial government of the Canadian government's duty contravened a long-standing British policy to address Aboriginal concerns through a central

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See also R. Boivin, *À qui appartient l'obligation de fiduciaire à l'égard des autochtones?*, (1994) 35 Les Cahiers de Droit 3 at 11: "[C]'est...en vertu de l'autorité exclusive conférée par l'article 91(24) que la *Couronne fédérale est la seule habilitée à recevoir la cession des droits des Indiens ou à les éteindre.*" [Emphasis added.] Unofficial English translation: "[I]t is...in virtue of the exclusive authority conferred by s. 91(24) that the *federal Crown is the only one empowered to receive a cession of Indian rights or to extinguish them.*" [Emphasis added.]

[1468] That the Canadian government has "constitutional obligations" in regard to the Territory covered by the James Bay and Northern Quebec Agreement and the Aboriginal peoples who live in the Territory is explicitly acknowledged in Indian and Northern Affairs Canada, *James Bay and Northern Quebec Agreement Implementation Review* (Ottawa: Minister of Indian Affairs, February 1982) at 7: "Canada's main purpose for participating in the negotiations was *to fulfill its constitutional obligations respecting the Territory and its native inhabitants.*" [Emphasis added.]

authority.[1469] As indicated in the constitutional terms and conditions attached to the *Rupert's Land and North-Western Territory Order*, the Parliament of Canada had committed itself to settle Aboriginal claims "*in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines...*"[1470] and "*to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer*[1471]*...*"[1472] [Emphasis added.];

vi) In view of the competing provincial interests,[1473] a delegation to any province by Parliament to obtain surrenders from Aboriginal peoples was contrary to the above-mentioned terms and conditions of the Imperial *Order*. Such a legislative measure by the Canadian Parliament was also incompatible with the fiduciary duty[1474] of the government and Parliament of Canada. This fiduciary duty was and continues to be of a constitutional nature according to the terms attached to the Imperial *Order*. In particular, the assumed federal role of "alert neutrality", discussed above, is an inappropriate and inadequate means of meeting the existing fiduciary obligations of the Canadian government.

[1469] See, for example, the Aboriginal provisions in the *Royal Proclamation of 1763*. See also the 1837 Report of the Imperial House of Commons' Select Committee on Aborigines (British Settlements), where it is recommended:

> "The protection of the Aborigines should be considered as a duty peculiarly belonging and appropriate to the Executive Department Government, as administered either in this country or by the Governors of the respective Colonies. *This is not a trust which could conveniently be confided to the local Legislatures...*
>
> Whatever may be the legislative system of any Colony, we therefore advise that, as far as possible, the Aborigines be withdrawn from its control. *In the formation of any new colonial constitution, or in the amendment of any which now exist, we think the initiative of all enactments affecting the Aborigines should be vested in the officer administering the Government...*"

Quoted in R. Barsh & J. Henderson, *Aboriginal Rights, Treaty Rights, and Human Rights: Indian Tribes and 'Constitutional Renewal'*, note 1315, *supra*, at 68.

See also *St. Catherine's Milling and Lumber Company* v. *The Queen*, [1889] 14 A.C. 46 (P.C.) at 59, where it said in relation to s. 91(24) of the *Constitution Act, 1867*: "It appears to be the plain policy of the Act that, in order to *ensure uniformity of administration*, all such lands, and Indian affairs generally, shall be *under the legislative control of one central authority*." [Emphasis added.]

[1470] See *Order*, Schedule (A), December 1867 Address.

[1471] In addition, it is worth noting that the obligation of the Canadian government in the *Rupert's Land and North-Western Territory Order* to protect "Indian tribes whose interests and well-being are involved in the transfer" appears to be broader than what the Canadian Parliament stipulated in the 1912 Act. In the latter legislation, Parliament obliges Quebec to recognize the rights of the "Indian inhabitants in the [1912] territory". Therefore, it would appear that Aboriginal peoples not "inhabiting" the 1912 territory at the time of the Act (or subsequently) would not be included within the terms of s. 2(c).

[1472] See *Order*, Schedule (B), May 1869 Address.

[1473] In regard to the James Bay and Northern Quebec Agreement, the Québec government has made clear its competing interests, intentions and purposes in negotiating land claims with the Crees and Inuit. See Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 5, 1975, No. 174, where Québec government representatives (J. Ciaccia) appeared before the Standing Committee of the National Assembly that considered the Agreement just prior to its signature and explained that "[t]he Québec government was only seizing the occasion offered to it...to affirm the integrity of our territory" [at B-5936, unofficial translation]; that the Québec government's "presence finally is totally and completely affirmed in northern Québec" [at B-5937, unofficial translation]; and that "we are giving to the cultural minorities a chance to survive collectively, and this, we are doing without diminishing in the least the power of the province to utilize the resources of Québec for the benefit and to the good of the whole population of Québec" [at B-5938, unofficial translation].

[1474] The element of vulnerability generally associated with fiduciary duty was clearly recognized by the Quebec government when it testified before the Standing Committee of the Québec National Assembly that considered the James Bay and Northern Quebec Agreement just prior to its signature. See Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 5, 1975, No. 174, at B-5938 (J. Ciaccia): "Nous avons négocié avec deux minorités qui se sentaient menacées d'extinction. Les autochtones se battent our leur survivance." Unofficial English translation: "We have negotiated with two minorities who feel threatened with extinction. The Aboriginal peoples are fighting for their survival."

In addition, aside from the problem of unconstitutional delegation, it is highly questionable whether the Canadian Parliament could require Quebec to "obtain surrenders of such rights in the same manner...as the Government of Canada has heretofore...obtained surrender thereof..."[1475] Canada had purportedly sought to obtain blanket surrenders of Indian title through the numbered treaties and this is not what was called for or intended by the *Royal Proclamation of 1763*. Moreover, the terms attached to the *Rupert's Land and North-Western Territory Order* obliged Canada to protect the Aboriginal peoples in those territories and to settle their land claims "in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines".

In other words, aside from the problem of unconstitutional delegation, the Canadian Parliament had an obligation to instruct Québec to act in a manner that conforms with the equitable principles of the British Crown (as most clearly demonstrated in the Royal Proclamation) and not in accordance with the purported practice of the Canadian government in the numbered treaties.

In conclusion, in enacting boundaries extension legislation in regard to the province of Québec, the Parliament of Canada had no constitutional authority to depart from its obligations under the *Rupert's Land and North-Western Territory Order*.[1476] By doing so, the Parliament of Canada has put into serious doubt the validity of the surrenders purportedly obtained from the Aboriginal peoples so affected. In addition, any legislative extinguishment that was purportedly carried out pursuant to this unconstitutional process is also of doubtful constitutional validity.

6.4 Effects of Crown's Fiduciary Duties on any Powers to Extinguish

There is little doubt that the effect, if not purpose, of fiduciary obligations is to limit substantially the capacity of fiduciaries to adversely affect beneficiaries or principals to whom they owe a special legal duty. As will be demonstrated below, this is true in the case of the Crown in regard to both its executive and legislative functions.

E. Weinrib emphasizes the role of fiduciary law in controlling a fiduciary's discretion:

> "[Where there is a fiduciary obligation] there is a relation in which the principal's interests can be affected by, and are therefore dependent on, the manner in which the fiduciary uses the discretion which has been delegated to him. The fiduciary obligation is the law's blunt tool for the control of this discretion."[1477]

In regard to recent Supreme Court of Canada rulings on, and the potential beneficiary impact of applying, fiduciary principles to Crown-Aboriginal relations, M. Bryant provides:

> "By using fiduciary principles to govern Crown-aboriginal relations and incorporating those principles into constitutional protections, the Supreme Court of Canada adopted the

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[1475] Similarly, it can be argued that the Parliament of Canada had no constitutional authority to limit its statutory instructions to any province under s. 2(c) of the *Quebec Boundaries Extension Act, 1912* to: i) "the rights of the Indian inhabitants in the [1912] territory" instead of *all* Aboriginal peoples "whose interests and well-being are involved in the transfer" of the territories of Rupert's Land, as indicated in the terms and conditions tied to the Imperial *Order*; and ii) "*recognize*...such rights in the same manner, as the Government of Canada has heretofore recognized such rights..." Again, the terms and conditions attached to the Imperial *Order* requires that Canada "act in conformity with the equitable principles which have governed the British in its dealings with the aborigines".

[1476] As already indicated, the relevant provisions pertaining to Aboriginal peoples are identical in the federal boundaries extension laws relating to Ontario and Québec. Therefore, the same conclusions as to unconstitutionality could be reached in regard to the specific provisions of the *Ontario Boundaries Extension Act* as the *Quebec Boundaries Extension Act, 1912*.

[1477] E. Weinrib, *The Fiduciary Obligation*, (1975) 25 U.T.L.J. 1, at 7, cited by the Supreme Court of Canada in *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 at 341, and in *K.M.* v. *H.M.*, (1992) 142 N.R. 321 at 382.

most compelling and effective means within existing law to achieve justice in the area of aboriginal rights. There is no other mechanism currently operating in law or equity that contains the breadth and flexibility - at least with respect to the *sui generis* relationship between the Crown and aboriginal peoples."[1478]

A. Pratt emphasizes how fiduciary law can serve to safeguard Aboriginal peoples vis-à-vis the Crown:

"The fiduciary duty is the 'blunt tool' which can police and discipline the Crown, and provide remedies when the Crown has acted dishonourably. It is a body of law which concentrates upon the obligations of the Crown to protect aboriginal peoples from intrusion."[1479]

As M.E. Turpel adds:

"...the notion of fiduciary duties has been introduced, among other things, to police the [Aboriginal/Crown] relationship and to ensure that the conduct of the Crown conforms to a standard of fairness and honour...Fiduciary obligations have been articulated in the jurisprudence on aboriginal and treaty rights precisely because the Crown has a special legal and constitutional duty not to affect First Nations adversely."[1480]

Under the following sub-headings, the impact of fiduciary duties on any powers of the Crown to extinguish aboriginal rights will be examined. First, the principal sources of legal and constitutional recognition of fiduciary obligations will be briefly outlined. Second, the standards of conduct required by the Crown as fiduciary will be discussed. Third, the applicability of fiduciary law to the Crown in right of the province will be highlighted.

6.4.1 Legal and constitutional recognition of fiduciary obligations

In relation to Aboriginal peoples, the fiduciary obligations of the Crown have been recognized as not only arising from the common law but also from a number of statutory and constitutional instruments. Prinicipal sources or bases on which fiduciary obligations are found include, among others:[1481]

i) common law,[1482] including the common law of aboriginal title;

[1478] M. Bryant, *Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law*, (1993) 27 U.B.C. L. Rev. 19, at 20.

[1479] A. Pratt, *Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?*, (1992) 2 N.J.C.L. 163, at 180-181.

[1480] M.E. Turpel, *A Fair, Expeditious, and Fully Accountable Land Claims Process*, [1995] 2 Indian Claims Commission Proc. (Special Issue on Land Claims Reform) 61 at 84.

[1481] The following list is not exhaustive. For example, fiduciary obligations can arise from treaties between Aboriginal peoples and the Crown. In addition, in regard to the Metis and fiduciary obligations arising under the *Manitoba Act, 1870*, see discussion under sub-headings 4.2.2 & 4.2.2.1 *supra*. See also *Quebec Boundaries Extension Act, 1912*, S.C. 1912, c. 45, s. 2(e) and the *Ontario Boundaries Extension Act*, S.C. 1912, c. 40, s. 2(c), both of which provisions identically provide: "That the *trusteeship of the Indians in the said territory*, and the *management of any lands now or hereafter reserved for their use*, shall remain in the Government of Canada subject to the control of Parliament." [Emphasis added.] Section 2(e) of the *Quebec Boundaries Extension Act, 1912* was repealed by the *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32, s. 7. However, the preamble of the repealing statute affirms the fiduciary responsibility of Parliament and the government of Canada as follows: "AND WHEREAS Parliament and the Government of Canada recognize and affirm a special responsibility for the said Crees and Inuit".

[1482] In *Guerin* v. *The Queen*, 13 D.L.R. (4th) 321 at 339, the Supreme Court of Canada indicates: "The concept of fiduciary obligation originated long ago in the notion of breach of confidence, one of the original heads of jurisdiction in chancery." See also M.V. Ellis, *Fiduciary Duties in Canada* (Toronto: Carswell, 1993) at 1-1, where the origins of fiduciary

ii) *Royal Proclamation of 1763*;

iii) *Rupert's Land and North-Western Territory Order* and related terms and conditions;

iv) *Indian Act*, s. 18(1); and

v) *Constitution Act, 1982*, s. 35(1).[1483]

In regard to fiduciary duties, each of these five sources or bases are discussed briefly below.

i) common law

In terms of the common law, the elements that are generally present for a fiduciary obligation to arise have been described by Wilson J. in *Frame* v. *Smith* as follows:

> "Relationships in which a fiduciary obligation has been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable[1484] to or at the mercy of the fiduciary holding the discretion or power."[1485]

These features were quoted with approval by Sopinka J. in *International Corona Resources Ltd.* v. *Lac Minerals Ltd.*, where he emphasized that the criteria for the existence of a fiduciary relationship is flexible:

> "It is possible for a fiduciary relationship to be found although not all of these characteristics are present, nor will the presence of these ingredients invariably identify the existence of a fiduciary relationship."[1486]

Based on the common law, a fiduciary relationship has arisen historically between Aboriginal peoples and the Crown. Historical practices to safeguard Aboriginal peoples and their

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duties are briefly discussed; and G.H.L. Fridman, *Restitution*, 2nd ed. (Toronto: Carswell, 1992) at 367, where early cases on fiduciary relationships are cited from the 18th and 19th century.

[1483] See also M. Bryant, *Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law*, note 1478, *supra*, at 25: "...the courts have referred to several 'sources' of the duty, including the *sui generis* nature of Indian title, the special discretion vested in the Crown regarding aboriginal peoples and the general inalienability of Indian title as entrenched in the *Indian Act* and *Royal Proclamation of 1763*."

[1484] See I. Brownlie (F.M. Brookfield, ed.), *Treaties and Indigenous Peoples [:] The Robb Lectures 1991* (Oxford: Clarendon Press, 1992) at 56, where the author indicates that, historically, "vulnerability" has generally been a significant factor affecting indigenous peoples:

> "[I]n the era of decolonization it was found useful to have a term for certain groups who remained vulnerable after decolonization had transferred power to the dominant group in the territory concerned. Without going into detail, *it can be stated that vulnerability was a criterion at least as significant as antecedence*."

[1485] *Frame* v. *Smith*, [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81 (per Wilson J. dissenting) at 99.

[1486] *International Corona Resources Ltd.* v. *Lac Minerals Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 at 62 - 63.

territories were central aspects of the fiduciary relationship and still continue. In particular, these important aspects of the relationship are reflected in the *Royal Proclamation of 1763*, the *Rupert's Land and North-Western Territory Order*, 1870, the *Indian Act*, and the *Constitution Act, 1982*.

ii) Royal Proclamation of 1763

There are two specific portions of the Royal Proclamation that reflect a fiduciary relationship and that give rise to fiduciary obligations:

> "And whereas *it is just and reasonable, and essential to our Interest, and the Security of our Colonies*, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, *should not be molested or disturbed in the Possession* of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds."[1487] [Emphasis added.]

And in a further paragraph of the Royal Proclamation, the obligation to safeguard Indian Nations or Tribes from "great Frauds and Abuses" is highlighted:

> "And whereas *great Frauds and Abuses have been committed in purchasing Lands of the Indians*, to the great Prejudice of our Interest, and to the great Dissatisfaction of the said Indians; In order, therefore, *to prevent such Irregularities for the future*, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with Advice of our Privy Council *strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians*, within those parts of our Colonies where, We have thought proper to allow Settlement; but 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 public Meeting or Assembly of the said Indians*, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie;..."[1488] [Emphasis added.]

D. Johnston emphasizes the importance of the Proclamation in establishing the "roots of trusteeship" in the Aboriginal-Crown relationship:

> "...the mandatory treaty process, established by *The Royal Proclamation*, qualified [aboriginal] title by attaching a limitation on disposition. More importantly, in restricting alienation, the Crown assumed responsibility for the protection and management of Indian proprietary interests, providing...'the roots of trusteeship in Canadian Indian Law'."[1489]

M. Bryant highlights the significance of the Proclamation in establishing the fiduciary nature of the Aboriginal-Crown relationship:

> "...one could characterize the *relationship as grounded in an omnibus undertaking*, which is recognized by several statutes and treaties, and most notably by the *Royal Proclamation, 1763*. The undertaking was to act in the best interests of aboriginal peoples

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[1487] In M. Bryant, *Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law*, note 1478, *supra*, at 28-29, it is said that "[t]his undertaking might be viewed as the general basis for the Crown's fiduciary capacity."

[1488] This undertaking is explicitly cited in *Guerin* v. *The Queen*, 13 D.L.R. (4th) 321 at 340, per Dickson J.

[1489] D. Johnston, *A Theory of Crown Trust Towards Aboriginal Peoples*, (1986) 18 Ottawa L.Rev. 307, at 310.

> in the treatment of their lands, and, in the self-management of those lands."[1490] [Emphasis added.]

B. Slattery describes the fiduciary relationship between the Crown and Aboriginal peoples as a "constitutional trust". This relationship is said to have emanated from historical practices that have "crystalized as part of the constitutional law governing the colonies":

> "The third collective facet of the Canadian constitutional trust is the *special fiduciary relationship between the Crown and Aboriginal peoples*, recognized by the Supreme Court. This relationship is grounded in historical practices that emerged from dealings between the British Crown and Aboriginal nations in eastern North America, especially during the formative period extending from the founding colonies in the early 1600s to the fall of New France in 1760. *By the end of this period, the principles underlying these practices had crystallized as part of the basic consitutional law governing the colonies, and were reflected in the Royal Proclamation issued by the British Crown on October 7, 1763.*"[1491] [Emphasis added.]

In *Guerin*, the Supreme Court made specific reference to the Royal Proclamation in discussing the Crown's fiduciary obligation to Aboriginal peoples.[1492] However, in terms of the Royal Proclamation alone, the Court has not characterized the Crown's fiduciary role as giving rise to a constitutional duty. Yet, there is little doubt that up to at least 1931, the Canadian Parliament had no authority to amend the provisions of the Royal Proclamation or legislate contrary to its terms.[1493]

As this study concludes, the Royal Proclamation is a constitutional instrument and therefore continues to limit the Canadian Parliament subsequent to 1931. Since the Proclamation continues to have force in Canada, the fiduciary obligations and other requirements[1494] in this instrument are of a constitutional nature. This would mean that any capacity of the Crown to obtain surrenders or to extinguish Aboriginal rights would be subject to and limited by the requirements in the Proclamation.

The obligation to accept cessions or engage in purchases in the context of ensuring the protection and security of Aboriginal peoples continues to be an essential component of the Royal Proclamation. The spirit and letter of the Proclamation does not allow voluntary purchases or cessions that would jeopardize the security of Aboriginal peoples. Nor does it countenance unilateral extinguishment by the Crown.

Regardless of whether the Proclamation is considered to have application in every region of Canada, the policies in the Proclamation have been uniformly applied throughout the country. As concluded in this study, the policies in the Royal Proclamation continue to have universal application in Canada,[1495] whether through the Proclamation or other constitutional

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[1490] M. Bryant, *Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law*, note 1478, *supra*, at 34.

[1491] See B. Slattery, *First Nations and the Constitution: A Question of Trust*, (1992) 71 Can. Bar Rev. 261, at 271-272.

[1492] *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 at 334, Dickson J. refers to both the Royal Proclamation and the *Indian Act* and states: "The surrender requirement, and the responsibility it entails, are the source of a distinct fiduciary obligation owed by the Crown to the Indians."

[1493] R. Dussault and L. Borgeat, *Administrative Law [:] A Treatise*, note 1283, *supra*, vol. 3, at 76: "Apparently, until the enactment of the *Statute of Westminster, 1931*, the rights conferred by the *Proclamation* could be neither amended nor revoked except by an Imperial statute."

[1494] As already described in this study, the notion of cession of aboriginal lands was a substantially qualified one in the Royal Proclamation. It was qualified by the principle of consent by Aboriginal peoples. It was also qualified by the primary objective of providing security to and protection of Indians in their territory.

[1495] See, for example, D. Johnston, *A Theory of Crown Trust Towards Aboriginal Peoples*, note 1489, *supra*, at 310: "The basic principles set forth in *The Royal Proclamation* informed all subsequent Indian-Crown dealings."; and J. Hurley, *Aboriginal Rights, the Constitution and the Marshall Court*, (1982-1983) 17 R.J.T. 403, at 412: "The Royal Proclamation

instruments reflecting the same equitable and protective principles.

iii) *Rupert's Land and North-Western Territory Order* and related terms and conditions

The Imperial *Rupert's Land and North-Western Territory Order*[1496] was made on terms and conditions, of a constitutional nature,[1497] that included those contained in the two "Addresses"[1498] of the Parliament of Canada.[1499] In addition to fiduciary obligations, the following conditions in the two Addresses are of particular relevance and importance to Aboriginal peoples with land rights in the territories concerned:

> "...*upon the transference of the territories in question* to the Canadian government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled *in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines...*"[1500] [December 1867 Address]

> "That *upon the transference of the territories in question* to the Canadian Government *it will be our duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer...*"[1501] [May 1869 Address] [Emphasis added.]

Although Canadian courts have not indicated to date that the *Rupert's Land Order* and its related terms and conditions incorporate any fiduciary obligations, it seems obvious that these constitutional enactments do give rise to fiduciary obligations.

The above-cited obligation in the 1867 Address to settle Aboriginal claims "in conformity with equitable principles which have uniformly governed the British Crown in its dealings with the aborigines" necessarily incorporates the principles as reflected by the *Royal Proclamation of 1763*. Therefore, if the Proclamation affects a fiduciary relationship between Aboriginal peoples and the Crown, the same conclusion would have to be reached with regard to the *Rupert's Land Order*.

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of 1763 has generally marked the point of departure for judicial considerations of Aboriginal rights in North America. *It is clear that the instrument articulates a uniform British policy respecting Indian Aboriginal rights throughout North America.*" [Emphasis added.]

[1496] R.S.C. 1985, App. II, No. 9, confirmed as part of the Constitution of Canada in Item 3 of the Schedule to the *Constitution Act, 1982*.

[1497] Section 146 of the *Constitution Act, 1867* provides: "It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada to admit Rupert's Land and the North-Western Territory or either of them into the Union, *on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve*, subject to the provisions of this Act: and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland." [Emphasis added.]

[1498] In regard to the constitutionally binding "addresses", B. Clark, note 2829, at 112-113, provides: "...additional constitutionally binding 'Terms and Conditions' within the meaning of section 146 of the Constitution Act, 1867 were set out in schedules to this order in council of 23 June 1870. Schedule A contained the Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada dated 16 December 1867...[A] second and revised "Address" [Schedule B] [was] from the Senate and House of Commons dated 17 May 1869."

[1499] J. Woodward, *Native Law*, note 1261, *supra*, at 78-79.

[1500] *Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada*, Schedule (A), R.S.C. 1985, App. II, No. 9, 8 at 8-9.

[1501] *Address*, Schedule (B), R.S.C. 1985, App. II, No. 9, 14 at 16.

Further, the Canadian government's "duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer" is a further indication of the fiduciary relationship and obligation incorporated by the conditions in the *Order*. These constitutional provisions in the joint Addresses of Parliament recognize the vulnerability of the Aboriginal peoples concerned and provide for their protection. At the same time, the provisions allow for a fair measure of discretion on the part of the Canadian government in satisfying Aboriginal claims. In effect, a balance is maintained between federal power and duty that imposes some restraint on federal capacity to affect Aboriginal peoples and their rights.

The intention in the *Rupert's Land Order* and accompanying terms and conditions to incorporate the fiduciary relationship and obligation that have historically existed between Aboriginal peoples and the Crown has been subsequently confirmed by the Parliament of Canada. In both the boundaries extension legislation relating to the provinces of Ontario and Québec, Parliament has confirmed the "trusteeship" of Aboriginal peoples in what is part of Rupert's Land, as follows:

> "That the *trusteeship of the Indians* in the said territory, and the management of any lands now or hereafter reserved for their use, *shall remain in the Government of Canada subject to the control of Parliament.*"[1502] [Emphasis added.]

In addition, since the recognition and affirmation of aboriginal and treaty rights in s. 35(1) of the *Constitution Act, 1982* gives rise to fiduciary obligations of a constitutional nature,[1503] the same conclusion must be reached in regard to the *Rupert's Land and North-Western Territory Order*. In the case of the latter instrument, the wording is even more specific and indicative of a fiduciary responsibility on the part of the government and Parliament of Canada than in s. 35(1).

As indicated in relation to the *Order*, the commitments and obligations of the Canadian government and Parliament concerning Aboriginal peoples and their rights are of a constitutional nature. Therefore, so are the fiduciary obligations that pertain to the implementation of these constitutional provisions. As a result, the principles established by the Supreme Court of Canada in *Sparrow* in regard to fiduciary obligations of a constitutional nature, would apply equally to the fiduciary duties incorporated in the *Rupert's Land Order*.

iv) Section 18(1) of the *Indian Act*

Section 18(1) of the *Indian Act* provides:

> "Subject to the provisions of this Act, reserves shall be held by Her Majesty for the use and benefit of the respective bands for which they were set apart; and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which the lands in a reserve are used or are to be used is for the use and benefit of the band."

In regard to s. 18(1) of the *Indian Act* and surrenders of aboriginal title, Dickson J. indicated in *Guerin* that *this provision* was a "confirmation" of the Crown's historic responsibility and "so as to prevent the Indians from being exploited":[1504]

[1502] *Quebec Boundaries Extension Act, 1912*, S.C. 1912, c. 45, s. 2(e); *Ontario Boundaries Extension Act*, S.C. 1912, c. 40, s. 2(c).

[1503] See discussion below on fiduciary obligations and s. 35(1).

[1504] *Guerin* v. *The Queen*, 13 D.L.R. (4th) 321 at 340; see also Wilson J. at 356-357, where s. 18(1) of the *Indian Act* is described as "the acknowledgement of a historic reality, namely, that Indian bands have a beneficial interest in their reserves and that the Crown has a responsibility to protect that interest and make sure that any purpose to which reserve land

"Through the confirmation in the *Indian Act* of the historic responsibility which the Crown has undertaken, to act on behalf of the Indians so as to protect their interests in transactions with third parties, Parliament has conferred upon the Crown a discretion for itself where the Indians' best interests really lie. This is the effect of s. 18(1) of the Act."[1505]

Wilson J. adds that the discretion of the Governor in Council is not an "unfettered" one:

"The discretion conferred on the the Governor in Council is not an unfetterred one to decide the use to which reserve lands may be put. It is to decide whether any use to which they are proposed to be put is 'for the use and benefit of the band'. *This discretionary power must be exercised on proper principles and not in an arbitrary fashion.*"[1506] [Emphasis added.]

Section 18(1) gives rise to a distinct fiduciary obligation on the part of the Crown in the event of a surrender. Since the discretion of the Governor in Council is subject to the terms of any treaty or surrender, there is envisaged some prior element of aboriginal consent[1507] to direct such discretion. However, s. 18(1) in itself is no guarantee against unilateral extiguishment of aboriginal title. First, s. 18(1) is said to be subject to the provisions of the *Indian Act* which confer on the federal government unilateral powers of expropriation. Second, s. 18(1) constitutes an ordinary statutory provision and therefore could be modified or repealed in the future to allow for other forms of extinguishment of title.[1508]

Although s. 18(1) is considered by the Supreme Court as a "confirmation" of the historic responsibility that the Crown has undertaken, it must be underlined that this section and the other provisions of the Indian Act are not a fair or just reflection of the historic commitments made to Aboriginal peoples through the Royal Proclamation or the treaty-making process.[1509]

v) Section 35(1) of the *Constitution Act, 1982*

In examining the sources of the Crown's fiduciary obligation to Aboriginal peoples, the Supreme Court in *Sparrow* has made reference both to the "historic powers and responsibility assumed by the Crown" and to s. 35(1) of the *Constitution Act, 1982*:

"This Court found [in *Guerin*] that the Crown owed a fiduciary obligation to the Indians with respect to the lands. The *sui generis* nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation. In our opinion, *Guerin* together with *R. v. Taylor and Williams* (1981), 34

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is put will not interfere with it." See also D. Hawley, *The Annotated Indian Act 1994* (Toronto: Carswell, 1993) at 27: "Section 18(1) of the Indian Act is not the source of the fiduciary obligation respecting reserve lands; rather, that source is the pre-existing aboriginal interest in the land."

[1505] Id.

[1506] Id., at 357.

[1507] See also the comments of Wilson J. in relation to the Aboriginal "interest" in reserve lands in *Guerin* v. *The Queen*, 13 D.L.R. (4th) 321 at 357: "It is an interest which 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."

[1508] See *Guerin* v. *The Queen*, 13 D.L.R. (4th) 321 at 359 per Wilson J., where it is said that what makes the fiduciary obligation or trust enforceable is the nature of aboriginal title and not s. 18(1): "It seems to me that the 'political trust' line of authorities are 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."

[1509] In particular, the excessive paternalism and control imposed by the *Indian Act* on Indians are inconsistent with the policy of non-interference in the Royal Proclamation of 1763.

> O.R. (2d) 360 (C.A.), ground a general guiding principle for s. 35(1). That is, *the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.*"[1510] [Emphasis added.]

The Supreme Court recognized in *Sparrow* that there is "no explicit language in [s. 35(1)] that authorizes the Court or any court to assess the legitimacy of any governmental legislation that restricts aboriginal rights."[1511] However, the Court determined that the wording of s. 35(1) imposed a fiduciary obligation of a constitutional nature and, as a result, s. 35(1) and the fiduciary relationship limited Parliament's exercise of legislative power:

> "Yet, we find that the words 'recognition and affirmation' incorporate the fiduciary relationship referred to earlier and so *import some restraint on the exercise of sovereign power*. Rights that are recognized and affirmed are not absolute. Federal legislative powers continue, including, of course, the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must however be read together with s. 35(1). In other words, *federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification*[1512] *of any government regulation that infringes upon or denies aboriginal rights.*"[1513] [Emphasis added.]

In seeking to reconcile federal fiduciary duty with federal power, it would appear that the Supreme Court is seeking a balance between the responsibilities of the Crown to Aboriginal peoples and those to the Canadian public at large. Such a consideration is especially significant, in view of the inherent conflict of interest[1514] that is often evident in regard to the Crown. Even if the Crown's overall interests and responsibilities are taken into account, the Supreme Court in *Sparrow* determined that the Crown must give priority consideration to its fiduciary obligations to Aboriginal peoples. Consequently, the Crown may bear a "heavy burden"[1515] in justifying its actions.

In regard to the post-1982 period, the Supreme Court of Canada provides in *Sparrow* v. *The Queen* that the "first consideration" is the "special trust relationship" when determining the validity of legislation:

[1510] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1108.

[1511] Id., at 1109.

[1512] It is worth noting that the justification tests in *Sparrow* have been applied to treaties, as well as to aboriginal rights. In regard to treaties, see, for example, *R.* v. *Bombay*, [1993] 1 C.N.L.R. 92; *Côté* v. *The Queen*, [1993] R.J.Q. 1350; *R.* v. *McIntyre*, [1992] 1 C.N.L.R. 129; *R.* v. *Joseph*, [1990] 4 C.N.L.R. 59; and *R.* v. *Agawa*, (1989) 65 O.R. (2d) 505 (Ont. C.A.).

[1513] Ibid.

[1514] In relation to liability, the Crown in right of Canada is viewed as divisible from the Crown in right of the province. However, all departments within a given government must be seen as bound by the fiduciary obligation of the Crown: see *Kruger* v. *The Queen*, [1985] 3 C.N.L.R. 15 (Fed. C.A.) at 75-77 per Heald J. (dissenting in part); see also *Apsassin* v. *Canada*, [1993] 2 C.N.L.R. 20 (Fed. C.A.), at 87-93 per Issac C.J. dissenting.

Conflicts of interest of the Crown are discussed in M. Bryant, *Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law*, note 1478, *supra*, at 42-44; and D. Johnston, *A Theory of Crown Trust Towards Aboriginal Peoples*, note 1489, *supra*, at 325-327. At 331, Johnston, *supra*, states: "In view of the scope for conflicts of interest, it is submitted that unless the government's fiduciary obligation encompasses a duty of loyalty, the trust relationship will exist more in form than in substance." See also D.W.M. Waters, "New Directions in the Employment of Equitable Doctrines: The Canadian Experience" in T.G. Youdan, (ed.), Equity, Fiduciaries and Trusts (Toronto: Carswell, 1989) at 419: "...the difficulty is that the Crown cannot avoid conflict; it can only lessen the ambiguity of its position" [cited by Bryant, *supra*, at 43]. However, the federal government, for example, could establish in conjunction with Aboriginal peoples an independent office to advise, supervise and monitor the Crown in its fiduciary relationship with Aboriginal peoples.

[1515] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1119.

> "...the honour of the Crown is at stake in dealings with aboriginal peoples. *The special trust relationship and the responsibility of the government vis-a-vis aboriginals must be the first consideration* in determining whether the legislation *or action* in question can be justified."[1516] [Emphasis added.]

Further, in regard to aboriginal rights such as fishing rights, the Supreme Court emphasized that "top priority" must be given to Aboriginal peoples' food requirements subject to necessary conservation measures:

> "Section 35(1) of the *Constitution Act, 1982*, provided the [Aboriginal people] with the right to a top priority allocation of any surplus of the fisheries resource which might exist after the needs of conservation had been taken into account."[1517]

As indicated in the above quotations from *Sparrow*, the fiduciary relationship and responsibility do not arise only when a "voluntary" surrender of aboriginal lands is involved. The Court explicitly indicated that the Crown's fiduciary duty arose in respect to "any government regulation that infringes or denies aboriginal rights".[1518] In particular, the fiduciary duty would apply in cases of unilateral extinguishment of aboriginal title. Further, the fiduciary obligation applies not only to the executive branch of government, but also to the legislature concerned. In *Delgamuukw* v. *British Columbia*, Macfarlane J.A. confirms:

> "If the fiduciary obligation of the Crown to Indians in relation to the sale of their land provides a 'guiding principle' for the application of s. 35 of the *Constitution Act, 1982*, then surely it must bear on the proper test to be applied to legislation purporting to extinguish aboriginal title."[1519]

6.4.2 Standards of conduct required of a fiduciary

Based on the common law and the historical practices reflected in the Royal Proclamation of 1763, as well as on other constitutional and statutory enactments, the fiduciary relationship between Aboriginal peoples and the Crown has been explicitly recognized by the Supreme Court of Canada. A distinctive fiduciary obligation on the part of the Crown is said to be present, especially in instances where purported surrenders and extinguishments of aboriginal title are involved.

Further, the government as fiduciary must generally act "for the benefit" of Aboriginal peoples.[1520] In *Guerin* v. *The Queen*, Dickson J. provides:

[1516] Id., at 1114.

[1517] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1117. See also Dickson C.J.'s comments at 1116: "If, in a given year, conservation needs required a reduction in the number of fish to be caught such that the number equalled the number required for food by the Indians, then *all the fish available after conservation would go to the Indians according to the constitutional nature of their fishing right*. If more realistically, there were still fish after the Indian food requirements were met, then *the brunt of conservation measures would be borne by the sport fishing and commercial fishing*." [Emphasis added.]

[1518] See also Heald J. in *Kruger* v. *The Queen*, [1986] 1 F.C. 3 at 12: "I do not think, however, that what was said by Mr. Justice Dickson relative to the fiduciary relationship existing between the Crown and the Indians can be construed in such a way as to be authority for the proposition generally that the fiduciary relationship arises only where there is a surrender of Indian lands to the Crown."

[1519] *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) at 157.

[1520] In *Sparrow*, *supra*, at 1112-1119, the Supreme Court generally indicated that some legislative restrictions on the exercise of aboriginal rights might occur if there exists a valid and compelling legislative objective, the measure is fully justified, and there is a little as infringement as possible with such rights. At 1113, the Court states: "Also valid would be objectives purporting to prevent the exercise of s. 35(1) rights that would cause harm to the general populace or to aboriginal peoples themselves, or other objectives found to be compelling and substantial." Under these criteria, it is difficult to envision how unilateral extinguishment, as opposed to some valid and "justified" form of regulation, could be defended and

> "...the [Indian] interest gives rise upon surrender to a distinctive fiduciary obligation on the part of the Crown to deal with the land *for the benefit of the surrendering Indians*...The nature of the Indians' interest is...best characterized by its general inalienability, coupled with the fact that the *Crown is under an obligation to deal with the land on the Indians' behalf* when the land is surrendered."[1521]

Also, it would appear that the fiduciary relationship and accompanying obligations that are recognized under s. 35(1), require non-Aboriginal governments to take affirmative measures to "protect and foster" aboriginal and treaty[1522] rights. As A. Pratt provides:

> "...it is perhaps also implied by fiduciary principles that both Parliament and provincial legislatures have the power and indeed *the obligation to enact laws within their legislative competence* which will both protect and foster aboriginal and treaty rights."[1523] [Emphasis added.]

A positive or affirmative duty to legislate "in the interest" of Aboriginal peoples based on treaty obligations (that give rise to fiduciary duties[1524]) is highlighted by Wilson J. (dissenting) in *Horseman* v. *The Queen*:

> "Because any regulations concerning hunting and fishing were to be 'in the interest' of the Indians, and because the Indians were promised that they would be as free to hunt, fish and trap 'after the treaty as they would be if they never entered into it', *such regulations had to be designed to preserve an environment in which the Indians could continue to hunt, fish and trap as they had always done.*"[1525] [Emphasis added.]

Even prior to 1982, the Parliament of Canada did not have unfettered authority to adopt laws in violation of treaty obligations. This conclusion is supported by the constitutional and fiduciary requirements in the *Royal Proclamation of 1763*, particularly that Aboriginal peoples "not be molested or disturbed" in the possession of their lands. It is also reinforced by the affirmative constitutional and fiduciary duties of the Canadian government to "make adequate provision for the protection" of Aboriginal peoples and settle their land rights in conformity with "equitable principles", as required under the Imperial *Rupert's Land and North-Western Territories Order*. In this context, it would hardly be protective or equitable to adopt laws that would contravene treaty rights and bring dishonour to the Crown.

In cases of purported surrender and extinguishment,[1526] it is important to determine when fiduciary obligations arise and the nature and scope of these legal duties at all the material times.

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rationalized.

[1521] *Guerin* v. *The Queen*, 13 D.L.R. (4th) 321 at 339. Although the *Guerin* case dealt with reserve land under the *Indian Act* rather than aboriginal title in traditional tribal lands, the same fiduciary duty exists in both instances.

[1522] For the essential link between government fiduciary obligations and treaties in the U.S., see Note, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, (1987) 22 Harv. C.R.-C.L. L. Rev. 507 at 549.

[1523] A. Pratt, *Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?*, note 1479, *supra*, at 177. See also *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1105-1106, where Dickson C.J. quotes with approval the following statement in N. Lyon, *An Essay on Constitutional Interpretation*, (1988) 26 Osgoode Hall L.J. 95 at 100: "...the context of 1982 is surely enough to tell us that [s. 35] is not just a codification of the case law on aboriginal rights that had accumulated by 1982. *Section 35 calls for a just settlement for aboriginal peoples.*" [Emphasis added.] For a view that frowns on the establishment of a positive duty to act by Parliament in favour of Aboriginal peoples, see W. Binnie, *The Sparrow Doctrine: Beginning of the End or the End of the Beginning?*, note 1332, *supra*, at 220.

[1524] If Treaty No. 8 purportedly deals with a surrender of aboriginal rights, there is no question that distinctive fiduciary obligations are owing on the part of the Crown.

[1525] *Horseman* v. *The Queen*, [1990] 1 S.C.R. 901 at 913.

[1526] Note that, as this study points out, there are issues other than fiduciary duties that can affect the validity of a purported surrender or extinguishment of aboriginal rights.

In *Apsassin* v. *Canada*, it was decided that the "cases support the existence of a fiduciary relationship between the Crown and the Indians *previous* to [a] surrender, just as one has been recognized once a surrender has taken place."[1527] In *Apsassin*, Marceau J.A. describes the nature of the fiduciary duties that arise at different periods prior to, during and subsequent to a surrender of reserve land as follows:

> "It is easy to realize that the duty of the Crown towards a Band, in respect of reserve land set aside for the use and benefit of the Band, cannot create the same obligations before, at the time of, or after surrender. *While after surrender the obligations parallel those of a trustee, before and at the moment of surrender they are necessarily quite different and closer to those of a guardian and special advisor.*"[1528] [Emphasis added.]

Therefore, *prior to and at the moment* of a surrender, the representatives of the Crown should show that they conducted themselves as guardian or protector (if not an advisor) of the Aboriginal peoples concerned and their interests. *Following* such surrender, the obligations parallel those of a trustee and the Crown should ensure that the obligations owed to Aboriginal peoples under any consensual arrangement are fully carried out.

As Dickson J. held in *Guerin*, the Crown must "deal with the land for the benefit of the surrendering Indians". That is, it is not sufficient for the Crown to simply obtain a surrender of aboriginal title from Aboriginal peoples, but must only engage in surrenders in a context where there are clear benefits in the short- and long-term[1529] to the peoples concerned. This is what this study has indicated has always been the nature of the obligation under the Royal Proclamation of 1763. It appears that this is also what Stone J.A. concludes is an applicable objective test in *Apsassin* v. *Canada*:

> "It would seem strange indeed that the Crown could allow the Indians to surrender their interest in the primary asset if it *considered or ought to have considered* that to do so would not be in their long-term interests but would be detrimental to those interests. In my view, the Crown as a fiduciary was required to put the interests of the Indians ahead of its own interests in the surrendering of the reserve lands."[1530] [Emphasis added.]

Moreover, the Supreme Court in *Sparrow* has indicated that "the relationship between the Government and aboriginals is trust-like, rather than adversarial".[1531] If non-aboriginal governments claim to have sought and obtained surrenders of aboriginal title through treaties or other agreements, these governments must demonstrate that they conducted themselves in a trust-like manner. Government representatives must not have acted as adversaries looking to exact the best possible "deal" for the Crown at the expense of the Aboriginal peoples affected. Rather, governments acting as fiduciaries are subject to strict standards of conduct.

[1527] *Apsassin* v. *Canada*, [1993] 2 C.N.L.R. 20 (Fed. C.A.), at 44 per Stone J.A.

[1528] Id., at 66. See also *Kruger* v. *The Queen*, [1985] 3 C.N.L.R. 15 (Fed. C.A.) at 61 per Heald J.: "...on the facts in this case, such a *fiduciary obligation and duty was a continuing one* - that is, it *arose as a consequence of the proposal to take Indian lands* and *continued throughout the negotiations* leading to the expropriations and thereafter including the dealings between the Crown and the Indians with respect to the *payment of the compensation to the Indians in respect of [the lands concerned]*." [Emphasis added.]

[1529] See also *Blueberry River Indian Band et al.* v. *Canada (Minister of Indian Affairs and Northern Development)*, [1988] 1 C.N.L.R. 73 at 93, where Addy J. likens the fiduciary obligation to a trust and provides: "...where a trustee is in any way interested in the subject matter of the trust, there rests upon him a special *onus of establishing that all of the rights and interests both present and future of the beneficiary are protected and are given full and absolute priority and the subject matter is dealt with for the latter's benefit* and to the exclusion of the trustee's interest to the extent there might be a conflict. A similar obligation rests on the Crown in the case at bar..." [Emphasis added.] This statement by the Trial Judge was referred to on appeal by Stone J.A. in *Apsassin* v. *Canada*, [1993] 2 C.N.L.R. 20 (Fed. C.A.), at 45, and the Federal Court of Appeal affirmed the decision of the Trial Judge.

[1530] *Apsassin* v. *Canada*, [1993] 2 C.N.L.R. 20 (Fed. C.A.), at 46.

[1531] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1108.

Under Canadian law of fiduciaries, it is indicated in general terms what is required for a fiduciary to conduct itself according to the highest standards. These include the duty of the fiduciary to act in "good faith"[1532], "honesty"[1533] and with the "utmost loyalty"[1534] to its principal. At the same time, it is said that "the test is an objective one: good faith and clear conscience will not suffice".[1535]

That the Crown's actions as a fiduciary cannot be excused on the basis of "good faith" action is reinforced by M. Bryant as follows:

> "This is particularly important because for much of Canada's history, the Crown's governing of aboriginal affairs was *bona fide*, yet unavoidably ethnocentric and paternalistic. Paternalism must be viewed as evidence of a breach, regardless of the misplaced 'good intentions' of the Crown. Public policy alone dictates that the Crown should not be excused for paternalistic actions, since *paternalism, ethnocentricism, prejudice and outright discrimination are the chief causes of injustices suffered by Canada's indigenous peoples since European contact.*" [Emphasis added.]

In *Guerin* v. *The Queen*, Dickson J. underlined that "equity will...supervise the relationship by holding him to the fiduciary's strict standard of conduct."[1536] He added that "[e]quity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal."[1537]

It is important to emphasize that the "vulnerability"[1538] of Aboriginal peoples in the face of the dominant European cultures in Canada does not mean that Aboriginal peoples are incapable. As stated by M. Bryant:

> "...paternalism or incapacity need not accompany any dependence or reliance of the aboriginals in relation to the Crown...it is submitted that the *sui generis* nature of the relationship justifies a finding that the Crown's duty of loyalty remains regardless of an aboriginal group's capacity to govern itself."[1539]

[1532] See M.V. Ellis, *Fiduciary Duties in Canada*, note 1482, *supra*, at 1-2 and 1-3, where the requirement of "utmost good faith" is emphasized and where it is indicated that the absence of malice will not validate a repugnant act:

> "As a corollary to the heightened degree of loyalty required, *the actions of the fiduciary will be viewed with a strictness unknown to most other areas of law*. It is the fact of a departure from adherence to the beneficiary's best interests, rather than an evaluation of the fiduciary's motive in the departure, that constitutes a breach of fiduciary duty. It is in this sense that the absence of malice will not validate a repugnant act..." [Emphasis added.]

[1533] See G.H.L. Fridman, *Restitution*, note 1482, *supra*, at 370-371.

[1534] See also G.H.L. Fridman, *Restitution*, note 1482, *supra*, at 374: "The underlying idea that governs the way the law has expounded the nature of the duties owed by a fiduciary is that the fiduciary is to act exclusively to the advantage and benefit of the person to whom he stands in the relationship of fiduciary. Everything must be subordinated to that. His liability was strict; his duty of loyalty is categorical." See also G.H.L. Fridman, *supra*, at 370-371.

[1535] *Blueberry River Indian Band et al.* v. *Canada (Minister of Indian Affairs and Northern Development)*, [1988] 1 C.N.L.R. 73 at 93 per Addy J., aff'd in *Apsassin* v. *Canada*, [1993] 2 C.N.L.R. 20 (Fed. C.A.).

[1536] *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 at 341.

[1537] Id., at 344.

[1538] In *International Corona Resources Ltd.* v. *Lac Minerals Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 at 62-63, Sopinka J. highlights vulnerability as a central element in a fiduciary relationship. In particular, Sopinka J. cites with approval the words of Dawson J. in *Hospital Products Ltd.* v. *United States Surgical Corp.*, (1984) 55 A.L.R. 417 at 488: "There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is *a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other* and requires the protection of equity acting upon the conscience of that other..." Sopinka J. also states that a "condition of dependency moves equity to subject the fiduciary to its strict standards of conduct."

[1539] M. Bryant, *Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law*, note 1478, *supra*, at 32. See also B. Slattery, *Understanding Aboriginal Rights*, (1987), 66 Can. Bar Rev. 727 at 753: "The sources of the general fiduciary duty do not lie, then, in a paternalistic concern to protect a 'weaker' or 'primitive' people, as has sometimes been

The Aboriginal-Crown relationship is likely to evolve into different, more egalitarian forms.[1540] This fiduciary relationship should develop in a manner consistent with the principle of self-determination and equality of peoples. However, notions of protection involving a fiduciary relationship will continue regardless of whether the Crown is safeguarding the capacity or incapacity[1541] of an Aboriginal people in a given situation.[1542] While vulnerability of Aboriginal peoples and societies will continue to be an important factor in a wide range of situations, an important objective of the Crown's fiduciary responsibility should be directed towards ensuring the Crown's accountability and a high standard of conduct, as well as opportunity and self-sufficiency of the Aboriginal people concerned. Exercise of the fiduciary duties of the Crown must not be paternalistic, intrusive or remove decision-making from the Aboriginal peoples involved.

Moreover, the fiduciary obligations will persist in connection with the nation-to-nation relationship[1543] and the Crown's commitments under new and existing treaties.[1544] As stated in the *Report of the British Columbia Claims Task Force*, in improving the Crown/Aboriginal relationship, the Crown's fiduciary duty does not end:

> "Important to the relationship between the Crown and aboriginal peoples is the concept of the fiduciary duty owed by the Crown. This duty is rooted in history and reflects the unique and special place of aboriginal peoples in Canada. *The treaty-making process will define and clarify the terms of the new relationship between the Crown and aboriginal peoples but it cannot end the Crown's fiduciary duty.*"[1545] [Emphasis added.]

In cases where the requisite standards of conduct are not met, it has been stated that there is an obligation of restitution.[1546] That is, the beneficiary has the right to be placed in the same position so far as possible as if there had been no breach of trust.[1547]

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suggested, but rather in the necessity of persuading native peoples, at a time when they still had considerable military capacities, that their rights would be better protected by reliance on the Crown than by self-help."

[1540] Legitimate exercise of the Crown's powers as a fiduciary would include: i) to facilitate full recognition of and respect for the status and rights of Aboriginal peoples; ii) to safeguard their status and rights; and iii) to conduct its own relations with Aboriginal peoples, and undertake its own policies and actions, in a manner consistent with these overall objectives.

[1541] Reference is being made here to "incapacity" for socio-economic reasons and not legal incapacity.

[1542] M. Bryant, *Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law*, note 1478, *supra*, at 33, n. 68.

[1543] A. Pratt, *Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?*, note 1479, *supra*, at 189: "It would be a mistake...to conceive that the entering into of a new self-government relationship will terminate all vestiges of the trust-like fiduciary duty. That would be the end of the nation-to-nation relationship. Just as the special relationship will never terminate as long as there are First Nations and aboriginal peoples, the fiduciary duties which are the legal emanation of that relationship will continue to exist as they evolve."

[1544] See, for example, *R.* v. *Agawa*, (1988) 28 O.A.C. 201 (Ont. C.A.) at 215-216, referred to in *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 at 1107-1108: "...the responsibility of Government to protect the rights of Indians aris[es] from the special trust relationship created by history, *treaties* and legislation..." [Emphasis added.]

[1545] *Report of the British Columbia Claims Task Force* (Vancouver: June 28, 1991) at 18.

[1546] See also *International Corona Resources Ltd.* v. *Lac Minerals Ltd.*, (1987), 62 O.R. (2d) 1 at 56 (C.A.), where it is said that the range of remedies available include injunction, recission, declaration of constructive trust, accounting of profits, and compensation of loss. This case is cited and point made in M. Bryant, *Crown-Aboriginal Relationships in Canada: The Phantom of Fiduciary Law*, note 1478, *supra*, at 345, n. 139.

[1547] See analysis of Wilson J. in *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 at 362-367, where she applies the law of trusts. At 365, Wilson J. quotes *Re Dawson; Union Fidelity Trustee Co. Ltd.* v. *Perpetual Trustee Co. Ltd.*, (1966), 84 W.N. (Pt. 1) (N.S.W.) 399 at 404-406: "The obligation of a defaulting trustee is essentially one of effecting a restitution to the estate...[new par.]...Considerations of causation, foreseeability and remoteness do not readily enter into the matter." Also, at 366-367, Wilson J. highlights: "...the principles applicable to determine damages for breach of trust are to be contrasted with the principles applicable to determine damages for breach of contract. In contract it would have been necessary for the band to determine that it would have developed the land; in equity a presumption is made to that effect...".

In enforcing strict standards of conduct by the Crown as a fiduciary, it would appear entirely appropriate for Canadian courts to consider the international human rights norms that both exist and are emerging in connection with indigenous peoples.[1548] In this context, both the draft *United Nations Declaration on the Rights of Indigenous Peoples* and the *Indigenous and Tribal Peoples Convention, 1989* (No. 169) are said to provide for "minimum" standards.[1549]

It would obviously not be adequate to simply apply "minimum" standards when the Crown as a fiduciary is subject to much higher norms under Canadian fiduciary law. However, these minimum international standards can serve as a frame of reference (i.e. a "floor") in regard to government conduct pertaining to Aboriginal peoples. In numerous instances, state governments are not even meeting the minimum standards being established under international law. For example, in relation to extinguishment, it is essential to note that the draft *United Nations Declaration on the Rights of Indigenous Peoples* provides:

> "Indigenous peoples have the right to...the *full recognition of their laws, traditions and customs, land-tenure systems* and institutions for the development and management of resources, and the *right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.*"[1550] [Emphasis added.]

While the protections, fiduciary relationship and affirmative duties owed by the Crown in the *Royal Proclamation of 1763*, in the terms and conditions of the *Rupert's Land and North-Western Territory Order*, 1870, and in s. 35(1) of the *Constitution Act, 1982* are fully compatible with the substantive content of the above provision, the notion of extinguishment of aboriginal and treaty rights is clearly not.

On a number of occasions, Canadian courts have considered the norms in international instruments, both in cases where such instruments have been ratified by Canada and where they have not.[1551] Aboriginal rights constitute collective and individual human rights of Aboriginal peoples.[1552] Therefore, it is fitting that international human rights norms pertaining to these peoples be fully considered in determining the strict standards of conduct of the Crown as a fiduciary. As this study confirms, the applicability of external international norms to domestic

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In regard to the irrelevance of forseeability in determining breach of fiduciary duty, see *Canson Enterprises Ltd.* v. *Boughton & Co.*, [1991] 3 S.C.R. 534 at 552-553 per McLachlin J.: "...it does not lie in the mouth of a fiduciary who has assumed the special responsibility of trust to say the loss could not reasonably be foreseen. This is sound policy...A breach of fiduciary duty is wrong in itself, regardless of whether a loss can be foreseen." For a case where a foreseeability test was applied in determining whether the Crown breached its fiduciary obligations to Aboriginal peoples, see *Blueberry River Indian Band et al.* v. *Canada (Minister of Indian Affairs and Northern Development)*, [1988] 1 C.N.L.R. 73 at 101 per Addy J., aff'd for different reasons in *Apsassin* v. *Canada*, [1993] 2 C.N.L.R. 20 (Fed. C.A.).

It is worth noting that while Wilson J. found that the fiduciary duty "crystallized upon the surrender into an express trust of specific land for a specific purpose" (at 361), Dickson J. describes the same duty as "trust-like" but not a trust (at 342). Dickson immediately adds: "If, however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect. More recently, Dickson C.J. describes the fiduciary relationship as a "special trust relationship": see *Sparrow* v *The Queen*, [1990] 1 S.C.R. 1075, at 1114.

[1548] See discussion under sub-heading 8.2.1.2 *supra*.

[1549] Art. 42 of the draft Declaration provides: "The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."

Similarly, the International Labour Organization has indicated in regard to the norms of the *Indigenous and Tribal Peoples Convention, 1989* (No. 169): "These standards are minimum standards in the sense that they set a minimum level for conduct for ratifying States...They are also minimum standards in being drafted so as not to impede the setting of higher standards either by national laws and regulations, or in other international instruments." See *Information received from United Nations organs, specialized agencies and intergovernmental organizations: Addendum*, U.N. Doc. E/CN.4/Sub.2/AC.4/1989/3/Add.2/para. 3; see also article 35 of the Convention.

[1550] Article 26.

[1551] See discussion under sub-heading 8.2.1 *infra*.

[1552] See discussion under sub-heading 8.2.1.3 *infra*.

conduct within states is a most suitable approach.[1553]

6.4.3 Fiduciary duties of the Crown in right of the province

Generally, in regard to both Aboriginal and non-Aboriginal contexts, it is well-established in Canadian law that the categories of fiduciary are not closed.[1554] As Dickson J. indicates in *Guerin* v. *The Queen*:

> "It is the nature of the relationship, not the specific category of the actor involved that gives rise to the fiduciary duty. The categories of fiduciary, like those of negligence, should not be considered closed".[1555]

Dickson J. indicates that a fiduciary relationship can arise in a wide range of circumstances:

> "...where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct.[1556]

Therefore, there exists no reason why a province would not incur fiduciary obligations if the elements for a fiduciary relationship are present.[1557]

[1553] See discussion under sub-heading 8.2.1.1 *infra*.

[1554] Non-Aboriginal cases include *Lac Minerals Ltd.* v. *International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, at 596-599; *Laskin* v. *Bache & Co. Inc.*, (1972), 23 D.L.R. (3d) 385 at 392 (Ont. C.A.); *Goldex Mines Ltd.* v. *Revill et al.*, (1974), 54 D.L.R. (3d) 672 at 680, 7 O.R. 216 (Ont. C.A.) at 224. See also *Frame* v. *Smith*, [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81 (per Wilson J. dissenting) at 97-98, who cites additional authorities on this point.

[1555] *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 at 341.

[1556] Id.

[1557] Cf. R. Boivin, *À qui appartient l'obligation de fiduciaire à l'égard des autochtones?*, (1994) 35 Les Cahiers de Droit 3, where it is concluded that the provincial Crowns in Canada owe no fiduciary obligations to Aboriginal peoples. Principal reasons for reaching such a conclusion include: i) the fiduciary obligation towards Aboriginal peoples, arising from the historical responsibility emanating from the time of the *Royal Proclamation of 1763*, was inherited in 1867 by the Crown in right of Canada; ii) the law applicable to aboriginal rights is federal common law; and iii) the special relationship and protective role of the Crown with Aboriginal peoples emanates from the exclusive federal jurisdiction under s. 91(24) of the *Constitution Act, 1867*. However, the author fails to properly take into account that the categories of fiduciaries are not closed; that provincial governments and legislatures can place themselves, according to the circumstances, in the position of a fiduciary; and that provincial governments and legislatures, according to the division of powers, can indirectly but significantly affect Aboriginal peoples and possess sufficient discretion to do so (i.e. through laws of general application).

Boivin recognizes (p. 16) that fiduciary obligations emanate from treaties, among other sources, and quotes in this regard *R.* v. *Agawa*, (1988) 28 O.A.C. 201 (Ont. C.A.) at 215-216, referred to in *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 at 1107-1108. However, the author fails to acknowledge that most treaty obligations in contemporary treaties with Aboriginal peoples within provinces are often provincial obligations. See, for example, the *James Bay and Northern Quebec Agreement* (1975) and the *Northeastern Quebec Agreement* (1978). In addition, Boivin cites (p. 18) the Supreme Court in *Sparrow* at 1105 that s. 35(1) of the *Constitution Act, 1982* "also affords aboriginal peoples constitutional protection against provincial legislative power", but unjustifiably concludes that s. 35(1) would not entail any fiduciary responsibility on the part of the provinces (pp. 20-21).

Finally, the author suggests (p. 20) that, if the courts find that there exists a provincial fiduciary responsibility towards Aboriginal peoples, then one should also conclude that provinces have the right to extinguish aboriginal title within their area of jurisdiction. With respect, such a conclusion would be totally unjustified. Just because a fiduciary has responsibilities not to adversely affect its principals or beneficiaries, and to act in their best interests, does not mean that a fiduciary must have the capacity to extinguish their rights.

A provincial government does not escape from having fiduciary obligations simply because it is the Crown in right of the province. As B. Slattery provides:

> "The Crown's general fiduciary duty binds both the federal Crown and the various provincial Crowns within the limits of their respective jurisdictions. The federal Crown has primary responsibility toward native peoples under section 91(24) of the Constitution Act, 1867, and thus bears the main burden of the fiduciary trust. But insofar as provincial Crowns have the power to affect native peoples, they also share in the trust."[1558]

Further, in *Mitchell* v. *Peguis Indian Band*, Dickson C.J. left open the possibility of provincial fiduciary responsibility, particularly in cases dealing with surrenders of Aboriginal lands:

> "On its facts, *Guerin* only dealt with the obligation of the federal Crown arising upon surrender of land by Indians and it is true that, since 1867, the Crown's role has been played, as a matter of the federal division of powers, by Her Majesty in right of Canada, with the *Indian Act* representing a confirmation of the Crown's historic responsibility for the welfare and interests of these peoples. *However, the Indians' relationship with the Crown or sovereign has never depended on the particular representatives of the Crown involved. From the aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations.*"[1559] [Emphasis added, underlining in original.]

It has sometimes been suggested that the Supreme Court decision in *Roberts* v. *The Queen*[1560] offers support for the view that the Crown in right of the provinces owes no fiduciary obligations to Aboriginal peoples. In *Roberts*, Wilson J. provides:

> "[It is] the common law relating to aboriginal title which underlies the fiduciary nature of the Crown's obligations."[1561]

Wilson J. adds later in the judgment:

> "...the question for us, therefore, is whether the law of aboriginal title is *federal* common law.
>
> *I believe that it is.*"[1562] [Emphasis added.]

Just because the fiduciary nature of the Crown's obligations historically arise from the common law relating to aboriginal title, and this common law is federal in nature, does not mean that provincial Crowns do not also have fiduciary obligations towards Aboriginal peoples.[1563] As already described under this sub-heading, the categories of a fiduciary are not closed. Provincial governments, like any other legal person, can be in the position of a fiduciary. Although the fiduciary obligations of the Crown in right of Canada and the Imperial Crown arose for historical reasons dating back at least to the time of the Royal Proclamation, this does not mean that the provincial Crowns in Canada do not incur fiduciary obligations. Provincial

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[1558] See B. Slattery, *Understanding Aboriginal Rights*, (1987) 66 Can. Bar Rev. 727 at 755. See also W. McTavish, *Fiduciary Duties of the Crown in the Right of Ontario*, (1991) 25 L. Soc. Gaz. 181.

[1559] *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85, at 108-109.

[1560] *Roberts* v. *The Queen*, [1989] 1 S.C.R. 322 (S.C.C.), where Wilson J. delivered the judgment on behalf of the Court.

[1561] Id. at 337.

[1562] Id. at 340.

[1563] For a contrary view, see R. Boivin, *À qui apparaît l'obligation de fiduciaire à l'égard des autochtones?*, (1994) 35 Les Cahiers de Droit 3 at 13.

fiduciary obligations, however, may in some cases arise from different situations[1564] than that of the federal Crown and, therefore, may be of a somewhat different nature.

B. Slattery elaborates on how provinces can incur the duties of a fiduciary in relation to Aboriginal peoples:

> "The trust relationship attaches primarily to the Federal government, but it also affects Provincial governments in certain contexts...Since section 91(24) of the Constitution Act, 1867 makes the Federal government responsible for 'Indians and Lands Reserved for the Indians', the main burden of the trust relationship clearly falls on its shoulders. *However, so long as the Provinces have powers and rights enabling them to affect adversely Aboriginal interests protected by the relationship, they hold attendant fiduciary obligations.*"[1565] [Emphasis added.]

Applying the relevant principles of fiduciary law, provinces can incur trust obligations in relation to surrenders or extinguishments of aboriginal title. In view of s. 35(1) of the *Constitution Act, 1982* and the *Royal Proclamation of 1763*, any provincial fiduciary duties that arise in this context would be of a constitutional nature. Also, provincial fiduciary obligations may arise prior to, during and subsequent to a purported surrender or extinguishment of aboriginal title.[1566] The precise nature of the fiduciary obligations owed by a province will necessarily depend on the circumstances in each case.

For example, in relation to the purported surrender and extinguishment of aboriginal title through the James Bay and Northern Quebec Agreement, it seems clear that the province of Québec took on the position of a fiduciary, when it accepted the annexation of the northern portion of what is now part of the province. In this regard, a statutory condition of the transfer of territory to the province was that Quebec would "*recognize the rights of the Indian inhabitants...and [would] obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights and has obtained surrender thereof*".[1567]

It would appear that the fiduciary obligations of the government of Quebec arose in 1912, and continued to exist both during the negotiations of the land claims agreement in 1975 and subsequent to such agreement, in view of the resultant treaty obligations arising from th purported surrender. However, this statutory condition did not alter the general federal duty o "trusteeship", which the same statute recognized as remaining with the government of Canada.[1568]

[1564] For example, provincial fiduciary obligations can arise from specific treaty obligations of the provincial Crown or from statutory enactments, such as the *Quebec Boundaries Extension Act, 1912* (discussed below).

[1565] B. Slattery, *First Nations and the Constitution: A Question of Trust*, (1992) 71 Can. Bar Rev. 261 at 274.

[1566] See R. Bartlett, *You Can't Trust the Crown: The Fiduciary Obligations of the Crown to the Indians: Guerin v. The Queen*, (1984-85) 49 Sask. L. Rev. 367, at 366: "It is suggested that the Crown in right of Canada *and* in right of the Province may both be liable for breach of the fiduciary obligation in the event of the non-fulfillment of the conditions attached to a surrender. Liability vests, or course, in the Crown, *not* merely the Crown in right of Canada or Crown in right of the Province. The liability of the Crown in right of Canada arises per se from the non-fulfillment of the assurances and promises made by the Crown in right of Canada. The liability of the Crown in right of the Province arises upon its failure to perform its fiduciary obligation, by ensuring that the conditions of surrender are met."

[1567] *Quebec Boundaries Extension Act*, S.C. 1912, c. 45, s. 2(c). As to the likely unconstitutionality of the delegation of power to obtain a surrender under s. 2(c), see discussion under sub-heading 6.3.1, *supra*.

[1568] *Quebec Boundaries Extension Act*, S.C. 1912, c. 45, s. 2(e): "That the trusteeship of the Indians in the said territory, and the management of any lands now or hereafter reserved for their use, shall remain in the Government of Canada subject to the control of Parliament." This provision was repealed by the *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32, s. 7. However, the preamble of the repealing statute affirms the fiduciary responsibility of Parliament and the government of Canada as follows: "AND WHEREAS Parliament and the Government of Canada recognize and affirm a special responsibility for the said Crees and Inuit".

6.5 Capacity of Aboriginal Peoples to Consent to Extinguishment

The question of Aboriginal consent arises most frequently in relation to treaties where purported land cession provisions appear. In this regard, a number of issues arise. First, it must be determined if the Aboriginal representatives involved had a valid mandate to negotiate and enter into agreements on land issues.[1569] Second, even if there were a legitimate mandate, a meeting or Assembly must be held where the people concerned are properly informed of the purported surrender, understand its implications and give their consent.[1570] It is not sufficient that solely the mandated negotiators understood what a proposed surrender of aboriginal rights entailed.[1571] Third, there is the question of whether an Aboriginal people can validly agree to a surrender of their Aboriginal rights, if the terms seriously jeopardize the future of present and future generations. It is this third aspect that will be presently examined.

In considering the legal capacity of Aboriginal peoples to consent to extinguishment of their fundamental rights, the question arises as to whether the applicable rules are those of domestic or international law (or both). In *Simon* v. *The Queen*, Dickson C.J. made the following statement concerning treaties with Aboriginal peoples:

> "While it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties, these principles are not determinative. An Indian treaty is unique; it is an agreement *sui generis* which is neither created nor terminated according to the rules of international law."[1572]

This statement has been used to deny any relevance of international law to treaties between Aboriginal peoples and the Crown. Generally, it would appear that too much emphasis has been placed on the last sentence of the above statement of Dickson C.J., without even stating or acknowledging that the Chief Justice indicated that it "*may be helpful...to analogize the*

[1569] See, for example, *Sheldon* v. *Ramsay*, (1852), 9 U.C.Q.B. 105 at 127: "There is nothing here" concluded Robinson C.J., "but the mere execution of a deed in a manner that could bind no one but himself [the chief], under the assertion of an authority from the Indians, which is in no manner proved." See also *A.G. Ontario* v. *Francis*, (1899), Public Archives of Ontario, Irving Papers, Box 43, File 42, Item 9 at 13, in relation to the instructions that an Indian band imparted to their chief. Ferguson J. of the Ontario High Court ruled: "...it is a proposition of law that if an agent exceed his authority, the principal is not bound. For this reason I think both the instructions and the contract must be seen in such a case." Both of the above cases and quotations are cited in B. Clark, *Indian Title in Canada* (Toronto: Carswell, 1987) at 79.

The question of mandate and representation is being raised by dissident Inuit in northern Québec, in regard to the James Bay and Northern Québec Agreement, in *Alashua* et al. v. *A.G. Canada* et al., No. 500-05-018552-818, Québec Superior Court: see discussion under sub-heading 7.1 and heading 11 *supra*.

[1570] See *Royal Proclamation of 1763*: "...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 public Meeting or Assembly of the said Indians, to be held for that Purpose..." Conformity with this same equitable principle is required in respect to lands contemplated by the *Rupert's Land and North-Western Territory Order*, 1870, since the terms attached to the Order provide: "*...upon the transference of the territories in question* to the Canadian government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled *in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines...*" *Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada*, Schedule (A), R.S.C. 1985, App. II, No. 9, 8 at 8-9. See discussion under sub-heading 2.3 *supra*.

[1571] For example, in *Howard* v. *The Queen*, [1994] 2 S.C.R. 299 (S.C.C.) at 306, Gonthier J. indicates that the representatives of the Hiawatha Band were able to understand and consent to the purported surrender in the 1923 Treaty. However, it is not clear from this Supreme Court of Canada decision whether the people as a whole, who were affected by any surrender, had the necessary understanding and agreed to the terms of the Treaty in this regard.

[1572] *Simon* v. *The Queen*, [1985] 2 S.C.R. 387 at 404. In support, the Court cites *R.* v. *White* and *Bob*, (1964) 50 D.L.R. (2d) 613 (B.C.C.A.), at 617-618, aff'd [1965] S.C.R. vi, 52 D.L.R. (2d) 481; *Francis* v. *The Queen*, [1956] S.C.R. 618, at 631; *Pawis* v. *The Queen*, [1980] 2 F.C. 18, (1979) 102 D.L.R. (3d) 602 at 607. It is worth noting, however, that treaties with Aboriginal peoples were "treated [by the British] as documents of international significance and published in official treaty series": B. Kingsbury, "The Treaty of Waitangi: some international law aspects" in I. Kawaharu, (ed.), *Waitangi [:] Māori and Pākehā Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989), at 122.

principles of international treaty law to Indian treaties".[1573]

If it is correct to characterize "Indian treaties" as "unique" and "*sui generis*",[1574] then it can be equally said that conventional principles in domestic private law are not wholly "determinative" of the legal effect of treaties.[1575] Rather, there are likely aspects of international and domestic law that would be of relevance in such cases. International treaties between states also incorporate certain domestic law principles.[1576] The contractual nature of treaty law is as evident in international treaties between states[1577] as it is in treaties between the Crown and Aboriginal peoples.

At the same time, the historical relationship of Aboriginal peoples with the Crown, the resulting fiduciary obligations, the unequal bargaining position[1578] of Aboriginal peoples, and their continuing vulnerability,[1579] all justify the incorporation of equitable principles to international and domestic legal aspects affecting them. Moreover, in relation to Aboriginal peoples in Aotearoa-New Zealand and the Waitangi Tribunal, there is precedent for the application of international legal principles to aboriginal rights issues.[1580]

Judicial rules of interpretation concerning Aboriginal peoples in Canada and the United

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[1573] See P. Hutchins, "International Law and Aboriginal Domestic Litigation" in Proceedings of the 1993 Conference of the Canadian Council on International Law, *Aboriginal Rights and International Law* (Ottawa: Canadian Council on International Law, 1992) 11 at 13: "...we cannot infer from Chief Justice Dickson's statement that he rejected an application of international law. We should rather take it to mean that Canadian courts should not limit themselves to the strict application of one set of principles or another, but that they should look at any source which might be pertinent, including international law in some instances."

[1574] However, see J. Henderson, "The Status of Indian Treaties in International Law" in Proceedings of the 1993 Conference of the Canadian Council on International Law, *Aboriginal Rights and International Law*, note 1573, *supra*, at 134: "[Indigenous peoples' treaties] are not *sui generis* in international law, but instead are an ordinary part of the Treaty Order. European states used the *same* wording in their treaties with other European states, or with indigenous peoples, as they used with First Nations in Canada..." [Emphasis in original.]

[1575] Cf. P. Hogg, *Constitutional Law of Canada*, note 1253, *supra*, vol. 1, at 27-22: "[An Indian treaty] is not a treaty at international law, and is not subject to the rules of international law. It is not a contract, and is not subject to the rules of contract law."

[1576] It is important to emphasize that the contractual aspects of a treaty with Aboriginal peoples do not diminish the status of a treaty. See B. Clark, *Indian Title in Canada*, note 1296, *supra*, at 75: "It should not, however, be assumed that the contractual character of the treaty somehow derogates from its status as a political compact defining constitutional rights or obligations." Similarly, in the case of international treaties between non-Aboriginal parties, the status of such treaties is not modified by applying domestic law concepts in construing the intent and meaning of the instrument. See A. Jacomy-Millette, *Treaty Law in Canada* (Ottawa: Univ. of Ottawa Press, 1975), at 296-297, where Cattanach J. in *Stickel* v. *M.N.R.*, (1972) F.C. 672 at 679 is quoted as follows: "...the duty of the Court is to construe a treaty as it would construe any other instrument public or private, that is to ascertain the true intent and meaning of the contracting States".

[1577] See *Reservations to the Genocide Conventions Case*, [1951] I.C.J. Rep. 32 (per Guerrero, McNair, Read and Hsu Mo, JJ.), cited in E.M. Morgan, "The Hermaphroditic Paradigm of International Law: A Comment on *Alvarez-Machain*", in Proceedings of the 1992 Conference of the Canadian Council on International Law, *State Sovereignty: The Challenge of a Changing World* (Ottawa: Canadian Council on International Law, 1992) 78 at 83, n.21.

[1578] See, for example, *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85 at 142 per La Forest J.: "...the Crown enjoyed a superior bargaining position when negotiating treaties with native peoples"; *R.* v. *Horseman*, [1990] 2 S.C.R. 901 at 907 per Wilson J. (dissenting).

[1579] In *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia), at 157, Toohey J. provides: "...the power to affect the interests of a person adversely...gives rise to a duty to act in the interests of that person; *the very vulnerability gives rise to the need for the application of equitable principles*." [Emphasis added.]

[1580] B. Kingsbury, "The Treaty of Waitangi: some international law aspects" in I. Kawaharu, (ed.), *Waitangi [:] Māori and Pākehā Perspectives of the Treaty of Waitangi*, note 1572, *supra*, at 134: "As the Treaty of Waitangi Act 1975 requires, the Tribunal does not confine itself to interpreting the Treaty. Its duty is to distill the principles of the Treaty, and to make recommendations intended to give modern effect to these principles. The discharge of this duty takes it into areas where other principles and approaches found in international and comparative law are relevant."

States are reconcilable with relevant international rules,[1581] and the latter should be applied together with recognized equitable principles.[1582]

As already described, Aboriginal peoples were treated as sovereign independent nations by European states during the period of the early historic treaties. This sovereignty has never been relinquished. The contending sovereignty of Aboriginal peoples, their increasingly recognized international personality,[1583] and their growing role in international affairs strongly support the application of relevant international rules together with equitable principles.[1584] In relation to treaties with Aboriginal peoples, such treaty-making is viewed by numerous commentators as indicative of international legal personality.[1585] As J. Henderson provides in regard to indigenous peoples' treaties:

> "Treaty-making with indigenous peoples was not a uniquely North American phenomenon. It was a global, rather than a regional order. Indigenous Nations'

[1581] See G. Rémillard, "Les règles d'interprétation relatives à la Charte canadiennes des droits et libertés et à la Charte des droits de la personne du Québec", in D. Turp & G.A. Beaudoin, (eds.), *Perspectives canadiennes et européennes des droits de la personne* (Cowansville, Québec: Éditions Yvon Blais, 1986) 205, at 225, where, in referring to the non-derogation clause in s. 25 of the *Canadian Charter of Rights and Freedoms* and the fact that rights acquired now or in the future by way of land claims agreements are treaty rights, Mr. Rémillard notes the usefulness of international law in interpreting the term "treaty": "Par conséquent, il se peut fort bien que la principale question d'interpretation dans cet article soit reliée au sens que l'on doit donner au terme 'traité'. *Il est certain que le droit international pourrait alors être d'un grand apport.*" [Emphasis added.] The unofficial translation is: "Consequently, it is very possible that the main question of interpretation in this section is linked to the meaning that one must give to the term "treaty". *It is certain that international law could then be of significant use.*" [Emphasis added]

[1582] B. Kingsbury, "The Treaty of Waitangi: some international law aspects", in I. Kawaharu, (ed.), *Waitangi [:] Māori and Pākehā Perspectives of the Treaty of Waitangi*, note 1572, *supra*, at 132-133: "In so far as treaties involving indigenous peoples fall to be interpreted by reference to international law principles, an approach analogous to *Jones* v. *Meehan* [175 U.S. 1 (1899) (U.S. Supreme Court)] appears entirely supportable."

[1583] See, for example, A. Buchanan, *The Role of Collective Rights in the Theory of Indigenous Peoples' Rights*, (1993) 3 Transnat'l L. & Contemp. Probs. 89 at 90: "Indigenous peoples have secured standing to speak with their own voices in the major fora in which international law is made. No longer are they held captive by the traditional conception that only states have standing under international law. [new para.]The second major thrust of the indigenous peoples' movement goes beyond recognition of the status of indigenous peoples as *distinct subjects of international law*." [Emphasis added.]

[1584] M. Simon, Statement to U.N. General Assembly, in *Living History [:] Inauguration of the "International Year of the World's Indigenous People"*, (1993) 3 Transnat'l L. & Contemp. Probs. 210 at 212: "*Treaties between indigenous peoples and states must be fully respected under international law.* Such treaties include modern land claims agreements. Indigenous treaties were not signed only as domestic instruments. They must not be turned into domestic instruments after the fact." [Emphasis added.]

[1585] B. Kingsbury, "The Treaty of Waitangi: some international law aspects" in I. Kawaharu, (ed.), *Waitangi [:] Māori and Pākehā Perspectives of the Treaty of Waitangi*, note 1572, *supra*, at 125; R. Boudreault, *Réflexion sur une réalité moderne à "incarner"*, (1993) 23 Recherches Amérindiennes au Québec 5, at 8. See also *Study on treaties, agreements and other constructive arrangements between States and indigenous populations [:] First progress report submitted by Mr. Miguel Alfonso Martínez, Special Rapporteur*, U.N. Doc. E/CN.4/Sub.2/1992/32, 25 August 1992, at 27, para. 158: "...the question as to whether or not indigenous nations were considered by their European interlocutors, in their early encounters, as political entities with treaty-making powers and full international personality is amply documented. On that basis, the Special Rapporteur is in the position to conclude that in English- and French-settled areas in North America and in those times, indigenous peoples/nations were indeed recognized as such by their European counterparts, in accordance with basic notions of the law of nations then applicable by non-indigenous standards."

See also R. Barsh & J. Henderson, *Aboriginal Rights, Treaty Rights, and Human Rights: Indian Tribes and 'Constitutional Renewal'*, note 1315, *supra*, at 68, 77; S. Aronson, *The Authority of the Crown to Make Treaties With Indians*, [1993] 2 C.N.L.R. 1, at 5; H. Berman, "Perspectives on American Indian Sovereignty and International Law, 1600 to 1776", in O. Lyons, et al., *Exiled in the Land of the Free [:] Democracy, Indian Nations, and the U.S. Constitution* (Santa Fe: Clear Light Publishers, 1992), 125 at 131: "*The pervasive application of treaty-making over time in North America gives clear evidence of the international personality* of the indigenous peoples of that time and place. Treaty-making, however, was not the source of Indian sovereign and territorial rights. *As political communities created by the original inhabitants, Indian societies possessed inherent, pre-existing sovereign rights and conducted political relations in their own interests on the international plane.*" [Emphasis added.] In O. Lissitzyn, *Territorial Entities Other Than Independent States in the Law of Treaties*, (1970) 125 Recueil des Cours: Collected Courses of the Hague Academy of International Law 1, it is provided at 15: "If an entity has treaty-making capacity, it is an 'international person', but if we are told that an entity has 'international personality', we cannot conclude that it has treaty-making capacity, since it may only possess some *other* capacity." [Emphasis in original.] The same point is made in R. Wallace, *International Law*, 2nd ed. (London: Sweet & Maxwell, 1992) at 70.

agreements with European kings and states were *considered as proper subjects of international law...*"[1586] [Emphasis added.]

In addition, the draft *United Nations Declaration on the Rights of Indigenous Peoples* calls for unsettled conflicts and disputes to be "submitted to competent international bodies agreed to by all parties concerned."[1587] It would hardly make sense for an international body to adjudicate in such conflicts or disputes and not have ready access to appropriate international rules.

Under the following sub-headings, relevant international law rules will be examined with a view to their application to Crown-Aboriginal treaties and questions of surrender or extinguishment of aboriginal and treaty rights. As will be described, under international law, there may be no "agreement" or "consent" by an Aboriginal people if the treaty violates a peremptory norm or deprives such people of its own means of subsistence.

6.5.1 Peremptory norms in treaty-making

In regard to international peremptory norms and treaty-making, article 53 of the 1969 *Vienna Convention on the Law of Treaties*[1588] provides:

> "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted by the *international community of states as a whole*[1589] as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." [Emphasis added.]

L. Hannikainen indicates that, regardless of the number of existing ratifications of the Vienna Convention, "the international community appears to have accepted the [above] definition...as a general legal definition of peremptory norms in international law."[1590]

I. Brownlie describes peremptory norms (*jus cogens*) as certain "overriding principles of international law" as follows:

> "The major distinguishing feature is their relative indelibility. They are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect. The least controversial examples of the class are the prohibition of the use of force, the law of genocide, *the principle of racial discrimination*, crimes against humanity, and the rules prohibiting trade in slaves and piracy."[1591] [Emphasis added.]

[1586] J. Henderson, "The Status of Indian Treaties in International Law" in Proceedings of the 1993 Conference of the Canadian Council on International Law, *Aboriginal Rights and International Law*, note 1573, *supra*, at 132.

[1587] Article 36 of the Draft Declaration.

[1588] *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, concluded May 23, 1969, in force for Canada Jan. 27, 1980.

[1589] "[T]his term means the overwhelming majority of States, including all essential components of the international community of States, but not necessarily every State": L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law [:] Historical Development, Criteria, Present Status* (Helsinki: Finnish Lawyers' Publishing Co., 1988) at 4.

[1590] Id., at 3.

[1591] I. Brownlie, 4th ed., *Principles of Public International Law* (Oxford: Clarendon Press, 1990) at 513.

Brownlie adds that, in his view, the right to self-determination is presently a peremptory norm.[1592]

In regard to "modern" treaties (or land claims agreements), the capacity of Aboriginal peoples and the federal Parliament to extinguish aboriginal or treaty rights, under international law, may also be limited according to the circumstances. For example, no other people in Canada are required to extinguish their human rights in order to participate in the Canadian federation and exercise basic rights. This could be a violation of peremptory international norms[1593], such as the prohibition against racial discrimination[1594] and the right to self-determination.

It is worth noting that other colonial notions associated with Aboriginal land dispossession and injustice, such as *terra nullius*, have been categorized as racial discrimination. If discrimination is found to have prevailed in legal notions in the past, the courts now appear prepared to reconsider and repudiate such doctrines. In *Mabo et al.* v. *State of Queensland*, Brennan J. indicates:

> "[N]o case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system."[1595]

And Brennan J. adds:

> "If it were permissable in past centuries to keep the common law in step with international law, *it is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination.*"[1596]

It is important to note that art. 53 of the 1969 *Vienna Convention on the Law of Treaties* is to be read together with art. 64 which provides as follows:

> "If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."

[1592] Id. See also S.J. Anaya, *Indigenous Rights Norms in Contemporary International Law*, (1991) 8 Arizona J. of Int'l & Comp. Law 1 at 29-30: "Beyond its textual affirmation, self-determination is widely held to be a norm of general or customary international law, and arguably *jus cogens* (a peremptory norm)"; P. Thornberry, *International Law and the Law of Minorities* (Oxford: Clarendon Press, 1991) at 14; H.G. Espiell, "Self-Determination and Jus Cogens" in A. Cassese, (ed.), *UN Law/Fundamental Rights [:] Two Topics in International Law* (Alphen aan den Rijn, The Netherlands: Sijthoff & Noordhoff, 1979) 167: "In 1963, in the International Law Commission's commentary to Art. 37 of the draft articles on the law of treaties, it was mentioned that the principle of self-determination could be cited as an example of *jus cogens*. However, since the Commission decided against including any examples of *jus cogens* in the article itself, the reference to self-determination appears solely in the report." Espiell adds at 167-168: "It is highly significant that the only expression of opposition to according the character of *jus cogens* to the principle of self-determination came from the then Government of Portugal..."; A. Rosas, "Internal Self-Determination" in C. Tomuschat, (ed.), *Modern Law of Self-Determination* (Boston: Martinus Nijhoff Publishers, 1993) 225 at 247-248; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970). Advisory Opinion*, [1971] I.C.J. 16 at 89-90 (separate opinion of Vice-President Ammoun): "The [representative of Pakistan] rightly viewed the act of using force with the object of frustrating the right of self-determination as an act of aggression, which is all the more grave in that the right of self-determination is a norm of the nature of *jus cogens*, derogation from which is not permissable under any circumstances." [Official translation.]

[1593] The position of the government of Canada in 1968 indicates that violations of fundamental human rights appear to conflict with peremptory international norms: "The concept [of *jus cogens*] is a new one in international law...Certainly wars of aggression, acts of genocide and *interference with fundamental human rights seem to conflict with peremptory norms of general international law*; but could we go beyond that?" [Emphasis added.]. See U.N. Doc. A/Conf. 39/11, at 351, cited in A. Jacomy-Millette, *Treaty Law in Canada* (Ottawa: Univ. of Ottawa Press, 1975), at 267-268.

[1594] In regard to the principle of non-discrimination, see *Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, I.C.J. Reports, 1970, at 3, paras. 33 & 34.

[1595] *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia), at 19, per Brennan J.

[1596] Id. at 28.

This would mean that, even if a peremptory norm did not exist at the time a treaty was entered into, the subsequent recognition of such a norm would serve to void a treaty that is in conflict with the new norm. However, it is said that "the emergence of a new rule of *jus cogens* is not to have retroactive effect" and the "invalidity is to attach only as from the time of the establishment of the new rule of *jus cogens*."[1597] In addition, it may be possible to simply void the offending provisions of the treaty, without terminating the treaty itself.[1598]

A vital question that arises is whether the international law principles, as reflected in the Vienna Convention, would be applicable to treaties between Aboriginal peoples and the Crown. The Convention defines "treaty" as "an international agreement concluded between States in written form and governed by international law..."[1599] However, the Convention does not define "States". The meaning of the term is said to be unsettled under international law and, in the view of some international jurists, could include "dependent",[1600] "not fully sovereign" or "semi-sovereign" states.[1601]

In addition, art. 3(b) of the Convention leaves open the possibility of applying the principles in the Convention to international agreements that are not within its scope:

> "The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:
>
> .....
>
> (b) the application of them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention".

In *Worcester* v. *State of Georgia*, Marshall C.J. emphasized that term "treaties" in relation to Aboriginal peoples is the same as treaties with other non-Aboriginal nations:

> "The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having a definite and well

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[1597] I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester: Manchester University Press, 1984) at 224-225.

[1598] Id., at 225. In regard to the principle of separability, see pp. 165-166. Art. 44 of the Vienna Convention on the Law of Treaties provides that, except for cases arising under arts. 51-53, the principle of separability can be applied in situations where the ground of the invalidity of a treaty relates to specific clauses (and not to the whole treaty). In this regard, see L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law [:] Historical Development, Criteria, Present Status*, note 1589, *supra*, at 299-300: "This means that in the cases of invalidity under Art. 53 the whole treaty is void, whereas in the cases of invalidity under Art. 64 it is not excluded that only a part of the treaty is declared void and terminated."

[1599] *Vienna Convention on the Law of Treaties*, art. 2 (1)(a).

[1600] Although the term "dependent nations" sometimes is used to describe Aboriginal peoples, it is doubtful whether the term properly captures the nature of the Aboriginal-Crown relationship. See F. Jennings, *The Invasion of America [:] Indians, Colonialism, and the Cant of Conquest* (New York/London: W.W. Norton & Co., 1975) at 118: "There seems to be no word in English that properly fits the situation. Our language tidily sorts out dependence, independence, and interdependence, of which the last comes closest to defining the whole relationship between Indians and Europeans; but if we want to categorize the special status of Indians as both dependent and independent the language fails us. Perhaps we should coin a new term..."

[1601] O. Lissitzyn, *Territorial Entities Other Than Independent States in the Law of Treaties*, note 1585, *supra*, at 8-9. At 9, the author states: "...'State' has no absolute or objective meaning in international law... *We must, therefore, be on guard against attaching too much significance to the characterisation of a particular entity as a 'State'*. Indeed, depending on one's preference, *certain entities which are not regarded as independent but which seem to participate in treaty relations can be described as 'dependent States' or as entities which, though not 'States', possess a degree of international personality*." [Emphasis added.] See also *Western Sahara (Advisory Opinion)*, [1975] I.C.J. 12 at 35-36; J. Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 1979) at 31; H. Berman, "Perspectives on American Indian Sovereignty and International Law, 1600 to 1776", in O. Lyons, et al., *Exiled in the Land of the Free [:] Democracy, Indian Nations, and the U.S. Constitution*, note 1585, *supra*, at 130: "International law...has never confined international legal personality to a single political structure, *nor has any clear definition of statehood ever been broadly accepted*. On the contrary, a vast array of political entities have in practice been embraced within that concept." [Emphasis added.]

understood meaning. *We have applied them to all in the same sense.*"[1602] [Emphasis added.]

G. Alfredsson underlines that treaties[1603] with indigenous peoples were historically viewed as international[1604] in character, but this status was unilaterally altered:

> "These agreements were of an international character until the status of one of the parties was eliminated by way of *unilateral acts of the other party, sometimes by legislation, sometimes by the courts, often by force, and as a rule without indigenous consent.* This status is now being addressed by a Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities."[1605] [Emphasis added.]

O. Lissitzyn states that there is nothing in international law that prevents making agreements of mixed character, "containing both obligations governed by public international law and undertakings governed by municipal law".[1606] Lissitizyn confims in his conclusions that "there is no norm of international law that limits the class of territorial entities with treaty-making capacity to independent States, or indeed to 'States' however defined."[1607]

Based on all of the above, there does not appear to be any valid reason for refusing to apply relevant international rules (subject to equitable principles) to treaties between Aboriginal peoples and the Crown. Failure to do so serves to unfairly diminish the status of Aboriginal peoples and their treaties. In view of the historic injustices inflicted on Aboriginal peoples and the far-reaching impacts of questionable surrenders or extinguishments of their fundamental rights, it is imperative that both international and domestic law principles be equitably utilized with the objective of redressing continuing dispossessions and other prejudices. Moreover, the application of international legal principles would be in keeping with existing and emerging international norms that directly pertain to indigenous peoples and states.

6.5.2 Prohibition against being deprived of subsistence

It is also not clear that "consent" of a particular Aboriginal people *per se* is sufficient to validate extinguishments regardless of the adverse consequences to the peoples concerned. For

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[1602] *Worcester* v. *State of Georgia*, 31 U.S. (6 Pet.)515 (1832) at 559-560.

[1603] In regard to historic treaties in Canada, see A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, including the Negotiations on which they were based* (Toronto: Belfords, Clarke & Co., 1880) (reprint Saskatoon, Saskatchewan: Fifth House Publishers, 1991); and Canada, *Indian Treaties and Surrenders* (from 1680-1890), 2 vols., (Ottawa: Fifth House Publishers, 1992) (first printed in 1891). In regard to the texts of the Indian treaties (as well as formal agreements up to 1883) in the U.S., see C. Kappler, *Indian Treaties* (New York: Interland Publishing Co., 1973).

[1604] In regard to Aboriginal treaties in the U.S., see F. Cohen, *Handbook of Federal Indian Law*, reprint of 1942 ed. (Albuquerque: University of New Mexico Press) at 39: "Until the last decade of the treaty-making period, terms familiar to modern international diplomacy were used in the Indian treaties...[new para.] Many provisions show the international status of the Indian tribes, through clauses relating to war, boundaries, passports, extradition, and foreign relations." See also W. Churchill, "Implications of Treaty Relationships Between the United States and Various Indian Nations", in F. Lyden & L. Legters, (eds.), *Native Americans and Public Policy* (Pittsburgh: University of Pittsburgh Press, 1992) 149 at 150: "...U.S. treaty making is definitionally restricted to the level of interaction between sovereign entities. Treaties are thus inherently international arrangements." In *United States* v. *Forty-three Gallons of Whiskey*, 93 U.S. 188 (1876) at 197, the U.S. Supreme Court provided: "Besides, the power to make treaties with the Indian tribes is, as we have seen, coextensive with that to make treaties with foreign nations. In regard to the latter, it is, beyond doubt, ample to cover all the usual subjects of diplomacy."

[1605] G. Alfredsson, "The Right of Self-Determination and Indigenous Peoples" in C. Tomuschat, (ed.), *Modern Law of Self-Determination* (Boston: Martinus Nijhoff Publishers, 1993) 41 at 47.

[1606] O. Lissitzyn, *Territorial Entities Other Than Independent States in the Law of Treaties*, note 1585, *supra*, at 83.

[1607] Id. at 87.

example, art. 1, para. 2 of both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* in part provides:

> "In no case may a people be deprived of its own means of subsistence".[1608]

As A. Cassese emphasizes, this provision in the international human rights covenants has the effect of vitiating "consent" that might otherwise be valid:

> "The last sentence of Article 1(2), 'In no case may a people be deprived of its own means of subsistence,' introduces an exception to what is provided earlier. *It may be used to nullify even arrangements 'freely made' by the people 'for their own ends' if these arrangements deprive the people of its means of subsistence.*"[1609] [Emphasis added.]

There is no single understanding of what the term "subsistence" entails in an Aboriginal context. However, a strong argument can be made that it necessarily incorporates more than a literal right to food and includes activities necessary for the support, sustenance, livelihood and preservation of distinct Aboriginal cultures and societies. The Inuit Circumpolar Conference (ICC) indicates that Aboriginal "subsistence" is a complex notion that has various important dimensions:

> "...aboriginal 'subsistence' is *a highly complex notion that includes economic, social, cultural and spiritual dimensions*. The harvesting of renewable resources provides Inuit with food, nutrition, clothing, fuel, shelter, harvesting equipment, and income. *Subsistence means much more than mere survival*[1610] *or a minimum standard of living.* It is a way of life that requires special skills, knowledge and resourcefulness. It enriches and sustains Inuit communities, in a manner that promotes cohesiveness, pride and sharing."[1611] [Emphasis added.]

Moreover, the ICC describes the interrelationship between "subsistence" and "self-determination":

> "Self-determination and subsistence are interrelated in the Arctic. The extent to which Inuit are able to maintain and develop their subsistence practices and way of life, according to their own values and standards, is an important indication of the degree of self-determination achieved."[1612]

In the context of subsistence, it is also useful to note the statements of Wilson J. in *Horseman* v. *The Queen*, where a contemporary interpretation of the Aboriginal "right to food" is said to extend to hunting for "support and subsistence" and would include some commercial elements:

> "Of course, the Indians' hunting and fishing rights were to be preserved and protected; Indians could not have survived otherwise. But *this cannot mean that in 1990 they are precluded from selling their meat and fish to buy other items necessary for their sustenance and the sustenance of their children*. Provided the purpose of their hunting is either to consume the meat or to exchange it or sell it in order to support themselves and

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[1608] *International Covenant on Civil and Political Rights*, (1976) 999 U.N.T.S. 171, [1976] C.T.S. 47, and the *International Covenant on Economic, Social and Cultural Rights*, (1976) 993 U.N.T.S. 3, [1976] C.T.S. 46.

[1609] A. Cassese, "The Self-Determination of Peoples" in L. Henkin (ed.), *The International Bill of Rights [:] The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) at 105-106.

[1610] See also T.R. Berger, *Village Journey [:] The Report of the Alaska Native Review Commission* (New York: Hill and Wang, 1985), ch. 2, "Subsistence: More Than Survival, A Way of Life", at 48.

[1611] Inuit Circumpolar Conference, *Principles and Elements for a Comprehensive Arctic Policy* (Montreal: Centre for Northern Studies and Research, McGill University, 1992) at 36.

[1612] Id., at 37.

> their families, I fail to see why this is precluded by any common sense interpretation of the words 'for food'."[1613] [Emphasis added.]

Moreover, the importance of the right to subsistence is highlighted in the draft *United Nations Declaration on the Rights of Indigenous Peoples* as follows:

> "Indigenous peoples have the right to...be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation."[1614]

In conclusion, there may be important reasons for reviewing existing treaties and monitoring new agreements to determine if the terms and conditions of the arrangements "agreed" to are in violation of the International Covenants. In 1976, Canada ratified the International Covenants that provide for the prohibition against depriving a people of its own means of subsistence. Further, it is the view of some international jurists that the right to self-determination is not only a part of customary international law, but is also a peremptory norm. In this context, the prohibition pertaining to a people's subsistence is an integral part of the international right to self-determination (from which there can be no derogation).

6.5.3 Capacity to waive constitutional rights or guarantees

A further question arises as to whether Aboriginal peoples can agree to renounce or waive their constitutional rights or guarantees under Canadian law and, if so, to what extent. In particular, it needs to be determined whether Aboriginal peoples have the capacity to consent to extinguishment of their aboriginal rights.

This specific issue has not been directly challenged in Canadian courts. However, there are some judicial decisions concerning the waiver of rights or guarantees under the *Canadian Charter of Rights and Freedoms* that would be useful to examine. For example, it has been held by the Supreme Court of Canada that persons can waive a legal guarantee to a procedure conceived for their protection, if they have full knowledge of the effect of renouncing to such right.[1615] In this context, waivers have been deemed valid by the Supreme Court in regard to the right to counsel,[1616] the right to be tried within within a reasonable time,[1617] and the right to trial by jury.[1618]

In addition, in *McKinney* v. *University of Guelph*,[1619] the Supreme Court of Canada has held that acceptance of a contractual obligation could perhaps, under certain circumstances, constitute a waiver of a right under the *Canadian Charter*. This might especially be upheld, if

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[1613] *Horseman* v. *The Queen*, [1990] 1 S.C.R. 901 at 919 per Wilson J. dissenting.

[1614] Art. 21 of the draft Declaration.

[1615] *Korponay* v. *A.G. Canada*, [1982] 1 S.C.R. 41 (S.C.C.) at 49.

[1616] *Clarkson* v. *The Queen*, [1986] 1 S.C.R. 383 at 394-395; *R.* v. *Black*, [1989] 2 S.C.R. 138 at 156-157; *R.* v. *Brydges*, [1990] 1 S.C.R. 190 at 204; *R.* v. *Smith*, [1991] 1 S.C.R. 714 at 728-729.

[1617] *R.* v. *Conway*, [1989] 1 S.C.R. 1659 at 1685-1686; *R.* v. *Askov*, [1990] 2 S.C.R. 1199 at 1228-1229, 1231-1232; *R.* v. *Morin*, [1992] 1 S.C.R. 771 at 790; *R.* v. *CIP Inc.*, [1992] 1 S.C.R. 843 at 860.

[1618] *R.* v. *Turpin*, [1989] 1 S.C.R. 1296 at 1313; *R.* v. *Lee*, [1989] 2 S.C.R. 1384 at 1410, 1416.

[1619] *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229 (waiver of equality rights).

the contract procures certain advantages for the party who waives a constitutional right.[1620] In this case, Wilson J. dissented, indicating that each right or freedom in the Charter should be examined independently to determine if its principal objective is solely of personal importance or a matter of public interest from which there is no derogation.[1621]

In regard to aboriginal rights, a number of distinctions can be made from these Charter cases. First, most of the Charter cases where rights have been validly waived involve procedural guarantees and not substantive rights.[1622] Second, none of the Charter cases where fundamental rights have been validly waived involve a permanent loss of rights for all purposes. The Charter cases dealing with procedural guarantees permit, in some instances, solely a renunciation of certain legal rights for a specific case that is before the courts. Similarly, the *McKinney* case involved a contract for employees that, by its nature, is subject to future renegotiation and is limited in its scope to employment matters. In contrast, an extinguishment of aboriginal rights is intended by non-Aboriginal governments to eliminate forever the fundamental rights of present and future generations of Aboriginal peoples. Moreover, the constitutional rights affected are pervasive and any extinguishment of these rights has potentially far-reaching impacts on the political, social, economic, and cultural rights and interests of Aboriginal peoples.

Third, in the case of Aboriginal peoples, it is difficult to characterize elimination of aboriginal rights as "voluntary". Aboriginal peoples are generally not willing to extinguish their ancestral rights. With limited exception, the policy of the federal government has been to insist upon blanket extinguishment of aboriginal rights as a pre-requisite to entering into any land claims agreement. This insistence by government is not evident in respect to waivers of rights among the non-Aboriginal population of Canada, even for much more limited purposes.

Fourth, in the case of aboriginal rights, it is exceedingly difficult to be cognizant of the whole range of legal and other implications should an extinguishment of rights be effected. Not all of the consequences are foreseeable. Even if legal counsel are involved in aboriginal matters, lawyers also cannot predict with any accuracy all of the major ramifications. This is especially true, since the extinguishment of aboriginal rights occurs in a cross-cultural context that is difficult to fully comprehend.

In Charter cases where procedural guarantees have been waived, the Supreme Court has required that there be full knowledge of the effect of such waiver by the person concerned.[1623] However, full knowledge would be very challenging to attain in the complex situation of extinguishment of aboriginal rights.[1624]

Fifth, the waiver of constitutional rights or guarantees in Charter cases takes place in a context where there is no fiduciary relationship between the persons involved and the government. Aboriginal peoples, on the other hand, have a fiduciary relationship with the Crown. As indicated in this study,[1625] it is arguably inconsistent with the high standards required of a fiduciary to seek to obtain an extinguishment of the aboriginal rights of Aboriginal peoples.

[1620] Id. at 277, per La Forest J. See also *Douglas/Kwantlen Faculty Assn.* v. *Douglas College*, [1990] 3 S.C.R. 570 (S.C.C.). (waiver of equality rights in regard to age).

[1621] Id. at 406-407, per Wilson J.

[1622] In *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229, where equality rights were involved, the majority opinion of the Supreme Court of Canada indicated that waivers of Charter rights could be permissable in certain cases. However, it is not yet clear what the range of parameters might be if such waivers were upheld by the Court in the future.

[1623] *Korponay* v. *A.G. Canada*, [1982] 1 S.C.R. 41 (S.C.C.) at 49.

[1624] For example, it is most difficult to comprehensively gauge the impact of extinguishment on the profound relationship Aboriginal peoples have with their lands, resources and environment. Similarly, it is very hard to adequately measure the full extent of the impacts of extinguishment on the identity of Aboriginal peoples.

[1625] See discussion under sub-heading 6.4 *infra*.

Aboriginal peoples not only have constitutionally-protected rights, but in most instances are owed constitutional duties of protection by the Crown.[1626] This legal situation reinforces the view that it is a matter of public interest to safeguard the rights of Aboriginal peoples. In the view of this study, wholesale extinguishments of aboriginal rights are harmful to Aboriginal peoples and serve to seriously undermine the maintenance of their distinct identities and societies. Government insistence on such extinguishment, as a pre-condition to entering into land claims agreements, does not appear to be constitutionally permissible.[1627]

Moreover, even if Aboriginal peoples were to "agree" to blanket extinguishment of their rights, it is not clear that they would have the necessary capacity. In future, it may be viewed by the courts as unconstitutional if deemed contrary to the public interest[1628] or fundamental constitutional values. This may especially be the case, since such action purports to eliminate in a wholesale and extensive manner the constitutional rights of both present and future generations of Aboriginal peoples.

Extinguishment of aboriginal rights or any other waiver of constitutional rights or guarantees should not be used as a bargaining chip by governments against individuals or peoples. This is especially true where the persons or peoples involved are highly vulnerable to the exercise of state power, as are Aboriginal peoples in Canada.

6.6 Natural Resources Transfer Agreements, 1930 - Partial Constitutional Protections or Partial Extinguishments?

The Natural Resources Transfer Agreements raise particular questions as to whether treaty rights received constitutional protection (at least in part) or were they partially extinguished.[1629] The Transfer Agreements were entered into between the federal government and the three prairie provinces.[1630] These Agreements were accorded constitutional status by the Imperial Parliament through an amendment to the *Constitution Act* in 1930.[1631]

[1626] For example, constitutional duties of protection owed by the Crown in favour of Aboriginal peoples are found in the *Royal Proclamation of 1763* and in the terms and conditions attached to the *Rupert's Land and North-Western Territory Order*, 1870. See discussion under sub-headings 2.3 and 2.5 *supra*.

[1627] In regard to the constitutionality of government insistence on the extinguishment of aboriginal rights, see text accompanying note 34, *supra*.

[1628] See, for example, *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229 (S.C.C.) at 406-407, where Wilson J. (dissenting) suggests that waivers of constitutional rights may possibly be prevented if they run counter to the public interest. However, the Supreme Court of Canada has not yet ruled definitively on this matter.

[1629] See, generally, A. Pratt, *Discussion Paper Regarding the Natural Resources Transfer Agreements of the Prairie Provinces*, prepared for the Royal Commission on Aboriginal Peoples, May 27, 1994.

[1630] The Parliament of Canada ratified the Transfer Agreements through legislation: see *Manitoba Natural Resources Act*, 20-21 Geo. V, c. 29; *Saskatchewan Natural Resources Act*, 20-21 Geo. V, c. 41; and *Alberta Natural Resources Act*, 20-21 Geo. V, c. 3. In parallel fashion, the provincial legislatures in the prairie provinces respectively ratified the Agreement applicable to their particular province: see *Manitoba Natural Resources Act*, S.M. 1930, c. 30; *Saskatchewan Natural Resources Act*, S.S. 1930, c. 87; and *Alberta Natural Resources Act*, S.A. 1930, c. 21.

[1631] *Constitution Act, 1930*, R.S.C. 1985, Appendix II, No. 26. Section 1 of the Act provides: "The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the Constitution Act, 1867, or any Act amending same, or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid." See generally P. Hogg, *Constitutional Law of Canada*, note 1253, *supra*, vol. 1, at 27-16.

In *R.* v. *Horseman*,[1632] the Supreme Court of Canada considered the effect of clause 12 of the Natural Resources Transfer Agreement with Alberta on treaty rights of Alberta Indians under Treaty No. 8. Clause 12 provides:

> "In order to secure to the Indians of the Province the *continuance of the supply of game and fish for their support and subsistence*, Canada agrees that the laws respecting game in force in the Province from time to time shall apply to the Indians within the boundaries thereof, provided, however, that the said Indians shall have the right, which the Province hereby assures to them of *hunting, trapping and fishing game and fish for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which the said Indians may have a right of access.*"[1633] [Emphasis added.]

The relevant provision in Treaty No. 8 provides:

> "And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have *the right to pursue their usual vocations of hunting, trapping and fishing* throughout the tract surrendered as heretofore described, *subject to such regulations as may from time to time be made by the Government of the country*, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes." [Emphasis added.]

Bert Horseman, a descendant of Indian people who were parties to Treaty No. 8, had shot a bear in self-defence. About one year later, he sold the grizzly hide in dire need to earn cash to support his family. As a result, he was charged a couple of months later with trafficking in wildlife under s. 42[1634] of Alberta's *Wildlife Act*[1635]. Horseman argued that he was acting within his treaty rights when he sold the hide.

In the majority[1636] opinion in *Horseman*, Cory J. recognized that the treaty rights of the Indians under Treaty No. 8 included both domestic and commercial aspects:

> "The economy of the Indian population at the time of the Treaty had clearly evolved to such a degree that hunting and fishing for commercial purposes was an integral part of their way of life."[1637]

In construing a broad treaty right under Treaty No. 8, Cory J. concludes that the treaty right had been unilaterally reduced by clause 12 of the Natural Resources Transfer Agreement of 1930. In so doing, Cory J. invoked the "merger and consolidation" theory of earlier cases,[1638] whereby it is said that the Transfer Agreement of 1930 "had the effect of merging and consolidating the treaty rights of Indians and restricting the power of the provinces

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[1632] *Horseman* v. *The Queen*, [1990] 1 S.C.R. 901.

[1633] In the Natural Resources Transfer Agreement with Saskatchewan and Manitoba, this same clause is included as clause 12 and 13 respectively.

[1634] Section 42 provides: "No person shall traffic in any wildlife except as is expressly permitted by this Act or by the regulations."

[1635] R.S.A. 1980, c. W-9.

[1636] The decision of the Supreme Court of Canada was split 4-3: the majority opinion of Cory J. was shared by La Forest, Lamer, and Gonthier JJ.; the dissenting opinion of Wilson J. was shared by Dickson C.J. and L'Heureux-Dubé J.

[1637] *Horseman* v. *The Queen*, [1990] 1 S.C.R. 901 at 928. Cory J. (at 929) in part on A. Ray, *Commentary on Economic History of Treaty 8 Area* (Department of History, University of British Columbia, 1985) (unpublished) at 4: "...differentiating domestic hunting from commercial hunting is unrealistic and does not enable one to fully appreciate the complex nature of the native economy following contact."

[1638] Id., at 930-933. The merge and consolidation theory was first put forward by McNiven J.A. in *R.* v. *Strongquill*, (1953) 8 W.W.R. (N.S.) 247 (Sask. C.A.). See also *Moosehunter* v. *The Queen*, [1981] 1 S.C.R. 282 at 285; *R.* v. *Sutherland*, [1980] 2 S.C.R. 451 at 460; *Frank* v. *The Queen*, [1978] 1 S.C.R. 95 at 100.

to regulate the Indians' right to hunt for food."[1639] Cory J. acknowledges that a "politically and morally unacceptable"[1640] (but legal) *quid pro quo* was included in such action, in determining that a reduction of treaty rights had occurred:

> "The 1930 Agreement widened the hunting territory and the means by which the Indians could hunt for food thus providing a real *quid pro quo* for the reduction in the right to hunt for purposes of commerce granted by the Treaty of 1899. The right of the federal government to act unilaterally in that matter is unquestioned.[1641] *I therefore conclude that the 1930 Transfer Agreement did alter the nature of the hunting rights originally guaranteed by Treaty No. 8.*"[1642] [Emphasis added.]

As a result, s. 42 of the provincial *Wildlife Act* was determined to be "a law of general application which does not infringe upon the Treaty 8 hunting rights of Indians *as limited by the 1930 Transfer Agreement.*"[1643] [Emphasis added.]

It is not surprising that in a subsequent decision of the Alberta Court of Appeal, *R.* v. *Badger*,[1644] Kerans J.A. has seriously questioned the approach taken by the majority in *Horseman* about the effect of the *Constitution Act, 1930* upon treaty rights. Mr. Justice Kerans characterizes the whole approach as "deeply troubling".[1645]

First, it is extremely difficult to reconcile the approach of the Supreme Court of Canada in *Horseman* with that in *Sparrow* v. *The Queen*[1646], *R.* v. *Sioui*[1647] and *Mitchell* v. *Peguis Indian Band*[1648]. Although *Sparrow* and *Sioui* were decided only a few weeks after *Horseman*, one has to wonder if the Court decided to significantly change its orientation on the matter of extinguishment of aboriginal and treaty rights. Second, the "clear and plain intention" test was never applied in *Horseman* in regard to the Natural Resources Transfer Agreement of 1930 and the *Constitution Act, 1930.*[1649] Instead, the Court relied on the "merge and consolidation" theory, fabricated by judges in the absence of any evidence in earlier decisions.[1650] As stated by Kerans J.A. in *R.* v. *Badger*, to say that treaty rights were "merged and consolidated" in clause 12 of the Transfer Agreement is "merely a polite way to describe extinction and replacement."[1651]

[1639] *Moosehunter* v. *The Queen*, [1981] 1 S.C.R. 282 at 285 per Dickson J.

[1640] *Horseman* v. *The Queen*, [1990] 1 S.C.R. 901 at 934: "...it might well be *politically and morally unacceptable* in today's climate to take such a step as that set out in the 1930 Agreement *without consultation and concurrence of the Native peoples affected...*" In view of the historic and legal significance of treaty-making and the solemnity of the Crown's treaty obligations, it is curious that Cory J. addresses the unacceptability of unilateral breach of the treaty solely in the context of "today's climate" (which implies that such unilateral conduct by the Crown might have been acceptable in th 1930s).

[1641] At 934, Cory J. indicates that this power of the federal government was not subjected to challenge in this case.

[1642] Id., at 936.

[1643] Id., at 938.

[1644] *R.* v. *Badger*, [1993] 5 W.W.R. 7.

[1645] Id., at 14.

[1646] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075.

[1647] *R.* v. *Sioui*, [1990], 1 S.C.R. 1025.

[1648] *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85 (S.C.C.).

[1649] This point is raised in *R.* v. *Badger*, [1993] 5 W.W.R. 7 at 14 (Kerans J.A.).

[1650] This aspect will be discussed further below.

[1651] *R.* v. *Badger*, [1993] 5 W.W.R. 7 at 14. In regard to Treaty No. 6, it has been held that the right to hunt commercially was removed by the *Constitution Act, 1930*: see *R.* v. *Littlewolf*, [1992] 3 C.N.L.R. 100 (Alta. Q.B.); *R.* v. *Heathen*, [1993] 2 C.N.L.R. 157 (Sask. Prov. Ct.); *R.* v. *Wolfe*, [1993] 2 C.N.L.R. 180 (Sask. Prov. Ct.) reversed in part

Furthermore, by suggesting that a "*quid pro quo*" was provided by the federal government to Indians in the Natural Resources Transfer Agreement, the majority opinion in *Horseman* seriously distorts the meaning of this term. *Quid pro quo* does not denote a unilateral alteration of an agreement or treaty, but a "reciprocal execution"[1652] or "mutual consideration"[1653] by the parties concerned. To suggest that "a real *quid pro quo*" was provided in the Transfer Agreement for the assumed reduction of hunting rights in the treaty only serves to imply that there was some measure of fairness and to minimize the seriousness of any treaty violation.

In the dissenting opinion of Wilson J., a different interpretive approach is adopted. In taking a somewhat limited view of the commercial aspects of the harvesting rights in Treaty No. 8,[1654] Wilson J. concludes that the treaty rights are compatible with and not partially extinguished by the Transfer Agreement:

> "The Treaty 8 hunting rights were neither extinguished nor reduced by para. 12 of the Alberta Natural Resources Transfer Agreement. The territorial limits within which they could be exercised were, however, modified[1655] by para. 12."[1656]

Consequently, Wilson J. concluded that s. 42 of the *Wildlife Act* "was applicable to Treaty 8 Indians only to the extent that they were engaged in [purely] commercial or sport hunting.

Both Wilson J. and Cory J. cite a number of judicial principles of treaty interpretation that are beneficial to the Indians. These include: i) treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians;[1657] ii) in particular, it is said that clause 12 in the 1930 Transfer Agreements should be given a broad and liberal construction;[1658] and iii) it should not be be readily assumed that the federal government intended to renege on its commitments, but rather interpret an instrument, if possible, which will implement and be fully consistent with such commitments.[1659]

Cory J. indicates that it is an established principle that "the onus of proving either express

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[1994] 1 C.N.L.R. 177 (Sask. Q.B.).

[1652] W. Schwab *et al.*, *Les locutions latines et le droit positif québécois [:] nomenclature des usages de la jurisprudence* (Québec: Éditeur officiel du Québec, 1981) at 190: "*Quid pro quo*" is described as "this for that, a good and valuable consideration". The authors further comment: "Il s'agit d'un équivalent, ce qu'on fait ou donne en échange: une contrepartie ou l'exécution réciproque des parties à un contrat." Unofficial English translation: "It is a question of an equivalent, that which one makes or gives in exchange: a compensation or reciprocal execution of the parties to a contract."

[1653] *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing Co., 1990), at 1248 defines "*quid pro quo*" as "the mutual consideration which passes between the parties to a contract, and which renders it valid and binding."

[1654] Id., at 919. Wilson J. indicates that the "right for food" in the Transfer Agreement extends to hunting for "support" and "subsistence" (the words used in Treaty No. 8). In order to ensure compatibility between the two instruments in question and not impute an intention by the federal government to renege on its treaty commitments, Wilson J. interprets the treaty rights and Transfer Agreement rights of Indians as "hunting not only for the direct consumption but also hunting for other items as was their wont, *as opposed to purely commercial* or sport hunting." Cory J., in the majority opinion, does not qualify in any way the commercial right of the Indians under Treaty No. 8.

[1655] In the 1930 Transfer Agreement, the territorial limits of the Indians' "right to hunt, fish and trap for food at all seasons of the year on all unoccupied Crown lands and on any other lands to which Indians may have a right of access" goes beyond the treaty area within Alberta in Treaty No. 8.

[1656] Id., at 923.

[1657] Id., at 906 per Wilson J., citing *Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29 at 36 per Dickson J. Similarly, see also Cory J. at 930.

[1658] Id. at 916-917 per Wilson J., citing *R.* v. *Sutherland*, [1980] 2 S.C.R. 451 at 461 per Dickson J.

[1659] Id., at 908 per Wilson J. At 911, she emphasizes that the evidence is unanimous that "the government of Canada's promise that hunting, fishing and trapping rights would be protected forever was the *sine qua non* for obtaining the Indians' agreement to enter into Treaty No. 8."

or implied extinguishment lies upon the Crown."[1660] Further, Wilson J. cites G. La Forest, *Natural Resources and Public Property under the Canadian Constitution*[1661] to the effect that it is quite proper to look to the Indian treaties (in Western Canada) in determining the meaning of the clause 12 of the Transfer Agreements.[1662] This cannot mean looking at the Transfer Agreements first and then concluding that the rights in Treaty No. 8 have been extinguished and replaced.

Wilson J. indicates in effect that the Natural Resources Transfer Agreements should be interpreted as an attempt to respect treaty commitments, i.e by providing in part constitutional protection, rather than as an attempt to partially extinguish treaty rights:

> "In my view, the decisions in *Smith*[1663] and *Wesley*[1664], cases that were decided shortly after the Transfer Agreement came into force, as well as later decisions in cases like *Strongquill*[1665] and *Frank*[1666], make clear that, to the extent possible, one should view para. 12 of the Transfer Agreement as *an attempt to respect the solemn engagement embodied in Treaty No. 8, not as an attempt to abrogate or derogate from that treaty.*"[1667] [Emphasis added.]

Madame Justice Wilson emphasizes a further principle regarding Parliament that would serve to uphold the honour of the Crown:

> "The view expressed in *Smith* and *Strongquill* to the effect that *one should assume that Parliament intended to live up to its obligations under treaties with the Indian* was subsequently approved by this Court in *Prince and Myron* v. *The Queen*[1668]..." [Emphasis added.]

With full respect to both the majority and dissenting opinions, it is submitted that neither decision fully and fairly applied the principles of judicial interpretation relating to treaties and statutes pertaining to Aboriginal peoples.

First, it is important that the rights of Indians under Treaty No. 8 not be diminished in order to ensure compatibility with the Transfer Agreements of 1930. As accommodated by the terms of Treaty No. 8, the Indians have harvesting rights that include commercial activities.[1669]

Second, according to recognized interpretation principles, the right to hunt, fish and trap

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[1660] Id., at 930.

[1661] G. La Forest, *Natural Resources and Public Property under the Canadian Constitution* (Toronto: University of Toronto Press, 1969) at 180.

[1662] Id., at 914.

[1663] *R.* v. *Smith*, [1935] 3 D.L.R. 703.

[1664] *R.* v. *Wesley*, [1932] 2 W.W.R. 337.

[1665] *R.* v. *Strongquill*, (1953) 8 W.W.R. (N.S.) 247 (Sask. C.A.).

[1666] *Frank* v. *The Queen*, [1978] 1 S.C.R. 95.

[1667] Id., at 916.

[1668] *Prince and Myron* v. *The Queen*, [1964] S.C.R. 81.

[1669] See also *R.* v. *Arcand*, [1989] 2 C.N.L.R. 110 (Alta. Q.B.) per Conrad J. In A. Pratt, *Discussion Paper Regarding the Natural Resources Transfer Agreements of the Prairie Provinces*, prepared for the Royal Commission on Aboriginal Peoples, May 27, 1994, at 40-41, the author comments on this decision as follows: "[This decision] found that the right to hunt commercially under Treaty 6 was given constitutional protection by section 35 and that the NRTA implied the continuance of treaty rights pursuant to regulations rather than their extinguishment. With all respect, this is the correct analysis."

for food under the Transfer Agreements should include the commercial aspects of the Indians activities, since they engage in them for their "support and subsistence".[1670]

Third, if the right to food is interpreted as falling short of the treaty rights in Treaty No. 8, then the legal effect of the Transfer Agreements would be to accord constitutional protection to part of the treaty rights without extinguishing or reducing the other aspects of these rights. In other words, in the absence of clear and uncontrovertible evidence that the Imperial Parliament[1671] and the governments concerned intended to limit the traditional rights of Aboriginal peoples through constitutional amendment (i.e. the *Constitution Act, 1930*), it cannot be concluded that by providing constitutional protection to certain aspects of Indian treaty rights, other parts were necessarily extinguished. No such interpretive rule exists in relation to Aboriginal peoples. Even in regard to constitutional instruments in general, the suggested method of interpretation is that they "should be interpreted in a large liberal and comprehensive spirit".[1672]

In *A.G. Québec* v. *Sioui*, Lamer J. made clear that an agreement made between the English and a non-Aboriginal party could not extinguish a treaty concluded between the English and an Aboriginal people, which treaty is considered sacred:

> "*It would be contrary to the general principles of law for an agreement concluded between the English and the French to extinguish a treaty concluded between the English and the Hurons*. It must be remembered that a treaty is a solemn agreement between the Crown and the Indians, an agreement the nature of which is sacred: *Simon*[1673]...at p. 410, and *White and Bob*[1674]...at p. 649. *The very definition of a treaty thus makes it impossible to to avoid the conclusion that a treaty cannot be extinguished without the consent of the Indians concerned*. Since the Hurons had the capacity to enter into a treaty with the British, therefore, they must be the only ones who could give the necessary

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[1670] See *R.* v. *Badger*, [1993] 5 W.W.R. 7 at 16 per Kerans J.A.: "By its terms, [para. 12 of the Transfer Agreement] is simply an assurance that provincial game laws shall *not* apply to Indians if these two conditions are met: they are hunting for food, and on unoccupied Crown lands. *On the face of it, I see no derogation of any pre-existing right to hunt, only a derogation of the power of the province to regulate the hunt.*" [Emphasis added.]

[1671] For example, there is no evidence that the Canadian government communicated to the Imperial government or Parliament that Canada was seeking to extinguish and replace the treaty rights of Aboriginal peoples in the Prairies. Such explicit communication with the Imperial government was constitutionally required in regard to the Prairie provinces, in view of the terms and conditions of the *Rupert's Land and North-Western Territory Order*, 1870.

[1672] *Edwards* v. *A.G. Canada*, [1930] A.C. 124 at 136 (P.C.). Note also that, in regard to the *Canadian Charter of Rights and Freedoms* in the *Constitution Act, 1982*, s. 26 provides: "The guarantee in this Charter of certain rights or freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada." In P. Hogg, "A Comparison of the Canadian Charter of Rights and Freedoms with the Canadian Bill of Rights" in W.S. Tarnopolsky & G.-A. Beaudoin, (eds.), *The Canadian Charter of Rights and Freedoms [:] Commentary* (Toronto: Carswell, 1982) 1 at 3, it is explained: "[Section 26] *makes clear* that the Charter is not to be regarded as impliedly repealing the Canadian Bill of Rights or provincial bills of rights or other constitutional or statutory provisions protecting 'other rights or freedoms'...In other words, a person would be entitled to invoke the provisions of the Canadian Bill of Rights where they are more favourable to him than the Charter, as they are with respect to several matters." [Emphasis added.]

In the Natural Resources Transfer Agreements and the *Constitution Act, 1930*, there are no such interpretive provisions or "for greater certainty" clauses as s. 26 above. However, if this omission creates an uncertainty, then it cannot be concluded that the Imperial Parliament had a "clear and plain intention" to extinguish unilaterally the treaty rights of Aboriginal peoples under another instrument (*viz.*, Treaty No. 8).

See also *A.G. Québec* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1064-65, where Lamer J. refused to come to the conclusion that the Royal Proclamation by recognizing and affirming the rights of Aboriginal peoples intended therefore to extinguish any treaty rights: "I see nothing in these passages [of the Proclamation] which can be interpreted as an intention on the part of the British Crown to extinguish the treaty of September 5. *The Proclamation confers rights on the Indians without necessarily thereby extinguishing any other right conferred on them by the British Crown under a treaty.*" [Emphasis added.]

[1673] *Simon* v. *The Queen*, [1985] 2 S.C.R. 387.

[1674] *R.* v. *White and Bob*, (1964) 50 D.L.R. (2d) 613 (B.C.C.A.).

consent to its extinguishment."[1675] [Emphasis added.]

Further, in *Mitchell* v. *Peguis Indian Band*, La Forest J. emphasized the following judicial rule of statutory interpretation pertaining to Aboriginal peoples:

> "...it is clear that *in the interpretation of any statutory enactment dealing with Indians*,...it is appropriate to interpret in a broad manner provisions that are aimed at maintaining Indian rights, and to interpret narrowly provisions aimed at limiting or abrogating them. *Thus if legislation bears on treaty promises, the courts will always strain against adopting an interpretation that has the effect of negating commitments undertaken by the Crown*; see *United States* v. *Powers*, 305 U.S. 527 (1939), at p. 533."[1676] [Emphasis added.]

In light of the above conclusions of Lamer J. (on behalf of the Supreme Court of Canada) in *Sioui* and La Forest J. in *Mitchell*, it is difficult to comprehend how the Natural Resources Transfer Agreement between the federal government and provincial governments in the Prairies (or the *Constitution Act, 1930*) could unilaterally extinguish, through a hypothetical "merge and consolidation" theory, the treaty rights of Aboriginal peoples under Treaty No. 8.

In particular, the "merge and consolidation" theory suggested in *Horseman* and earlier cases[1677] is based on no solid evidence of any kind that would lead to the firm conclusion of "clear and plain intention" to extinguish or reduce existing aboriginal or treaty rights.[1678] As Wilson J. underlined in *Horseman*, the Supreme Court should not take such a position in the absence of historical evidence, especially since it would imply bad faith on the part of the Crown:

> "*The [government] in this appeal has not pointed to any historical evidence* in support of its claim that para. 12 of the Transfer Agreement was intended to limit the Indians' traditional hunting right to hunt and fish (which included a right of exchange) to one confined to hunting and fishing for personal consumption only. *Absent such evidence, and in view of the implications of bad faith*[1679] *on the part of the federal government which would arise from it, I am not prepared to accept that this was the legislature's intent.*"[1680] [Emphasis added.]

In *R.* v. *Badger*,[1681] Kerans J.A. indicates that there was no intention to alter the

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[1675] *A.G. Quebec* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1063. Lamer J. added that the same reasoning would apply in regard to the Treaty of Paris of 1763 between France and England: "England and France could not validly agree to extinguish a treaty between the Hurons and the English, *nor could France claim to represent the Hurons regarding the extinguishment of a treaty the Hurons had themselves concluded with the British Crown.*" [Emphasis added.]

[1676] *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85 (S.C.C.) at 143.

[1677] In *R.* v. *Badger*, [1993] 5 W.W.R. 7 at 18-120, Kerans J.A. describes how the "merge and consolidation" theory gradually gained acceptance by a slim majority as extinguishing and replacing existing treaty rights. Kerans J.A. indicates that the theory was first referred to "fatefully and unnecessarily" by McNiven J.A. in *R.* v. *Strongquill*, (1953) 8 W.W.R. (N.S.) 247 at 267, since it was "unnecessary in that case to examine Treaty obligations" (provincial regulation failed for lack of legislative jurisdiction). Then, in *Frank* v. *The Queen*, [1978] 1 S.C.R. 95, Kerans J.A. indicates that "the Supreme Court took the first step toward adoption of the doctrine of merger and consolidation. It effectively refused to accept that para. 12 was a mere re-statement of Treaty rights, and held that it created new rights. *It did not, however, commit itself to the idea that these new rights replaced old rights.*" [Emphasis added.] In *Horseman*, a slim majority took the last step of concluding that the merge and consolidation notion in para. 12 of the Transfer Agreement had the effect of replacing the existing treaty rights with a new right.

[1678] For a similar conclusion, see S. Grammond, *Les traités entre l'État canadien et les peuples autochtones* (Cowansville, Québec: Les Éditions Yvon Blais, 1994), at 161-162.

[1679] On the same page as this statement, Wilson J. emphasizes the need to be extremely hesitant about concluding that there was an intention to effect "serious and invidious restrictions" through the Transfer Agreement.

[1680] Id., at 916.

[1681] *R.* v. *Badger*, [1993] 5 W.W.R. 7.

rights of Aboriginal peoples when non-Aboriginal governments negotiated the 1930 Agreements:

> "I incline to the view that *they did not believe they were changing any native rights*. I fear the notion of "merger and consolidation" is the result of a patina applied by a later generation of judicial interpretation. That is the reason for my disquiet...
>
> In my view, *para. 12 of the Natural Resources Transfer Agreement is not about extinction, nor indeed extension of Treaty rights*. It seems, rather, to have been an attempt to confer on one level of government, the province, a broad power to regulate the hunt, subject to those rights."[1682] [Emphasis added.]

In addition, Kerans J.A. adds that in the early cases following the coming into force of the *Constitution Act, 1930*, extinguishment of treaty rights by such Act was not even a consideration before the Alberta Court of Appeal:

> "When the matter reached this Court, there was no argument that Treaty rights had been abolished or superseded. See *R.* v. *Wesley*, [1932] 2 W.W.R. 337 (Alta. C.A.). On the contrary, McGillivray J.A. noted that it was 'common ground' that Wesley was 'entitled to the benefits" of the Treaty."[1683]

Depending on the interpretation given to clause 12 of the Transfer Agreements, the *Constitution Act, 1930* subjected a part of Indian treaty rights to provincial regulation between 1930 and 1982.[1684] However, such regulation had to be justified as being, for example, in the interest of conservation or Aboriginal peoples.[1685] Since April 17, 1982, when s. 35(1) recognized and affirmed treaty rights, any existing treaty rights that did not receive constitutional protection in 1930 through the Transfer Agreements became constitutionally protected under s. 35(1).

It can perhaps be said that a uniform policy of constitutionally protected harvesting rights relating to Aboriginal peoples[1686] in the Prairie provinces was realized through the 1930 Transfer Agreements. However, this did not mean (nor is there any factual evidence) that other existing aboriginal or treaty rights relating to harvesting were extinguished through any "merge and consolidation" theory. As suggested by the Supreme Court of Canada in *Frank* v. *The*

[1682] Id., at 15.

[1683] Id., at 17.

[1684] See, for example, *R.* v. *Smith*, [1935] 2 W.W.R. 433 at 436 per Turgeon J.A.: "It follows therefore that whatever the situation may have been in earlier years the extent to which Indians are now exempted from the operation of the game laws of Saskatchewan is to be determined by an interpretation of par. 12, given force of law by this Imperial statute." This statement is cited by Cory J. in *Horseman*, *supra*, at 931. However, the subjection of some but not all treaty rights to provincial regulation does mean that the "merge and consolidation" theory had been intentionally effected by the Crown to extinguish or reduce Indian treaty rights.

[1685] It is critical to note that clause 12 characterizes the overall intention of the provision, including the provincial regulatory power, with the following objective: "*In order to secure to the Indians of the Province the continuance of the supply of game and fish for their support and subsistence...*". [Emphasis added.] See *Horseman* v. *The Queen*, [1990] 1 S.C.R. 901 at 912-913, where Wilson J. refers to the report of the treaty Commissioners stating that a solemn assurance was made that only such laws "as were in the interest of the Indians and were found necessary in order to protect the fish and fur-bearing animals would be made." See also Cory J. at 935: "The Commissioners specifically observed that the right of the Indians to hunt, trap and fish as they had always done would continue with the proviso that these rights would have to be exercised subject to such laws as were necessary to protect the fish and fur-bearing animals on which the Indians depended for their sustenance and livelihood." Also, in *R.* v. *Badger*, [1993] 5 W.W.R. 7 at 16, Kerans J.A. provides: "...para. 12 affirmed the power of the provinces in question to make laws about game management, and granted them the power to subject aboriginal Canadians to them. But it limited the power in two ways: one purpose of the regulation must be to secure supply for aboriginal Canadians, and any regulation must comply with Treaties or other aboriginal rights."

[1686] Note that in *R.* v. *Ferguson*, [1993] 2 C.N.L.R. 148 (Alberta Prov. Ct.) per Goodson J., it was determined that "Indian" as used in the Natural Resources Transfer Agreements includes "non-status Indians" and might possibly include "Metis".

Queen,[1687] the rights of other "Indians" were constitutionally recognized in 1930. In particular, "Indians within the boundaries" refers not only to Indians living in Alberta but also to those "who, at any particular moment, happen to be found within the boundaries of the province of Alberta."[1688]

In *A.G. Québec* v. *Sioui*, the Supreme Court did not accept the government's argument that the Royal Proclamation extinguished treaty rights (in what might have been described as a "merge and consolidation" of Aboriginal peoples' rights). When the Crown (in right of Quebec) argued that the Royal Proclamation extinguished the treaty of September 5, 1760 with the Hurons, Lamer J. concluded that the British Crown had no intention to extinguish any treaty rights:

> "I see nothing in these passages which can be interpreted as an intention on the part of the British Crown to extinguish the treaty of September 5. *The Proclamation confers rights on the Indians without necessarily thereby extinguishing any other right conferred on them by the British Crown under a treaty.*"[1689] [Emphasis added.]

It is worth noting that Cory J. in *Horseman* indicates that he bases his conclusions on the fact that the federal government had the right to unilaterally modify treaty rights of Aboriginal peoples in 1930:

> "The right of the Federal Government to act unilaterally in that manner is unquestioned. I therefore conclude that the 1930 Transfer Agreement did alter the nature of the hunting rights originally guaranteed by Treaty No. 8."[1690]

However, even if there existed a federal capacity to unilaterally modify treaty rights in 1930, this does not necessarily mean that such an intention existed. The "strict proof of the fact of extinguishment" necessary in each case, as emphasized by the Supreme Court in *Simon*[1691] and *Sparrow*, never materialized in the *Horseman* case.

Moreover, it is far from clear that Canada had the power to unilaterally alter or abrogate the treaty rights of Aboriginal peoples during that period.[1692] In particular, Canada was constitutionally bound to the settle the claims of Aboriginal peoples "in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines". These principles could hardly accommodate unilateral extinguishment of treaty rights, without even consultation. In *R.* v. *Wesley*,[1693] McGillivray J.A. cites the constitutional terms and conditions[1694] relating to Aboriginal peoples that bind Canada in

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[1687] *Frank* v. *The Queen*, [1978] 1 S.C.R. 95.

[1688] Id. at 96 per Dickson J., where it is said that this larger group have the right of hunting, trapping and fishing game and fish for food at all seasons of the year on unoccupied Crown lands and on any other lands to which the Indians may have a right of access.

[1689] *A.G. Québec* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1064-1065.

[1690] *Horseman* v. *The Queen*, [1990] 1 S.C.R. 901 at 936.

[1691] *Simon* v. *The Queen*, [1985] 2 S.C.R. 387 at 405–406 (per Dickson C.J.).

[1692] It would appear that, even prior to 1982, the Parliament of Canada did not have unfettered authority to adopt laws in violation of treaty obligations.

[1693] *R.* v. *Wesley*, [1932] 2 W.W.R. 337 at 349.

[1694] *Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada*, Schedule (A), R.S.C. 1985, App. II, No. 9, 8 at 8-9: "...*upon the transference of the territories in question* to the Canadian government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled *in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines*...[December 1867 Address]; and *Address*, Schedule (B), R.S.C. 1985, App. II, No. 9, 14 at 16: "That *upon the transference of the territories in question* to the Canadian Government *it will be our duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer*..." [May 1869 Address]

relation to the Imperial *Rupert's Land and North-Western Territory Order*[1695]. The Alberta Court of Appeal judge then adds:

> "Assuming as I do that our treaties are on no higher plane than other formal agreements yet *this in no wise makes it less the duty and obligation of the Crown to carry out the promises contained in those treaties with the exactness which honour and good conscience dictate and it is not to be thought that the Crown has departed from those equitable principles* which the Senate and the House of Commons declared in addressing Her Majesty in 1867, uniformly governed the British Crown in its dealings with the aborigines."[1696] [Emphasis added.]

McGillivray J.A.'s comments were cited recently in *R.* v. *Badger*[1697], where Kerans J.A. raised significant doubts about the capacity of the Crown to unilaterally extinguish treaty rights, when he stated:

> "The commitment thus expressed [by McGillivray J.A.] offers a very different view of the power of Canada to abrogate treaties."[1698]

In addition, if the commitments of Canada in the joint addresses of Parliament[1699] in 1867 and 1869 are of a constitutional nature, the fiduciary obligations that arise in carrying out such commitments (especially in the case of purported surrenders or extinguishments of aboriginal title) would also be of a constitutional nature.[1700] This fiduciary duty of Parliament would further limit its capacity to act in a manner detrimental to Aboriginal peoples.

In regard to the hunting, fishing and trapping rights referred to in Treaty No. 8, the treaty indicates that such rights are "subject to such regulations as may from time to time be made by the Government of the country". That any future regulation of harvesting activities would have to be in the interests of conservation and the Indians concerned is confirmed by the report of the Commissioners who negotiated Treaty No. 8 on behalf of the Crown:

> "...over and above the provision, we had to solemnly reassure [the Indians] that only such laws as to hunting and fishing as were in the interest of the Indians and were found to be necessary in order to protect the fish and fur-bearing animals would be made, *and they would be as free to hunt and fish after the treaty as they would be if they never entered into it.*"[1701] [Emphasis added by Cory J.]

In addition, Corey J. indicates that the "Government of the country" has been altered by the Transfer Agreement to include provincial authority.[1702] If such is the case, then it can also be argued that the right of self-government under s. 35(1) of the *Constitution Act, 1982* has in

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[Emphasis added.].

[1695] *Rupert's Land and North-Western Territory Order*, R.S.C. 1985, App. II, No. 7, confirmed as part of the Constitution of Canada in Item 3 of the Schedule to the *Constitution Act, 1982*. It is not clear whether Alberta was a part of Rupert's Land or the North-Western Territory, but in either case the Imperial Order applies to Alberta. See K. McNeil, *Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations*, note 1350, *supra*, at 2-5.

[1696] *R.* v. *Wesley*, [1932] 2 W.W.R. 337 at 351.

[1697] *R.* v. *Badger*, [1993] 5 W.W.R. 7.

[1698] Id. at 20.

[1699] Reference is being made here to the terms and conditions relating to Aboriginal peoples that bind Canada in relation to the Imperial *Rupert's Land and North-Western Territory Order* (referred to above).

[1700] See generally *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075.

[1701] *Horseman* v. *The Queen*, [1990] 1 S.C.R. 901 at 929.

[1702] Id., at 935.

turn altered the *Constitution Acts* of 1930 and 1867. If this view is correct, then Aboriginal rights of self-regulation that are recognized and affirmed would result in Aboriginal laws that prevail over federal or provincial laws within the sphere of aboriginal authority. As B. Slattery provides:

> "[Subject to certain limitations], Provincial laws of general application may validly apply to Aboriginal people and their territories so long as the laws fall within Provincial jurisdiction and do not conflict with valid Federal or Aboriginal laws. *Where such a conflict occurs, the Federal or Aboriginal laws will take precedence.* So, within its sphere of authority, an Aboriginal government may prevent the application of Provincial statutes by enacting divergent legislation."[1703] [Emphasis added.]

Similarly, K. McNeil states:

> "To the extent that Aboriginal and treaty rights are adequately regulated by Aboriginal laws, federal laws infringing those rights cannot apply to them. This conclusion flows from the *Sparrow* decision...[I]f an Aboriginal people is already regulating its own rights in a way which is consistent with the [valid federal] legislative objective, there can be no need, and therefore no justification, for the federal laws to apply."[1704]

In conclusion, in the view of this study, the Natural Resources Transfer Agreements and the *Constitution Act, 1930* provide constitutional protection for a portion of the aboriginal and treaty rights of Aboriginal peoples in the Prairie provinces.[1705] Prior to 1982, other aspects of their aboriginal and treaty rights may or may not have had constitutional protection (based on other instruments), depending on the particular facts involved in each case and the interpretation of other applicable constitutional instruments.[1706] In any event, in the absence of "clear and plain intention", these other aspects of aboriginal and treaty rights were not extinguished in 1930.

6.6.1 Is federal law-making limited by the 1930 Transfer Agreements?

In *Daniels* v. *White* and *The Queen*,[1707] the Supreme Court of Canada decided by a slim 5-4 majority that the Natural Resources Transfer Agreement of 1930 in regard to Manitoba did not impose any obligations or restrictions on the federal government or Parliament. The Court concluded that any obligations or restrictions that were created were on the provincial government and legislature. This ruling has since been followed by the Supreme Court in *Elk* v. *The Queen*.[1708]

In *Daniels*, the appellant, an Indian from the province of Manitoba, was convicted of

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[1703] B. Slattery, *First Nations and the Constitution: A Question of Trust*, (1992) 71 Can. Bar Rev. 261 at 284. At 282, Slattery indicates: "...in the case of conflict between Aboriginal laws and Federal legislation enacted under section 91, valid Aboriginal laws (including customary laws) will take precedence, except where the Federal laws can be justified under the section 35 standard laid down in the *Sparrow* case."

[1704] K. McNeil, *Envisaging Constitutional Space for Aboriginal Governments*, note 1340, *supra*, at 134-135.

[1705] A similar conclusion of "partial" constitutional protection arising from the *Constitution Act, 1930* (i.e. not "partial" extinguishment of treaty rights) is reached in S. Grammond, *Les traités entre l'État canadien et les peuples autochtones* (Cowansville, Québec: Les Éditions Yvon Blais, 1994), at 161. At 162, the author expresses the firm hope that the *Horseman* decision will be reversed.

[1706] For example, according to the circumstances, one would have to consider the constitutional implications and effect of the *Royal Proclamation of 1763* and the terms and conditions of the *Rupert's Land and North-Western Territory Order*, 1870.

[1707] *Daniels* v. *White and The Queen*, [1968] S.C.R. 517.

[1708] *Elk* v. *The Queen*, [1980] 2 S.C.R. 166.

having game birds in his possession, contrary to the *Migratory Birds Convention Act*[1709]. The issue in appeal before the Supreme Court of Canada was whether para. 13 of the 1930 Transfer Agreement exempted the appellant from compliance with the *Migratory Birds Convention Act*[1710] and its regulations.

Para. 13 of the Transfer Agreement provides:

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

In determining that the appellant was not exempted from compliance with the federal *Migratory Birds Convention Act* and regulations, the Supreme Court judges who formed part of the majority opinion[1711] based their decision on the following arguments:

i) **Specific obligations and restrictions placed only on the transferee (province).** In this regard, Judson J. provides: "The whole tenor of the agreement is that of a *conveyance of land* imposing specified obligations and restrictions on the transferee, not on the transferor."[1712]

In response, one might note that it is not accurate to describe the 1930 Transfer Agreement simply as a "conveyance of land". The Agreement provides for the administration of a whole territory, including financial arrangements. Moreover, it deals not only with a transfer of unalienated natural resources but also questions of jurisdiction. In this broad context, the rights and interests of Aboriginal peoples and others[1713] are specifically addressed in the Agreement.

Rather than executing a real estate transaction, the federal government was clearly providing for the rights and interests of all parties concerned. Within this framework, it is to be expected that the rights of Aboriginal peoples would be safeguarded in a manner consistent with any relevant treaties. As Judson J. states: "As indicated by para. 11 of the agreement...*Canada*, in negotiating these agreements, *was mindful of the fact it had treaty obligations with Indians on the Prairies.*"

The Transfer Agreement also makes reference in its preamble to the "conditions and stipulations contained in the Agreement for the surrender of Rupert's Land by the Hudson's Bay Company to Her Majesty".[1714] These conditions and stipulations led to constitutional terms

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[1709] *Migratory Birds Convention Act*, R.S.C. 1952, c. 179 (now in R.S.C. 1985, c. M-7).

[1710] Section 6 of the Act provides: "No person, *without lawful excuse*, the proof whereof shall lie on such person, the proof whereof shall lie on such person, shall buy, sell or have in his possession any migratory game bird, migratory insectivorous bird or migratory nongame bird, or the nest or egg of any such bird or any part of any such bird, nest or egg, during the time when the capturing, killing or taking of such bird, nest or egg is prohibited by this Act." [Emphasis added.]

[1711] The judgment of Fauteux, Abbott, Martland and Judson JJ. was delivered by Judson J.; Pigeon J. rendered a separate opinion, but reached the same result.

[1712] *Daniels* v. *White* and *The Queen*, [1968] S.C.R. 517 at 524.

[1713] See, for example, the provisions for existing trusts and interests affecting mines, minerals or royalties (para. 1); soldiers (para. 14); and for public shooting grounds (para. 19). The Memorandum of Agreement is attached as a Schedule to *The Manitoba Natural Resources Act*, 20-21 George V, c. 29.

[1714] See *Rupert's Land Act, 1868*, 31-32 Vict., c. 105, s. 3: "...provided, however, that such Surrender shall not be accepted by Her Majesty until the Terms and Conditions upon which Rupert's Land shall be admitted into the said Dominion of Canada shall have been approved by Her Majesty, and *embodied in an Address to Her Majesty from both the Houses of the Parliament of Canada in pursuance of [s. 146 of the BNA] Act, 1867.*" [Emphasis added.]

and conditions that were embodied in the joint addresses of the Parliament of Canada and that are binding on both the federal and provincial governments and legislatures.

In particular, the Canadian government had an affirmative constitutional duty to "make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer."[1715] In light of these constitutional obligations owed by the government of Canada to Aboriginal peoples in Rupert's Land, it is unlikely that the intention was to only place restrictions and obligations on the province and leave the federal government with the possible liberty[1716] to violate its treaty obligations.

ii) **Only provincial (not federal) laws contemplated by the parties.** Judson J. indicates that the phrase in para. 13, "...laws respecting game in force in the province" only contemplates provincial game laws and not federal enactments.

It is unclear whether only provincial laws or also federal laws were foreseen by the above phrase. In any event, the issue to be decided is whether the phrase "Canada agrees" applies only to the phrase immediately following (i.e. extending provincial jurisdiction over game) or if it also applies to the rest of that sentence (i.e. the substantive right of "Indians" to hunt, fish, and trap for food at all seasons of the year).

Ritchie J., Hall J. and Cartwright C.J. conclude that the words "which the Province hereby assures to them" in para. 13 "do not have the effect of limiting the rights accorded to Indians to provincial rights, but rather that they constitute additional assurance of the general rights described in the paragraph."[1717]

It would appear that the above analysis of Ritchie J., Hall J. and Cartwright C.J. is more in keeping with the various rules of judicial interpretation that would apply in this case. However, rules pertaining to interpretation of constitutional instruments or to enactments that relate to Aboriginal peoples were never explicitly considered in *Daniels* by any of the Supreme Court judges.

As already described in this study, the doctrine of progressive interpretation of constitutional documents would require a generous, broad and liberal interpretation that would clearly favour the full enjoyment of the Aboriginal peoples' rights.[1718] A similar liberal approach in respect to interpreting statutes or agreements relating to Aboriginal peoples would lead to the same conclusion of affirming the full scope of such rights.[1719] In *Mitchell* v. *Peguis Indian Band*, LaForest J. provides: "...it is appropriate to *interpret in a broad manner provisions that are aimed at maintaining Indian rights*, and to *interpret narrowly provisions aimed at limiting or abrogating them*."[1720] [Emphasis added.]

Further, in *Simon* v. *The Queen*, Dickson C.J. concludes:

> "Given the serious and far-reaching consequences of a finding that a treaty right has been extinguished, *it seems appropriate to demand strict proof of the fact of extinguishment in each case where the issue arises*. As Douglas J. said in *United States* v. *Santa Fe Pacific*

[1715] For a full description of the constitutional obligations contained in the joint addresses of Parliament, see text accompanying note 341 *et seq.* In addition, "the claims of Indian tribes" were to be "settled *in conformity with the equitable principles* which have uniformly governed the British Crown in its dealings with the aborigines."

[1716] In the view of this study, the capacity of the Canadian government and Parliament to violate treaty obligations was not unfettered. See discussion in text accompanying note 1692 *et seq.*

[1717] *Daniels* v. *White* and *The Queen*, [1968] S.C.R. 517 at 527 per Ritchie J. (dissenting).

[1718] The doctrine of progressive interpretation is described in the text accompanying note 332 *et seq.*

[1719] Judicial rules of statutory interpretation are discussed in the text accompanying note 304 *et seq.*

[1720] *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85, at 143.

Ry. Co....extinguishment cannot be lightly implied."[1721] [Emphasis added.]

Given Canada's constitutional obligations (see above) and the absence of any evidence that the federal government was seeking to establish or preserve a capacity to extinguish treaty rights in effecting the 1930 Transfer Agreements, it should not be presumed that the federal Crown did not wish in any way to be limited by its constitutional terms. Further, in light of the Canadian government's fiduciary and other constitutional obligations under the *Rupert's Land and North-Western Territory Order* and the Canadian Parliament's commitments in this regard, it is by no means clear that the government or Parliament had any capacity of unilateral extinguishment of treaty rights to preserve.

iii) **1930 agreements and legislation did not repeal by implication the *Migratory Birds Convention Act*.** Judson J. indicates that the 1930 Transfer Agreements and the *Constitution Act, 1930* "did not repeal by implication a statute of Canada giving effect to an international convention".[1722]

In *Daniels*, it was not a question of repealing the whole statute but merely declaring s. 6 of the *Migratory Birds Convention Act* inapplicable to the extent of any inconsistency with para. 13 of the 1930 Transfer Agreement.[1723] Moreover, s. 6 itself did not provide for any absolute prohibition in regard to migratory birds but indicated that the prohibition applied to persons "without lawful excuse".[1724] In *Daniels*, the "lawful excuse" was the constitutional right emanating from the 1930 Transfer Agreement in para. 13 and the relevant Treaties No. 5 and 6.

In addition, para. 13 since 1930 has been entrenched in a constitutional amendment. Section 1 of the *Constitution Act, 1930* provides that the 1930 Transfer Agreements:

> "...shall have the force of law *notwithstanding* anything in the British North America Act, 1867, or any Act amending the same, or *any Act of Parliament of Canada*, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid." [Emphasis added.]

From s. 1 above, it is clear that the Imperial Parliament contemplated derogating from "any Act of Parliament of Canada". This would certainly include the *Migratory Birds Convention Act*. Cartwright C.J. emphasized the all-encompassing nature of this non-derogation clause as follows:

> "I find it impossible to uphold the conviction of the appellant unless we are able to say that, by the application of some rule of construction, there should be inserted in s. 1 of the *British North America Act, 1930*, immediately after the words, 'Parliament of Canada' the words 'except the *Migratory Birds Convention Act*'. I know of no such rule which permits us to take such a course."[1725]

iv) **Presumption not to legislate in breach of any treaty or established rules of international law.** In this regard, Pigeon J. states:

> "...this is a case for the application of the rule of construction that Parliament is not presumed to legislate in *breach of a treaty* or in any manner *inconsistent with the comity*

[1721] *Simon* v. *The Queen*, [1985] 2 S.C.R. 387, at 405-406. Cited with approval in *A.G. Quebec* v. *Sioui*, [1990] 1 S.C.R. 1025 (S.C.C.) at 1061.

[1722] *Daniels* v. *White* and *The Queen*, [1968] S.C.R. 517 at 526.

[1723] *Daniels* v. *White* and *The Queen*, [1968] S.C.R. 517 at 527 per Ritchie J.

[1724] Section 6 is quoted in note 1710 *supra*.

[1725] *Daniels* v. *White* and *The Queen*, [1968] S.C.R. 517 at 521-522.

of nations and the established rules of international law."[1726]

In response, it should be noted that there is no rule that states this rule takes precedence over the judicial rules of interpretation in regard to constitutional instruments or provisions that relate to Aboriginal peoples (referred to above). In addition, we have already seen that s. 6 of the *Migratory Birds Convention Act* contemplates exceptions for persons "with lawful excuse". Further, P.A. Côté states that "[t]he principle can apply not only to international treaties and conventions, but to analogous agreements such as *treaties with indigenous peoples* and federal-provincial tax accords implemented by regulation."[1727]

v) **Must not reach an interpretation that has no relation to the stated purpose of the agreement**. Pigeon J. states that the purpose of the Transfer Agreement is stated in the preamble to be that "the Province be placed in a position of equality with the other provinces with respect to the adminstration and control of its natural resources".[1728] Consequently, he indicates that "it would not only be foreign to this object but even inconsistent with it, to provide for an implied modification of the *Migratory Birds Convention Act*."[1729]

With respect, the above purposive analysis of Pigeon J. is far from comprehensive and fails to consider other essential purposes of the Transfer Agreement. In particular, no reference whatsoever is made to the fundamental objective of safeguarding the rights of Aboriginal peoples.[1730] Moreover, as already discussed above, the preamble to the Agreement explicitly refers to Canada's constitutional obligations in receiving the transfer of Rupert's Land. These obligations included commitments pertaining to Aboriginal peoples in the regions concerned.

In summary, the majority of the Supreme Court in *Daniels* appears to have seriously erred in construing that para. 13 of the 1930 Transfer Agreement does not limit federal legislative powers. If appropriate judicial rules of interpretation were to be applied to para. 13, it would appear that the prevailing rules would favour upholding the full enjoyment of the rights recognized in that paragraph. As a result, federal law-making powers would be curtailed by the constitutional rights in favour of "Indians" in para. 13.

In addition, it is not clear that para. 13 is inconsistent with s. 6 of the *Migratory Birds Convention Act*. This latter Act does not provide for an absolute prohibition, but in fact foresees that persons with "lawful excuse" are exempted. In any event, s. 1 of the *Constitution Act, 1930* expressly provides that provisions in the 1930 Transfer Agreement can derogate from "any Act of Parliament of Canada" without exception.

7. EXTINGUISHMENT OF RIGHTS OF ABORIGINAL THIRD PARTIES

The extinguishment of the rights of Aboriginal third parties is said to have occurred in two situations: i) in granting land rights to non-Aboriginal persons; and ii) in land claims agreements with Aboriginal peoples. In both cases, the validity of such alleged extinguishments can be seriously challenged.

[1726] Id. at 541.

[1727] P.A. Côté, *The Interpretation of Legislation in Canada* (Cowansville, Québec: Éditions Yvon Blais, 1984) at 291. Côté cites in support *R.* v. *Smith*, [1935] 3 D.L.R. 703 (Sask. C.A.), at 703, where it is suggested that Indian treaties may "throw some light upon the interpretation of certain words" in another instrument such as the Transfer Agreement.

[1728] *Daniels* v. *White* and *The Queen*, [1968] S.C.R. 517 at 542.

[1729] Ibid.

[1730] The 1930 Transfer Agreement also specifically provided for Indian reserves (para. 11).

Crown grants of land to non-Aboriginal persons

In relation to Crown grants of land subject to aboriginal title, K. McNeil makes clear that the Crown cannot give what it does not have:

> "The Crown could not derogate from the Aboriginal title of the [Aboriginal peoples] by grant because that title is proprietary...and a fundamental common law rule prevents the Crown from derogating from vested property rights".[1731]

Similarly, G. Lester explains:

> "...if a discovery delivers [to the Crown] merely a preferential right to acquire title, that is all that could pass under a charter as against subjects who are in lawful possession..."[1732]

This common law principle concerning Crown grants is also highlighted in *Worcester* v. *State of Georgia*, where Marshall C.J. provides:

> "...these grants [in colonial charters] asserted a title against Europeans only, and were *considered as blank paper so far as the rights of the natives were concerned.*"[1733]

More specifically, in regard to the 1670 Royal Charter granting Rupert's Land to the Hudson's Bay Company, McNeil indicates that Mahoney J. of the Federal Court erred when he concluded that any proprietary right the Inuit may have had by virtue of their aboriginal title "would necessarily have been extinguished by the Royal Charter"[1734]:

> "If Mahoney meant by this last statement that the Crown by grant could derogate from vested property rights in a settlement, he was clearly mistaken."[1735]

[1731] K. McNeil, *The High Cost of Accepting Benefits From the Crown: A Comment on the Temagami Indian Land Case*, [1992] 1 C.N.L.R. 40 at 61, n. 123. The author cites *The Queen* v. *Hughes* (1866), L.R. 1 P.C. 81 at 87-8; *Bristow* v. *Cormican* (1878), 3 App. Cas. 641; *Drulard* v. *Welsh* (1906), 11 O.L.R. 647 at 656, reversed on other grounds (1907), 14 O.L.R. 54; J. Chitty, *A Treatise on the Law of the Prerogatives of the Crown* (London: Butterworth and Son, 1820), at 386. At 62, McNeil adds: "...the Crown does not have the authority to extinguish Aboriginal title by unilateral executive action." See also B. Clark, *Indian Title in Canada* (Toronto: Carswell, 1987), at 37-63. Clark indicates that Crown grants in unceded aboriginal lands are void. It is said that the law in Canada is that the grant is null from the time it was made. An alternative view held by some commentators is that the grant could only convey the Crown's bare legal title. In this regard, see also J. Woodward, *Native Law* (Toronto: Carswell, 1989), at 208.

[1732] G. Lester, *Inuit Territorial Rights in the Canadian Northwest Territories [:] A Survey of the Legal Problems* (Ottawa: Tungavik Federation of Nunavut, 1984) at 31. See also B. Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of Their Territories* (Saskatoon: Univ. of Saskatchewan Native Law Centre, 1979) at 124-125.

[1733] *Worcester* v. *State of Georgia*, 31 U.S. (6 Pet.) 512 at 546. And at 545: "They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim; nor was it so understood."

[1734] *Baker Lake* v. *Minister of Indian Affairs*, [1980] 1 F.C. 518 (T.D.), at 577. In regard to the point that the granting of a Royal Charter by the Crown could not establish the latter's claim to a territory where there are pre-existing rights, see discussion under sub-heading 4.4.3 *supra*.

[1735] K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989), at 283; K. McNeil, "Aboriginal Nations and Quebec's Boundaries: Canada Couldn't Give What It Didn't Have" in D. Drache & R. Perrin, (eds.), *Negotiating With a Sovereign Québec* (Toronto: James Lorimer & Co., 1992) 107.

See also McNeil, *Common Law Aboriginal Title*, *supra*, at 139, n. 25: "If the Crown has a title but lacks possession nothing will pass by its patent unless it expressly grants *its right instead of the land*...If the Crown grants land where it has neither title nor possession the grant is simply void, and should the patentee enter, he will be a disseisor". See also J. Chitty, *A Treatise on the Law of Prerogatives of the Crown: and the Relative Duties and Rights of the Subject* (London: Joseph Butterworth & Son, 1820) at 386:"It is scarcely necessary to mention that the King's grants are invalid, when they destroy

Based on the above reasoning, it is submitted with respect that Turgeon J.A. erred when he declared in *La Société de développement de la Baie James* v. *Kanatewat*:

> "Vu l'absence d'une reconnaissance explicite ou implicite d'un droit indien, l'existence de ce droit était incompatible avec le titre absolu de propriété du territoire cédé à la Compagnie de la Baie Hudson. Tout droit aborigène dans ce territoire, s'il avait déjà existé, se trouvait éteint par la décision du roi."[1736]

In conclusion, if grants were made by the Crown to non-Aboriginal persons (e.g. in colonial charters), such grants did not effect any extinguishment of the pre-existing land rights of Aboriginal peoples. As indicated above, the Crown cannot grant what it does not have.

Aboriginal third party rights in land claims agreements

In the context of land claims agreements or other treaties, the issue of third party rights of Aboriginal peoples can most often be characterized as a matter of overlapping or co-existent claims. In *Hamlet of Baker Lake* v. *Minister of Indian Affairs* it was indicated that, for purposes of establishing aboriginal title, occupation by an Aboriginal people must be to the "exclusion of other organized societies".[1737] However, this criterion is highly questionable[1738] and Aboriginal peoples frequently have overlapping territorial claims among themselves based on aboriginal title.[1739]

As the Report of the British Columbia Claims Task Force stipulates, the traditional territories of Aboriginal peoples "in many instances" overlap and this issue requires discussion with all Aboriginal peoples affected:

> "*In many instances, traditional territories of First Nations overlap one another.* To the extent that these overlaps may affect negotiations, it is the responsibility of First Nations to resolve them.
>
> Preparation for negotiations *must include discussions with neighbouring First Nations on the issue of overlapping territories.* Because treaties will identify specific territories...*a process for resolution should be in place before conclusion of the treaty.*"[1740] [Emphasis added.]

Generally, in regard to the safeguarding of third-party rights in land claims agreements, the 1985 Task Force To Review Comprehensive Claims Policy highlights the following

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and derogate from rights previously vested in another subject by grant, & c.", cited in McNeil, *Common Law Aboriginal Title*, *supra*, at 238, n. 174.

[1736] *La Société de développement de la Baie James* v. *Kanatewat*, [1975] C.A. 166 at 172: "In view of the absence of any explicit or implicit recognition of an Indian right, the existence of this right is incompatible with the absolute title of ownership of territory ceded to the Hudson's Bay Company. Any aboriginal right in this territory, if it had existed before, was thereby extinguished by the decision of the King." [Unofficial translation.]

[1737] *Hamlet of Baker Lake* v. *Minister of Indian Affairs*, [1980] 1 F.C. 518 (F.C.T.D.) at 557-558, per Mahoney J.

[1738] In the view of this study, Mahoney J.'s criterion of "exclusive" occupation is erroneous in regard to aboriginal title: see discussion in note 493, *supra*.

[1739] See, for example, *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 at 1094, where it was determined that the Musqueam fishing rights constituted aboriginal rights, despite the absence of exclusive occupation of its territory. In this regard, Dickson C.J. cites the following evidence in regard to Musqueam fishing rights as summarized by the B.C. Court of Appeal: "Between the tribes there was a flow of people, wealth and food. No tribe was wholly self-sufficient or occupied its territory to the complete exclusion of others."

[1740] *Report of the British Columbia Claims Task Force* (Vancouver: June 28, 1991) at 52.

fundamental principle:

> "Existing third-party interests should be dealt with equitably."[1741]

Further, the Task Force concludes as follows in regard to overlapping Aboriginal claims:

> "*Where an overlap remains unresolved...we think it would be unfair to recognize the rights of one of the competing groups to the detriment of another.* Thus, rights in the overlap area should be recognized only after the overlap has been resolved. However, failure to resolve the overlap should not impede settlement of aspects that deal with other parts of the traditional area."[1742] [Emphasis added.]

A most glaring example of how Aboriginal third party rights can be unfairly dealt with is found in connection with the James Bay and Northern Quebec Agreement signed in 1975.[1743] Aboriginal peoples, who were not party to this land claims settlement, had their rights purportedly extinguished unilaterally through legislation. In this context, the overlapping claims of Aboriginal third parties were for the most part denied or ignored.[1744]

In the years following the James Bay and Northern Quebec Agreement, the federal government apparently has rethought its position. With the recognition and affirmation of aboriginal rights in the *Constitution Act, 1982*, there was little choice[1745] but to alter federal policy on Aboriginal third party rights. As a result, in connection with overlapping claims, the comprehensive claims policy was necessarily revised. As indicated in 1987, lands that are claimed by more than one Aboriginal people would no longer be "granted" to any Aboriginal people until the dispute had been resolved:

> "Where more than one claimant group utilizes common areas of land and resources, and the claimants cannot agree on boundaries, resource access or land-sharing arrangements, no lands will be granted to any group in the contested area until the dispute is resolved."[1746]

This revision in federal claims policy was also in keeping with the following recommendation of the Report of the Task Force:

> "[R]ights that an aboriginal group may claim *in another jurisdiction* should not be subject to an agreement to which they have not consented. *Any aboriginal group* claiming rights to land across a provincial or territorial boundary, regardless of its place of residence,

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[1741] Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy* (Ottawa: Department of Indian Affairs and Northern Development, 1985) at 32 & 62.

[1742] Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy*, note 1741, *supra*, at 91.

[1743] *James Bay and Northern Quebec Agreement* (Quebec: Éditeur officiel du Québec, 1976). Agreement between the Government of Québec, Société d'énergie de la Baie James, Société de développement de la Baie James, Commission hydroélectrique de Québec (Hydro-Québec), Grand Council of the Crees (of Québec), Northern Quebec Inuit Association, Government of Canada, signed November 11, 1975.

[1744] As discussed under the following sub-heading, the Agreement (s. 2.14) only provided for a commitment by the Québec government to negotiate with those Aboriginal third parties whose rights were to be unilaterally extinguished by federal legislation approving the land claims agreement. At the same time, it was expressly stated that the undertaking to negotiate did not constitute a recognition, by Canada or Québec, of any rights of Aboriginal third parties.

[1745] In the view of this study, the federal government also had fiduciary and other constitutional obligations to safeguard Aboriginal peoples and their rights prior to 1982, in light of such constitutional instruments as the *Royal Proclamation of 1763* and *Rupert's Land and North-Western Territory Order*, 1870. See discussion under sub-headings 2.3, 2.5 and 7.1.1.

[1746] Indian and Northern Affairs Canada, *Comprehensive Land Claims Policy* (Ottawa: Indian Affairs and Northern Development, 1987) at 12.

should not have its rights altered without its consent."[1747] [Emphasis added.]

However, in regard to the James Bay and Northern Quebec Agreement, there is inadequate mention in the Task Force Report of how third-party Aboriginal peoples had their land rights purportedly extinguished by the legislation approving, giving effect to, and declaring valid the Agreement. Since there are important constitutional, human rights, fiduciary and other legal issues connected to unilateral government acts that seek to extinguish Aboriginal third party rights, this aspect in the James Bay and Northern Quebec Agreement is examined further under the following sub-heading.

7.1 Third Party Extinguishment in relation to the James Bay and Northern Quebec Agreement[1748]

> "*[Third party Aboriginal] people have been denied their rights, they have been cheated out of their rights, whether it has happened unilaterally or by conspiracy.* If the [federal government] really cared about what rights may or may not exist [it] would have kept those rights in place...I am saying that we are talking about people, not about trees, water, grass or mines."[1749] [Emphasis added.]
>
> F. Oberle, M.P., 1977

As already indicated, in regard to the James Bay and Northern Quebec Agreement, the federal and Québec governments sought to extinguish the rights of *all* Aboriginal peoples in and to the territory through federal legislation pertaining to the Agreement.[1750] These legislative measures were carried out despite the express objections of Aboriginal peoples who were not party to the Agreement, but who nevertheless were included in the purported extinguishment provisions.

Third party Aboriginal peoples who had their rights purportedly extinguished include the Atikamekw, Montagnais (Innu), Algonquins, Mo Cree Bec (now in Ontario), Labrador Inuit, Labrador Innu, and Inuit (Belcher Islands, N.W.T.).[1751] The Naskapis in Québec also fit into

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[1747] Id., at 51-52.

[1748] See also the Case Study on the James Bay and Northern Quebec Agreement under Part II of this study, heading 11 *infra*.

[1749] House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development, *Bill C-9, James Bay and Northern Quebec Native Claims Settlement Act*, Issue No. 23, March 10, 1977, at 26.

[1750] See James Bay and Northern Quebec Agreement, s. 2.6; *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32, s. 3.

[1751] That Atikamekw, Montagnais and Algonquins are Aboriginal third parties (among others) with claims in the territory is acknowledged in Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 6, 1975, No. 176, at B-6069 (J.-Y. Morin, Leader of the Opposition) and Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 7, 1975, No. 177, at B-6071 (J.-Y. Morin). Similarly, in regard to the Naskapis in Québec, Innu (Labrador), and Inuit (Belcher Islands, N.W.T.), see Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 11, 1975, No. 178,

this category, but they chose to quickly negotiate the 1978 Northeastern Quebec Agreement with a view to avoiding "being left out of the [James Bay and Northern Quebec] Agreement".[1752]

In addition, dissident Inuit from three Inuit communities had withdrawn their mandates[1753] from the Northern Quebec Inuit Association (N.Q.I.A.), through duly executed legal documents, prior to the signing of the James Bay and Northern Quebec Agreement.[1754] According to the N.Q.I.A., it "has never purported to act on behalf of those Inuit who revoked their powers of attorney before the Final Agreement was signed".[1755] However, the federal and provincial governments do not appear to consider the dissident Inuit as a category of third parties who had their rights unilaterally extinguished in the process.[1756]

Just prior to signature of the Agreement in November 1975, the dissident Inuit appeared before the Québec National Assembly Standing Committee that was considering the Agreement. They indicated that they had not received a copy of the draft Agreement being considered.[1757] Consequently, they asked the Standing Committee for time to go through the draft Agreement and then reappear before the Committee to communicate their views.[1758] The Quebec government indicated that it would provide the dissidents with a copy of the draft Agreement, but it would not agree to hold back the work of the government so that the views of the dissident

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at B-6089 (J. Ciaccia).

[1752] See statement by R.A. Pratt, Naskapis' legal counsel, in S. Vincent & G. Bowers, (eds), *Baie James et Nord québécois: dix ans après/James Bay and Northern Québec: Ten Years After* (Montréal: Recherches amérindiennes au Québec, 1985) at 67.

[1753] See Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 6, 1975, No. 176, at B-6057, where Z. Nungak of the Northern Quebec Inuit Association confirms: "...339 adults at one time or other indicated their opposition to the signature [of the Agreement] and withdrew their powers of attorney in total." Also, at B-6059, C. Melançon, legal counsel for the dissident Inuit indicates that he has in hand the withdrawals of mandates from over 300 adults.

[1754] In order to organize in their opposition to the Agreement, the dissident Inuit formed an organization called I.T.N. (Inuit Tungavingat Nunamini): see N. Rouland, *Les Inuit du Nouveau-Québec et la Convention de la Baie James* (Québec: Association Inuksiutiit & Centre d'études nordiques de l'Université Laval, 1978) at 175-181; see also House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development, *Bill C-9, James Bay and Northern Quebec Native Claims Settlement Act*, Issue No. 10, February 8, 1977, at 10A:6.

At present, it is not known how many Inuit in northern Quebec remain opposed to the James Bay and Northern Quebec Agreement. However, litigation to challenge the validity of the Agreement was first instituted by dissident Inuit in December 1981 and has recently been reactivated: see *Alashua* et al. v. *A.G. Canada* et al., No. 500-05-018552-818, Québec Superior Court.

[1755] House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development, *Bill C-9, James Bay and Northern Quebec Native Claims Settlement Act*, Issue No. 10, February 8, 1977, at 10A:7 (N.Q.I.A. written submission to the Standing Committee).

Aside from questions of representativity of N.Q.I.A., a further problem raised in 1975 pertained to the legal capacity of the Inuit organization to apply any agreement to an Inuit community, without the approval of its duly elected representatives. See Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 6, 1975, No. 176, at B-6050, where J.-Y. Morin, Leader of the Opposition, questions whether N.Q.I.A. has the power to conclude the JBNQA. In support of his concerns, he cites the following paragraph from the incorporation documents of N.Q.I.A.: "notwithstanding anything herein contained, any of the powers conferred or exercisable pursuant hereto, shall not be enforced on or applicable to the residents of any [Inuit] settlement, unless accepted by the association of such settlement of the duly elected representatives thereof". For further discussion of this and other related legal issues, see also B-6051 - B-6065.

[1756] See, for example, Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 5, 1975, No. 174, at B-5950 (J. Ciaccia).

[1757] Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 6, 1975, No. 176, at B-6039 (G. Filotas) & B-6062 (C. Melançon, legal counsel for Inuit dissidents).

[1758] Id. at B-6067 (C. Melançon).

Inuit could be heard.[1759]

Depite the lack of government response to the dissident Inuit, P. Sivuaq, a representative of the dissident group in northern Quebec, has explained their ongoing fundamental opposition as follows:

> "When we read the contents of the Agreement, we were shocked at the words. Paragraph 2.1 - stating the extinguishment of rights in exchange for assets and services to be given to the Cree and Inuit of northern Quebec - really hurts. This paragraph is the most damaging and most insulting - native people giving up their heritage and culture and land in exchange for money. *It was both the provincial and federal governments that pushed for and got this paragraph on extinguishment of rights. When one comes to think of it, it was as though our right to be a different and sovereign culture was sold and bulldozed aside.*"[1760] [Emphasis added.]

It would appear that the federal and Quebec governments wished to ensure that no Aboriginal person or people whose rights were unilaterally extinguished, or any other person, could successfully take legal action challenging the Agreement. Therefore, the words "declared valid" were added to the following provision in both the federal and Quebec legislation approving the Agreement:

> "The Agreement is hereby approved, given effect and *declared valid.*"[1761] [Emphasis added.]

In the process of purporting to extinguish unilaterally the land rights in the northern territory of all third party Aboriginal peoples, the Agreement solely provided for an undertaking by the Québec government to negotiate with those parties in the future. In this regard, section 2.14 of the Agreement provides:

> "*Québec undertakes to negotiate* with other Indians or Inuit who are not entitled to participate in the compensation and benefits of the present Agreement, in respect to any claims which such Indians or Inuit may have with respect to the Territory.
>
> Notwithstanding the undertakings of the preceding sub-paragraph, *nothing in the present paragraph shall be deemed to constitute a recognition, by Canada or Québec, in any manner whatsoever, of any rights of such Indians or Inuit.*
>
> Nothing in this paragraph shall affect the obligations, if any, that Canada may have with respect to claims of such Native persons with respect to the Territory. *This paragraph shall not be enacted into law.*" [Emphasis added.]

In regard to Aboriginal third parties, it is uncertain what is the precise legal value, if any, of Quebec's undertaking to negotiate under s. 2.14 of the Agreement.[1762] One lawyer representing an Aboriginal third party has indicated that "Québec's pledge...is an obligation

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[1759] Id. at B-6064 & B-6067 (J. Ciaccia).

[1760] P. Sivuaq, "The Extinguishment Clause in the Agreement", in S. Vincent & G. Bowers, (eds), *Baie James et Nord québécois: dix ans après/James Bay and Northern Québec: Ten Years After* (Montréal: Recherches amérindiennes au Québec, 1985), at 57.

[1761] *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32, s. 3; *An Act Approving Agreement Concerning James Bay and Northern Quebec*, S.Q. 1976, c. 32, s. 2 (1) (the only difference in the Quebec provision is the addition of the word "to" after the word "effect"). For further discussion of the ramifications of legislated extinguishment clauses and the "declared valid" provision, see sub-heading 1.4 *supra*.

[1762] Under Québec civil law, a stipulation for a third party in a contract creates a legal obligation: see *Le* v. *Le*, [1994] R.J.Q. 1058 (Québec S.C.) at 1063; J.-L. Beaudoin, *Les Obligations*, 3ème éd. (Cowansville, Québec: Les Éditions Yvon Blais, 1989) at 261-262. However, the nature of Québec's undertaking in s. 2.14 (i.e. to negotiate) would not provide Aboriginal third parties with any legal rights in the event that the negotiations with the Québec government did not lead to an agreement.

which is...legally unenforceable."[1763] During the hearings before the House of Commons Standing Committee examining the federal legislation (Bill C-9) to approve the Agreement, the federal Associate Deputy Minister of Justice indicated that the commitment by Québec constituted a legal obligation that might lead to an action for compensation.[1764] However, he also indicated that he was "not prepared to express an opinion on what the outcome of such a recourse would be".[1765] Further, a representative of the Labrador Inuit Association has expressed little confidence, in view of its experience, in negotiating a satisfactory arrangement based on s. 2.14.[1766]

Various human rights and other bodies have denounced the unilateral third party extinguishment imposed on Aboriginal peoples.[1767] For example, the Commission des droits de la personne du Québec has described the human rights implications of the extinguishment of third party rights under the James Bay and Northern Quebec Agreement as follows:

> "*The Agreement, in that it extinguishes the rights of third parties, does not respect certain internationally recognized rights which are at the very heart of the concept of democracy.* These rights enshrined in the Quebec's Charter of Human Rights and Freedoms include firstly, *the right to the peaceful enjoyment and free disposition of one's property, except to the extent provided by law* (sec. 6); secondly, *the right to a public and fair hearing by an independent and impartial tribunal*, for the determination of one's rights and obligations (sec. 23); thirdly, *the right not to be deprived of one's liberty or of one's rights except on grounds provided by law and in accordance with prescribed procedures* (sec. 24)." [Emphasis added.][1768]

Since 1978 to the present time, the Commission des droits de la personne du Québec continues

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[1763] See statement by R.A. Pratt, Naskapis' legal counsel, in S. Vincent & G. Bowers, (eds), *Baie James et Nord québécois: dix ans après/James Bay and Northern Québec: Ten Years After* (Montréal: Recherches amérindiennes au Québec, 1985) at 68.

[1764] House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development, *Bill C-9, James Bay and Northern Quebec Native Claims Settlement Act*, Issue No. 21, March 8, 1977, at 21:38 (testimony of P.M. Ollivier).

[1765] Id. at 21:39. At 21:36, the Associate Deputy Minister of Justice adds: "The obligation to negotiate does not carry with it an obligation to settle...It is merely to sit down with the other side and to negotiate - in good faith, I would say."

[1766] See comment by W. Anderson, Labrador Inuit Association, in S. Vincent & G. Bowers, (eds), *Baie James et Nord québécois: dix ans après/James Bay and Northern Québec: Ten Years After* (Montréal: Recherches amérindiennes au Québec, 1985) at 70: "...third party native groups negotiating with the parties to the Agreement are *negotiating from a position of legal weakness because the most vital of their interests and rights have been granted exclusively to the Québec native parties and their aboriginal rights have been abrogated.* If Québec parties insists on treating the claimants as beggars, as people who are being granted new rights, and reminding us that we are in a position of weakness, the process of affirmation of our rights will be a degrading and resented experience." [Emphasis added.]

[1767] See, for example, Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy* (Ottawa: Department of Indian Affairs and Northern Development, 1985) at 51: "[T]he James Bay and Northern Quebec Agreement *extinguished all aboriginal rights within a specified area.* As a result, the rights of the Labrador Inuit, who have hunted in northern Quebec, and of the Mo Cree Bec of Quebec, who now live in Ontario, were *extinguished without their consent although they had not been party to the negotiations.*" [Emphasis added.]

While the Task Force addresses third-party extinguishment insofar as it relates to Aboriginal peoples outside a particular provincial or territorial boundary, it fails to adequately deal with the grievous situation of those Aboriginal peoples *within the same provincial or territorial boundary* who have had their aboriginal rights unilaterally extinguished by government against their wishes.

[1768] Commission des droits de la personne du Québec, *The Rights of Aboriginal Peoples [:] Native rights in Québec: the need to raise the level of discussion* (Québec: September 1980) (Document 5), at 21-22, where the Commission concludes that Aboriginal peoples who were not party to the James Bay and Northern Quebec Agreement "were prejudiced by the...Agreement".

to condemn such unilateral acts by the federal and Québec governments.[1769]

In addition, in regard to the third party extinguishment of aboriginal rights connected with the James Bay and Northern Quebec Agreement, a complaint was made by the Conseil des Atikamekw et Montagnais to the Russell Tribunal in Rotterdam. In response, it is provided in the *Report of the Fourth Russell Tribunal on The Rights of the Indians of the Americas*:

> "[T]he Canadian Parliament extinguished unilaterally the landrights of the Attikameks, Montagnais and Algonquins...*This was done notwithstanding vivid and official protest on the part of the Attikameks and the Montagnais.*
>
> ...As long as this [extinguishment] law remains in effect and as long as the Canadian Government doesn't acknowledge the territorial rights of the Attikameks, Montagnais and the Algonquins, *their future and their survival as a people is at stake.*"[1770] [Emphasis added.]

In regard to the Labrador Inuit, whose rights were also purportedly extinguished through unilateral legislation related to the James Bay and Northern Quebec Agreement, the Inuit Tapirisat of Canada has also condemned this action and has called for recognition and affirmation of the rights of Labrador Inuit:

> "The purported extinguishment of Labrador Inuit rights in Quebec by virtue of section 3(3) of the James Bay and Northern Quebec Native Claims Settlement Act without negotiation, agreement or compensation is legally and morally wrong. The Inuit of Labrador should be compensated by the federal government for this wrongful action and *the Governments of Canada and Quebec should enter into an agreement with the Inuit of Labrador that recognizes and affirms their rights in respect of the territory covered by the said Act.*"[1771] [Emphasis added, underlining in original.]

A question that arises is what was the nature and scope of the obligations of the federal and Québec governments in addressing Aboriginal third party rights in the northern territory. While it was the federal Parliament that adopted a law purporting to extinguish the rights of Aboriginal third parties, it is important to note that these unilateral legislative measures were taken upon the insistence of the government of Québec. This fact was affirmed in the House of

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[1769] In regard to the purported extinguishment of third party rights of Aboriginal peoples in connection with the James Bay and Northern Quebec Agreement, see Commission des droits de la personne du Québec, *The Rights of Aboriginal Peoples [:] We must respect the rights of Native Peoples and deal with them accordingly* (Québec: January 1978) (Document 1) at 21-23; P. Lepage, *Droits autochtones et droits de la personne: Quelques perspectives d'avenir*, (Québec: Commission des droits de la personne du Québec, mai 1987) at 12, 45; M. Rochon & P. Lepage, *Oka-Kanehsatake - Été 1990 [:] Le choc collectif* (Québec: Commission des droits de la personne du Québec, 1991) at 85-86; Commission des droits de la personne du Québec, *Mémoire de la Commission des droits de la personne présenté à la Commission royale sur les peuples autochtones* (Montréal: novembre 1993) at 15, 26.

[1770] *Report of the Fourth Russell Tribunal on The Rights of the Indians of the Americas* (Rotterdam: November 1980) at 5. At 5-6, the Report provides:

"We, the members of the Russell Tribunal, find that: 1. The actions of the Canadian government violate the rights of the Attikameks and Montagnais to retain their land, which is protected by:

- art. 17 of the Universal Declaration of Human Rights [right to property]
- art. 21 of the American Convention on Human Rights [right to use and enjoyment of property].

2. Those actions also violate: The Indians' right to control their natural resources and economic development, which are protected by:

- art. 1 of the International [Covenant] on Economic, Social and Cultural Rights
- paragraph II of the Declaration on the Granting of Independence to Colonial Countries and Peoples [right to self-determination]
- General Assembly Resolution 1803, concerning Permanent Sovereignty over Natural Resources."

[1771] Inuit Tapirisat of Canada, *Submission of the Inuit Tapirisat of Canada to the Royal Commission on Aboriginal Peoples* (Ottawa: ITC, March 31, 1994), at 66 (Recommendation #21).

Commons by the federal Minister of Indian Affairs and Northern Development.[1772] Yet, the Québec government prefers to put the responsibility for such action on the federal government.[1773]

This apparent lack of forthrightness from the Québec government has evoked the following response from the Leader of the Official Opposition, Jacques-Yvan Morin, who views both governments as responsible for the unilateral acts against third parties:

> "...il ne faudrait pas que le [M]inistre [des Richesses naturelles] joue l'innocent dans cette affaire...
>
> .....
>
> ...[L]a convention éteints les droits de tous les Indiens du Québec. *Le ministre ne s'en tirera pas wn prétextant que seul le gouvernement fédéral est responsable de cette extinction.*"[1774] [Emphasis added.]

Rather than act in accordance with its constitutional and fiduciary duty towards the Aboriginal peoples affected, the federal government chose to accede to the wishes of the Québec government and seek to unilaterally extinguish their fundamental rights. Moreover, it can be strongly argued that both Canada and Québec had fiduciary and other constitutional obligations toward Aboriginal third parties when these governments chose to purportedly extinguish the rights of the third parties concerned.[1775]

In this context, is noteworthy that a motion to hear testimony from the Indians of Quebec on the issue of extinguishment of their rights (as third parties to JBNQA) was opposed and defeated by the Québec government in the Standing Committee of the Québec National Assembly that was considering the Agreement just prior to its signature.[1776] In this regard, a senior Québec government representative indicated that the Indians of Quebec Association had no

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[1772] The government of Quebec communicated its insistence in writing to the federal government that the rights of all third parties be extinguished by the Parliament of Canada. See House of Commons, *Debates*, April 28, 1977, at 5090 (Honourable Warren Allmand, Minister of Indian Affairs and Northern Development).

[1773] Assemblée nationale, *Journal des Débats*, 4th Sess., 30th Legisl., vol. 17, No. 29, June 21, 1976, at 1591 (Minister of Natural Resources, Jean Cournoyer); and Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 7, 1975, No. 177, at B-6073 (J. Ciaccia), where it is said that only federal legislation can extinguish the rights of Aboriginal peoples and that rights are not extinguished by the signing of the JBNQA. See also the comments of Éric Gourdeau, Director of SAGMAI, in S. Vincent & G. Bowers, (eds), *Baie James et Nord québécois: dix ans après/James Bay and Northern Québec: Ten Years After* (Montréal: Recherches amérindiennes au Québec, 1985), at 152, where he states that it was a federal law that legally extinguished the rights of Aboriginal peoples, including those of third parties. SAGMAI is the Quebec government department whose principal responsibilities included the implementation of the James Bay and Northern Quebec Agreement.

However, the insistence of the Québec government (J. Ciaccia) is made clear in its testimony before the Standing Committee that considered the James Bay and Northern Quebec Agreement in 1975 prior to its signature: see Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 7, 1975, No. 177, at B-6071 and B-6074: "...nous allons insister, si l'entente est signée, pour que les droits soient éteints. [new para.] C'est le moins qu'on puisse faire pour le Québec." Unofficial English translation: "...we are going to insist, if the Agreement is signed, that the rights are extinguished. [new para.] That is the least that one could do for Québec."

[1774] Id. Unofficial English translation: "...the Minister [of Natural Resources] should not play innocent in this affair...[new para]...[T]he Agreement extinguishes the rights of all the Indians of Québec. *The Minister will not get out of this by giving as an excuse that only the federal government is responsible for this extinguishment.*" [Emphasis added.]

[1775] The Crown's fiduciary duties in favour of Aboriginal peoples are discussed under sub-heading 6.4 *supra*. In particular, the provincial Crown's fiduciary duties are described under sub-heading 6.4.3 *supra*. In regard to the *Quebec Boundaries Extension Act, 1912*, see also sub-heading 6.3.1 *supra*, where it is argued that the province of Québec assumed fiduciary obligations in carrying out its statutory duty towards Aboriginal peoples under s. 2(c) of the 1912 Act.

[1776] This motion was put forward by J.-Y. Morin, Leader of the Opposition, and voted upon: see Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 7, 1975, No. 177, at B-6075.

interest in the territory and were only engaging in blackmail.[1777]

In view of these many problems surrounding the purported extinguishment of the rights of Aboriginal third parties, the constitutionality of this government action is examined under the next sub-heading.

7.1.1 Constitutionality of extinguishing Aboriginal third parties' rights

> "[Au sujet de l'abrogation unilatérale des droits,] je crois que nous sommes devant *un grave risque d'injustice à l'endroit d'un certain nombre d'Indiens du Québec* qui sont d'ailleurs parmi ceux qui vivent le plus près de nous...[new para.]...cela constitue aussi, dans mon esprit,...*un dangereux précédent pour d'autres négotiations semblables non seulement au Québec, mais à l'extérieur du Québec.*"[1778] [Emphasis added.]
>
> J.-Y. Morin, Leader of the Opposition, Québec National Assembly, 1975

> "Je suis aussi préoccupé que [J.Y. Morin] des droits des minorités. Je ne veux léser personne. Je ne veux pas causer des préjudices, mais arrive - laissez-moi expliquer - un moment où il faut prendre des décisions et où il faut prendre nos responsabilites."[1779]
>
> J. Ciaccia, Special Representative of Premier Robert Bourassa, in regard to the *James Bay and Northern Quebec Agreement*, 1975

[1777] Id. at B-6073 (J. Ciaccia, Special Representative of Premier Robert Bourassa and head of negotiations of JBNQA for Québec government).

[1778] Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 6, 1975, No. 176, at B-6070 (J.-Y. Morin). Unofficial English translation: "[In regard to the unilateral abrogation of rights,] I believe that we face *a serious risk of injustice in regard to a certain number of Indians of Québec* who are from elsewhere among those who live closest to us...[new para.]...that would constitute also, in my view,...*a dangerous precedent for other similar negotiations not only in Québec, but also outside Québec.*" [Emphasis added.] Similarly, see Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 7, 1975, No. 177, at B-6071 (J.-Y. Morin).

[1779] Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 7, 1975, No. 177, at B-6072 (J. Ciaccia). Unofficial English translation: "I too am concerned as [J.-Y. Morin] with the rights of minorities. I do not wish to injure anyone. I do not wish to cause harm, but there arrives - let me explain - a time when one must take decisions and when we must assume our responsibilities."

As described above, the federal legislation approving the James Bay and Northern Quebec Agreement includes legislative provisions that purport to extinguish the rights of Aboriginal third parties, deny them a legal recourse or otherwise diminish their capacity to safeguard their rights. Grounds for challenging the constitutionality of these legislative provisions would include:

i) **Failure to respect constitutional obligations arising from *Rupert's Land Order*.** As already described in this study,[1780] the *Rupert's Land and North-Western Territory Order*[1781] and the related terms and conditions stipulated in the joint Addresses of the Canadian Parliament include a number of constitutional obligations relevant to Aboriginal peoples. First, the Canadian government was only to settle Aboriginal claims "*in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines...*"[1782] Second, the Canadian government had a "*duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer...*"[1783] Third, aboriginal claims had to "be disposed of by the Canadian Government *in communication with the Imperial Government...*"[1784] Further, in carrying out the terms and conditions pertaining to the *Rupert's Land Order*, the Canadian Governor in Council was obliged to take the "necessary directions" from one of the Queen's principal Secretaries of State.[1785]

The unilateral extinguishment of the land rights of Aboriginal third parties that is purported to have been carried out by the Parliament of Canada, as insisted upon by the federal and Quebec governments, clearly fails to respect any of the above obligations. In particular, the Canadian government did not have the constitutional capacity to act alone, yet failed to communicate with the Imperial government on this matter so as to receive the necessary instructions.

ii) **Unconstitutionality of s. 2(c) of the *Quebec Boundaries Extension Act, 1912*.**[1786] The statutory delegation to the Québec government to obtain surrenders of the rights of Aboriginal peoples is, in the view of this study, of doubtful constitutionality.[1787] Since the reasons for this position are elaborated elsewhere in this study,[1788] they will not be repeated fully here.

[1780] For a detailed discussion of the *Rupert's Land and the North-Western Territory Order*, see sub-heading 2.3 *supra*.

[1781] R.S.C. 1985, App. II, No. 9, confirmed as part of the Constitution of Canada in Item 3 of the Schedule to the *Constitution Act, 1982*.

[1782] *Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada*, Schedule (A), R.S.C. 1985, App. II, No. 9, 8 at 8-9.

[1783] *Address*, Schedule (B), R.S.C. 1985, App. II, No. 9, 14 at 16.

[1784] Schedule (B), R.S.C. 1985, App. II, No. 9, at 12. The same provision is also included as Term 14 of the Order, as well as in Schedule (C) (Deed of Surrender). It should be noted that Mahoney J. in *Hamlet of Baker Lake* v. *Minister of Indian Affairs*, (1979) 107 D.L.R. (3d) 513 at 549 declares that Term 14 of the *Order* "neither created nor extinguished rights or obligations *vis-à-vis* the aborigines, nor did it, through s. 146 of the *British North America Act, 1867* limit the legislative competence of Parliament." [Emphasis in original.] With respect, Mahoney J. seriously erred in this regard. The learned judge never considered Term 14 in the context of all the relevant Aboriginal provisions attached to the *Order*, especially in the two Addresses of the Canadian Parliament. Nor did Mahoney J. provide any reasoning to support his conclusions in relation to his interpretation of Term 14.

[1785] Term 15 of the Order provides: "The Governor in Council is authorized and empowered to arrange any details that may be necessary to carry out the above terms and conditions. [new para.] *And the Right Honourable Earl Granville, one of Her Majesty's principal Secretaries of State, is to give the necessary directions herein accordingly.*" [Emphasis added.]

[1786] In relation to the 1912 territory, boundaries extension legislation was enacted by both the federal Parliament and the Québec legislature: see *Quebec Boundaries Extension Act, 1912*, S.C. 1912, c. 45, ss. 2(c), (d) & (e); *An Act respecting the extension of the Province of Quebec by the annexation of Ungava*, S.Q. 1912, c. 7. Section 2(c) is identical in both the federal and Québec acts.

[1787] In *Société de développement de la Baie James* v. *Kanatewat*, [1975] C.A. 166 at 175, Turgeon J.A. declined to pronounce on the constitutionality of the delgation in s. 2(c) of the *Quebec Boundaries Extension Act, 1912*.

[1788] See discussion under sub-heading 6.3.1 *supra*.

The obligations stipulated in s. 2(c) were the basis on which the negotiations concerning the James Bay and Northern Quebec Agreement were conducted, with Québec clearly assuming a most predominant and leading role. Since the arrangements and obligations in s. 2(c) were not what was required of Canada under the *Rupert's Land and North-Western Territory Order*, the whole negotiation process in general does not appear to conform to the constitutional obligations under Canadian law.

In any event, s. 2(c) of the *Quebec Boundaries Extension Act, 1912* obliged Québec to "recognize the rights of the Indian inhabitants in the territory...to the same extent, and...obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights and has obtained surrender thereof..." Clearly, unilateral extinguishment of the rights of Aboriginal third parties constitutes neither "recognition" nor "surrender of such rights in the same manner" as had generally been done by the Government of Canada.[1789] Although s. 2(c) in the federal 1912 Act[1790] was repealed by the legislation approving the James Bay and Northern Quebec Agreement,[1791] the equivalent provision in the Quebec 1912 Act[1792] has never been abrogated.[1793] While uncertain, this "omission" could have additional legal implications for the government of Québec.

iii) **Failure of Canadian government to act in conformance with its fiduciary obligations.** As indicated in this study, the *Rupert's Land and North-Western Territory Order* incorporated specific fiduciary obligations by the Canadian government in favour of the Aboriginal peoples contemplated by its provisions.[1794] Consequently, any legislation that seeks to infinge upon or deny the land rights of Aboriginal peoples will be subject to justification tests (as set out in *Sparrow* v. *The Queen*)[1795].

As already indicated, provisions in the federal law approving the James Bay and Northern Quebec Agreement purport to extinguish the rights of Aboriginal third parties[1796] and also seek to deprive these parties of an effective legal remedy.[1797] It would appear that, in neither case, are such provisions likely to survive the type of justification tests required by the Supreme Court of Canada in *Sparrow* that call for minimum interference (if any).

The provisions enacted appear to run counter to the constitutional obligations in the *Rupert's Land Order*. They also render Aboriginal third parties more vulnerable to the actions of government. Further, the bargaining power of the Aboriginal peoples affected are significantly and unjustifiably diminished, in any future negotiations to satisfy their land claims. In addition, by purporting to recognize exclusive or preferential rights to other Aboriginal peoples, the

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[1789] It would appear that, in order to benefit from s. 2(c), Aboriginal peoples would have to demonstrate that they "inhabit" now, or did inhabit at the time of the adoption of the 1912 Act, the northern territory contemplated by the Act.

[1790] *Quebec Boundaries Extension Act, 1912*, S.C. 1912, c. 45.

[1791] See the *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32, s. 7.

[1792] *An Act respecting the extension of the Province of Quebec by the annexation of Ungava*, S.Q. 1912, c. 7.

[1793] See *An Act Approving the Agreement Concerning James Bay and Northern Québec*, S.Q. 1976, c. 46, s. 5, where it is provided that the Legislature of Québec consents to the repeal of s. 2 in the federal 1912 Act, but does not repeal the equivalent provision in the provincial 1912 legislation (i.e. *An Act respecting the extension of the Province of Quebec by the annexation of Ungava*, S.Q. 1912, c. 7).

[1794] See discussion under sub-heading 6.4.1 *supra*.

[1795] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1109: "In other words, *federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.*" [Emphasis added.]

[1796] *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32, s. 3(3).

[1797] Id., s. 3(1). By "declaring valid" the Agreement, Parliament appears to have sought to deny Aboriginal peoples an effective recourse in challenging the validity of the Agreement and safeguarding their fundamental rights: see discussion under sub-heading 1.4 *supra*.

governments involved are in effect dispossessing Aboriginal third parties of all or part of their land rights in the territory covered by the land claims agreement. Finally, the Québec government's commitment to negotiate with such dispossessed third parties is hardly effective, since the approval of the "Native parties" to the James Bay and Northern Quebec Agreement would be required if their own rights would be affected by any new arrangement.

iv) **Failure of Québec government to act in conformance with its fiduciary obligations.** In regard to the purported extinguishment of rights of Aboriginal third parties, the Québec government is also constrained by fiduciary obligations. As already described in this study,[1798] provincial Crowns can assume fiduciary obligations, particularly in the case of purported land surrenders or extinguishments.

First, the Québec government assumed the role of obtaining surrenders as contemplated in s. 2(c) of the *Quebec Boundaries Extension Act, 1912*. Second, Québec chose to take a predominant and lead role in insisting that the rights of third parties be extinguished. Based on its fiduciary duties, it does not appear that the provincial government could take such a position. Moreover, the federal Orders in Council that preceded the adoption of the 1912 Act, instructed against blanket extinguishments of the rights of Aboriginal peoples:

> "*Neither in the case of Ontario nor Quebec would it be proposed to immediately extinguish [Indian] title throughout the territory but to proceed gradually as may be dictated by the needs of the Indian tribes* or by the progress of settlement, prospecting, railway construction or general development throughout the territory."[1799] [Emphasis added.]

Third, by "declaring valid" the James Bay and Northern Quebec Agreement in the provincial legislation approving the Agreement,[1800] the Québec government and the Québec National Assembly sought to deprive Aboriginal peoples of an effective legal remedy in relation to their fundamental rights.

v) **Failure to respect Aboriginal provisions in the *Royal Proclamation of 1763*.** As described in this study, the Royal Proclamation applies to Rupert's Land whether directly,[1801] or indirectly through incorporation by the terms and conditions of the *Rupert's Land and North-Western Territory Order*.[1802]

The Proclamation is a constitutional instrument that does not countenance blanket extinguishment of the rights of Aboriginal peoples.[1803] Any "cessions" referred to in the Proclamation must be circumscribed in an overall regime of confirming and safeguarding Aboriginal peoples and their territorial rights. Further, such cessions are subject to the free and informed consent of the Aboriginal peoples affected, following a public meeting to explain the significance of any proposed cession of rights. Even when the Agreement was being considered by a standing committee of the National Assembly just prior to the Agreement's signature in November 1975, the Quebec government refused to allow Aboriginal third parties to be heard

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[1798] See discussion under sub-heading 6.3 *supra*.

[1799] *Order in Council*, P.C. 2626, January 17, 1910; and *Order in Council*, May 2, 1910, P.C. 801. See discussion in *Gros-Louis* v. *Société de développement de la Baie James*, [1974] R.P. 38 (Québec S.C.) at 58-59, per Malouf J.; and in *Société de développement de la Baie James* v. *Kanatewat*, [1975] C.A. 166 at 174, per Turgeon J.A.

[1800] *An Act Approving the Agreement Concerning James Bay and Northern Québec*, S.Q. 1976, c. 46, s. 2(1).

[1801] See discussion under sub-heading 2.1 *supra*.

[1802] See discussion under sub-heading 2.3 *supra*.

[1803] See discussion under sub-heading 1.2 *supra*.

at the hearing and to answer questions that the Opposition wished to ask.[1804]

Consequently, the purported extinguishment of the rights of Aboriginal third parties under the James Bay and Northern Quebec Agreement is wholly inconsistent with the Aboriginal provisions of the Royal Proclamation.

vi) **Violation of Aboriginal peoples' human rights.** Aboriginal rights embrace both collective and individual human rights.[1805] Any unilateral extinguishment of these rights is a destruction or elimination of human rights that violates international and Canadian standards.[1806] In the Canadian context, extinguishment of the fundamental rights of Aboriginal third parties arguably violates their rights to liberty and security.[1807] In addition, the unilateral extinguishment of third party rights by Parliament violates equality guarantees and the principle of non-discrimination under both the *Canadian Charter of Rights and Freedoms*[1808] and international human rights instruments.[1809]

In regard to human rights, it is worth noting that violations of these fundamental rights are also relevant in determining whether non-Aboriginal governments are meeting the necessary standards required of a fiduciary.[1810]

vii) **Failure to recognize and protect the aboriginal rights of Aboriginal peoples.** As already described, the *Rupert's Land and North-Western Territory Order* and the *Royal Proclamation of 1763* constitutionally require the recognition and protection of the territorial rights of Aboriginal peoples. However, the rights of all Aboriginal peoples with claims in the territory covered by the James Bay and Northern Quebec Agreement were consistently denied by both governments. Such a position of denial was taken by the two governments not only during the James Bay litigation,[1811] but also throughout the negotiation of the land claims agreement itself. Even the undertaking to negotiate under s. 2.14 of the Agreement denied in express terms any recognition of the rights of Aboriginal third parties.[1812] In addition, the Québec government denied that any obligations were owed to Aboriginal peoples in the territory based on s. 2 of the *Quebec Boundaries Extension Act, 1912.*

It would be fair to say that such categorical denial of any recognition of their aboriginal rights, or of the obligations owed to them by governments, put undue pressure on all the Aboriginal peoples concerned. Also, in light of existing constitutional obligations in favour of

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[1804] See Assemblée nationale, *Journal des Débats*, 4th Sess., 30th Legisl., vol. 17, No. 29, June 21, 1976, at 1591, where Opposition Leader J.-Y. Morin indicated that he was "profoundly shocked" by the manner in which the Quebec government was proceeding in extinguishing the rights of third parties without consultation and without taking account of their claims.

[1805] See discussion under sub-heading 8.2.1.3 *infra*.

[1806] See discussion under sub-heading 8.2.1.5 *infra*.

[1807] See discussion under sub-heading 8.3.2 *infra*.

[1808] See discussion under sub-heading 8.3.3 *infra*. Even if infractions occurred prior to the coming into force of the Canadian Charter in 1982, ongoing violations of Charter provisions may in some cases give rise to a legal remedy in accordance with the Charter.

[1809] See discussion under sub-heading 8.2.2 *infra*.

[1810] See, for example, D. McRae, *Report on the Complaints of the Innu of Labrador to the Canadian Human Rights Commission*, Ottawa, August 18, 1993, at 5.: "At the very least, [the fiduciary] standard requires observance by the government of Canada of minimal standards for the *protection of human rights*, and to this extent the *category of aboriginal rights and human rights overlap.*" [Emphasis added.]

[1811] See *Gros-Louis* v. *Société de développement de la Baie James*, [1974] R.P. 38; *Société de développement de la Baie James* v. *Kanatewat*, [1975] C.A. 166.

[1812] Section 2.14 provides in part: "Notwithstanding the undertakings of the preceding sub-paragraph, *nothing in the present paragraph shall be deemed to constitute a recognition, by Canada or Québec, in any manner whatsoever, of any rights of such Indians or Inuit.*" [Emphasis added.]

recognition of aboriginal rights, the governments appear to have misrepresented to Aboriginal peoples the nature and scope of their rights. As a result, these government positions made it significantly more difficult for the Aboriginal peoples involved to achieve a satisfactory settlement of their claims.

Just prior to and following the signature of the Agreement and the purported surrender of rights, the rights[1813] and obligations[1814] in favour of Aboriginal peoples were suddenly acknowledged. As J. Cournoyer, Quebec Minister of Natural Resources stated before the National Assembly at the time of the adoption of provincial legislation approving the Agreement:

> "Dans le territoire visé, les principales personnes qui, c'est sûr, avaient des droits la-dessus, c'étaient les Cris...et les Inuit..."[1815]

And in regard to the obligations of Québec under the *Quebec Boundaries Extension Act, 1912*, the Minister added:

> "...dans ce qu'on appelle la loi de 1912, ou la loi de l'extention du territoire québécois, nous dit que nous devons faire un certain nombre du gestes que nous avons négligé, comme gouvernement, de poser depuis 1912 et que nous avons dû poser, suivant notre bon jugement, à partir de 1970 ou 1971."[1816]

Based on all of the above considerations, it is the conclusion of this study that there exist a number of serious grounds for challenging the constitutionality of the legislative provisions that purport to extinguish the rights of Aboriginal third parties, deny them a legal recourse or otherwise diminish their capacity to safeguard their rights.

In relation to the Aboriginal parties to the Agreement, similar grounds appear to exist to

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[1813] The rights of Aboriginal peoples are recognized by the Québec government in in Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 5, 1975, No. 174, at B-5935 (J. Ciaccia, MNA and Special Representative of Premier Robert Bourassa). In addition, the leader of the Opposition at that time, referred to the rights of Indians as "droits acquis" (acquired rights) by virtue of the *Quebec Boundaries Extension Act, 1912*: see Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 11, 1975, No. 178, at B-6113.

[1814] The Québec government acknowledged its obligations under the *Quebec Boundaries Extension Act, 1912* to satisfy territorial claims of Aboriginal peoples in Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 5, 1975, No. 174, at B-5934 (J. Ciaccia, MNA and Special Represenative of Premier Robert Bourassa); and at B-5935, Ciaccia quotes the *Rapport de la Commission d'étude sur l'intégrité du territoire du Québec* (Québec: Éditeur Officiel, 1971), vol. 4.1, at 392 (Dorion Report) as concluding and recommending that Québec take measures without delay to honour the obligations contracted towards Indians under the boundaries extension acts of 1912. See also Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 7, 1975, No. 177, at B-6073 (J. Ciaccia).

For a similar acknowledgement of Québec's obligations by the then leader of the Opposition, J.-Y. Morin, see Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 11, 1975, No. 178, at B-6114.

[1815] Assemblée nationale, *Journal des Débats*, 4th Sess., 30th Legisl., vol. 17, No. 29, June 21, 1976, at 1597. Unofficial English translation: "In the territory contemplated, the principal persons who, it is certain, had rights there, were the Crees...and the Inuit..."

[1816] Id. Unofficial English translation: "...in that which we call the Act of 1912, or the Act extending the Québec territory, we say that we must make a number of gestures that we neglected, as a government, to do since 1912 and which we had to do, according to our good judgement, since 1970 or 1971."

See also the *ex post facto* statement of J. Ciaccia in the "Philosophy of the Agreement" in the James Bay and Northern Quebec Agreement, at xx: "The Québec government has taken the position in these negotiations that it wanted to do all that was necessary to protect the traditional culture and economy of the native peoples, *while at the same time fulfilling its obligations under the Act of 1912*." [Emphasis added.]

challenge the purported surrender and extinguishment of their rights. While the case of the Aboriginal parties may prove more difficult in this regard than for Aboriginal third parties, there are certain constitutional arguments that can be validly raised. In particular, the government practice of denying that the Crees and Inuit had any rights and that the Québec government had any obligations, until an agreement to surrender and extinguish the rights of Aboriginal peoples could be obtained, is duplicitous and incompatible with the fiduciary and other constitutional obligations owed to them. In this regard, it may be useful to remember the words of Lloyd Barber, Indian Claims Commissioner for Canada, when he said:

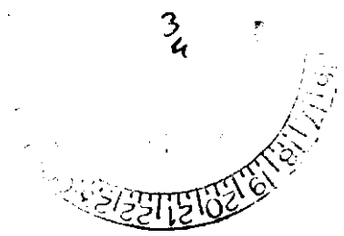
> "For us to have accepted their generosity and their assistance, to have accepted their basic concept of sharing, and then later to claim that we were in fact conquerors in disguise and *that they really have no rights seems to me immense hypocrisy.*"[1817] [Emphasis added.]

[1817] Quoted (at the time of the James Bay and Northern Quebec Agreement) in H. Gendron, "Native claims are far from frivolous" in the *Montreal Star*, March 20, 1976, at B5.

EXTINGUISHMENT OF THE RIGHTS OF ABORIGINAL PEOPLES: PROBLEMS AND ALTERNATIVES

A STUDY PREPARED FOR THE ROYAL COMMISSION ON ABORIGINAL PEOPLES

VOLUME 2



Paul Joffe and Mary Ellen Turpel

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8.1 Norms Prohibiting Colonialism

> "Our land and our culture are the two things in this world that we cherish above all else. We have been dispossessed and dispersed. *Our culture has been threatened as a result of colonization*. Many of our languages have been lost. Our spiritual beliefs have been ridiculed. We have become marginalised in our own country.[1819]
>
> L. O'Donoghue, Aboriginal and Torres Strait Islander Commission, 1992

> "*Colonialism has not ceased, but continues with even greater intensity...[new para.] First peoples are in the frontline*. They are sitting on resources the rest of the world wants, and wants at the lowest possible cost. *Their territories are considered frontier lands, unowned, underused and, therefore, open to exploitation*. More often than not their populations are low in density, they are politically weak and physically isolated. And, until recently, their resistance has been relatively ineffective."[1820] [Emphasis added.]
>
> J. Burger, 1990

The extinguishment of aboriginal rights is an integral part of the larger historical process of colonialism. Many other discriminatory or assimilative manifestations of colonialism affecting Aboriginal peoples in Canada have now been eliminated.[1821] However, the pervasive notion of extinguishment remains as a "relic of colonialism". As D. Sambo describes:

> "*The ongoing implementation of state extinguishment policies constitutes a very serious threat to indigenous societies. It is another relic of colonialism*. Extinguishment is used to ensure state domination of indigenous peoples and to sever their ancestral ties to their

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[1818] The work under this heading was prepared with input from Chris Tennant.

[1819] L. O'Donoghue, Statement to U.N. General Assembly, in *Living History [:] Inauguration of the "International Year of the World's Indigenous People"*, (1993) 3 Transnat'l L. & Contemp. Probs. 197 at 198.

[1820] J. Burger, *The Gaia Atlas of First Peoples* (New York: Anchor Books, 1990) at 78-80.

[1821] For example, in regard to the criminalization of Indian spiritual practices, such as the potlach, see *An Act Further to Amend "The Indian Act, 1880"*, S.C. 1884, c. 27, s. 3: "Every Indian or other person who engages in or assists in celebrating the Indian festival known as the 'Potlach' or in the Indian dance known as 'Tamanawas' is guilty of a misdemeanor, and shall be liable to imprisonment for a term of not more than six nor less than two months in any gaol or other place of confinement..." Cited in W. Moss, *History of Federal and Provincial Laws Discriminating Against Aboriginal People* (Ottawa: Library of Parliament, 1987) at 10. The author indicates that the anti-potlach laws continued as late as 1951.

A further repressive practice of colonialism was the pass system to confine Indians in Western Canada to their reserves: see O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: MacLelland & Stewart, 1992) at 314-315. At 495, n. 20, the author indicates that the pass system lasted until 1941. See also F.L. Barron, *The Indian Pass System in the Canadian West, 1882-1935* (1988) 13 Prairie Forum 1.

own territories."[1822] [Emphasis added.]

Within the international human rights context, the relationship between the struggles of indigenous peoples and the wider struggle against colonialism has been recognized by a number of jurists.[1823] Commentators have emphasized, for example, the common experience of indigenous peoples and colonized peoples in overseas territories,[1824] the intense efforts to impose the ideologies of colonizers on indigenous peoples,[1825] the status of indigenous peoples as "internal colonies",[1826]and the continuity between the colonization of the New World and contemporary state law and policies toward indigenous peoples.[1827]

The basic international law instrument outlawing colonialism is the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, a 1960 Resolution of the United Nations General Assembly.[1828] The first article of the Declaration condemns "alien subjugation, domination and exploitation", otherwise known as "colonialism":

> "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co-operation."

While the Declaration is only a Resolution of the U.N. General Assembly, there is a general consensus among international lawyers that colonialism, "in all its forms and manifestations" is now contrary to international law.[1829] In fact, in some instances, colonialism has been

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[1822] D. Sambo, *Indigenous Peoples and International Standard-Setting Processes: Are State Governments Listening?*, (1993) 3 Transnat'l L. & Contemp. Probs. 13, at 31.

[1823] Moreover, the inherently discriminatory nature of colonialism has been emphasized. See, for example, R. Williams Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, (1989) 31 Arizona L. Rev. 237 at 277: "...the relationship between the thousand-year-old legacy of European racism and colonialism and United States public discourses of law and politics regarding Indian rights and status can be more precisely defined by focusing on the racist attitude itself. This racist attitude can be found recurring throughout the history of white society's contact with Indian tribalism. *The legacy of European colonialism and racism in federal Indian law and policy discourses can be located most definitively, therefore, in those Indian policy discourses that seek to justify white society's privileges or agression in the Indian's Country on the basis of tribalism's asserted deficiency and unassimilability.*" [Emphasis in original.]

[1824] C. Iorns, *Indigenous Peoples and Self Determination: Challenging State Sovereignty*, (1992) 24 Case W. Res. J. Int'l L. 199, at 296-297.

[1825] A. Buchanan, *The Role of Collective Rights in the Theory of Indigenous Peoples' Rights*, (1993), 3 Transnat'l L. & Contemp. Prob. 89, at 90: "*It has widely been observed that colonizing groups around the world augmented their material power over indigenous peoples by imposing ideologies.* A common element in colonial ideologies is the attitude that all indigenous peoples, regardless of their cultural and political differences, are 'mere natives' — all equal in their inferiority to their colonial masters...Today, international networks of indigenous peoples' advocates are becoming a force to be reckoned with, in the domestic law and politics of many countries, from Canada and the United States to Nicaragua and New Zealand, as well as in the United Nations." [Emphasis added.]

[1826] T. Howland, *U.S. Law as a Tool of Forced Social Change: A Contextual Examination of the Human Rights Violations by the United States Government Against Native Americans at Big Mountain*, (1987) 7 B.C. Third World L.J. 61 at 74.

[1827] R. Williams Jr., *Columbus' Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples; Rights of Self-Determination*, (1991) 8 Ariz. J. Int'l & Comp. L. .

[1828] *Declaration on the Granting of Independence to Colonial Countries and Peoples*, (1960), G.A. Res. 1514 (XV), 15 U.N. GAOR, Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960).

[1829] C. Theodoropoulos, *Colonialism and General International Law* (New Horizon Publishing House, 1987), at 42. See also *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970), which reiterates the General Assembly's earlier condemnation of colonialism.

characterized in the U.N. General Assembly as a "crime".[1830] Similarly, the International Court of Justice has called colonialism (in South Africa) one of the greatest "plagues" in the history of humankind.[1831] Further, the U.N. General Assembly has called upon states to take "resolute steps" to eliminate massive human rights violations arising from colonialism.[1832]

As will be discussed later in this study, extinguishment not only serves to dispossess indigenous peoples of most of their lands and territories, but it also undermines the self-determination of indigenous peoples. Since the remedy to colonialism was said by the international community to include external as well as other forms of self-determination,[1833] many states take the position that "colonialism" in international law only refers to those peoples in territories outside of independent states. As D. Johnston explains:

> "This view of colonialism became known as the '*Blue Water*' or '*Salt Water' thesis* because it insisted on geographical separateness, in the form of overseas possessions, as a prerequisite of colonialism. Accordingly, any peoples located within the boundaries of a member state, *regardless of their degree of actual subordination*, could not be classified as 'colonial' and could not exercise the right to self-determination."[1834] [Emphasis added.]

The "Blue Water" or "Salt Water" thesis has come under severe criticism by jurists. The legitimacy of this theory is being vigorously challenged on the basis of it being "misguided...attempts to limit the scope of self-determination",[1835] "unjustifiable",[1836] "artificial",[1837] and "absurd"[1838]. As S. Williams provides:

[1830] See M. Pomerance, *Self-Determination in Law and Practice* (The Hague/Boston: Martinus Nijhoff Publishers, 1982) at 106, n. 260, where it said that the colonialism was first declared to be a "crime" by the General Assembly in Resolution 2621 (XXV), October 12, 1970 (adopted by a vote of 86-5-15).

See also G. Mueller, *Four Decades After Nuremberg: The Prospect of an International Criminal Code*, [1987] 2 Conn. J. Int'l L. 499 at 501-502, where the author states that attempts to establish an international criminal code are moving beyond the "three basic crime categories, namely crimes against peace, war crimes, and crimes against humanity. Rather, it should extend to *more recent international crimes such as colonialism*, apartheid, serious environmental offences, economic aggression, mercenarism, hostage taking, violence against persons enjoying diplomatic privilege and immunities, the hijacking of aircraft, international terrorism, and piracy." [Emphasis added.]

[1831] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970). Advisory Opinion*, [1971] I.C.J. 16 at 86 (separate opinion of Vice-President Ammoun), who refers to colonialism in Africa as "[one of the] two greatest plagues in the recorded history of mankind...which exploited humanity and natural wealth to a relentless extreme." [The other "plague" referred to was slavery.]

[1832] See *Declaration on the Right to Development*, adopted by the U.N. General Assembly, Dec. 4, 1986. U.N.G.A. Res. 41/128, 41 U.N.GAOR, Supp. (No. 53) U.N. Doc. A/41/925 (1986), art. 5: "States shall take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from *apartheid*, all forms of racism and racial discrimination, *colonialism*, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination." [Emphasis added]

See also *Stockholm Declaration of the United Nations Conference on the Human Environment*, adopted by the U.N. Conference on the Human Environment June 16, 1972, U.N. Doc. A/Conf. 48/14 (Stockholm 1972), 11 I.L.M. 1416 (1972), Principle 1, which provides in part: "...[P]olicies promoting or perpetuating apartheid, racial segregation, discrimination, *colonial and other forms of oppression and foreign domination* stand condemned and must be eliminated." [Emphasis added.]

[1833] *Declaration on the Granting of Independence to Colonial Countries and Peoples*, (1960), G.A. Res. 1514 (XV), 15 U.N. GAOR, Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960).

[1834] D. Johnston, *The Quest of the Six Nations Confederacy for Self-Determination*, (1986) Univ. Tor. Fac. L. Rev. 1 at 24.

[1835] L. Bucheit, *Secession [:] The Legitimacy of Self-Determination* (New Haven: Yale University Press, 1978) at 18.

[1836] Note, *The Logic of Secession*, (1980) 89 Yale L.J. 802 at 808.

[1837] M. Sornarajah, *Internal Colonialism and Humanitarian Intervention*, (1981) 11 Ga. J. Int'l & Comp. L. 45 at 52: "Efforts to limit the principle to 'salt-water' colonialism seem *artificial* when the broad objective of the principle is to *end the dominance of one group by another*." [Emphasis added.]

> "...geography alone, in the context of overseas colonialism, should not dictate the composition of peoples."[1839]

Moreover, it is discriminatory to seek to deny indigenous peoples in independent countries the right of self-determination, by arbitrarily denying these peoples the "status" of being "colonized" in international law terms.[1840] This would violate the *International Convention on the Elimination of All Forms of Racial Discrimination*[1841] and, more specifically, the prohibition against racial discrimination[1842] - a peremptory international norm.[1843] If the characterization as a discriminatory and arbitrary doctrine is correct, the "Salt Water" thesis is untenable and invalid under international law.

It is most difficult to accept that indigenous peoples suffer a form of colonialism that should not be fully recognized without any double standard. For example, B. Petawabano *et al.* describe how pervasive colonization of Aboriginal peoples during most of Canada's history continues to have far-reaching adverse effects on their mental health:

> "The central aspect of this problem is the state of religious, economic, social, cultural, and psychological colonization that aboriginals were locked in for more than a century, the impact of which is still being felt."[1844]

As the Inuit Tapirisat of Canada has indicated to the Royal Commission on Aboriginal Peoples:

> "The denial of the right to self-determination to indigenous peoples because our peoples and our territories have suffered a form of colonization trapping us within existing states is *no less discrimination, is no less an arbitrary and unjust denial of fundamental human rights.*"[1845] [Emphasis added.]

Consequently, indigenous peoples have often suffered from double discrimination in the

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[1838] R. Barsh, "Indigenous Peoples and the Right to Self-Determination in International Law" in B. Hocking (ed.), *International Law and Aboriginal Human Rights* (Toronto: Carswell, 1988) 68 at 72: "'Blue water' is an *absurd distinction* which has simply served to slow down the process of decolonization for purely political reasons...The United Nations has nearly run out of overseas colonies to deal with now, however, and it *can no longer avoid dealing with colonized enclaves of indigenous peoples.*" [Emphasis added.]

[1839] S. Williams, *International Legal Effects of Secession by Quebec* (North York, Ontario: York University Centre for Public Law and Public Policy, 1992) at 19.

[1840] See, for example, M.C. Lâm, *Making Room for Peoples at the United Nations: Thoughts Provoked by Indigenous Claims to Self-Determination*, (1992) 25 Cornell Int'l L. J. 603 at 616: "...some families of subjugation (blue-water) are more equal than others."

[1841] *International Convention on the Elimination of All Forms of Racial Discrimination*, done March 7, 1966, entered into force Jan. 4, 1969, 660 U.N.T.S. 195, (1966) 5 I.L.M. 352.

[1842] The Convention defines "racial discrimination" in article 1(1) as:

> "...any distinction, *exclusion*, restriction or preference based on race, colour, descent, or national or ethnic origin which has as the *purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and freedoms* in the *political*, economic, social, cultural or any other field or public life." [Emphasis added.]

[1843] I. Brownlie, *Principles of Public International Law*, 4th ed. (Oxford: Clarendon Press, 1990) at 513. For a discussion of peremptory norms of international law, see sub-heading 6.5.1 *supra*.

[1844] B. Petawabano *et al.*, *Mental Health and Aboriginal People of Quebec/La santé mentale et les autochtones du Québec* (Boucherville, Québec: Gaetan Morin Éditeur, 1994), at 107. The authors focus in their study on the situation in Québec, but the historical treatment they describe generally can be applied to indigenous peoples in Canada and other independent countries.

[1845] Inuit Tapirisat of Canada, *Submission of the Inuit Tapirisat of Canada to the Royal Commission on Aboriginal Peoples* (Ottawa: ITC, March 31, 1994), at 41.

colonial context. First, colonialism generally involves racial discrimination in denying indigenous peoples the right of self-determination.[1846] Second, in providing international remedies to colonialism, some members of the international community have sought to deny indigenous peoples the legal status of being colonized, with a view to denying them the right of self-determination.

In regard to the appropriate decolonization measures,[1847] D. Sanders suggests the following measures:

> "Indigenous peoples lost their independence and their control over resources as a result of colonization. Decolonization should be recognized as having at least two kinds of consequences. For overseas colonies it means a right to sovereign independence. For colonies within States, it should mean political autonomy and control over resources, thus respecting both the principle of the self-determination of peoples and the principle of the territorial integrity of States."[1848]

In any event, it is said that indigenous peoples in the Americas and elsewhere were colonized both in the "external" and "internal" sense. As C. Iorns provides:

> "...the interests of indigenous peoples should not be automatically outweighed by the...interests of states, and *indigenous peoples should be accorded the same legal status as colonized peoples presently enjoy.* The reasons for this are that indigenous peoples have actually been colonized and subjugated by foreign peoples, *both in the traditional sense (externally) as well as in a not-so-traditional sense (internally[1849]).*
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> Most indigenous peoples have been subjected to the traditional form of external, alien subjugation...For example, the *indigenous peoples of the Americas* and various parts of

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[1846] H.G. Espiell, Special Rapporteur, *The Right to Self-Determination: Implementation of United Nations Resolutions*, Study for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, (New York: United Nations, 1980), U.N. Doc. E/CN.4/Sub.2/405/Rev.1, at 4: "It is often - and might even be said to be necessarily - the case in practice that *the denial of the right of self-determination to peoples under colonial and alien domination is associated with racial discrimination*, the population of the dominating Power being of a different colour from that of the subject population." [Emphasis added.]

[1847] See also K. McNeil, *Envisaging Constitutional Space for Aboriginal Governments*, (1993) 19 Queen's L.J. 95 at 136: "Decolonization of the Canadian *Constitution* involves envisaging space for Aboriginal governments to exercise their inherent powers, which can be done by interpreting s. 35(1) [of the *Constitution Act, 1982*] in an expansive way." And at 134: "The rule of law must also be redefined to include Aboriginal laws, as well as the common law and federal and provincial legislation. *To cling to the old notions of parliamentary sovereignty and the rule of law is to perpetuate outdated and unacceptable colonial attitudes.*" [Emphasis added.]

[1848] D. Sanders, "Remembering Deskaheh: Indigenous Peoples and International Law" in I. Cotler & F. Eliadis, (eds.), *International Human Rights Law [:] Theory and Practice* (Montreal: Canadian Human Rights Foundation, 1992) 485 at 495.

[1849] C. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, note 1824, *supra*, at 299 provides: "Internal colonialism, as another form of colonialism, should be rejected just as external colonialism is now rejected. This is linked to the argument that we should try to remedy the injustices done by past external colonialism, because the internal colonialism that currently exists is often one of the injustices identical to these that have arisen from the past external colonialism. *In the case of indigenous peoples, external and internal colonialism tend to merge, as the original source of the present, internal domination of many indigenous peoples was external.*" [Emphasis added.]

"Internal colonialism" is described in M. Sornarajah, *Internal Colonialism and Humanitarian Intervention*, note 1837, *supra*, at 46: "Internal colonialism results where an ethnic group in control of *a government systematically exploits resources of the region* occupied by minority ethnic groups 'reducing the development of those regions to that of dependencies'....Typical results include an *inequitable distribution of national wealth and of access to employment and educational opportunities*. With local resources and income used primarily to serve the interests of the dominant ethnic or religious group, the resemblance to traditional colonialism is strong." [Emphasis added.]

See also R. Stavenhagen, *The Ethnic Question: Conflicts, Development, and Human Rights* (Tokyo: United Nations Univ. Press, 1990) at 118: "The *subordination* of indigenous peoples to the nation-state, their *discrimination* and *marginalization*, has historically, in most cases, been the *result of colonization and colonialism*. Within the framework of politically independent countries, the situation of indigenous and tribal peoples may be described in terms of internal colonialism." [Emphasis added.]

the Pacific were colonized in this way."[1850] [Emphasis added.]

C. Iorns adds:

> "Today we would regard such colonialism as contrary to notions of human dignity and to international law because of the breach of fundamental human rights that it entails."[1851]

In the *Report of the Fourth Russell Tribunal on The Rights of the Indians of the Americas*, the external and internal colonialism in the Americas is confirmed in the following terms:

> "*The program of cultural destruction and social oppression of the native People of the Americas did not cease when the several countries of the American continent declared their independence. On the contrary, they simply assumed new forms.* Since then, the machinery of internal colonialism has been continuously consolidated, ruthlessly seeking the disintegration of Indian communities. Now we are seeking an intensification of agression led by governmental and local ruling groups, often dominated by transnational centres of power."[1852] [Emphasis added.]

A. Patry describes the links between indigenous peoples, human rights, and colonialism as follows:

> "...cette question [autochtone] est devenue, à mes yeux, prioritaire dans le contexte qui nous intéresse ici. Non seulement parce qu'elle concerne les *droits humains* qui ont acquis de nos jours une importance considérable sur la scène internationale mais aussi parce qu'elle suscite depuis quelques décennies l'élaboration d'un droit nouveau, celui des *peuples indigènes et tribaux qui ont eu à souffrir des actes de l'ère coloniale.*"[1853] [Emphasis added.]

Premier of Ontario, Bob Rae, highlights that the colonialism faced by indigenous peoples in Canada is similar to that elsewhere in the world:

> "...I see communities that have been left in the *same colonial status*, with all of those implications. Powerlessness, mistrust, people forced to speak English, destruction of native customs, destruction of native language, destruction of a native economy - *destruction of a way of life that is no different from the destruction that is taking place everywhere where imperial power has been extended.*"[1854] [Emphasis added.]

In a comparative study on indigenous peoples in Canada with those in other countries,

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[1850] C. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, note 1824, *supra*, at 296-297. See also E.I. Daes, *Some Considerations on the Right of Indigenous Peoples to Self-Determination*, (1993) 3 Transnat'l L. & Contemp. Probs. 1 at 8: "Self-determination has consequently taken on a new meaning in the post-colonial era. Ordinarily it is the right of the citizens of an existing, independent State to share power democratically. However, a State may sometimes abuse this right of its citizens so grievously and irreparably that *the situation is tantamount to classic colonialism, and may have the same legal consequences.*" [Emphasis added.]

[1851] Id. at 297.

[1852] *Report of the Fourth Russell Tribunal on The Rights of the Indians of the Americas* (Rotterdam: November 1980), at 1.

[1853] See testimony of A. Patry in Assemblée Nationale, *Journal des débats*, Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté, 7 nov. 1991, No. 8, p. CEAS-200. Unofficial English translation: "...this issue [of aboriginal peoples] has become, in my view, a priority in the context which interests us here. Not only because it concerns *human rights* which have acquired these days considerable importance at the international level but also because it has given rise in the past few decades to a new law, that of *indigenous and tribal peoples who have suffered from actions of the colonial era.*" [Emphasis added.]

[1854] M. Cassidy, (ed.), *Aboriginal Self-Determination* (B.C./Montreal: Oolichan Books/Institute for Research on Public Policy, 1991) at 152.

B. Morse speaks of the "remaining shackles of colonialism and apartheid policies".[1855] Morse concludes that Canada's history of colonizing indigenous peoples has been an "unmitigated disaster":

> "...*the effects of colonization and dispossession of the Indian, Inuit and Metis peoples have been tragic beyond belief.* Our history has been one in which our European ancestors at an early stage pursued positive and respectful policies toward the Nations they encountered...This attitude, however, was quickly jettisoned...and our self-interest switched to favour *oppression and assimilation so as to facilitate the purchase - or theft - of their lands and its resources as well as the denial of their inherent rights* to maintain their ways of life, traditions, cultures, religious beliefs, laws and governments. *The history of colonization in the land now called Canada has been an unmitigated disaster from the perspective of Aboriginal peoples and from the view of any neutral observer.*"[1856] [Emphasis added.]

In addition, the Canadian Human Rights Commission characterizes the federal Crown's relationship with Aboriginal peoples in Canada as one between the "colonizers" and "colonized":

> "With hindsight one can see that the whole idea of the federal stewardship over aboriginal peoples - and its manifestation in the Indian Act and the Department of Indian and Northern Affairs - has been *an attempt to rationalize and legitimize the relationship between colonizers and colonized.*"[1857] [Emphasis added.]

In relation to Aboriginal peoples, the damaging impacts of colonization are described by the Royal Commission on Aboriginal Peoples as follows:

> "As a result of the historical processes that accompanied colonization, many Aboriginal peoples have been *deprived of their original lands and means of livelihood and confined to small areas with little economic potential.*"[1858] [Emphasis added.]

P. Kierans also concludes:

> "*The root of [Aboriginal peoples'] suffering lies outside the legal system, in the historical process of colonization which has imposed a foreign value system on Natives*, thereby consigning them to poverty and economic marginalization. Under present circumstances, Natives cannot meet their fundamental need for self-actualization; *they require a viable community on their own terms, based on their own cultural values.*"[1859] [Emphasis added.]

Furthermore, emerging international norms directly applicable to indigenous peoples are explicitly making the link between deprivation of human rights, colonization, and dispossession of lands, territories and resources. As the draft *U.N. Declaration on the Rights of Indigenous*

[1855] B. Morse, "Comparative Assessments of Indigenous Peoples in Québec, Canada and Abroad" in Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté, *Les Attributs d'un Québec souverain* (Québec: Bibliothèque nationale du Québec, 1992), Exposés et études, vol. 1, 307 at 345.

[1856] Id. at 344.

[1857] Canadian Human Rights Commission, *Annual Report 1993* (Ottawa: Minister of Supply and Services Canada, 1994) at 24. See also M.E. Turpel, *Book Review*, (1990) 69 Can. Bar Rev. 828 at 829: "...the last vestiges of global colonization (indigenous peoples enclaved in nation-states)".

[1858] Royal Commission on Aboriginal Peoples, *Partners in Confederation[:] Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services, 1993) at 42.

[1859] P. Kierans, "An Argument for a Separate Aboriginal Legal System Based on the Notion of Need" in W. Tarnopolsky, J. Whitman & M. Ouellette, (eds.), *Discrimination in the Law and the Administration of Justice* (Montreal: Les Éditions Thémis, 1993) 593 at 608. At 602, the author states: "Many have argued that the heart of the problem Natives experience with the present legal system lies outside the legal system itself. *Its roots are in the process of degradation, dispossession and marginalization which characterizes colonization.*" [Emphasis added.]

Peoples provides:

> "...the indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting *inter alia*, in their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests".[1860]

Therefore, it is concluded that the existing international norms prohibiting colonialism must apply equally to all indigenous peoples, without discrimination. Colonialism is no more acceptable in independent states, such as Canada, than it is in overseas non-self-governing territories.

This conclusion is reinforced by the factual and legal links between indigenous peoples and colonialism that are increasingly being recognized both in Canada and internationally. As suggested above, extinguishment of Aboriginal rights was and continues to be a central element of the colonialism imposed on and suffered by indigenous peoples.

8.2 Existing and Emerging International Law and Norms

> "It...remains the position of our Commission that the plight of native Canadians is *by far the most serious human rights problem in Canada*, and that failure to achieve a more global solution can only continue to tarnish Canada's reputation and accomplishments."[1861]
>
> Canadian Human Rights Commission, 1994

> "...the indigenous peoples' movement's emphasis on collective rights, including collective land rights, *enriches*, rather than undermines, *international human rights law*."[1862]
>
> A. Buchanan, 1993

8.2.1 International human rights and extinguishment

Generally, under heading 8, the relationship between the human rights of Aboriginal (or

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[1860] Draft *U.N. Declaration on the Rights of Indigenous Peoples*, fifth preambular paragraph. See also ILO *Indigenous and Tribal Peoples Convention, 1989* (No. 169), art. 1, para. 1(b), where the Convention is said to apply to indigenous peoples in independent countries and colonization is said to have occurred (at least in some instances).

[1861] Canadian Human Rights Commission, *Annual Report 1993* (Ottawa: Minister of Supply and Services Canada, 1994) at 20.

[1862] A. Buchanan, *The Role of Collective Rights in the Theory of Indigenous Peoples' Rights*, note 1825, *supra*, at 108.

indigenous[1863]) peoples and extinguishment is examined. Human rights are and should be broadly conceived. In the Canadian context, they include a continuum of rights, from the constitutional rights contained in the *Canadian Charter of Rights and Freedoms* and in Part II of the *Constitution Act, 1982* (aboriginal and treaty rights), to the human rights in the *Canadian Bill of Rights*,[1864] the *Canadian Human Rights Act*,[1865] and the provincially legislated human rights charters.[1866] Also relevant and applicable to the Canadian legal setting, are the universal norms contained in international law,[1867] including numerous human rights instruments and international customary law.

It is worth emphasizing that Canadian and international human rights standards should not be viewed as isolated from each other. Rather, the domestic and international norms often address the same classes or categories of human rights. Although not always consistent, Canadian courts are increasingly turning to international human rights norms to assist them in determining the nature and scope of rights in the *Canadian Charter of Rights and Freedoms*.[1868]

In international human rights instruments, commitments are made by states concerning the universal standards that are to govern the conduct of both governments and people. In some cases, the norms are binding in Canada and in other cases they are not. However, in determining human rights issues, courts in Canada have taken into account standards in international instruments, both in cases where these instruments have been ratified by Canada[1869] and where they have not.[1870]

In a number of instances, if a state fails to honour a commitment to respect the rules of human rights, a legal remedy may be available though not always effective according to the

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[1863] In this study, "Aboriginal peoples" and "indigenous peoples" are used interchangeably. In general, "Aboriginal peoples" is the term used in the domestic Canadian context (see *Constitution Act, 1982*, s. 35); and "indigenous peoples" is the phrase used in the international context. For a discussion of the origins of the phrase "indigenous peoples", see C. Tennant, *Indigenous Peoples, International Institutions, and the International Legal Literature, 1945-1993*, (1994) 16 Human Rts. Q. 1 at 4, n.11.

[1864] *Canadian Bill of Rights*, 1960, R.S.C. 1985, App. III.

[1865] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6.

[1866] In the provinces and territories, see British Columbia *Human Rights Act*, S.B.C. 1984, c. 22; *Alberta Individual's Rights Protection Act*, R.S.A.1980, c. I-2, S.A. 1985; Saskatchewan *Human Rights Code*, R.S.S. 1978, c. S-24.1; Manitoba *Human Rights Code*, R.S.M. 1987, c. H-175; Ontario *Human Rights Code*, S.O. 1981, c. 53; Quebec *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12; New Brunswick *Human Rights Code*, R.S.N.B. 1973, c. H-11; Nova Scotia *Human Rights Act*, R.S.N.S. 1989, c. 214; Prince Edward Island *Human Rights Act*, S.P.E.I. 1988, c. H-12; Newfoundland *Human Rights Code, 1981*, S.N. 1988, c. 62; Northwest Territories *Fair Practices Act*, R.S.N.W.T. 1974, c. F-4; and Yukon Territory *Human Rights Act*, S.Y. 1987, c. 3.

[1867] W. Schabas, *International Human Rights Law and the Canadian Charter [:] A Manual for the Practitioner* (Toronto: Carswell, 1991) at 41: "Within the state's own jurisdiction, international human rights law also has an important influence on the construction and scope of domestic protections of human rights. In some cases, it has been *directly incorporated or adopted into domestic law*. More commonly, domestic courts are influenced in their construction of statutes and constitutional provisions by the international instruments and jurisprudence...*Canada is undoubtedly one of the world's best examples of this synergy between international and domestic law.*" [Emphasis added.] See also A.F. Bayefsky, *International Human Rights Law [:] Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) at 2.

[1868] This aspect is discussed further under sub-heading 8.2.1.1 *infra*.

[1869] For a list of human rights instruments ratified by Canada (as of 1990), see A.F. Bayefsky, *International Human Rights Law [:] Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) at 23, n. 2. For a similar but more recent list (as of March 31, 1993), see C. Emanuelli, *Droit international public [:] Les organisations internationales, les individus, les relations diplomatiques et consulaires, la responsabilité internationale, le règlement pacifique des différends, les conflits armés*, 2ième éd. (Montréal: Éditions Wilson & Lafleur Ltée, 1994), tome 2, at 53-65.

[1870] W. Schabas, *International Human Rights Law and the Canadian Charter [:] A Manual for the Practitioner* (Toronto: Carswell, 1991) at 55-56.

circumstances.[1871] For example, in Canada, anyone whose rights or freedoms, as guaranteed by the Canadian Charter, have been infringed or denied has the right to a remedy before a competent Canadian court.[1872] Further, Aboriginal peoples and individuals may seek a legal remedy for violation of aboriginal and treaty rights under the *Constitution Act, 1982*. Also, at the international level, aggrieved individuals may file a claim[1873] with the U.N. Human Rights Committee[1874] under the *Optional Protocol*[1875] to the *International Covenant on Civil and Political Rights*.[1876]

Although many of the procedures are inadequate, it should be mentioned that in numerous instances reporting and complaint processes exist under various international human rights instruments. There are state reporting[1877] and state-to-state complaint[1878] procedures under the *International Covenant on Civil and Political Rights* (aside from individual complaint

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[1871] For example, in regard to the efficacy of the Human Rights Committee under the *Optional Protocol* to the *International Covenant on Civil and Political Rights*, see M.E. Turpel, *Indigenous Peoples' Rights to Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition*, (1992) 25 Cornell Int'l L.J. 579.

[1872] *Constitution Act, 1982*, s. 24(1).

[1873] The individual complaints procedure under the Optional Protocol is described in D. Shelton, "Individual Complaint Machinery Under the United Nations 1503 Procedure and the Optional Protocol to the International Covenant on Civil and Political Rights" in H. Hannum, (ed. for the International Human Rights Group), *Guide to International Human Rights Practice* (Philadelphia: University of Pennsylvania Press, 1984) 59; A.H. Robertson, "The Implementation System: International Measures" in L. Henkin, (ed.), *The International Bill of Rights [:] The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 332 at 360-364.

[1874] In regard to indigenous peoples in Canada, complaints determined by the Human Rights Committee include: *Lovelace* v. *Canada*, (No. 24/1977) *Report of the Human Rights Committee*, U.N. GAOR, 36th Sess., Supp. No. 40, at 166, U.N. Doc. A/36/40 (1981); and in (1981) 68 I.L.R. 17 (denying Indian woman who married a non-Indian the right to live on a reserve is a violation of art. 27 of the *International Covenant on Civil and Political Rights*); *Mikmaq Tribal Society* v. *Canada*, (No. 205/1986), U.N. Doc. CCPR/C/39/D/205/1986 (1990) (Human Rights Committee admissibility decision, July 20, 1990); *Mikmaq Tribal Society* v. *Canada*, U.N. Doc. CCPR/C/43/D/205/1986 (1991) (Human Rights Committee final decision, Dec. 3, 1991); *Ominayak* v. *Canada*, U.N. Doc. CCPR/C/38/D/167/1984 (Human Rights Committee decision, March 28, 1990) (Canada found to be in violation of art. 27 of the Covenant, in respect to unresolved land claims, but the Committee was of the view that efforts proposed by Canada would rectify the situation).

In Sweden, an indigenous person has successfully brought a complaint for violations of traditional hunting rights: see *Kitok* v. *Sweden*, U.N. Doc. CCPR/C/33/D/197/1985 (Human Rights Committee decision released Aug. 10, 1988).

[1875] *Optional Protocol to the International Covenant on Civil and Political Rights* (1966), G.A. Res. 2200A (XXI), 21 U.N. GAOR, Supp. (No. 16) at 59, U.N. Doc.A/6316, Can T.S. 1976 No. 47 (1966). Entered into force March 23, 1976, and in force in Canada August 19, 1976.

[1876] *International Covenant on Civil and Political Rights* (1966), G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 49, U.N. Doc. A/6316, Can. T.S. 1976 No. 47 (1966). *Entered into force* January 3, 1976, and in force in Canada August 19, 1976.

[1877] Under art. 40 of the International Covenant, states are required to submit reports on human rights matters to the Human Rights Committee when the Committee so requests. See A.H. Robertson, "The Implementation System: International Measures" in L. Henkin, (ed.), *The International Bill of Rights [:] The Covenant on Civil and Political Rights*, note 1873, *supra*, at 350-351; F. Pocar, "The International Covenant on Civil and Political Rights" in U.N. Centre for Human Rights & U.N. Institute for Training and Research, *Manual on Human Rights Reporting* (New York: United Nations, 1991) 79.

In regard to reporting on the right of self-determination, see A. Cassese, "The Self-Determination of Peoples" in L. Henkin, (ed.), *The International Bill of Rights [:] The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 92 at 113; H. Hannum, *Autonomy, Sovereignty, and Self-Determination [:] The Accommodation of Conflicting Rights* (Philadelphia: Univ. of Penn. Press, 1990) at 41.

[1878] Arts. 41-42 of the International Covenant. See A.H. Robertson, "The Implementation System: International Measures" in L. Henkin, (ed.), *The International Bill of Rights [:] The Covenant on Civil and Political Rights*, note 1873, *supra*, at 353-356. Under ss. 41-42, violations of article 1 of the Covenant on self-determination are said to be within the competence of the Human Rights Committee: see L. Bucheit, *Secession [:] The Legitimacy of Self-Determination*, note 1835, *supra*, at 79-80.

procedures under the *Optional Protocol*); state reporting[1879] procedures under the *International Covenant on Economic, Social and Cultural Rights*; state reporting[1880] procedures under the *International Convention on the Elimination of All Forms of Racial Discrimination*[1881]; and complaint procedures[1882] (initiated solely by ILO members[1883]) that are applicable to the ILO Conventions concerning indigenous peoples.[1884]

Many of the international human rights instruments,[1885] such as the *Universal Declaration of Human Rights*,[1886] recognize rights that are to be enjoyed by all persons. However, there is an emerging body of international instruments that provide for the rights of indigenous peoples and the corresponding duties of states. The most recent and important of these instruments is the draft *United Nations Declaration on the Rights of Indigenous Peoples*[1887] (not yet in force). Other international instruments specific to indigenous peoples include two International Labour Organization conventions: *Indigenous and Tribal Peoples Convention, 1989* (No. 169)[1888] and *Indigenous and Tribal Populations Convention, 1957*

[1879] Arts. 16-22 of the International Covenant. See D. Fischer, "International Reporting Procedures" in H. Hannum, (ed. for the International Human Rights Group), *Guide to International Human Rights Practice*, note 1873, *supra*, 165. At 174, the author states: "Unlike the International Covenant on Civil and Political Rights, the [Economic, Social and Cultural] Covenant makes no provision for the examination of reports by a new body composed of independent experts." In regard to reporting procedures under the Covenant, see P. Alston, "The International Covenant on Economic, Social and Cultural Rights" in U.N. Centre for Human Rights & U.N. Institute for Training and Research, *Manual on Human Rights Reporting*, note 1877, *supra*, 39.

[1880] Art. 9(2) of the Convention. See L. Rodriguez, "The International Convention on the Elimination of All Forms of Racial Discrimination" in U.N. Centre for Human Rights & U.N. Institute for Training and Research, *Manual on Human Rights Reporting*, note 1877, *supra*, 127; D. Fischer, "International Reporting Procedures" in H. Hannum, (ed. for the International Human Rights Group), *Guide to International Human Rights Practice*, note 1873, *supra*, at 166-168.

[1881] *International Convention on the Elimination of All Forms of Racial Discrimination*, adopted on Dec. 21, 1965 and entered into force on January 4, 1969. Entered into force for Canada on October 14, 1970.

[1882] The procedures that would be relevant to indigenous peoples include "representations" (ILO *Constitution*, arts. 24, 25, & 26, para. 5); and "complaints" (ILO *Constitution*, arts. 26-29, 31-34). See L. Swepston, "Human Rights Complaint Procedures of the International Labour Organization" in H. Hannum, (ed. for the International Human Rights Group), *Guide to International Human Rights Practice*, note 1873, *supra*, 74.

[1883] Individuals do not have direct access to lodging complaints. These ILO procedures can only be used directly by governments, workers' or employers' associations, or delegates to the International Labour Conference. Therefore, complaints of indigenous peoples would have to be raised by one of these eligible groups.

[1884] The relevant ILO Conventions are: *Indigenous and Tribal Peoples Convention, 1989* (No. 169); and *Indigenous and Tribal Populations Convention, 1957* (No. 107). Canada would have to first ratify these Conventions, before complaints to the ILO could be made in regard to human rights violations under these instruments.

[1885] For compilations of international human rights instruments, see L. Henkin, R. Pugh, O. Schacter, & H. Smit, (eds.), *Basic Documents Supplement to International Law Cases and Materials*, 3rd ed. (St. Paul, Minn.: West Publishing Co., 1993); I. Brownlie, (ed.), *Basic Documents on Human Rights*, 3d ed. (Oxford: Clarendon Press, 1992); B.Weston, R. Falk, & A. D'Amato, (eds), *Basic Documents in International Law and World Order*, 2nd ed. (St. Paul, Minn.: West Publishing Co., 1990).

[1886] *Universal Declaration of Human Rights*, adopted by U.N General Assembly, Dec. 10, 1948, U.N.G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948). For a discussion as to whether the entire *Declaration* is now considered to have the status of customary law, see A.F. Bayefsky, *International Human Rights Law [:] Use in Canadian Charter of Rights and Freedoms Litigation*, note 1869, *supra*, at 15, n. 66; R. Lillich, *Invoking International Human Rights Law in Domestic Courts*, (1985) 54 Cincinnati L. Rev. 367 at 393 *et seq.*

[1887] *United Nations Declaration on the Rights of Indigenous Peoples*, in E.-I. Daes, Chairperson/Rapporteur, *Discrimination Against Indigenous Peoples [:] Report of the Working Group on Indigenous Populations on its eleventh session*, U.N. Doc. E/CN.4/Sub.2/1993/29, 23 August 1993, 50 (Annex I).

[1888] *Indigenous and Tribal Peoples Convention, 1989* (No. 169), done at Geneva, June 27, 1989. Opened for signature June 27, 1989; entered into force Sept. 5, 1991. Reprint in (1990) 28 Int'l Legal Mat'ls 1384. To date, Argentina, Bolivia, Columbia, Costa Rica, Mexico and Norway have ratified the Convention.

(No. 107)[1889].

In regard to the majority of the extinguishments discussed in earlier portions of this study, it is important to note that they took place *before* Canada assumed the international human rights obligations referred to under this part. These human rights obligations formally began with the *Charter of the United Nations*[1890] and continue to develop through to the present. However, decisions by the U.N. Human Rights Committee indicate that what is significant is whether the *effect* of the violation continues into the era of modern human rights. In *Ominayak* v. *Canada*, [1891] the Human Rights Committee found that Canada had violated article 27 of the *International Covenant on Civil and Political Rights*, by failing to provide adequate land to the Lubicon Lake Cree, in a series of transactions going back many years. The Committee concludes:

> "*Historical inequities*, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and *constitute a violation of article 27 so long as they continue.*"[1892] [Emphasis added.]

As B. Kingsbury provides:

> "*...the finding that historical inequities which continued were a major component of the violation is potentially very significant.* In *Ominayak*, historical inequities resulted especially from the failure of Canada (including, for responsibility purposes, the Province of Alberta) to honor the terms of a treaty with indigenous people (Treaty 8), and possibly also the terms of certain legislation, by ensuring reasonable land rights for the Lubicon Lake Band...Thus *Canada was responsible under the Covenant for the failure to rectify a continuing inequity, notwithstanding that the initial injustices predated the entry into force of the Covenant by many years.*"[1893] [Emphasis added.]

In *Ominayak*, the Committee went even further, in considering the effects of events in the distant past, than it had in its earlier case of *Lovelace.*[1894] In *Lovelace*, the Human Rights Committee emphasized the 'persisting' effects of the injury in finding that the complaint was admissible even though the actual loss of Indian status which was at the heart of the complaint had occurred some six years before the *International Covenant on Civil and Political Rights* and the related *Optional Protocol* entered into force for Canada.[1895]

[1889] *Indigenous and Tribal Populations Convention, 1957* (No. 107), adopted in 1957, entered into force on June 2, 1959, and has been ratified by twenty-seven member states of the ILO (not including Canada). Reprint in 328 U.N.T.S. 247. Text is also reproduced in G. Bennett, *Aboriginal Rights in International Law* (London: Royal Anthropological Institute, 1978) App. I.

[1890] *Charter of the United Nations*, signed June 26, 1945; entered into force October 24, 1945. As of August 1, 1992, 179 states were represented in the U.N. General Assembly. As one of the original members, Canada has been a member since November 9, 1945.

[1891] *Ominayak* v. *Canada*, U.N. Doc. CCPR/C/38/D/167/1984 (Human Rights Committee decision, March 28, 1990).

[1892] Id., para. 33.

[1893] B. Kingsbury, *Claims by Non-State Groups in International Law*, (1992) 25 Cornell Int'l L.J. 481, at 491.

[1894] *Lovelace* v. *Canada*, U.N. Doc. CCPR/C/DR/(XIII)/R.6/24 (July 30, 1981).

[1895] These instruments entered into force in Canada in Jan. 3, 1976 and March 23, 1976 respectively. In regard to the decision of the Committee in *Lovelace*, see A. F. Bayefsky, *The Human Rights Committee and the Case of Sandra Lovelace*, (1982) 20 Can. Ybk. Int'l L. 244, at 254.

> "In *Lovelace* the Committee applied a further procedural decision concerning the issue of admissibility, namely to consider communications relating to *events which took place prior to the entry into force of the Covenant and the Protocol (for the State Party Concerned) if the alleged violation continued after that date or the event had effects which themselves constituted a violation after that date.* The fact that communications concerning events prior to this date would otherwise be inadmissible was the reason why the Committee emphasized the 'persisting' effects of Lovelace's loss of Indian status, the loss of status having occurred upon her marriage six years prior to the entry into force of the Covenant and Protocol for Canada." [Emphasis added.]

The implication of these decisions is that international human rights standards are not only of importance in assessing so-called "modern" extinguishments (as in the James Bay and Northern Quebec Agreement[1896]). In addition, existing international norms are relevant to the Human Rights Committee's consideration of prior extinguishments of aboriginal title that occurred much earlier in Canada's history, if these extinguishments can be demonstrated to be the source of continuing violations of human rights under the *International Covenant on Civil and Political Rights*.

Under subsequent sub-headings, international norms relevant to the issue of extinguishment of aboriginal title will be described. In considering the wide range of applicable standards, it is vital to keep in mind that the various human rights they entail are most often interrelated and interdependent. This is especially true in the Aboriginal context. As a prior first step, however, we will assess briefly the relevance and applicability of international human rights standards under Canadian law, and then examine aboriginal rights as fundamental human rights.

8.2.1.1 Relevance of international standards under Canadian law

International human rights law and standards are relevant in the Canadian domestic context for several important reasons. First, to the extent that some international human rights standards have become norms of customary international law[1897] (e.g. the right to protection from genocide)[1898], these standards may have been directly incorporated into domestic Canadian law. Canadian case law suggests that norms of customary international law may be "adopted" directly into Canadian domestic law, without any need for the incorporation of these standards by statute.[1899] However, there has as yet been no definitive pronouncement on the issue from the Supreme Court of Canada.[1900]

Second, international human rights standards are important guideposts for the evolution of Canadian law. This has been particularly apparent in the developing jurisprudence of the *Canadian Charter of Rights and Freedoms*. In *Slaight Communications Inc.* v. *Davidson*, Dickson C.J. noted the importance of Canada's human rights obligations in *Charter* interpretation[1901]:

> "Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights."[1902]

[1896] See the case study of this land claims agreement, in Part II, heading 11 *infra*.

[1897] In regard to proving customary international law, see A.F. Bayefsky, "International Human Rights Law in Canadian Courts" in I. Cotler & F. Eliadis, (eds.), *International Human Rights Law [:] Theory and Practice*, note 1848, *supra*, at 118.

[1898] *Reservations to the Genocide Convention*, [1951] I.C.J. Reports 15, at 23. Genocide is also described as an international peremptory norm: see I. Brownlie, *Principles of Public International Law*, note 1843, *supra*, at 513.

[1899] A.F. Bayefsky, *International Human Rights Law*[:] *Use in Canadian Charter of Rights and Freedoms Litigation*, note 1869, *supra*, at 5.

[1900] Id.

[1901] See also W. Tarnopolsky, "The Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights: Domestic Implementation of International Human Rights Norms" in I. Cotler & F. Eliadis, (eds.), *International Human Rights Law [:] Theory and Practice*, note 1848, *supra*, 169.

[1902] *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 749 at 1057. Dickson C.J. referred favourably to this passage from *Slaight* in his judgment in *R.* v. *Keegstra*, [1990] 3 S.C.R. 697. See also *R.* v. *Brydges*, [1990] 1 S.C.R. 190, per Lamer J. for the majority; and *Canada (Cdn. Human Rights Commn.)* v. *Taylor* [1990] 3 S.C.R. 892, per Dickson C.J.C. for the majority; *Reference Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 at 350 per Dickson C.J.

International human rights standards may also guide the development of common law rights. The High Court of Australia has recently recognized the importance of international human rights standards in the development of the common law. In *Mabo et al. v. State of Queensland*, Brennan J. noted that:

> "The opening up of international remedies to individuals pursuant to Australia's accession to the Optional Protocol to the International Covenant on Civil and Political Rights brings to bear on the common law the powerful influence of the Covenant and the international standards it imports. The common law does not necessarily conform with international law, but *international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.* A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration."[1903] [Emphasis added]

Even in regard to international instruments that Canada has *not ratified*, Canadian courts have on occasion referred to such instruments. This can especially be useful in cases where Canada lacks its own norms or experience in the rights being deliberated. For example, W. Schabas points out the use made of the European Convention by Canadian courts:

> "Although Canada is not and cannot be a party to the *European Convention [for the Protection of Human Rights and Fundamental Freedoms]*, it has been abundantly cited by the Canadian courts in *Charter* interpretation."[1904]

As A. Bayefsky highlights, judicial reference to non-binding international law in Canadian human rights cases is rapidly growing:

> "Between 1982 when the Charter came into force and 1991 there have been about *130 cases which have referred to international law which does not bind Canada.* In about half these cases, the reference supported the decision made."[1905] [Emphasis added.]

The relevance of international human rights norms to the determination of human rights matters in domestic courts[1906] is described by I. Brownlie as follows:

> "The principles of human rights have emerged as an objective and general international legal standard. The consequence has been that *the principles of human rights now constitute a standard which is external to the individual states but also intrusive. In other*

[1903] *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia), at 29, per Brennan J. See also A. F. Bayefsky, *International Human Rights Law[:] Use in Canadian Charter of Rights and Freedoms Litigation*, note 1869, *supra*, at 85, where the author provides that there is "the common law presumption and the *necessity* of the court ensuring the conformity of Canadian law, including the Charter, with Canada's international legal obligations where the Charter language permits."

[1904] W. Schabas, *International Human Rights Law and the Canadian Charter [:] A Manual for the Practitioner*, note 1870, *supra*, at 55-56. At 56, the author also cites a speech given by Supreme Court Justice G. La Forest to the Canadian Council on International Law, October 22, 1988: "The [European] Convention decisions are obviously not directly applicable to the Canadian context, reflecting as they do to compromises necessary for a multinational agreement in post-war Europe. However, *given that the [European] Commission has had the opportunity to consider many of the issues that are coming before our courts, the more frequent citation of these materials would assist us as we develop a Canadian approach to these common issues."*

See also *Re Federal Republic of Germany and Rauca*, (1983) 145 D.L.R. (3d) 638 (Ont. C.A.); aff'g (1982) 141 D.L.R. (3d) 412 (H.C.J.), where the Ontario Court of Appeal referred to the European Convention.

[1905] A.F. Bayefsky, "International Human Rights Law in Canadian Courts" in I. Cotler & F. Eliadis, (eds.), *International Human Rights Law [:] Theory and Practice*, note 1848, *supra*, at 136. For a listing of cases where the Supreme Court of Canada has used or referred to non-binding international law in determining domestic cases, see A.F. Bayefsky, *supra*, at 155, n. 97.

[1906] In regard to the U.S., see R. Lillich, *Invoking International Human Rights Law in Domestic Courts*, (1985) 54 Cincinnati L. Rev. 367; R. Bilder, *Integrating International Human Rights Law Into Domestic Law - U.S. Experience*, [1981] 4 Houston J. Int'l L. 1; G. Christenson, *The Uses of Human Rights Norms to Inform Constitutional Interpretation*, [1981] 4 Houston J. Int'l L. 39.

> *words domestic legal and social values have now become subject to external tests and evaluation.* Even the normal application of national and local legal rules to the citizens of the given state may not be sufficient, if the rules themselves fail to accord with the relevant external standards."[1907] [Emphasis added.]

Third, as a state, Canada is bound by the rules of international law, including the provisions of the international treaties which Canada has ratified. Even in cases where there may be no domestic remedy for international law violations, failure to comply with international law, including human rights matters, is not only unlawful at the international level, but may cause Canada as a nation considerable international embarrassment.

In Canada, the 1985 Task Force To Review Comprehensive Claims Policy has highlighted the importance of international norms pertaining to indigenous peoples, as well as Canada's accountability at the international level for its treatment of indigenous peoples:

> "Within the international community, increasing recognition is being given to the responsibility of nation states to ensure the survival of their indigenous peoples. At the United Nations, Canada has been called to account for its treatment of aboriginal peoples. *If it is to have credibility in promoting the observance of human rights by other countries, Canada will have to demonstrate its willingness to respect the rights of its most vulnerable peoples.*"[1908] [Emphasis added.]

A similar view has been expressed more recently by Manitoba's Justice Inquiry:

> "Canada's treatment of its first citizens is an international disgrace. To fail to take every needed step to correct this lingering injustice will continue to bring tragedy and suffering to aboriginal people, and to *blacken our country's name throughout the world.*"[1909] [Emphasis added.]

Based on the above considerations, it can be concluded that international human rights norms are both relevant and applicable to the determination of human rights issues before Canadian domestic tribunals. However, in numerous instances, where such standards have not been implemented within the national legal system, international norms are not "binding" within the domestic context (unless a part of customary international law). However, this would not necessarily mean that these norms are not relevant and applicable. Domestic courts may still cite relevant international standards in interpreting the nature and scope of human rights and any related violations.

8.2.1.2 International norms concerning indigenous peoples

For numerous decades, states have ignored many of the world's indigenous peoples in undertaking the international trusteeship[1910] and decolonization processes under U.N.

[1907] I. Brownlie (F.M. Brookfield, ed.), *Treaties and Indigenous Peoples [:] The Robb Lectures 1991* (Oxford: Clarendon Press, 1992) at 35.

[1908] Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy* (Ottawa: Department of Indian Affairs and Northern Development, 1985) at 103.

[1909] Report of the Aboriginal Justice Inquiry of Manitoba, *The Justice System and Aboriginal People* (Winnipeg, Manitoba: Queen's Printer, 1991), vol. 1, at 674.

[1910] The international trusteeship system for "trust territories" is provided for in the *Charter of the United Nations*, art. 75 *et seq.* See also art. 73 of the Charter, where a "sacred trust" is established in regard to "non-self-governing territories".

supervision.[1911] However, in more recent times, the international community has been taking steps to establish minimum standards that specifically address indigenous peoples' fundamental rights and concerns.

International instruments have been adopted or are emerging in various international fora that make express reference to indigenous peoples. These include the *Indigenous and Tribal Peoples Convention, 1989* (No. 169) which substantially revises the assimilationist orientation of the earlier *Indigenous and Tribal Populations Convention, 1957* (No. 107);[1912] and the draft *United Nations Declaration on the Rights of Indigenous Peoples*. In addition, explicit reference to indigenous people is provided in the *Rio Declaration on Environment and Development*.[1913] Further, the Organization of American States,[1914] through the Inter-American Commission on Human Rights, is in the early stages of preparing a "legal instrument relative to the rights of indigenous peoples".[1915]

Whether international norms pertaining to indigenous peoples are being formulated in binding conventions or aspirational declarations, should not detract from the importance of the matters being addressed or their relevance to the states concerned. As indicated by C. Chinkin, declarations of the U.N. General Assembly[1916] may be "soft law" but they are still highly significant:

> "The use of soft law instruments has presented a challenge to the normative structure, the traditional sources, the subjects and subject matter of international law. The international legal order is an evolving one that requires a broad range of modalities for change and development, especially into new subject areas...*Labelling these instruments as law or non-law disguises the reality that both play a major role in the development of international law and both are needed for the regulation of States activities and for the creation of expectations.*"[1917] [Emphasis added.]

[1911] M.E. Turpel, *Indigenous Peoples' Rights to Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition*, note 1871, *supra*, at 579.

[1912] For a view that ILO Convention No. 169 is still assimilationist, see S. Venne, *The New Language of Assimilation: A Brief Analysis of ILO Convention 169*, (1989) II Without Prejudice 53. A more positive analysis is found in R. Barsh, *An Advocate's Guide to the Convention on Indigenous and Tribal Peoples*, (1990) 15 Okla. City U. L. Rev. 209. In regard to key differences between Convention No. 169 and Canadian law, see R. Dupuis, *Des écarts importants entre la Convention No. 169 et le droit canadien*, (1994) 24 (No. 4) Recherches amérindiennes au Québec 29.

[1913] *Rio Declaration on Environment and Development*, U.N. Doc. A/Conf. 151/5/Rev. 1, June 13, 1992, reprinted in 31 I.L.M. 874 (1992), Principle 22: "Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development."

[1914] On January 1, 1990, Canada ratified the *Charter of the Organization of the American States*, done April 30, 1948, entered into force Dec. 13, 1951, 2 U.S.T. 2394, T.I.A.S. no. 2361, 119 U.N.T.S. 3.

[1915] In November 1989, the OAS General Assembly adopted Resolution 1022 (XIX-O/89) requesting the Inter-American Commission on Human Rights to prepare such an instrument. See H. Jiminez, "The Development of Indigenous Peoples' Rights in International Organizations: A Latin American Perspective" in Proceedings of the 1993 Conference of the Canadian Council on International Law, *Aboriginal Rights and International Law* (Ottawa: Canadian Council on International Law, 1992) 56 at 60. Generally, in regard to the Inter-American human rights system, see D. Shelton, "The Inter-American System for the Protection of Human Rights: Emerging Law" in I. Cotler & F. Eliadis, (eds.), *International Human Rights Law [:] Theory and Practice*, note 1848, *supra*, 369.

[1916] On the legal status of U.N. General Assembly resolutions, see V. Gowland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia* (London: Martinus Nijhoff Publishers, 1990) at 136-144; J. Castañeda, *Legal Effects of United Nations Resolutions* (transl. A. Amoia) (New York: Columbia University Press, 1969); O. Asamoah, *The Legal Significance of the Declarations of the General Assembly of the United Nations* (The Hague: Martinus Nijhoff Publishers, 1966).

[1917] C. Chinkin, *The Challenge of Soft Law and Change in International Law, (1989)*, 38 I.C.L.Q. 850 at 866, cited in M.L. McConnell, "The Relationship Between Theories About Women and Theories About International Law" in Proceedings of the 1992 Conference of the Council on International Law, *State Sovereignty: The Challenge of a Changing World* (Ottawa, Canadian Council on International Law, 1992) 68 at 76-77.

A further question is whether these instruments should be used as a guide in domestic Canadian courts. In the case of ILO Convention No. 169, Canada has not yet ratified the Convention although it is in force; and in the case of the draft U.N. Declaration, it is not yet an adopted instrument of the United Nations.[1918] These two instruments are not legally binding in Canadian courts, but the norms they contain may still be binding if deemed to be a part of customary international law.

S.J. Anaya indicates that "a new constellation of international norms specifically concerned with indigenous peoples"[1919] has emerged. Anaya states that these standards may already be customary law and therefore binding on states, regardless of treaty ratification:

> "Insofar as the content of these norms and expectations of compliance with them are rooted in a preponderance of international opinion, they are customary law and hence generally binding upon the constituent units of the world community regardless of treaty ratifications[1920] or other formal act of assent to the norms."[1921]

As previously indicated, Canadian courts can refer to international norms to guide their interpretation of human rights concerns, regardless of whether these standards are binding within Canada.[1922] This judicial view would be especially useful in relation to indigenous peoples and their collective human rights, since uniform standards are woefully lacking within Canada. Moreover, in recent years, Canada's record in relation to Aboriginal peoples has been described by the Canadian Human Rights Commission as "a national tragedy".[1923]

Also, in all of the international standard-setting processes concerning indigenous peoples (since at least 1982), the Canadian government has played and continues to play a most direct and active role.[1924] Further, in relation to the draft U.N. Declaration, the standard-setting process has continued consistently for a period of almost ten years.[1925] This has allowed for

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[1918] See C. Berkey, "The Use of Human Rights Law in Domestic Litigation to Enhance Self-Determination for American Indians" in Proceedings of the 1993 Conference of the Canadian Council on International Law, *Aboriginal Rights and International Law*, note 1915, *supra*, at 50, where the author acknowledges that the draft *U.N. Declaration on the Rights of Indigenous Peoples* has not yet been adopted by the U.N. General Assembly, but indicates: "In its present form, [the draft Declaration] represents a wide-spread consensus of indigenous people and many states regarding minimum standards of treatment and fundamental rights."

[1919] S.J. Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, (1994) 28 Georgia L. R. 309 at 338.

[1920] At 338, n. 85, Anaya cites L.B. Sohn, "Unratified Treaties as a Source of Customary International Law" in A. Bos & H. Siblesz, (eds.), *Realism in Law-Making: Essays on International Law in Honour of Willem Riphagan* (1986).

[1921] S.J. Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, note 1919, *supra*, at 338.

[1922] Many of the following points have been raised in Assembly of First Nations, *Violations of Law and Human Rights by the Government of Canada and Newfoundland in Regard to the Mushuau Innu [:] A Documentation of Injustice in Utshimasits (Davis Inlet)*, Submission to the Canadian Human Rights Commission, May 1993, at 21-22.

[1923] Canadian Human Rights Commission, *Annual Report 1989* (Ottawa: Government of Canada Printers, 1990) at 10 and 15.

[1924] D. Marantz, "Aboriginal Rights and International Law Development of Indigenous Peoples' Rights in International Organisations" in Proceedings of the 1993 Conference of the Canadian Council on International Law, *Aboriginal Rights and International Law*, note 1915, *supra*, at 65.

See also W. Tarnopolsky, *The Canadian Bill of Rights and Freedoms*, 2nd revised ed. (Toronto: McClelland & Stewart, 1975) at 159, where he emphasizes the relevance of the international human rights instruments in interpreting Canadian human rights legislation because of Canada's active participation in the formulation of these international instruments.

[1925] In regard to the importance of the draft Declaration and the U.N. Working Group's standard-setting process, see R. Williams, Jr., *Encounters of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, (1990) Duke L.J. 660 at 666-672; C. Scott, "Dialogical Sovereignty: Preliminary Metaphorical Musings", in Proceedings of the 1992 Conference of the Canadian Council on International Law, *State Sovereignty: The Challenge of a Changing World*, note 1917, *supra*, at 283; M.C. Lâm, *Making Room for Peoples at the United Nations: Thoughts Provoked*

extensive response by the international community at large.

Consequently, it is the view of this study that the international standards referred to above, whether or not they are legally binding, are both relevant and applicable to domestic human rights situations within Canada.[1926] What will be discussed under the next sub-heading is that aboriginal rights are collective and individual human rights. As a result, extinguishment of aboriginal rights should be carefully considered in this context.

8.2.1.3 Aboriginal rights as human rights

> "...the situation of indigenous people must surely prompt us to ponder more deeply human rights as they are today. Henceforth, *we must realize that human rights are not only the rights of individuals. They are also collective rights - historic rights.* We are discovering 'new human rights,' including first and foremost, cultural rights."[1927]
>
> B. Boutros-Ghali, Secretary-General of the United Nations, 1992

> "*...aboriginal rights constitute...human rights unique to Native peoples*, indivisible from their ancestries, heritage and identities and these aboriginal rights are a sustaining historical source of their pride, dignity and self-worth;..."[1928]
>
> Inuit Tapirisat of Canada, 1979

As demonstrated under this sub-heading, aboriginal rights are human rights. Yet, what is often absent from analyses or debates on extinguishment is the human rights dimension. A human rights perspective underlines the seriousness of eliminating aboriginal rights through the

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by Indigenous Claims to Self-Determination, note 1840, *supra*, at 620-621.

For a view that opposes the draft Declaration, see generally C. Cantin, "Droits des autochtones et exploitation des ressources" in Proceedings of the 1993 Conference of the Canadian Council on International Law, *Aboriginal Rights and International Law*, note 1915, *supra*, 89. The author is a legal representative of the Quebec government, who, rather than consider the emerging human rights norms as a measure of her government's own conduct, chooses to reject the draft Declaration to the extent that it recognizes different standards from that employed by Quebec in its dealings with Aboriginal peoples.

[1926] See B. Kingsbury, *Whose International Law? Sovereignty and Non-State Groups*, [1994] Am. Soc. Int'l L. Proc. 1 at 6, where the author confirms that "use [is being] made of proceedings in the UN Working Group on Indigenous Populations as a source of legitimacy for particular positions in intrastate politics." At 7, the author adds that courts in Canada, New Zealand and Australia are beginning to make "shifts in their approaches" and are "rethinking relations between indigenous peoples and states", in view of international developments in such international forums as the U.N. Working Group and the International Labour Organization.

[1927] B. Boutros-Ghali, Statement to U.N. General Assembly, in *Living History [:] Inauguration of the "International Year of the World's Indigenous People"*, (1993) 3 Transnat'l L. & Contemp. Probs. 168 at 170.

[1928] Inuit Tapirisat of Canada, *Significance of Maintaining the Concept of Aboriginal Rights*, Resolution #2, Igloolik, N.W.T., September 3-7, 1979, submitted by Inuit Committee on National Issues to the Meeting of the Steering Committee of the Continuing Committee of Ministers on the Constitution and the Native Presidents, Ottawa, Dec. 3, 1979, Doc. 830-77/011.

notion of extinguishment. Moreover, a human rights approach serves to link domestic and international law. This is especially important in the Aboriginal context, since aboriginal rights have more than domestic implications and are being recognized and protected in international instruments.

In assessing the significance of aboriginal rights, it should be highlighted that they constitute not only collective rights, but also entail important individual rights aspects.[1929] If (as indicated in this study), aboriginal rights include the inherent right to self-government, then the concept of aboriginal rights also embraces vital jurisdictional dimensions.

It is sometimes said that, as collective rights, the rights of indigenous peoples pose a fundamental challenge to the individual-centred system of international human rights which has developed in the post-World War II era.[1930] For example, in regard to the *Universal Declaration of Human Rights*, it is readily acknowledged that "the general concept of the Declaration, as well as much of its language, bear the stamp of Western philosophical and legal thinking".[1931] However, even in this context, collective rights have evolved within the international human rights system. As P. Alston explains:

> "The *vagueness and flexibility* of the language used in the Declaration has *enabled the notion of collective rights to be significantly developed* in the years since 1948 without doing violence to the basic text."[1932] [Emphasis added.]

And Alston adds:

> "*...the language used in the Declaration is, by design, sufficiently flexible* to allow each State a 'margin of appreciation' in interpreting the requirements of any particular right. To take but one example, 'the right to own property alone as well as in association with others' (article 17 of the Declaration) is recognized in virtually every society."[1933] [Emphasis added.]

Consistent with the above view, the universal human rights in existing international instruments, as they relate to indigenous peoples, should be flexibly interpreted in a manner compatible with their collective and individual rights. In this way, many of the fundamental economic, social, cultural and political rights that are inherent in the concept of aboriginal rights can find expression (at least in part) in the international regime of universal human rights.

This existing interrelationship has led some observers to conclude that there exists an "overlapping" between aboriginal rights and human rights. In a recent report prepared for the Canadian Human Rights Commission, in view of the fiduciary relationship between Aboriginal peoples and the Crown, D. McRae has expressed the overlap as follows:

> "At the very least, [the fiduciary] standard requires observance by the government of Canada of minimal standards for the *protection of human rights*, and to this extent the

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[1929] I. Cotler, "Human Rights Advocacy and the NGO Agenda" in I. Cotler & F. Eliadis, (eds.), *International Human Rights Law [:] Theory and Practice*, note 1848, *supra*, at 81: "...aboriginal rights involve both collective and individual rights." See also *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) at 127, per Macfarlane J.A.: "Aboriginal rights are communal rights, although each member of the community has a personal right to exercise them: *Pasco* v. *Canadian National Railway Co.*, (1989) 56 D.L.R. (4th) 404 at 410...(B.C.C.A.); *Twinn* v. *R.*, [1987] 2 F.C. 450 at 462 (T.D.)."

[1930] The most important examples of such collective rights are the right to self-determination, and collective rights to land. See A. Buchanan, *The Role of Collective Rights in the Theory of Indigenous Peoples' Rights*, note 1825, *supra*, at 93-95.

[1931] P. Alston, *The Universal Declaration at 35: Western and Passé or Alive and Universal*, (1983) 31 Int'l Comm'n of Jurists Rev. 60 at 61.

[1932] Id. at 63.

[1933] Id. at 66.

category of aboriginal rights and human rights overlap."[1934] [Emphasis added.]

The fact that aboriginal rights include numerous elements that already exist in the *International Bill of Human Rights*,[1935] does not in any way preclude aboriginal rights *per se* from being viewed independently as human rights. In fact, such content reinforces the perspective that aboriginal rights are human rights. For example, it is said that emerging human rights, such as the right to development, are also comprised of existing human rights. As R. Rich describes:

> "...while it may not be entirely accurate to describe the right to development as a new human right, it has clearly added a new dimension to human rights law."[1936]

In addition, the human rights set out in the *International Bill of Human Rights* should be interpreted in each specific situation within any given state in such a way that they do not restrict or derogate from human rights recognized or existing in that country. In this regard, the *International Covenant on Economic, Social and Cultural Rights* provides:

> "No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights *or that it recognizes them to a lesser extent.*"[1937] [Emphasis added.]

In this context, J. O'Manique confirms that while human rights are common to all peoples, the implementation of these rights would vary according to the peoples in question:

> "The human rights in their origin, are common to all peoples regardless of the role played by race, culture, and politics. In addition, *human rights, in their application, are peculiar to race, society, culture and politics*. The existence of rights is absolute; the exercise of rights is relative. The parameters for their variation are set by human development itself. *To be valid and useful, any claims about the implementation and relative importance of rights must be based on an empirical investigation of the development needs of the people in question.*"[1938] [Emphasis added.]

Therefore, for example, in the case of the property rights recognized in the *Universal Declaration of Human Rights* (art. 17), these rights would need to be interpreted in a manner that does not derogate from the collective and individual aboriginal rights of indigenous peoples when applying art. 17 to them. It would appear that a similar approach is provided for in the draft

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[1934] D. McRae, *Report on the Complaints of the Innu of Labrador to the Canadian Human Rights Commission*, Ottawa, August 18, 1993, at 5.

[1935] The *International Bill of Human Rights* is comprised of the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, and the *International Covenant on Economic, Social and Cultural Rights*.

[1936] R. Rich, *The Right to Development as an Emerging Human Right*, (1983) 23 Virginia J. of Int'l L. 287 at 325. See also Inuit Circumpolar Conference, *Principles and Elements for a Comprehensive Arctic Policy* (Montreal: Centre for Northern Studies and Research, McGill University, 1992) at 26, para. 8: "The emerging human rights of peace and development are considered as individual and collective rights, and they establish both rights and duties. *These rights may not be entirely new human rights, since they bring together and expand upon existing rights. However, they clearly add a new and dynamic dimension*"; H. Espiell, *The Right of Development as a Human Right*, (1981) 16 Texas Int'l L. J. 189 at 205: "The right of development as a human right is the synthesis of all human rights...All human rights are interdependent and each one conditions the remaining."

[1937] Art. 5, para. 2 of the Covenant. Similarly, see art. 5, para. 2 of the *International Covenant on Civil and Political Rights*. While the *Universal Declaration of Human Rights* appears to be silent on this specific aspect, the Declaration contains many human rights that are affirmed or even elaborated upon in the two Covenants. This would strongly suggest that a similar interpretation should now be given to the Declaration as is provided in the two Covenants.

[1938] J. O'Manique, *Universal and Inalienable Rights: A Search for Foundations*, (1990) 12 Human Rts. Q. 465 at 483.

U.N. Declaration on the Rights of Indigenous Peoples[1939] and in the *Indigenous and Tribal Peoples Convention, 1989* (No. 169)[1940].

Further, the international community is increasingly recognizing the need to specifically recognize and protect the collective and individual rights of indigenous peoples, as human rights, in a more comprehensive manner. Consequently, the United Nations and specialized agencies (such as the ILO) are addressing the indigenous peoples' rights in international human rights instruments. In particular, the *Indigenous and Tribal Peoples Convention, 1989* (No. 169) characterizes indigenous rights as human rights as follows:

> "No form of force or coercion shall be used in violation of the *human rights and fundamental freedoms* of the [indigenous and tribal] peoples concerned, *including the rights contained in this Convention.*"[1941] [Emphasis added.]

I. Cotler & F. Eliadis specifically list aboriginal rights as a discrete category of human rights.[1942] Moreover, the authors describe aboriginal rights in the following terms:

> "A ninth category [of human rights], one distinguishably set forth in the Canadian *Charter* - and increasingly recognized in international human rights law - is the category of *aboriginal rights*. Indeed, this notion of aboriginal rights, associated with the related concept of indigenous people, is bound up with the whole spectrum of human rights and the notion of human dignity."[1943] [Emphasis in original.]

Today, a wide range of commentators recognize that the collective and individual rights of indigenous peoples are human rights.[1944] This is hardly a surprising development. First, collective rights are generally recognized as being a part of the corpus of international human

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[1939] The draft *U.N. Declaration on the Rights of Indigenous Peoples*, art. 44 provides: "Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire."

[1940] The *Indigenous and Tribal Peoples Convention, 1989* (No. 169) provides in art. 34: "The nature and scope of the measures to be taken to give effect to this Convention shall be determined in a flexible manner, having regard to the conditions characteristic of each country." And in art. 35: "The application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements."

[1941] Art. 3, para. 2 of the Convention.

[1942] I. Cotler, "Human Rights Advocacy and the NGO Agenda" in I. Cotler & F. Eliadis, (eds.), *International Human Rights Law [:] Theory and Practice*, note 1848, *supra*, at 70.

[1943] Id. at 66.

[1944] Numerous commentators take the view that the collective rights of indigenous peoples are human rights, while acknowledging the challenges that such rights pose to the conventional emphasis on individual rights. For example, see R. A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, note 1925, *supra*, at 686 (indigenous rights as collective human rights); A. Buchanan, *The Role of Collective Rights in the Theory of Indigenous Peoples' Rights*, note 1825, *supra*, at 108 ("the indigenous peoples' movement's emphasis on collective rights, including collective land rights, enriches, rather than undermines, international human rights law."); M. Jackson, *A New Agenda for Human Rights Activists: The Collective Rights of Native Peoples*, (1989) 22 Interculture 19, 23 (notion of collective rights in fact has a long history in Canadian jurisprudence); M. L. Schwartz, *International Legal Protection for Victims of Environmental Abuse*, (1993) 18 Yale J. Int'l L 355 (rights of indigenous peoples are human rights); C. Berkey, *International Law and Domestic Courts: Enhancing Self-Determination for Indigenous Peoples*, (1992) 5 Harv. Hum. Rts. J. 65 (rights of indigenous peoples are human rights); M. L. Ferch, *Indian Land Rights: An International Approach to Just Compensation*, (1992) 2 Transnat'l L. & Contemp. Probs. 301 (rights of indigenous peoples are human rights); M. L. Turpel, *Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition*, note 1871, *supra*, (rights of indigenous peoples are human rights); R. Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, (1991) 16 Yale J. Int'l L. 127 (rights of indigenous peoples are human rights); D. Sanders, *Collective Rights*, (1991) 13 Hum. Rts. Q. 368, at 379-380. See generally, Symposium, *The Human Rights of Indigenous Peoples*, (1982) 36 Colum. J. Int'l Aff. 1-161; B. Hocking, (ed.), *International Law and Aboriginal Human Rights* (Toronto: Carswell, 1988).

rights.[1945] Second, it would be inconsistent with the notion of human rights that the fundamental collective and individual rights of indigenous peoples not be so recognized, when indigenous rights are inextricably linked to their cultures, heritage, identities and survival as distinct peoples.

If the fundamental rights of indigenous peoples are clearly human rights, the next question is whether human rights are regarded as alienable under international law. This is examined under the next sub-heading.

8.2.1.4 Are human rights alienable under international law?

In determining whether or not human rights are alienable under international law, it is worth noting that the modern Western concept of rights arose as "natural rights" and, as such, were inalienable. As J. O'Manique describes:

> "*The modern Western concept of rights arose from natural law theory*. In the continuation of the theistic tradition, natural law was associated with divine law or Providence. Human rights, which could be discovered along with natural law by human reason, were given to us by God. They were, therefore, both *inalienable and universal*."[1946] [Emphasis added.]

From a positive law perspective, it would also appear that there is no contemplation of alienating, eliminating or otherwise destroying human rights. Rather, there are repeated affirmations of the *inalienability* of human rights. In the 1990 *Charter of Paris for a New Europe a New Era of Democracy, Peace and Unity*, of which Canada is a signatory, the importance and inalienability of human rights are expressed as follows:

> "*Human rights and fundamental freedoms are the birthright of all human beings, are inalienable and are guaranteed by law*. Their protection and promotion is the first responsibility of government. Respect for them is an essential safeguard against an over-mighty State. Their observance and full exercise are the foundation of freedom, justice and peace."[1947] [Emphasis added.]

[1945] There is a vast literature on collective rights as human rights in general. In this literature, collective human rights are often called "third generation" human rights. Within such a categorization, "first generation" rights are said to be civil and political; and "second generation" rights are economic, social, and cultural.

See for example, R. Herz, *Legal Protection for Indigenous Cultures: Sacred Sites and Communal Rights*, (1993) 79 Va. L. Rev. 691 at 710 (collective rights of peoples are "third generation" human rights); I. Cotler, "Human Rights Advocacy and the NGO Agenda" in I. Cotler & F. Eliadis, (eds.), *International Human Rights Law [:] Theory and Practice*, note 1848, *supra*, at 63; L. B. Sohn, *The New International Law: Protection of Individuals Rather than States*, (1982) 32 Am. U. L. Rev. 1 at 48 (collective rights are human rights because all collective rights have individual right aspects); Y. Dinstein, *Collective Human Rights of Peoples and Minorities*, (1976) 25 Int'l & Comp. L.Q. 102; J. E. Parker, *Cultural Autonomy: A Prime Directive for the Blue Helmets*, (1993), 55 U. Pitt. L. Rev. 207, 207 (human rights are both individual and collective). See generally, V. Van Dyke, *Human Rights and the Rights of Groups*, (1974) 18 Am. J. Pol. Sci. 725.

For a contrary view, see J. Donnelly, *In Search of the Unicorn: The Jurisprudence and Politics of the Rights to Development*, (1985) 15 Cal. W. Int'l L.J. 473 (human rights are individual not collective); J. Donnelly, "Third Generation Rights" in C. Brölmann, R. Lefeber, M. Zieck, (eds.), *Peoples and Minorities in International Law* (Boston: Kluwer Academic Publishers, 1993) 119 (inappropriateness of third generation rights).

[1946] J. O'Manique, *Universal and Inalienable Rights: A Search for Foundations*, note 1938, *supra*, at 468. See also D. Gormley, *Aboriginal Rights as Natural Rights*, (1984) 4 Can. J. Native Studies 29 at 30, where the author also describes the inherent nature of human rights being based on a "natural law" position and then indicates that positive law does not envision extinguishing these rights.

[1947] *Charter of Paris for a New Europe a New Era of Democracy, Peace and Unity*, November 21, 1990, reprinted at 30 I.L.M. 190 (1991).

In addition, the first preamble in the *Universal Declaration of Human Rights* provides:

> "*Whereas* recognition of the inherent dignity and of the *equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world*".

Virtually identical language is also included in the first preamble of both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

While human rights are declared to be inalienable, there are provisions in numerous instances for their limitation or derogation,[1948] but not their destruction.[1949] Article 5 (para. 1) of both the International Covenants make clear that nothing in the Covenants can be construed as permitting "destruction" of human rights:

> "*Nothing in the present Covenant may be interpreted as implying* for any State, group or person any right to engage in any activity or to perform any act aimed at the *destruction of any of the rights or freedoms recognized herein*, or at their limitation to a greater extent than is provided for in the present Covenant."[1950] [Emphasis added.]

Further, any "limitations" to the rights in the *International Covenant on Economic, Social and Cultural Rights* must be "compatible with the nature of the rights concerned":

> "...the State may subject such rights only to such *limitations* as are determined by law *only in so far as this may be compatible with the nature of these rights* and solely for the purpose of promoting the general welfare in a democratic society."[1951] [Emphasis added.]

Even narrower limitations are permissible under the *International Covenant on Civil and Political Rights*:

> "*In time of public emergency which threaten the life of the nation* and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant *to the extent strictly required by the exigencies of the situation*, provided that such measures are *not inconsistent with their other obligations under international law* and *do not involve discrimination* solely on the ground of race, colour, sex, language, religion or social origin."[1952] [Emphasis added.]

Also, in terms of regional human rights instruments, there is no evidence of human rights

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[1948] See, for example, the *International Covenant on Civil and Political Rights*, art. 4, where State parties are permitted certain derogations from their human rights obligations under the Covenant "[i]n time of public emergency which threatens the life of the nation and the existence of which is publicly proclaimed". However, any such derogations must be exercised without discrimination and are contemplated to be temporary.

[1949] For a discussion of limitation and derogation clauses in international human rights instruments, see generally A. Kiss, "Les clauses de limitation et de dérogation dans la Convention Européenne des droits de l'homme", in D. Turp & G.A. Beaudoin, (eds.), *Perspectives canadiennes et européennes des droits de la personne* (Cowansville, Québec: Éditions Yvon Blais, 1986) 119. At 124, the author includes a table comparing reasons and conditions in limitations clauses in various human rights instruments.

[1950] In regard to the "destruction" of human rights, similar wording is found in art. 30 of the *Universal Declaration of Human Rights*.

[1951] Art. 4 of the Covenant.

[1952] Art. 4, para. 1 of the Covenant. However, para. 2 provides: "No derogation from articles 6 [inherent right to life], 7 [cruel, inhuman or degrading treatment or punishment], 8 (paragraphs 1 and 2) [slavery and servitude], 11 [imprisonment for failure to fulfil contractual obligations], 15 [prohibition against retroactive criminal laws or penalties], 16 [legal recognition as a person], and 18 [freedom of thought, conscience and religion] may be made under this provision. In addition, para. 3 obliges states to report any derogations to immediately report them to other State Parties through the U.N.

being subject to alienation or destruction. In the *European Convention for the Protection of Human Rights and Fundamental Freedoms*,[1953] a limitations clause[1954] is provided in virtually the same language as described above for the International Covenants on human rights. In addition, the *American Convention on Human Rights*[1955] only allows for temporary suspension of human rights guarantees "[i]n time of war, public danger, or other emergency that threatens the independence of a State Party",[1956] as well as limited restrictions.[1957]

In the case of the *African Charter on Human and Peoples' Rights*,[1958] even limitations or restrictions are not expressly provided. However, the Commission under the Charter is required to interpret all human rights provisions by "draw[ing] inspiration form international law..., particularly from the provisions of...the Universal Declaration of Human Rights [and] other instruments adopted by the United Nations".[1959]

Based on the above, it is clear that human rights under such major international instruments as the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* or the *International Covenant on Economic, Social and Cultural Rights* are not subject to alienation or other forms of destruction.[1960] The same is true for such major regional human rights instruments as the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and the *American Convention on Human Rights*. Depending on the particular right involved and which international instrument applies, there is the possibility of limiting such rights but only to a certain extent (as set out in the instrument concerned).

Since the time of the adoption of the *Universal Declaration on Human Rights* in 1948, major international and regional human rights instruments have not permitted fundamental human rights to be subjected to alienation or other forms of destruction. Instead, these instruments have carefully circumscribed any allowable limitations or derogations. Moreover, it is said that the "reasonable limits"[1961] permissable under the *Canadian Charter of Rights and Freedoms* are modelled largely after the limitations provisions in the *Universal Declaration on Human Rights* and the International Covenants.[1962] This raises the question as to why aboriginal rights,

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[1953] *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221, E.T.S. 5. Signed at Rome on November 4, 1950; entered into force on September 3, 1953.

[1954] Id., art. 17.

[1955] *American Convention on Human Rights*, (1970) 9 I.L.M. 673, (1971) 65 A.J.I.L. 679, (1970) 9 I.L.M. 673. Signed at San José, Costa Rica on November 22, 1969; entered into force on July 18, 1978. Similarly, solely restrictions or limitations are provided in art. 5 of the *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)*, November 17, 1988, O.A.S.T.S. 69, (1989) 28 I.L.M. 698. Not yet in force.

[1956] Art. 27.

[1957] Arts. 29 & 30.

[1958] *African Charter on Human and Peoples' Rights* (Banjul Charter), OAU Doc. CAB/LEG/67/3/Rev. 5, reprinted at (1982) 21 I.L.M. 58. Adopted by the Organization of African Unity on June 27, 1981; entered into force October 21, 1986.

[1959] Art. 60.

[1960] Positivists may argue that inalienability of human rights arises because that is what is provided for under the current *International Bill of Human Rights*. In other words, inalienability does not arise from human rights (at least not all of them) being inherent in nature.

For a different view, see J. O'Manique, *Universal and Inalienable Rights: A Search for Foundations*, note 1938, *supra*, at 467: "The inalienability and universality of right...are interdependent concepts. [A]n inalienable right...[is] a right that exists by virtue of the right-holder's existence. *It is not created or granted by some agent and therefore cannot be taken away by such an agent.*" In this regard, it is worth noting that in Canada aboriginal rights are considered to be inherent in nature and are not dependent for their existence on any law, statute or executive instrument.

[1961] S. 1 of the Charter. See discussion under the following sub-heading.

[1962] A.F. Bayefsky, *International Human Rights Law [:] Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) at 38-40.

which Aboriginal peoples view as their collective and individual human rights, have been historically subjected to extinguishment policies by non-Aboriginal governments in Canada.

It would appear that federal and provincial governments in Canada have not characterized aboriginal rights as human rights, in implementing extinguishment policies or practices. However, if aboriginal rights are human rights, then extinguishing or otherwise destroying aboriginal rights would be viewed as unacceptable from a human rights perspective. This aspect is examined under the following sub-heading.

8.2.1.5 Extinguishment of aboriginal rights as human rights

> "Our position is that...aboriginal title to land, water and sea ice flows from aboriginal rights and all rights to practice our customs and traditions, to retain and develop our customs and traditions, to retain and develop our languages and cultures, and the right to self-government, all these things flow from the fact that we have aboriginal rights...*In our view, aboriginal rights can also be seen as human rights, because these are the things that we need to continue to survive as distinct peoples in Canada.*"[1963] [Emphasis added.]
>
> J. Amagoalik, Co-Chairperson, Inuit Committee on National Issues, 1983

International law provides a number of norms that would not support the notion that aboriginal rights, as human rights, may be validly extinguished. First, it has already been demonstrated in the previous subsection that under the *International Bill of Human Rights* alienation, extinguishment or other forms of destruction of human rights is not permitted. In regard to indigenous peoples' rights, the draft *United Nations Declaration on the Rights of Indigenous Peoples*, adds: "Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire."[1964]

However, aboriginal rights, like other human rights, may to a certain extent be subject to limitations. For example, limitations arise when Aboriginal peoples agree to share their lands and resources with non-Aboriginal peoples and states. As already discussed, "limitations" of rights are very different, both in fact and in law, from their "extinguishment" or "destruction". Moreover, a portion of aboriginal lands may in some circumstances be alienated through such consensual means as purchase or gift, but this is different from extinguishing wholly the aboriginal title or land tenure systems of indigenous peoples.

Second, in the familiar context where extinguishment of title results in the land and resource dispossession of indigenous peoples, such extinguishment can have most serious consequences. As already discussed in this study, extinguishment, even if voluntary, cannot

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[1963] J. Amagoalik, Co-Chairperson, Inuit Committee on National Issues, statement at First Ministers Conference on Aboriginal Constitutional Matters, March 15, 1983, cited in M. Asch, "To Negotiate into Confederation: Canadian Aboriginal Views on Their Political Rights" in E. Wilmsen, (ed.), *We Are Here [:] Politics of Aboriginal Land Tenure* ((Berkeley: University of California Press, 1990) 118 at 121-122.

[1964] Art. 44 of the draft *Declaration*.

result in a people being deprived of their means of subsistence.[1965] Further, as will be discussed under a subsequent sub-heading, land and resource dispossession can constitute cultural genocide. In some cases, where the survival of an indigenous people is jeopardized, it can also be tantamount to genocide.

Third, insistence by national governments that indigenous rights be extinguished as a pre-condition to entering into land claims negotiations or agreements, affects the voluntariness of any "consent" to extinguishment. Most often, indigenous peoples are in a position of great vulnerability or in dire need of basic services. This situation should not be exploited by government to exact "agreement" to extinguishment from indigenous peoples.

In the *Indigenous and Tribal Peoples Convention, 1989* (No. 169), article 3 provides for the full enjoyment of human rights and prohibits any forms of coercion:

> "1. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination...
>
> 2. No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned..."

In addition, it is worth noting that the Commission des droits de la personne du Québec has indicated recently to the Royal Commission on Aboriginal Peoples that extinguishment, as a necessary pre-condition to any negotiation of territorial rights, is "unacceptable".[1966] As the Commission des droits de la personne du Québec previously stated in 1987:

> "Il faut réviser systématiquement les principes et les modes de négotiations avec les Autochtones, notamment en matière de droits territoriaux, et pour y *bannir en particulier le principe de l'extinction de ces droits comme préalable obligatoire à toute négotiation.*"[1967] [Emphasis added.]

The Ligue des droits et libertés emphasizes the "inalienable" nature of the rights of Aboriginal peoples as follows:

> "...les droits qui sont indispensable à leur survie en tant que nations sont, du point de vue international, **inaliénable** et ne peuvent faire l'objet d'aucune cession."[1968] [Emphasis in original.]

Fourth, extinguishment of indigenous title often involves more than loss of rights to lands and resources. Extinguishment also frequently entails loss of indigenous peoples' rights to their own land tenure system. In this context, for a state government to impose on indigenous peoples the legal system of the dominant population implies a policy or practice of superiority that violates international human rights principles. As stated in the draft *U.N. Declaration on the Rights of Indigenous Peoples*:

[1965] See art. 1 of the *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*. See also discussion under sub-heading 6.5.2.

[1966] Commission des droits de la personne du Québec, *Mémoire de la Commission des droits de la personne présenté à la Commission royale sur les peuples autochtones* (Montréal: novembre 1993) at 14; see also (at 43) the recommendation to permanently cast aside any pre-conditions requiring the extinguishment of rights.

[1967] P. Lepage, *Droits autochtones et droits de la personne: Quelques perspectives d'avenir*, (Québec: Commission des droits de la personne du Québec, Mai 1987) at 45. Unofficial English translation: "It is necessary to revise systematically the principles and methods of negotiation with Aboriginal peoples, notably in regard to territorial rights, and *to bannish in particular the principle of extinguishment of these rights as a mandatory pre-condition to any negotiation.*" [Emphasis added.]

[1968] Ligue des droits et libertés, *La Ligue des droits et libertés et le dossier autochtone: une lecture de persévérance*, (Mémoire présenté devant la Commission royale sur les peuples autochtones), November 17, 1993, at 9. Unofficial English translation: "...the rights which are indispensable to their survival as nations are, from the international viewpoint, **inalienable** and cannot be made the object of any cession." [Emphasis in original.]

> "...all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust".[1969]

Fifth, extinguishment of indigenous title, to the extent that it dispossesses indigenous peoples of their lands and resources and entails a loss of control over their own development, also denies them exercise of their right of self-determination.

Sixth, extinguishment of aboriginal title appears to be discriminatory. Aboriginal rights, as collective and individual *human rights*, are the only human rights in Canada that are targetted for extinguishment. As this study demonstrates, the Canadian policy and practice of blanket extinguishments are especially far-reaching and harmful in their effects. Within Canada, human rights may in some cases be subjected to certain *limits*[1970] and override[1971], but there is no specific authority to extinguish or otherwise destroy human rights. Rather, in regard to aboriginal and treaty rights, the Canadian Constitution requires the recognition and affirmation of these fundamental rights.[1972]

A further important legal dimension in Canada is the fiduciary obligation of the Crown in relation to Aboriginal peoples, and the national and international commitments of Canada concerning human rights. D. McRae describes the interrelationship between the Crown's fiduciary obligations and human rights in his 1993 commissioned report to the Canadian Human Rights Commission, as follows:

> "*At the very least, such a [fiduciary] standard requires observance by the government of Canada of minimal standards for the protection of human rights*...In this regard there is an undoubted commitment in Canadian public policy to *a high standard in the recognition and protection of human rights in respect of all peoples in Canada*. That commitment has been articulated in different ways through the involvement of Canada in developing international instruments for the protection of human rights and becoming a party to

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[1969] Third preambular paragraph of the Declaration. For similar statements on policies and practices on racial superiority, see also *International Convention on the Elimination of All Forms of Racial Discrimination*, fifth and ninth preambular paras.; and *Declaration on Race and Racial Prejudice*, adopted and proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its twentieth session, on November 27, 1978, art. II, paras. 1 & 2.

[1970] See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, art. 1: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such *reasonable limits* prescribed by law as can be demonstrably justified in a free and democratic society." [Emphasis added.] See generally J. Woehrling, "L'article 1 de la Charte canadienne et la problématique des restrictions aux droits et libertés: l'état de la jurisprudence de la Cour suprême" in Institut canadien d'études juridiques supérieures, *Droits de la personne [:] l'émergence de droits nouveaux* (Cowansville, Québec: Les Éditions Yvon Blais, 1993) 3.

See generally J. Gosselin & G. Laporte, *La Charte canadienne des droits et libertés: Les grands énoncés de la Cour suprême* (Cowansville, Québec: Les Éditions Yvon Blais, 1994), vol. 1, at IV/1-4 - IV/1-7, where decisions of the Supreme Court of Canada are cited indicating that s. 1 of the *Canadian Charter of Rights and Freedoms* permits "limitations" but not "negations" of the rights and freedoms in the Charter. In this regard, see *A.G. Québec* v. *Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66 at 86 and 88; *Ford* v. *A.G. Québec*, [1988] 2 S.C.R. 712 at 771 *et seq.* See also *R.* v. *Oakes*, [1986] 1 S.C.R. 103 (S.C.C.) at 136, where Dickson C.J. indicates that a "free and democratic society" referred in s. 1 of the Charter includes such essential values and principles as the promotion of justice and social equality.

[1971] The *Canadian Charter of Rights and Freedoms*, s. 33, enables legislatures to specifically enact a "notwithstanding" clause in order to override certain fundamental rights and freedoms. In addition, the *Canadian Bill of Rights*, s. 2 and human rights charters in Alberta, Saskatchewan and Quebec allow for the use of notwithstanding clauses in their provincial legislation.

However, see W. Tarnopolsky, "The Canadian Charter of Rights and Freedoms and the International Covenant on Civil and Political Rights: Domestic Implementation of International Human Rights Norms" in I. Cotler & F.P. Eliadis, (eds.), *International Human Rights Law [:] Theory and Practice*, note 1848, *supra*, at 193: "Obviously, any government in Canada which resorts to s. 33 [of the Canadian Charter] may find the result to be contrary to Canada's obligations under the Covenant."

[1972] *Constitution Act, 1982*, s. 35(1).

them, and through the enactment of human rights legislation at both the federal and provincial levels."[1973] [Emphasis added.]

And as McRae adds:

"Although the national and international standards for the protection of human rights to which Canada has made both a political and legal commitment provide a basis for the content of the fiduciary obligation of Canada towards its aboriginal peoples, they do not exhaust that content. Other obligations may be imposed upon a fiduciary as well. *Moreover, human rights standards may also provide a basis for assessing the conduct of government independently of the fiduciary obligation Canada has towards its aboriginal peoples.*"[1974] [Emphasis added.]

In view of many of the above arguments, the Inuit Tapirisat of Canada concludes:

"The extinguishment of aboriginal title under land claims agreements is *contrary to principles of international law, principles of Canadian constitutional law and is inconsistent with the Crown's fiduciary obligations towards the aboriginal peoples of Canada*. This is so because the policy seeks to deprive the aboriginal peoples of their rights and relationship to their lands and resources; destroys rather than recognizes and affirms aboriginal rights and title; and seeks to secure for the benefit of the Crown, the full aboriginal interest in land in a confrontational and adversarial negotiation in which the balance of power rests with the Crown."[1975] [Emphasis added.]

International norms relevant to the issue of extinguishment will be discussed further under the following sub-headings.

8.2.2 Principle of equality and non-discrimination[1976]

"Where in the world do you extinguish rights in order to recognize other rights? It's a...prejudicial act...racially discriminatory,[1977] that it's only with Indian people or Aboriginal people that a government can extinguish rights..."[1978]

Ted Moses, Ambassador to the United Nations of the Grand Council of the Crees, 1993

In regard to indigenous peoples, discrimination is a constant factor that they have been

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[1973] D. McRae, *Report on the Complaints of the Innu of Labrador to the Canadian Human Rights Commission*, note 1934, *supra*, at 5.

[1974] Id.

[1975] Inuit Tapirisat of Canada, *Submission of the Inuit Tapirisat of Canada to the Royal Commission on Aboriginal Peoples*, note 1845, *supra*, at 63.

[1976] "...equality and non-discrimination are positive and negative statements of the same principle": see A.F. Bayefsky, *The Principle of Equality or Non-Discrimination in International Law*, (1990) 11 Human Rights L.J. 1 at n. 1.

[1977] See also D. Sambo, *Indigenous Peoples and International Standard-Setting Processes: Are State Governments Listening?*, note 1822, *supra*, at 31: "No other people are pressured to "extinguish" their rights to lands. *This is racial discrimination*. The practice of extinguishment must be eliminated." [Emphasis added.]

[1978] Interview with Ted Moses by Chris Tennant, July 29, 1993, Geneva.

confronted with and continue to face in their relations with the governments and peoples of dominant cultures. Even prior to Confederation and the establishment of Canada, there were some indigenous peoples used as slaves as early as the seventeenth century.[1979]

As already indicated, Aboriginal peoples are the only peoples in Canada that are required to surrender or extinguish their aboriginal rights in order for the Canadian government to recognize their inherent rights to lands and resources. As discussed under a previous sub-heading, there is generally no specific authority for the extinguishment or destruction of human rights under Canadian or international law. Moreover, in regard to aboriginal rights, the Canadian Constitution since 1982 specifically provides for their recognition and affirmation.[1980] Prior to 1982, other constitutional enactments (still in force) provided for the protection of Aboriginal peoples and their rights.[1981]

Internationally, discrimination is clearly prohibited under every human rights instrument. For example, the *Universal Declaration of Human Rights* forbids discrimination based on a wide range of matters including race, colour, national or social origin, and property:

> "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as *race*, colour, sex, language, religion, political or other opinion, national or social origin, *property*, birth or other status."[1982] [Emphasis added.]

Similarly, the *International Covenant on Civil and Political Rights* provides:

> "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as *race*, colour, sex, language, religion, political or other opinion, national or social origin, *property*, birth or other status."[1983] [Emphasis added.]

In the *International Convention on the Elimination of All Forms of Racial Discrimination*, "racial discrimination" is defined as follows:

> "In this Convention, the term 'racial discrimination' shall mean any distinction, *exclusion, restriction* or preference based on race, colour, descent, or national or ethnic origin which has the *purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights* and fundamental freedoms in the political, economic, social, cultural or any other field of public life."[1984] [Emphasis added.]

[1979] W. Tarnopolsky, "Discrimination in Canada: Our History and our Legacy" in W. Tarnopolsky, J. Whitman & M. Ouellette, (eds.), *Discrimination in the Law and the Administration of Justice*, note 1859, *supra*, at 3. The author cites as authority M. Trudel, *L'esclavage au Canada français: Histoire et conditions de l'esclavage* (Québec: Les presses de l'Université Laval, 1960).

[1980] *Constitution Act, 1982*, s. 35(1). In regard to aboriginal rights, Canadian legislation prior to 1982 that makes or did make reference to extinguishment of aboriginal title includes: i) the *Manitoba Act, 1870* (in regard to the Metis), however, the Act does not extinguish Metis rights but contemplates their extinguishment and the provision concerned was the product of a negotiation with Metis representatives during that early period; ii) the *Dominion Lands Acts* (now repealed) also contemplate the extinguishment of Metis aboriginal title, but the constitutionality of the legislation in this regard is highly questionable; iii) legislation approving the James Bay and Northern Quebec Agreement and the Inuvialuit Final Agreement, however, the validity of the extinguishment provisions in those laws is also subject to serious doubt for a variety of reasons outlined in this study.

[1981] In particular, reference is being here to the *Royal Proclamation of 1763* and the terms and conditions pertaining to the *Rupert's Land and North-Western Territory Order*, 1870.

[1982] Art. 2 of the Declaration.

[1983] *International Covenant on Civil and Political Rights*, art. 2, para. 1. For a similar provision, see *International Covenant on Economic, Social and Cultural Rights*, art. 2, para. 2.

[1984] Art. 1, para. 1 of the Convention.

N. Lerner highlights the broad scope of the discrimination definition as follows:

> "...when dealing with the Convention on Racial Discrimination...the definition [on 'racial discrimination'] that it contains in Article 1.1 is broad enough to *include all discriminatory acts, whether intentional or not*, or whether successful or not, provided that the *purpose or effect* exists. As to the grounds, the definition covers all the groups[1985] in which we are interested."[1986] [Emphasis added.]

In addition, the *International Convention on the Elimination of All Forms of Racial Discrimination* provides in art. 5:

> "...State Parties undertake to *prohibit and to eliminate racial discrimination in all its forms* and to guarantee the right of everyone, without distinction, as to race, colour, or national or ethnic origin, to *equality before the law*, notably in the enjoyment of the following rights:
> .....
>
> (d) Other civil rights, in particular:
>
> (v) The *right to own property alone as well as in association with others*;
>
> (e) *Economic, social and cultural rights*..." [Emphasis added.]

The elements of "race" and "property" are especially relevant to Canadian government actions on extinguishment. In particular, federal land claims policies indicate that the aboriginal titles (property rights) of Aboriginal peoples are too vague and purportedly justify extinguishment. Virtually no regard is given by governments in Canada to the fact that Aboriginal peoples do not desire to have their aboriginal human rights extinguished. There continues to be insufficient concern for the profound relationship indigenous peoples have with their lands, resources and environment. This relationship entails vital spiritual, economic, social, cultural and political dimensions.

In the *Indigenous and Tribal Peoples Convention, 1989*, (No. 169), the principle of equality and non-discrimination is described in the following terms:

> "Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination."[1987]

In addition, the property and culture of indigenous peoples are to be safeguarded through affirmative measures that are not contrary to their "freely-expressed wishes":

> " 1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, *property*, labour, *cultures* and *environment* of the peoples concerned.
>
> 2. Such special measures shall *not be contrary to the freely-expressed wishes* of the peoples concerned."[1988] [Emphasis added.]

Further, in the draft *U.N. Declaration on the Rights of the Indigenous Peoples*, it is provided:

> "Indigenous individuals and peoples are *free and equal* to all other individuals and

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[1985] The author specifically discusses Aboriginal peoples in his book.

[1986] N. Lerner, *Group Rights and Discrimination in International Law* (Boston: Martinus Nijhoff, 1991) at 26.

[1987] Art. 3, para. 1 of Convention No. 169.

[1988] Art. 4, paras. 1 and 2 of Convention No. 169.

> peoples in dignity and rights, and have the right to be *free from any kind of adverse discrimination*, in particular that based on their indigenous origin or identity."[1989] [Emphasis added.]

N. Bankes describes the international norm of equality or non-discrimination and its particular relevance to property as follows:

> "It is a *free-standing right* but it *also informs the application of other substantive rights*[1990] such as the right to own property alone or in association with others. We also know...that the international principle of equality is concerned with *substantive equality and not just formal equality*[1991]."[1992] [Emphasis added.]

The prohibition against racial discrimination, as provided in the *International Convention on the Elimination of All Forms of Racial Discrimination*, has been invoked successfully in Australia in *Mabo* v. *Queensland*.[1993] In this case, the Australian High Court held that Queensland legislation which purported to extinguish aboriginal land rights without compensation was discriminatory, and to that extent, invalid.[1994] However, it does not appear that the parties in the litigation raised the issue of whether extinguishment of aboriginal rights *per se* was discriminatory.

In the second *Mabo* case, Brennan J. of the Australian High Court invoked international law norms pertaining to discrimination in calling for reconsideration of common law doctrines that are discriminatory:

> "*A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.* It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands."[1995] [Emphasis added.]

The international norm of equality and non-discrimination entails a "right to be different"[1996]. As indicated in the *South West Africa Cases (Second Phase)*:

[1989] Art. 2 of the draft Declaration.

[1990] A.F. Bayefsky, *The Principle of Equality or Non-Discrimination in International Law*, note 1976, *supra*.

[1991] W. McKean, *Equality and Discrimination Under International Law* (Oxford: Clarendon Press, 1983) at 51: "Equality has both a negative aspect (non-discrimination) and a positive aspect (special measures of protection). 'Equality in law' no longer means purely formal or absolute equality, but relative equality, which often requires differential treatment."

[1992] N. Bankes, "Aboriginal Peoples, Resource Exploitation, and International Law" in Proceedings of the 1993 Conference of the Canadian Council on International Law, *Aboriginal Rights and International Law*, note 1915, *supra*, at 74.

[1993] *Mabo* v. *Queensland*, (1988) 63 A.L.R.J 84.

[1994] It is worth noting that Australia had legislation implementing the *International Convention on the Elimination of All Forms of Racial Discrimination*. In regard to Canada, it could be argued that the equality and non-discrimination provisions in the *Canadian Charter of Rights and Freedoms* implement similar provisions in the international human rights instruments that Canada has ratified.

[1995] *Mabo* v. *Queensland*, (1992) 66 A.L.R.J 408 at 422. Both the 1988 and the 1990 *Mabo* cases of the Australian High Court are discussed in N. Bankes, "Aboriginal Peoples, Resource Exploitation, and International Law" in Proceedings of the 1993 Conference of the Canadian Council on International Law, *Aboriginal Rights and International Law*, note 1915, *supra*, at 76.

[1996] See also the first preambular para. of the draft *U.N. Declaration on the Rights of Indigenous Peoples*: "...indigenous peoples are equal in dignity and rights to all other peoples, while recognizing the *right of all peoples to be different, to consider themselves different, and to be respected as such*". [Emphasis added.] For a similar text, see *Declaration on Race and Racial Prejudice*, adopted and proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its twentieth session, on November 27, 1978, at art. 1, para. 2.

> "The principle of equality does not mean absolute equality, but recognizes relative equality, namely, *different treatment proportionate to concrete individual circumstances.*"[1997]

In conclusion, the principle of equality and non-discrimination in international law is highly relevant to the Canadian government policy and practice of extinguishing the aboriginal rights of Aboriginal peoples in Canada. The practice of extinguishment is contrary to the expressed wishes of the Aboriginal peoples concerned. Moreover, it impairs or prevents Aboriginal peoples from fully enjoying and exercising their aboriginal human rights and undermines their right to be different.

In this context, the ongoing racial discrimination practised by federal and provincial governments in Canada is a deeply-imbedded collective response. As Inuit Tapirisat of Canada highlights, racism is more than an individualized phenomenon, and is spawned by untenable attitudes at the collective level:

> "Racism is not simply an individualized phenomenon. It is after all, theories of group superiority (based on race, culture, ethnicity, sex, religion, etc.) that lead to justification for violations of the rights of individuals. *Racism at an individual level is spawned by fundamental attitudes at a collective level, that is, by continuing assumptions about racial or cultural superiority and by rationalizations of domination of other peoples.* The legal system is often an instrument of perpetuating such biases. The impacts of racism and colonialism on aboriginal peoples can not be adequately addressed by individual rights alone."[1998] [Emphasis added.]

Finally, it should be underlined that the prohibition against racial discrimination is said to be a rule of customary international law[1999]. It is said to be part of the law of Canada, since there is no conflict between the customary law rule of non-discrimination with either the *Canadian Charter of Rights and Freedoms* or the *Canadian Bill of Rights.*[2000]

Consequently, if it is correct to say that extinguishment of Aboriginal rights is discriminatory, then federal and provincial governments in Canada cannot agree to make extinguishment the basis of resolving land claims. They cannot validly agree to discriminate on the basis of race and property, without violating customary international law. In this case, the principle of non-discrimination in matters of race is not only a principle of customary

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[1997] *South West Africa Cases (Second Phase)*, [1966] ICJ Reports at 468, (1966), Judge Tanaka dissenting.

[1998] Inuit Tapirisat of Canada, *Submission of the Inuit Tapirisat of Canada to the Royal Commission on Aboriginal Peoples*, note 1845, *supra*, at 32.

[1999] In regard to the requirements for the existence of a rule of customary international law, see A.F. Bayefsky, *International Human Rights Law [:] Use in Canadian Charter of Rights and Freedoms Litigation*, note 1869, *supra*, at 10: "International jurisprudence sets two conditions for the existence of a customary rule of international law: (1) evidence of a sufficient degree of state practice, and (2) a determination that states conceive themselves as acting under a legal obligation. This has been stated as the requirement for a 'constant and uniform usage, accepted as law'."

[2000] See A.F. Bayefsky, *International Human Rights Law [:] Use in Canadian Charter of Rights and Freedoms Litigation*, note 1869, *supra*, at 17: "Assuming ...that an adoption theory prevails in Canada, customary international law (including customary human rights law) is part of the law of Canada *in the absence of conflicting statutes or well-established rules of the common law, or, of course, provisions of the Constitution.*" [Emphasis added.]

In the next paragraph, Bayefsky adds: "...customary international human rights law can be directly invoked, as part of the law of the land, to itself provide the basis for a remedy. This right of action has not been affected by the Charter [*Canadian Charter of Rights and Freedoms*]. According to s. 26 of the Charter, 'The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.' *Hence, rights or freedoms embodied in customary international law and which under an adoption theory exist as part of the law of Canada continue to exist with the enactment of the Charter.* This will be relevant with respect to 'other' rights embodied in customary international law which bear little resemblance to rights and freedoms guaranteed in the Charter." [Emphasis added.]

international law[2001] but also a peremptory norm.[2002]

8.2.3 Prohibition of *apartheid*

An integral part of the principle of non-discrimination is the prohibition of *apartheid*. In the *International Convention on the Elimination of All Forms of Racial Discrimination*, *apartheid* is referred to in the preamble as follows:

> "*Alarmed* by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of *apartheid*, segregation or separation." [Emphasis in original.]

In the *International Convention on the Supression and Punishment of the Crime of Apartheid*,[2003] the term "*apartheid*" is described as a crime against humanity and violating principles of international law:

> "The State Parties to the present Convention declare that *apartheid* is a *crime against humanity* and that inhuman acts resulting from the policies and practices of *apartheid* and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are *crimes violating the principles of international law*, in particular the principles of the Charter of the United Nations..."[2004] [Emphasis added.]

Article II of the Convention defines "*apartheid*" as follows:

> "For the purposes of the present Convention, the term 'the crime of *apartheid*'...shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:
>
> (a) Denial to a member or members of a racial group or groups of the right to life and *liberty of the person...*;

[2001] A.F. Bayefsky, *The Principle of Equality or Non-Discrimination in International Law*, note 1976, *supra*, at 19-20. See also *South West Africa Cases, Second Phase*, [1966] I.C.J. Reports at 293 per Tanaka J.: "We consider that the norm of non-discrimination...on the basis of race has become a rule of customary international law..."

[2002] See I. Brownlie, *Principles of Public International Law*, note 1843, *supra*, at 82: "...the principle of non-discrimination on grounds of race...forms part of general international law and...falls within the class of *peremptory norms*." [Emphasis added.]

Brownlie, *supra*, at 513, indicates that there are certain "overriding principles of international law [that exist], forming a body of *jus cogens*": "*The major distinguishing feature of such rules is their relative indelibility. They are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect.* The least controversial examples of the class are the prohibition of the use of force, the law of genocide, the *principle of racial discrimination*, crimes against humanity, and the rules prohibiting trade in slaves and piracy." [Emphasis added.]

At 598, Brownlie cites, in particular, *Barcelona Traction, Light & Power Co. (Belgium v. Spain)*, [1970] I.C.J. Reports at 3, paras. 33 and 34: "In 1970 the majority of the International Court, consisting of twelve judges, delivering judgement in the *Barcelona Traction* case (Second Phase) referrred to obligations *erga omnes* in contemporary international law which included 'the principles and rules concerning the basic rights of the human person, including protection from...*racial discrimination*'." [Emphasis added.] Obligations "*erga omnes*" is said to mean "binding on all states and also having the status of peremptory norms (*jus cogens*)": see Brownlie, *supra*, at 598, n.2.

[2003] *International Convention on the Supression and Punishment of the Crime of Apartheid*, adopted and opened for signature and ratification by U.N. General Assembly resolution 3068 (XXVIII) of November 30, 1973; entered into force, July 18, 1976. Canada is not a signatory to this Convention.

[2004] Art. I of the Convention.

(b) Deliberate imposition on a racial group or groups of *living conditions calculated to cause its or their physical destruction in whole or in part*;

(c) Any legislative measures and other measures calculated to *prevent a racial group or groups from participation in the political, social, economic, and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups*, in particular by denying to members of a racial group or groups basic human rights and freedoms, including...the *right to freedom of movement* and residence, the *right to freedom of opinion and expression*, and the *right to freedom of peaceful assembly and association*;

(d) Any measures, including legislative measures, designed to divide the population along racial lines by the *creation of separate reserves and ghettos for the members of a racial group or groups...*" [Emphasis added.]

Based on the above criteria, there is little doubt that, during Canada's earlier history, the Canadian government engaged in legislative and other policies and practices against Indians in Canada that constitute *apartheid* or "similar policies and practices of racial segregation and discrimination".[2005]

Examples of systematic and widespread discriminatory government policies and practices against "Indians" include: (i) prohibition of the right to vote, if Indian status not relinquished;[2006] (ii) disqualification from serving on juries;[2007] (iii) imposition of style of Indian government and repression of "tribal system";[2008] (iv) criminalization of spritual practices, including potlaches and dance ceremonials[2009]; (v) implementation of a pass system

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[2005] See, for example, O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: MacLelland & Stewart, 1992) at 495, n. 24: "In 1902, a Canadian delegation from South Africa came to study the Canadian pass system [on Indian reserves] as a method of social control." See also D. Paul, *We Were Not the Savages [:] A Micmac Perspective on the Collision of European and Aboriginal Civilization* (Halifax: Nimbus Publishing Co., 1993) at 75: "The policies and practices instituted by the British towards Aboriginal Americans would in the future influence White South Africans in the formulation of their inhuman policies of apartheid. In fact, some authorities state without reservation that the British, and, later, the Canadians created the mould that the South Africans copied."

[2006] "As early as 1885, the federal *Electoral Franchise Act* had already excluded native Indians, and persons 'of Mongolian or Chinese race'": see W. Tarnopolsky, "Discrimination in Canada: Our History and our Legacy" in W. Tarnopolsky, J. Whitman & M. Ouellette, (eds.), *Discrimination in the Law and the Administration of Justice*, note 1859, *supra*, at 9. See also W. Moss, *History of Federal and Provincial Laws Discriminating Against Aboriginal People*, note 1821, *supra*, at 3: "...enfranchisement required the abandonment of reserve rights and the right to live with one's family and culture. Further, it was dependent upon proof of literacy, education, morality, and solvency." In regard to provincial discriminatory legislation, see for example, *An Act to make better provision for the Qualification and Registration of Voters*, S.B.C. 1875, c. 2, where it was provided that "no Chinaman or Indian" could vote in British Columbia elections.

At 6, Moss indicates: "At various times, all provinces except Nova Scotia and Newfoundland passed legislation disqualifying Indians form voting in one manner or another." And at 7, the author adds: "Universal adult suffrage was not finally achieved federally, until 1960 with the unqualified extension of voting rights to all Indians and was not complete provincially until 1969 when Quebec became the last province to so extend its provincial franchise."

[2007] W. Moss, *History of Federal and Provincial Laws Discriminating Against Aboriginal People*, note 1821, *supra*, at 7, where the author also indicates that 1972 was the first time that Indians actually served on a Canadian jury.

[2008] W. Moss, *History of Federal and Provincial Laws Discriminating Against Aboriginal People*, note 1821, *supra*, at 9.

[2009] See *An Act Further to Amend "The Indian Act, 1880"*, S.C. 1884, c. 27, s. 3, where the Indian festival known as "Potlach" and the Indian dance known as "Tamanawas" was made a criminal offence. Anti-potlach laws were only repealed in 1951.

The significance of these events is described in W. Moss, *History of Federal and Provincial Laws Discriminating Against Aboriginal People*, note 1821, *supra*, at 10: "These events were important social, cultural and political conventions that provided a means of affirming leadership and social order and of recognizing property rights, inheritance and transfer of property." In regard to the importance of the potlach, see also P. Tennant, *Aboriginal Peoples and Politics* (Vancouver: University of British Columbia Press, 1990) at 7-8; and *Report of the British Columbia Claims Task Force* (Vancouver: June 28, 1991) at 9: "The governments outlawed the great, traditional potlaches which were the heart of the First Nations' social and political system."

in Western Canada to confine[2010] free movement of Indians to their reserves;[2011] (vi) prohibition against Indian homesteading in Western Canada until 1951;[2012] (vii) prohibition of sale of agricultural products grown on reserves in Western Canada, except with government approval;[2013] (viii) similar prohibition concerning sale of wild animals and furs;[2014] (ix) forced attendance by Indian children at off-reserve residential schools;[2015] and (x) prohibition against raising of money by Indians for the litigation of their land and other claims.[2016]

Although many discriminatory practices have been eliminated, there are important questions that remain concerning the confining of Indians on reserves. The Royal Proclamation of 1763 had declared that the extensive lands in possession of the Indians were to be "reserved" to them without molestation or disturbance. However, what developed as an integral part of Canadian policy was a totally different "reserve system" with numerous anomalies.[2017] In most instances, reserves comprise only a tiny fraction (in many cases, less than 1 or 2%)[2018] of the original territory of the Indians concerned. These small segregated areas, with increasingly little or no recognized access to an extended land and resource base outside the reserve, significantly contribute to (if not ensure) the deterioration of Indian communities and nations. As Joe Clark, then Leader of the Opposition, has stated in the House of Commons:

> "We all know that the history of this country is full of *treaties which were signed in bad faith; reserves which were established on bad land*; adminstrators who created among

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[2010] A distinction is being made here between "confining" Indians on reserves, as compared to establishing reserves for the ongoing "development" and "protection" of Indian societies and nations.

[2011] See O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: MacLelland & Stewart, 1992) at 314-315. At 495, n. 20, the author indicates that the pass system lasted until 1941. See also F.L. Barron, *The Indian Pass System in the Canadian West, 1882-1935*, note 1821, *supra*.

[2012] W. Moss, *History of Federal and Provincial Laws Discriminating Against Aboriginal People*, note 1821, *supra*, at 11-14. See especially *Indian Act*, S.C. 1876, c. 18, s. 70.

[2013] W. Moss, *History of Federal and Provincial Laws Discriminating Against Aboriginal People*, note 1821, *supra*, at 14, where the author indicates that the restrictions on agricultural products remained until 1951. See also *An to Amend "The Indian Act, 1880"*, S.C. 1881, c. 17, s. 1.

[2014] W. Moss, *History of Federal and Provincial Laws Discriminating Against Aboriginal People*, note 1821, *supra*, at 14. See *An Act to Amend the Indian Act*, S.C. 1940-41, c. 19.

[2015] W. Moss, *History of Federal and Provincial Laws Discriminating Against Aboriginal People*, note 1821, *supra*, at 19: "...Indian children were forced to attend residential schools at great distance from their families and homes and otherwise were barred from participating in provincial school systems."

See also P. Tennant, *Aboriginal Peoples and Politics* (Vancouver: University of British Columbia Press, 1990) at 80: "By far the most frequent stories told by those who attended the schools concern the beating of children for using their native languages. The goal was not simply to make English the everyday language; it was also, and explicitly, to *have each Indian child incapable of using his or her own mother tongue. In this way the fundamental cultural and personal link between tradition and posterity would be shattered...*"; O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times* (Toronto: MacLelland & Stewart, 1992) at 333-334: "Residential schools were favoured over day schools, as it was believed that they *accelerated the process of assimilation*, removing children as they did from their homes and communities for extended periods of time." [Emphasis added.] See also C. Haig-Brown, *Resistance and Renewal [:] Surviving the Indian Residential School* (Vancouver: Tillacum Library, 1991); *Report of the British Columbia Claims Task Force* (Vancouver: June 28, 1991) at 9.

[2016] *An Act to Amend the Indian Act*, R.S.C. 1927, c. 98, s. 141, which only allowed prosecution of Indian claims with the consent of the Superintendent General. See discussion under sub-heading 2.5.2 *supra*.

[2017] D. Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada" in S. Beck & I. Bernier, (eds.), *Canada and the New Constitution [:] The Unfinished Agenda* (Montreal: Institute for Research on Public Policy, 1983) 225 at 250: "*The system that emerged had numerous anomalies. Reserves were established by grant, purchase, reservation, and designation. Formal title could rest in the Indian band, a religious order, a provincial government, or the federal government*...In most of the Prairies reserves were established according to the formula of one square mile...per family of five, but no formula existed for reserves in any other province." [Emphasis added.]

[2018] P. Cumming & N. Mickenburg, *Native Rights in Canada* (Toronto: General Publishing, 1972) at 124: "In Treaties Nos. 1, 2, 5, and 8, the size of the reserve was to be 160 acres per family of five with smaller amounts for smaller families. In Treaties Nos. 3, 4, 6, 7, 9, 10, and 11, the standard was one square mile of land per family of five."

> Indian people a sense of dependence because they were treated like children."[2019] [Emphasis added.]

From the Indian viewpoint, reserves were intended to provide a base for the ongoing development and protection as distinct peoples and nations, with continued access to a land and resource base on their traditional territory outside the reserves.[2020] As D. Sanders describes:

> "While the tribal populations came to understand that they were facing fundamental changes in their way of life, they had no intention of abandoning the political and social structures that they knew. *The reserves were areas where their societies could continue and develop. Initially the reserves were not confining.* Extensive hunting and gathering activity could take place on traditional lands outside the reserves."[2021] [Emphasis added.]

From the government viewpoint, in the absence of express recognition to the contrary, the reserves were increasingly viewed as virtually the only lands on which on-reserve Indians had any land and resource rights. Regardless of whether reserves had been unilaterally established by non-Aboriginal governments, the aboriginal rights of Indians were often considered not to exist or otherwise extinguished outside the reserves.[2022]

Therefore, the perspective and understanding of the Indians that reserves were an *essential but not exclusive* part of their traditional territories were eventually departed from by non-Aboriginal governments in Canada. As D. Sanders points out:

> "As Euro-Canadian settlement increased in fertile areas of Canada, the economic base for the communities became *increasingly restricted to the reserve*, both by the loss of hunting lands and by the exclusion of Indians from the economic and political life around them. *Paradoxically, while the reserves had become a trap, they were still vital to Indian survival.*"[2023] [Emphasis added.]

In referring back to the international norms on *apartheid*, it is clear that Indian reserves are not discriminatory if they serve as a base for the ongoing development and protection of Indians as distinct peoples and nations. If no separate political communities were ensured and indigenous peoples were simply integrated within the majority population in Canada, their survival as distinct peoples would be jeopardized. As D. Williams provides:

> "...inclusion into a majoritarian order would involve cultural suicide for them."[2024]

[2019] House of Commons, *Debates*, December 14, 1976 (Opposition Leader, Joe Clark), at 2002.

[2020] A recent judicial description in the U.S. of the purpose of a reserve is found in *Colville Confederated Tribes* v. *Walton*, 647 F.2d 42 at 49 (9th Cir. Ct., 1981): "...[the] general purpose of an Indian reservation...[was to provide] a homeland for the survival and growth of Indians and their way of life."

[2021] D. Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada" in S. Beck & I. Bernier, (eds.), *Canada and the New Constitution [:] The Unfinished Agenda*, note 2017, *supra*, at 262.

[2022] For example, in regard to British Columbia, see R. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon, Sask.: University of Saskatchewan Native Law Centre, 1990) at 35: "...the province of British Columbia never recognized an obligation to treat with the Indians with respect to aboriginal title. It asserted that such title never existed and that if it did, it was extinguished prior to Confederation." In recent years, the New Democratic government in B.C. has reversed this long-standing policy of previous governments.

[2023] D. Sanders, "Prior Claims: Aboriginal People in the Constitution of Canada" in S. Beck & I. Bernier, (eds.), *Canada and the New Constitution [:] The Unfinished Agenda*, note 2017, *supra*, at 262. See also J.L. Tobias, "Indian Reserves in Western Canada: Indian Homelands or Devices for Assimilation?" in B. Cox, (ed.), *Native People, Native Lands [:] Canadian Indians, Inuit and Metis* (Ottawa: Carleton University Press, 1992) 148.

[2024] D. Williams, *Legitimation and Statutory Interpretation: Conquest, Consent, and Community in Federal Indian Law*, (1994) 80 Virginia L. Rev. 403 at 426. In D. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, (1991) 38 U.C.L.A. L. Rev. 759 at 847, the author cautions against interpreting equal protection clauses as a rationale for dismantling tribal governments: "*Forced to merge into a different, unreceptive, and often hostile culture, the 'democratic'*

However, if the government of Canada seeks to interpret existing treaties as having extinguished the aboriginal land titles of Indians outside their reserves,[2025] leaving Indians with no access to an adequate land and resource base for their economic, social and cultural development in other areas of their traditional or historic territories, the government may be opening itself to incriminations of *apartheid* or similar acts of discrimination.[2026]

Based on a human rights analysis, the government cannot use reserves and purported land cession clauses in treaties (with which the Indian parties have a fundamentally different understanding) to in effect "confine"[2027] such peoples to their reserves. That Aboriginal peoples have been "confined" to reserves and "deprived of their original lands" and means of subsistence is indicated by the Royal Commission on Aboriginal Peoples as follows:

> "As a result of the historical processes that accompanied colonization, many Aboriginal peoples have been *deprived of their original lands and means of livelihood and confined to small areas with little economic potential.*"[2028] [Emphasis added.]

Also, B. Petawabano *et al.* conclude:

> "By confining Amerindian communities to small reserves, Canada and Quebec contribute to the perpetuation of the tragic unemployment situation and its deleterious effects on individual and community mental health."[2029]

Aboriginal peoples have generally possessed the means of subsistence on their traditional or historic territories (at least when not impacted by colonial settlement). To continue to prevent them, through extinguishment and other policies, from access to an extended land and resource base outside the reserves, would perpetuate their poverty[2030] and deterioration as

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rights of the Indians would be next to meaningless. Permanently outvoted, they would have lost all opportunity of real self-determination. In that case, the equal protection clause would have brought the Indians *not freedom and equality, but semipermanent, structural repression*." [Emphasis added.] See also J. Webber, *Reimagining Canada [:] Language, Culture, Community, and the Canadian Constitution* (Montreal: McGill-Queen's University Press, 1994, at 222, where the author concludes that Aboriginal self-government does not have an exclusively ethnic or racial basis. Rather, it is justifiable on the basis of broad cultural concerns and the will to survive and function as distinct societies and peoples.

[2025] The Canadian government takes the position that, in some cases, the aboriginal title *on reserves* are also extinguished, and replaced with other rights through a "grant-back" scheme.

[2026] See, for example, R. Williams, Jr., *Jefferson, the Norman Yoke, and American Indian Lands*, (1987) 29 Ariz. L. Rev. 165 at 172, where the creation of exclusive Indian settlements, for the purpose of protecting British economic interests, is described as a "policy of racial apartheid". See also B. Morse, "Comparative Assessments of Indigenous Peoples in Québec, Canada and Abroad" in Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté, *Les Attributs d'un Québec souverain*, note 1855, *supra*, at 345, where in a comparative study on Aboriginal peoples in Canada with those in other countries the author speaks of the "remaining shackles of colonialism and apartheid policies". In J.-J. Simard, "La question autochtone: quelques prolégomènes", *L'Action nationale*, vol. LXXXII, June 1992, no. 6, 709 at 712, the author refers to the federal regime as perpetuating "ethnic apartheid".

[2027] The intention of non-aboriginal governments to "confine" Indians on reserves, as opposed to providing a base from which they would have ready access to their expansive territories, is described in H. Robertson, *Reservations are for Indians*, 2nd ed. (Toronto: James Lorimer & Co. Ltd., 1991) at xi as follows: "Deprived of their traditional lands in the interests of agriculture and electricity, *Indians were confined to small parcels of communal territory*. For generations they were not allowed to leave their reserves, to drink liquor, own property or vote." [Emphasis added.]

[2028] Royal Commission on Aboriginal Peoples, *Partners in Confederation[:] Aboriginal Peoples, Self-Government, and the Constitution*, note 1858, *supra*, at 42

[2029] B. Petawabano *et al.*, *Mental Health and Aboriginal People of Quebec/La santé mentale et les autochtones du Québec* (Boucherville, Québec: Gaetan Morin Éditeur, 1994), at 114.

[2030] "...Indian poverty is neither a mistake nor an omission. It is a deliberate and inevitable product of Canadian attitudes and social structures": H. Robertson, *Reservations are for Indians*, 2nd ed. (Toronto: James Lorimer & Co. Ltd., 1991) at 10.

nations.[2031] It would deny them their fundamental human rights.

In particular, it would unduly restrict their liberty and right to development; undermine their collective and individual security; prevent them from effectively participating in political, social, economic, and cultural life; and substantially affect their capacity to survive.[2032] Since it is well known that the current land and resource bases on most reserves are inadequate to support present and future generations of Indians, the government may be vulnerable to challenges that it has deliberately created, or at least knowingly perpetuated, conditions preventing the full and equitable development of the indigenous peoples concerned.

8.2.4 Integrity of Aboriginal societies and rights to identity and culture

> *"To allow original languages, different cultures, and traditions to perish...should, henceforth, be regarded as essentially a violation of human rights, an inadmissable violation.* One could even go so far as to say that there can be no possible human rights without, at the same time, preserving cultural authenticity."[2033]
>
> B. Boutros-Ghali, Secretary-General of the United Nations, 1992

A fundamental objective in ensuring the survival, ongoing development, and protection of indigenous peoples is not merely to ensure the recognition and respect for their various human rights. It is also to guarantee the integrity of their societies[2034] and the right to their own identity.[2035]

This central objective is included as a responsibility of state governments and indigenous

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[2031] Federal and provincial government responsibility in this regard are described in Royal Commission on Aboriginal Peoples, *Partners in Confederation[:] Aboriginal Peoples, Self-Government, and the Constitution*, note 1858, *supra*, at 42 as follows: "The federal and provincial governments have the *responsibility to ensure that the land and resource bases of Aboriginal peoples are enhanced* and, further, that *sufficient financing is available to allow services to be provided at levels comparable to those in other parts of Canada.*" [Emphasis added.]

[2032] That the confining government policies have jeopardized the very survival of Indians on reserves is described in H. Robertson, *Reservations are for Indians*, note 2027, *supra*, at xi: "When I arrived on the scene in the late sixties, it was obvious that most Indian reserves could not support their exploding populations...The reservation system is a Darwinian experiment where only the fittest survive. The survivors are very fit, but the casualty rate is appalling."

[2033] B. Boutros-Ghali, Statement to U.N. General Assembly, in *Living History [:] Inauguration of the "International Year of the World's Indigenous People"*, (1993) 3 Transnat'l L. & Contemp. Probs. 168 at 170.

[2034] In Canada, the fundamental constitutional objective "to ensure the integrity of [Aboriginal] societies" was included in a substantive provision of the now defunct Charlottetown Accord. See Draft Legal Text, October 9, 1992, s. 35.1 (contextual statement) in K. McRoberts & P. Monahan, (eds.), *The Charlottetown Accord, the Referendum and the Future of Canada* (Toronto: Univ. of Toronto Press, 1993) at 348.

[2035] In the view of this study, extinguishment of aboriginal and treaty rights results in the destruction of cultural identity and diversity. The importance and inseparability of culture and identity are emphasized in N. Duclos, *Lessons of Difference: Feminist Theory on Cultural Diversity*, (1990) 38 Buffalo L. Rev. 325 at 327 as follows: "People throughout history have fought successfully to preserve their cultures against all odds, in the face of the most unyielding oppression. The tenacity of ethnicity suggests that our cultures are inseparable from us, that *any vision of the future that is meant for us must respect our cultural identities*. Seen this way, fostering cultural diversity is necessary to allow people to be who they are."

peoples in the *Indigenous and Tribal Peoples Convention, 1989*:

> " 1. Governments shall have the responsibility for developing, with the participation of the [indigenous and tribal] peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and *to guarantee respect for their integrity*.
>
> 2. Such action shall include measures for:
> .....
> (b) promoting the full realisation of the social, economic, and cultural rights of these peoples with *respect for their social and cultural identity, their customs and traditions* and their institutions;..."[2036] [Emphasis added.]

In addition, art. 5(b) of Convention No. 169 provides:

> "In applying the provisions of this Convention:
> .....
> (b) the *integrity of the values, practices and institutions of these peoples shall be respected*;..." [Emphasis added.]

Further, the draft *U.N. Declaration on the Rights of Indigenous Peoples*, provides that cultural genocide is associated with:

> "Any action which has the aim or effect of *depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities*;..."[2037] [Emphasis added.]

S.J. Anaya emphasizes that the norm of cultural integrity includes remedial aspects calling for affirmative measures:

> "...the norm has developed remedial aspects particular to indigenous peoples in light of their historical and continuing vulnerability...[T]he cultural integrity norm has developed to entitle indigenous groups...to affirmative measures to remedy the past undermining of their cultural survival and to guard against continuing threats in this regard."[2038]

In view of the spiritual, economic, social, cultural and political dimensions included in indigenous peoples' relationship with the land and resources, it is clear that extinguishment of aboriginal title has far-reaching impacts on the integrity of Aboriginal societies and peoples.

In particular, the cultural rights of indigenous peoples are of critical importance in considering the impacts of exinguishment. Although the status of indigenous peoples goes well beyond that of "minorities", art. 27 of the *International Covenant on Civil and Political Rights* has been used to safeguard the cultural and spiritual rights of indigenous peoples. Art. 27 provides:

> "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, *to enjoy their own culture, to profess and practise their own religion*, or to use their own language." [Emphasis added.]

In *Ominayak* v. *Canada*,[2039] the U.N. Human Rights Committee considered both

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[2036] Art. 2, paras. 1 & 2(b) of Convention No. 169.

[2037] Art. 7, para. (a) of the draft Declaration.

[2038] S.J. Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, note 1919, *supra*, at 345.

[2039] *Ominayak* v. *Canada*, U.N. Doc. CCPR/C/38/D/167/1984 (Human Rights Committee decision, March 28, 1990).

cultural and spiritual[2040] factors in concluding that "historical inequities...and more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue."[2041] N. Bankes comments on the legal implications of this decision as follows:

> "At the very least, the *Lubicon* decision *confirms the close connection between land and culture*. Certainly, the general literature on Article 27 confirms that the state...must take positive steps to guarantee real equality. Concrete services may be required and *surely the protection and acquisition of an adequate land base are well within the scope of Article 27.*"[2042] [Emphasis added.]

As indicated above, the Human Rights Committee appropriately interpreted the cultural rights of indigenous peoples in a broad manner so as to encompass their way of life and use and occupation of land. Ongoing "historical inequities" such as lack of recognition of their aboriginal title in the face of resource development were viewed by the Committee as clear threats to the Lubicon Lake Band and a violation of their cultural rights under art. 27 of the Covenant.

Therefore, it is likely that an historical or current "inequity" such as extinguishment of aboriginal title constitutes a violation of art. 27. In this context, indigenous peoples would have to demonstrate such far-reaching impacts as depriving them of an adequate land and resource base, undermining their spiritual and cultural practices, affecting their identity as distinct peoples, and otherwise threatening their way of life.

It is also important to note that both the *Indigenous and Tribal Peoples Convention, 1989*[2043] and the draft *U.N. Declaration on the Rights of Indigenous Peoples*[2044] include numerous provisions pertaining to indigenous peoples' cultural rights. These provisions can serve to reinforce the importance of indigenous cultures in the context of extinguishment.

As C. Brölmann & M. Zieck underline, the cultures and lands of indigenous peoples go hand-in-hand and both are critical to their survival:

> "[I]t is generally acknowledged that the enjoyment of a fully-fledged relationship with the land (traditionally) inhabited constitutes a condition *sine qua non* for the well-being and even survival of indigenous peoples. It is, at the same time, a pre-condition for the preservation of the distinct cultural identity of indigenous peoples. That is to say, *although safeguarding the territorial basis can be considered a necessary condition for the preservation of indigenous peoples, it is not sufficient: their culture in its broadest sense needs protection as well.*"[2045] [Emphasis added.]

[2040] The indigenous party alleged that their members had been "robbed of the physical realm to which their religion attaches": Id. at paras. 29.5 & 32.2.

[2041] Id. at para. 33.

[2042] N. Bankes, "Aboriginal Peoples, Resource Exploitation, and International Law" in Proceedings of the 1993 Conference of the Canadian Council on International Law, *Aboriginal Rights and International Law*, note 1915, *supra*, at 78-79.

[2043] See, for example, arts. 5(a) (social, cultural, religious and spiritual values and practices must be recognized and protected); 8, para. 1 (due regard for indigenous customs and customary laws); and 13, para. 1 (special importance for the cultures and spiritual values of indigenous peoples in their relationship with lands or territories).

[2044] See, for example, arts. 9 (right to belong to an indigenous community or nation in accordance with their traditions and customs); 12 (right to practise cultural traditions and customs); 25 (right to maintain and strengthen their distinctive spiritual and material relationship with the lands, waters and resources); and 26 (right to full recognition of their laws, traditions and customs and land tenure systems).

[2045] C. Brölmann & M. Zieck, "Indigenous Peoples" in C. Brölmann, R. Lefeber, M. Zieck, (eds.), *Peoples and Minorities in International Law*, note 1945, *supra*, at 197. See also F. Griffiths, *Canada as a Sovereign State*, (1994) 2 Canadian Foreign Policy 15 at 26: "As with the extinction of species, the extinction of cultures is detrimental to the security of humankind."

Human rights norms pertaining to indigenous peoples' lands and resources are described under subsequent sub-headings below.

8.2.5 Self-determination and self-government

Article 1 of both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* provide for the right of all peoples to self-determination. Para. 1 of art. 1 provides:

> "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

In addition, para. 2 of art. 1 describes what is often said to refer to economic self-determination:

> "All peoples may, for their own ends, *freely dispose of their natural wealth and resources* without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. *In no case may a people be deprived of their means of subsistence.*" [Emphasis added.]

In the draft *U.N. Declaration on the Rights of Indigenous Peoples*, the language on self-determination tracks the language in the two International Covenants:

> "Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[2046]

In the *Indigenous and Tribal Peoples Convention, 1989* (No. 169), it is provided in art. 1:

> "The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law."[2047]

This provision is not intended to, and does not in any way, signify that indigenous peoples do not have the right to self-determination under international law. What is intended is to highlight the fact that the issue of political self-determination is outside the competence of the International Labour Organization that adopted Convention No. 169. Consequently, it is intended that the use of the term "peoples" *per se* in this Convention not be used to either recognize or deny that the right to self-determination applies to indigenous peoples.

This view is confirmed in the remarks of the Chairperson of the ILO Committee that revised Convention No. 107[2048], leading to the adoption of Convention No. 169:

> "The Chairman considered that the text was distancing itself to a certain extent from *a*

[2046] Art. 3 of the draft Declaration.

[2047] Art. 1, para. 3 of the Convention. See also explanatory note in *Report of the Committee on Convention No. 107*, International Labour Conference, Provisional Record, 76th Session, Geneva, 1989, no. 25, at 7, para. 31: "It is understood by the Committee that the use of the term 'peoples' in this Convention had no implication as regards to the right to self-determination as understood in international law."

[2048] *Indigenous and Tribal Populations Convention, 1957* (No. 107).

> *subject outside the competence of the ILO.* In his opinion, *no position for or against self-determination was or could be expressed in the Convention, nor could any restrictions be expressed in the context of international law."*[2049] [Emphasis added.]

Further, in regard to the above clarification in art. 1 concerning use of the term "peoples", the provisions of the Convention make clear that there can be no negative effect on indigenous peoples. First, it is provided that the application of the provisions of Convention No. 169 shall not adversely affect the rights of indigenous peoples pursuant to other international instruments.[2050] Second, the Convention provides that indigenous peoples shall enjoy the "full measure of human rights and fundamental freedoms without hindrance or discrimination". This would necessarily include the right to self-determination.

At a U.N. Meeting of Experts in Nuuk, Greenland in September 1991, it was formally concluded:

> "The Meeting of Experts shares the view that *indigenous peoples constitute distinct peoples and societies, with the right to self-determination*, including the right to autonomy, self-government, and self-identification."[2051]

The view that a primary element of self-determination is self-government is found in the draft *U.N. Declaration on the Rights of Indigenous Peoples*:

> "Indigenous peoples, *as a specific form of exercising their right to self-determination, have the right to autonomy or self-government* in matters relating to their internal and local affairs, including culture, religion,...economic activities, land and resources management, environment..., as well as ways and means of financing these autonomous functions."[2052] [Emphasis added.]

Also, S.J. Anaya provides:

> "Self-government is the overarching political dimension of ongoing self-determination, a dimension that extends in favor of indigenous peoples...no less than others."[2053]

As evident from the above, issues of self-determination and self-government are by definition linked to the political, economic, social and cultural development of indigenous peoples. Morever, self-determination and self-government include land, resource and environmental dimensions. Extinguishment of aboriginal title, in its purpose and effects, severely impedes or prevents indigenous peoples from freely determining the course of their development. The right of indigenous peoples to development, according to their own values, perspectives and priorities, is a critical aspect of the right to self-determination. Yet, too often extinguishment is used by non-Aboriginal governments to suggest that land, resource and environmental questions are not the domain of the indigenous peoples concerned, except perhaps at the level of consultation.

[2049] *Report of the Committee on Convention No. 107*, International Labour Conference, Provisional Record, 76th Session, Geneva, 1989, no. 25, at 8, para. 42.

[2050] Art. 35 of the Convention.

[2051] See preamble in *Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government*, United Nations Meeting of Experts, Nuuk, Greenland, 24-28 September 1991, U.N. Doc. E/CN.4/1992/42 and Add.1. See also para. 2 of the Conclusions, which provides in part: "Indigenous peoples have the right of self-determination *as provided for in the international covenants on human rights and public international law and as a consequence of their continued existence as distinct peoples.*" [Emphasis added.]

[2052] Art. 31 of the draft Declaration.

[2053] S.J. Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, note 1919, *supra*, at 354.

As illustrated in the various sub-headings pertaining to international human rights norms, extinguishment has a real and far-reaching potential to seriously undermine the integrity of indigenous societies in innumerable ways. By unjustifiably limiting the fundamental choices available to indigenous peoples, extinguishment thwarts the very essence or meaning of self-determination and self-government from an indigenous vantage point.

8.2.6 Recognition of Aboriginal relationship with lands and territories

The impacts of disrupting the relationship of Aboriginal peoples with their traditional lands can be far-reaching. For example, the denial or *de facto* extinguishment of aboriginal rights in the context of large-scale projects has had far-reaching adverse effects on the development of Aboriginal peoples and the integrity of their societies. J. Ryan and B. Ominayak describe these impacts in the case of the Lubicon Crees:

> "No one asked the Cree if they had concerns about the way development should proceed, or if it should proceed, on their lands. The outcome has been a loss of a viable economy. *As the land base was disrupted human lives were shattered because the relationship with the land was broken...The rhythm of life was broken and we began to see the predictable results*: people became depressed, they drank, they abandoned themselves, they had no context, they could not find new meanings in old lands, they had no money, no access to work, they lost status, dignity, identity, responsibility.[2054] [Emphasis added.]

L. Little Bear describes aboriginal conceptions of ownership and how it affects the relationship of indigenous peoples to their lands:

> "Indian ownership of property, like Indians' way of relating to the world, is holistic. Land is communally owned; ownership rests not in any one individual, but rather belongs to the tribe as a whole...The members of the tribe have an undivided interest in the land; everybody, as a whole, owns the whole. *Furthermore, the land belongs not only to the people presently living, but also to past generations and future generations*, who are considered to be as much a part of the tribal entity as the present generation. *In addition, the land belongs not only to human beings, but also to other living things* (the plants and animals and sometimes the even the rocks); they, too, have an interest."[2055] [Emphasis added.]

In the *Indigenous and Tribal Peoples Convention, 1989*, Part II (Land) emphasizes indigenous peoples' relationship to land as follows:

> "In applying the provisions of this Part of the Convention, governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship."[2056]

Further, the draft *U.N. Declaration on the Rights of Indigenous Peoples* provides:

> "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other

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[2054] J. Ryan & B. Ominayak, "The Cultural Effects of Judicial Bias" in S. Martin & K. Mahoney, *Equality and Judicial Neutrality* (Toronto: Carswell, 1987) at 349-350.

[2055] 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 245.

[2056] Art. 13, para. 1 of the Convention.

resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard."[2057]

The profound significance of this relationship is described by J. Cobo in a major U.N. study pertaining to indigenous peoples:

"The whole range of emotional, cultural, spiritual and religious considerations is present where the relationship with the land is concerned...The land forms part of [indigenous peoples'] existence..."[2058]

C. Brölmann & M. Zieck also emphasize:

"One element which...invariably comes to the fore...is the particular relationship of indigenous peoples with the land they live on. This relationship, referred to...as the 'territorial basis', has two aspects: a geographical and a spiritual one...[T]his territorial basis has been recognized as crucial to the indigenous existence..."[2059]

Similarly, W. Shutkin confirms:

"It is well known that indigenous communities maintain an intricate and salutary relationship with the earth which is basic to their existence and their culture."[2060]

As the above discussion indicates, the relationship of indigenous peoples with their lands and territories is increasingly recognized internationally as a fundamental human rights standard that must be respected. Yet, in the context of extinguishment, it is precisely this relationship that is often severed, or at least affected to a significant degree, to the detriment of the indigenous peoples concerned.

8.2.7 Importance of a people's own means of subsistence[2061]

In art. 1, para. 2 of both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* it is provided in part as follows:

"All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. *In no case may a people be deprived of its own means of subsistence*". [Emphasis added.]

The right of a people not to be deprived of its own means of subsistence is considered to be so consequential that it can vitiate a people's "consent" to certain arrangements. As A. Cassese provides:

[2057] Art. 25 of the draft Declaration.

[2058] U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7 & Adds. 1-4 (1986) (J. Cobo, Special Rapporteur) at 28.

[2059] C. Brölmann & M. Zieck, "Indigenous Peoples" in C. Brölmann, R. Lefeber, M. Zieck, (eds.), *Peoples and Minorities in International Law*, note 1945, *supra*, at 193.

[2060] W. Shutkin, *International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment*, (1991) 31 Virginia J. Int'l L. 479 at 484.

[2061] The international norm of subsistence is also discussed under heading 6.5.2 *infra*.

> "The last sentence of Article 1(2), 'In no case may a people be deprived of its own means of subsistence,' introduces an exception to what is provided earlier. *It may be used to nullify even arrangements 'freely made' by the people 'for their own ends' if these arrangements deprive the people of its means of subsistence.*"[2062] [Emphasis added.]

The term "subsistence", as used in the International Covenants, is not defined. It is also worth noting that peoples are not to be deprived of their "own" means of subsistence. This would suggest that states or other persons could not unilaterally substitute a means of subsistence for that freely enjoyed by a people at a particular time. In relation to indigenous peoples, "subsistence" can refer to hunting, fishing, trapping and gathering activities, but there is no limitation as to what might be included in this term under international law.

The importance of subsistence for indigenous peoples is emphasized by the various references and protections included in recent instruments. For example, art. 23, para. 1 of the *Indigenous and Tribal Peoples Convention, 1989* (No. 169) provides:

> "Handicrafts, rural and community-based industries, and *subsistence and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering*, shall be recogised as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, *ensure that these activities are strengthened and promoted.*" [Emphasis added.]

In addition, art. 14, para. 1 of Convention No. 169 provides in part:

> "...measures shall be taken in appropriate cases to *safeguard the right of the peoples concerned to use lands* not exclusively occupied by them, but to which they have traditionally had *access for their subsistence and traditional activities...*" [Emphasis added.]

In the draft *U.N. Declaration on the Rights of Indigenous Peoples*, art. 21 recognizes the right of indigenous peoples to be secure in the enjoyment of their own means of subsistence and to compensation in the event that they have been so deprived:

> "Indigenous peoples have the right to maintain and develop their political, economic and social systems, *to be secure in the enjoyment of their own means of subsistence* and development, and to engage freely in all their traditional and other economic activities. *Indigenous peoples who have been deprived of their own means of subsistence* and development are *entitled to just and fair compensation.*"[2063] [Emphasis added.]

Further, in the *North American Agreement on Environmental Cooperation*,[2064] the importance of indigenous peoples' subsistence is highlighted by defining "environmental law"[2065] so as to "avoid any conflict between the environmental law enforcement requirements of the Agreement and indigenous rights to harvest natural resources".[2066]

[2062] A. Cassese, "The Self-Determination of Peoples" in L. Henkin (ed.), *The International Bill of Rights [:] The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) at 105-106.

[2063] See also art. 11(c) of the draft Declaration, where it is provided that indigenous peoples shall not be forced to abandon their own means of subsistence, even in circumstances of emergency and armed conflict.

[2064] *North American Agreement on Environmental Cooperation*, September 1993, entered into by Canada, United States and Mexico.

[2065] Art. 45(2) of the North American Agreement provides, *inter alia*, that "environmental law" does not include "any statute or regulation, or provision thereof, the primary purpose of which is managing...subsistence or aboriginal harvesting of natural resources."

[2066] H. Mann, "International Environmental Law and Aboriginal Rights" in Proceedings of the 1993 Conference of the Canadian Council on International Law, *Aboriginal Rights and International Law*, note 1915, *supra* , at 152.

Based on the above, it is clear that preservation of indigenous peoples' own means of subsistence is considered so vital that it is recognized as a right. Moreover, indigenous peoples have a right to use lands for their subsistence, regardless of whether such lands are occupied exclusively by them. Also, in the draft Declaration, fair and just compensation is provided in cases where indigenous peoples have been deprived of their own means of subsistence.

The right of indigenous peoples not to be deprived of their own means of subsistence has particular consequences in reference to the extinguishment of aboriginal land and resource rights. In such cases, it would appear that, in accordance with the International Covenants, any indigenous people's consent to purported extinguishments may be vitiated if the effect of such an agreement is to deprive such people of their own means of subsistence.

8.2.8 Recognition of land and resource rights

In 1948, when the *Universal Declaration of Human Rights* was adopted, the property rights of "everyone" were recognized in general terms in art. 17 as follows:

> " 1. Everyone has the right to own property alone as well as in association with others.
>
> 2. No one shall be arbitrarily deprived of his property."

By 1966, both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* explicitly recognized the resource rights of "peoples" as part of their right of economic self-determination:

> "All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law."[2067]

In view of the history of land and resource dispossessions suffered by indigenous peoples, it is hardly surprising that more recent international instruments are stipulating specific protections in this regard.[2068] For example, in the *Indigenous and Tribal Peoples Convention, 1989*, art. 14, para. 1 provides in part:

> "The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised..."

In addition, art. 15, para. 1 safeguards indigenous peoples' rights to natural resources as follows:

> "The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources."

[2067] Art. 1.

[2068] Even in countries, such as Guatemala, where indigenous peoples suffer severe discrimination, the resource rights of indigenous peoples are increasingly being recognized. See *Agreement on Identity and Rights of Indigenous Peoples*, in *Letter dated 5 April 1995 from the Secretary-General to the President of the General Assembly and to the President of the Security Council*, U.N. Doc. A/49/882, S/1995/256, 10 April 1995, Annex, section F, para. 6: "The Government [of Guatemala] shall adopt or promote the following measures:...(b) Recognize and guarantee the right of communities to participate in the use, administration and conservation of the natural resources existing in their lands; (c) Secure the approval of the indigenous communities prior to the implementation of any project for the exploitation of natural resources which might affect the subsistence and way of life in the communities..."

Furthermore, the draft *U.N. Declaration on the Rights of Indigenous Peoples* provides at art. 26:

> "Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used..."

In the *Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government*, the essential nature of lands and resources to all aspects of indigenous peoples' existence, subsistence and ongoing development is emphasized:

> "*Indigenous territory and the resources it contains are essential to the physical, cultural and spiritual existence of indigenous peoples and to the construction and effective exercise of indigenous autonomy and self-government.* This territorial and resource base must be guaranteed to these peoples for their subsistence and the ongoing development of indigenous societies and cultures..."[2069] [Emphasis added.]

In referring to the land and resource provisions in the *Indigenous and Tribal Peoples Convention, 1989* and the subsequent responses of state governments, S.J. Anaya concludes:

> "It is evident that *indigenous land rights norms*, rooted in otherwise accepted precepts of property, cultural integrity, and self-determination, have made their way not just into conventional international law, but also into *customary law.*"[2070] [Emphasis added.]

In addition, T.R. Berger describes the human rights significance of indigenous peoples' land rights as follows:

> "The defence of Native land rights is the issue upon which Native peoples base claims to their *identity, culture and political autonomy, and ultimately to their survival.* Throughout the New World Native people understand that *without a secure land base they will cease to exist as distinct peoples; their fate will be assimilation.*"[2071] [Emphasis added.]

Also, N. Rouland comments on the rights of indigenous peoples to lands and resources, as follows:

> "...on s'accordait à reconnaître aux autochtones, en raison de l'authenticité de leur culture, des droits non seulement à la réhabilitation de leur passé, mais également à la survie. Or la reconnaisance de droits aborigènes sur les terres qu'ils occupent de façon immémoriale procède de cette double démarche: *le rapport qu'entretiennent avec la terre les sociétés traditionnelles est un élément-maître de leur culture*; d'autre part, si leurs terres contiennent des richesses inexploitées, l'occupation qu'ils en ont faite légitime la *participation à ces richesses* en méme temps qu'elle fonde leurs droits à la survie."[2072]

[2069] *Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government*, United Nations Meeting of Experts, Nuuk, Greenland, 24-28 September 1991, U.N. Doc. E/CN.4/1992/42 and Add.1 at para. 4.

[2070] S.J. Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, note 1919, *supra*, at 350.

[2071] T.R. Berger, *A Long and Terrible Shadow [:] White Values, Native Rights in the Americas 1492-1992* (Toronto/Vancouver: Douglas & McIntyre, 1992) at 141.

[2072] N. Rouland, *Les Inuit du Nouveau-Québec et la Convention de la Baie James* (Québec: Association Inuksiutiit & Centre d'études nordiques de l'Université Laval, 1978) at 5-6. An unofficial translation reads: "One agrees to recognize to Aboriginal peoples, by reason of the authenticity of their culture, rights not only to rehabilitate their past, but also for their survival. However, the recognition of aboriginal rights on the lands they occupy from time immemorial proceeds from a double process: *the relationship that the traditional societies maintain with the land is a principal element of their culture*; also, if their lands contain unexploited resources, the occupation that they have legitimizes their *participation in these resources* at the same time that it is the basis of their rights to survival." [Emphasis added.]

[Emphasis added.]

Both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* safeguard the "inherent right of all peoples" to their natural resources as follows:

> "Nothing in the present Covenant shall be interpreted as impairing the *inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.*"[2073] [Emphasis added.]

In some instances, governments have sought to justify extinguishment of aboriginal title based on the purported need for indigenous peoples to conform to the land tenure systems of the dominant population. This would appear to contravene various provisions in the draft *U.N. Declaration on the Rights of Indigenous Peoples* as follows:

> "Indigenous peoples have the *right to maintain and strengthen* their distinct political, economic, social and cultural characteristics, *as well as their legal systems*, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State."[2074] [Emphasis added.]

In addition, art. 26 of the draft Declaration specifically provides for the recognition and protection of the land tenure systems of indigenous peoples:

> "Indigenous peoples have the *right to...the full recognition of their laws, traditions and customs, land-tenure systems* and institutions for the development and management of resources, and the *right to effective measures by States* to prevent any interference with, alienation of or encroachment upon these rights." [Emphasis added.]

The land tenure systems of indigenous peoples are intimately connected to the customs and traditions concerning their lands. In this regard, it is also worth noting that the *Indigenous and Tribal Peoples Convention, 1989* generally requires that procedures be established to resolve conflicts (rather than assume that the customs, institutions or land tenure systems must be eradicated where these differ from the national legal system). Art 8, para. 2 of Convention No. 169 provides:

> "[Indigenous and tribal] peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. *Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.*" [Emphasis added.]

In Canada, aboriginal and treaty rights of Aboriginal peoples are recognized and protected under Canada's Constitution. Therefore, it could not be argued that the customs and institutions linked to aboriginal and treaty rights are "incompatible with fundamental rights defined by the national legal system".

The land and resource rights of indigenous peoples, as well as their land tenure systems, are intrinsically connected to the respective cultures and heritages of the peoples concerned. Therefore, under international law, it does not appear acceptable for states to seek to extinguish these land and resource rights and the land tenure systems they entail. Cultural rights have been addressed under a previous sub-heading. However, it is worth highlighting here some additional relevant aspects.

[2073] *International Covenant on Civil and Political Rights*, art. 47; and *International Covenant on Economic, Social and Cultural Rights*, art. 25.

[2074] Art. 4 of the draft Declaration. See also art. 21: "Indigenous peoples have the *right to maintain and develop their political, economic and social systems...*"

In the *Declaration of the Principles of International Cultural Co-operation*,[2075] all cultures are said to be a part of the cultural heritage of humankind and are equally worthy of respect and preservation. Art. I, paras. 1 and 3 provide:

> "1. Each culture had a dignity and value which must be respected and preserved.
> .....
> 3. In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage belonging to all mankind."

This important principle is specifically affirmed in the draft *U.N. Declaration on the Rights of Indigenous Peoples* as follows:

> "*Affirming also* that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,..."[2076]

Also, the *Declaration on Race and Racial Prejudice*[2077] highlights the right of each cultural group to determine freely the values it regards as essential to its identity:

> "...it rests with each group to decide in complete freedom on the maintenance, and, if appropriate, the adaptation or enrichment of the values which it regards as essential to its identity."[2078]

Although the above Declarations are not legally binding, they provide additional reasons why extinguishment of indigenous peoples' title to their lands and resources is contrary to international norms. As emphasized by D. Sambo, in light of emerging international norms, the notion of extinguishing the land and resource rights of Aboriginal peoples must be thoroughly examined:

> "Related to lands and resources is the state policy of "extinguishment" of the territorial rights of indigenous peoples. *Given the international norms that have emerged to date, this odious concept must be thoroughly re-examined.* The concept of extinguishment of indigenous peoples' rights to territory is completely anti-indigenous, especially in light of the recognition by the ILO Convention No. 169 of the 'special importance for the cultures and spiritual values of the peoples concerned for the relationship with their lands and territories'[2079] and the 'collective aspects of this relationship'."[2080] [Emphasis added.]

[2075] *Declaration of the Principles of International Cultural Co-operation*, proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its fourteenth session, on November 4, 1966.

[2076] Draft Declaration, second preambular para.

[2077] *Declaration on Race and Racial Prejudice*, adopted and proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its twentieth session, on November 27, 1978.

[2078] Art. 5, para. 1 of the Declaration.

[2079] See *Indigenous and Tribal Peoples Convention, 1989* (No. 169), art. 13.

[2080] D. Sambo, *Indigenous Peoples and International Standard-Setting Processes: Are State Governments Listening?*, (1993) 3 Transnat'l L. & Contemp. Probs. 13, at 31.

8.2.9 Prohibition against genocide and ethnocide

> "...it is no longer possible for us to allow a single ethnocide to take place. Let us pledge that we will be more vigilant in this respect than we have been thus far: let us organize an alliance; *let us sound the alarm as soon as a civilization, a language, or a culture is in danger. This commitment...should be one for the entire international community...*"[2081] [Emphasis added.]
>
> B. Boutros-Ghali, Secretary-General of the United Nations, 1992

> "Not because they are indigenous peoples, but because they are human beings with indigenous cultures, and with unique ways of being human, should *their defense and protection be a matter of highest-priority concern for all people the world over who care about human rights.*"[2082] [Emphasis added.]
>
> C. Bay, 1984

In the *Convention on the Prevention and Punishment of the Crime of Genocide*, "genocide" is defined as follows:

> "In the present Convention, genocide means any of the following acts *committed with intent to destroy*, in whole or in part, a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or *mental harm* to members of the group;
> (c) *Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction* in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group."[2083]

The Genocide Convention has not been applied in practice to indigenous peoples. Reasons for this may include: i) Many of the acts that are prohibited in the Convention occurred well before the instrument was adopted; ii) indigenous peoples' treatment at the hands of non-indigenous governments were most often ignored or not well-known to people in different areas

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[2081] B. Boutros-Ghali, Statement to U.N. General Assembly, in *Living History [:] Inauguration of the "International Year of the World's Indigenous People"*, note 1927, *supra*, at 170.

[2082] C. Bay, *Human rights on the periphery: No room in the ark for the Yanomani?*, (1984) 1 Development Dialogue 23. Cited in J. Bodley, *Victims of Progress*, 3rd ed. (Mountain View, California: Mayfield Publishing, 1990) at 179.

[2083] *Convention on the Prevention and Punishment of the Crime of Genocide*, done on Dec. 9, 1948, entered into force on January 12, 1951, 78 U.N.T.S. 277, art. II. Canada ratified the Convention on September 3, 1952.

of the world; iii) Eurocentric attitudes contributed to the view that the demise of indigenous peoples was due more to the inability of such peoples to adjust to "civilization" than to the land dispossessions or other discriminatory actions imposed against them; iv) even where government actions were subsequently acknowledged to be highly destructive of indigenous societies and cultures, it was generally difficult to establish that the legal requirement of "intent to destroy" was present.

V. Van Dyke makes clear the relevance of the Genocide Convention to indigenous peoples worldwide, including North America:

> "Originating in the horror of the Holocaust, the Genocide Convention is relevant to the indigenous peoples of the world. *Many of them were victims of genocide before anyone thought to coin the word. The American Indians are a case in point*, as indicated by the notion that there is no good Indian but a dead Indian and as indicated by Wounded Knee and other massacres."[2084] [Emphasis added.]

H. Hannum describes the widespread genocide committed against indigenous peoples in North America[2085] and elsewhere worldwide:

> "*Genocide has been committed against indigenous, Indian or tribal peoples in every region of the world, and it is this context that any discussion of indigenous rights must occur.* The general perspective of the state toward indigenous peoples - that they are to be conquered or converted to the beliefs of the dominant, more 'advanced' society - has *remarkable similarities, whether the state is found in North, Central, South America*; the Caribbean; the Pacific; Asia, from Bangladesh to China; Africa, with respect to groups such as the pygmies; or northern Europe."[2086] [Emphasis added.]

Also, R. Williams, Jr. concludes:

> "The genocidal legacy of European racism and colonialism in the narrative traditions of federal Indian law continues to threaten tribalism with elimination from what once was the Indian's America."[2087]

Similarly, D. Paul concludes:

> "The Native American has been made to suffer, since the Americas came under European domination, every conceivable indignity that can be visited upon man by man. *Physical and cultural genocide has been inflicted upon innocent human beings without care or conscience.* Without any pity or remorse being demonstrated by the invaders, fully functioning and viable civilizations that were well advanced in the humanities were

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[2084] V. Van Dyke, *Human Rights, Ethnicity, and Discrimination* (Westport, Connecticut: Greenwood Press, 1985) at 81.

[2085] In regard to genocide against indigenous peoples in North and South America, see also S.J. Anaya, *Indigenous Rights Norms in Contemporary International Law*, (1991) 8 Arizona J. Int'l & Comp. L. 1 at 1: "Europeans arrived and began to lay claims to their lands, frequently slaughtering the native children, women and men who stood in their way. For many of those who survived, the Europeans brought disease and slavery. [new para.] *Not long after the genocidal patterns began*, concerned European theologians and jurists questioned the legality and morality of the onslaught." [Emphasis added.]

[2086] H. Hannum, *New Developments in Indigenous Rights*, (1988) 28 Virginia J. Int'l L. 649 at 649.

[2087] R. Williams Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, (1989) 31 Arizona L. Rev. 237 at 278. See also R. Williams, Jr., *The American Indian in Western Legal Thought [:] The Discourses of Conquest* (New York: Oxford University Press, 1990) at 326: "Animated by a central oriented vision of its own universalized, hierarchical position among all other discourses, *the West's archaic, medievally derived legal discourse respecting the American Indian is ultimately genocidal in both its practice and intent.*" [Emphasis added.]

maliciously destroyed."[2088] [Emphasis added.]

It is not the intention here to suggest that every destruction or serious deterioration of an indigenous society or culture is the result of genocide or ethnocide. In each particular case, the facts must be fairly examined and evidence fully considered. At the same time, it must be stated that both acts of genocide and ethnocide against indigenous peoples have been and continue to be noted by a wide range of commentators.

The particular interest in this study is how the norms prohibiting genocide and ethnocide are relevant to extinguishment policies or practices of governments. This task is made difficult since, even where extinguishment may contribute to the genocide or ethnocide of indigenous peoples, there are usually other additional factors also contributing to these prohibited actions. In other words, extinguishment of indigenous peoples' land and resource rights or their status as indigenous peoples may not be the sole actions leading to genocide or ethnocide in any given situation.

Despite these complexities, it is critical to consider the norms of genocide and ethnocide in relation to indigenous peoples. Too often, governments summarily dismiss as ludicrous any such accusations on the part of indigenous peoples. Yet, there is disturbing evidence that, in many instances,[2089] significant elements of genocide and ethnocide have been present in the treatment of indigenous peoples by government. This is especially true in relation to acts of ethnocide or cultural genocide, where the criterion of "intention" is not a required element to be legally proved.

It is worth noting that the pre-contact populations of indigenous peoples were literally decimated throughout North America. To the extent that this was the result of colonization and land dispossession issues, it is relevant to the present study.

Although estimates significantly vary, it is said that the pre-contact indigenous population in North America was approximately 7 million and that the population lowpoint was 390,000.[2090] J. Bodley states that this (and other depopulations of indigenous peoples elsewhere) was "genocide on a grand scale".[2091] He adds that, "in North America, with the exception of some portions of the southwest and California, most of the depopulation was...after 1800"[2092] and attributes it to colonization:

"Severe depopulation of tribal peoples is a characteristic feature of the frontier process

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[2088] D. Paul, *We Were Not the Savages [:] A Micmac Perspective on the Collision of European and Aboriginal Civilization* (Halifax: Nimbus Publishing Co., 1993) at 338. At 107-113 & 142-143, the author describes how in the mid-1700s a bounty was offered by the government for Micmac scalps.

[2089] In relation to acts of cultural genocide, see for example, Assembly of First Nations, *Violations of Law and Human Rights by the Government of Canada and Newfoundland in Regard to the Mushuau Innu [:] A Documentation of Injustice in Utshimasits (Davis Inlet)*, note 1922, *supra*, at 95-99.

[2090] J. Bodley, *Victims of Progress*, note 2082, *supra*, at 39, Table 2.1. See also T.R. Berger, *A Long and Terrible Shadow [:] White Values, Native Rights in the Americas 1492-1992*, note 2071, *supra*, at 29, where it is said that diseases ravaged populations in the Americas between 1500 and the middle of that century and the population decreased from 80 million to about 10 million. In some cases, Berger indicates that diseases came prior to colonization: "The new diseases travelled across the continents so swiftly that in some regions epidemics preceded the arrival of Europeans by decades, even centuries." Id.

In R. Wright, *Stolen Continents [:] The New World Through Indian Eyes Since 1492* (Toronto: Viking, 1992) at 14, it is indicated that the diseases that had devastating effects on indigenous societies were "Old World plagues": "By 1600, after some twenty waves of pestilence had swept through the Americas, less than a tenth of the original population remained. Perhaps 90 milion died, the equivalent in today's terms, to a loss of a billion." Generally, see also L. Stiffarm & P. Lane Jr., "The Demography of Native North America [:] A Question of American Indian Survival" in M.A. Jaimes, (ed.), *The State of Native America [:] Genocide, Colonization, and Resistance* (Boston: South End Press, 1992) 23.

[2091] J. Bodley, *Victims of Progress*, note 2082, *supra*, at 39.

[2092] Id. at 38-39.

> and has been reported by observers from all parts of the world over the past 150 years. As early as 1837 the members of Select Committee on Aborigines found *tribal populations to be declining at alarming rates in areas invaded by British colonists.*"[2093] [Emphasis added.]

Similarly, N. Rouland refers to the genocide and ethnocide of aboriginal societies in the context of colonialism:

> "Ces societés idéales, presqu'idylliques, *l'homme blanc ne les a-t-il pas détruites par les génocides sanglants et les ethnocides culturels qui ont accompagné l'érection des empires coloniaux?* La culpabilité de l'homme blanc en est accrue d'autant. Il lui faut donc réparer. C'est-à-dire tout d'abord considérer avec respect ces sociétés autrefois méprisées, puis reconnaître et restaurer leurs droits, leur permettre de survivre."[2094] [Emphasis added.]

As indicated in the *Report of the Fourth Russell Tribunal on The Rights of the Indians of the Americas*:

> "Many cases submitted to the fourth Russell tribunal have demonstrated, with powerful eloquence, the usurping character of the governmental bodies which are supposedly dedicated to the protection of the native people and to the safeguarding of their rights. *We have been confronted with concrete cases of genocide and ethnocide*: massive killings of Indian people; *harrassment of their traditional homelands and expulsion from their historic territories; plundering of their natural resources*; extreme exploitation of their labour and violation of the spiritual foundations of their cultures for which both the land and living creatures are sacred."[2095] [Emphasis added.]

J. Bodley links genocide and ethnocide to the forced "surrender" of "nearly half the globe" by indigenous peoples:

> "*The destruction of independent tribal societies* was an immense human tragedy that was brought about by *political decisions which were both inhumane and genocidal.* Millions died in the hundred years before 1920, when tribals were forced to surrender nearly half the globe. Why was this allowed to happen?...*ethnocide was caused by political decisions which denied the human rights of tribal peoples to an independent existence.* Those who accepted ethnocide as inevitable were unable to prevent massive tribal depopulation, and their humanitarian efforts to minimize the damage diverted attention from the real political issues and delayed the human rights struggle of indigenous peoples."[2096] [Emphasis added.]

And Bodley adds:

> "Regardless of the inherent vitality of tribal peoples, the *overwhelming historical reality, which was well established in the nineteenth century, was that tribal peoples died and cultures disintegrated when Europeans invaded tribal territory.* The British Parliamentary Select Committee on Aborigines acknowledged this fact in their official reports of 1836-

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[2093] Id. at 38.

[2094] N. Rouland, *Les Inuit du Nouveau-Québec et la Convention de la Baie James*, note 2072, *supra*, at 5. An unofficial translation reads: "*These ideal societies, almost idyllic, has not the white man destroyed them by bloody genocide and cultural ethnocide which have accompanied the building of colonial empires?* The culpability of the white man is increased accordingly. He must then redress the situation. That is to say above all to consider with respect these societies otherwise looked down on, then to recognize and restore their rights, to permit them to survive." [Emphasis added.]

[2095] *Report of the Fourth Russell Tribunal on The Rights of the Indians of the Americas* (Rotterdam: November 1980), at 1.

[2096] J. Bodley, *Victims of Progress*, note 2082, *supra*, at 179.

1837."[2097] [Emphasis added.]

P. Thornberry makes clear that there is an essential link between land dispossession and the possible death or destruction of a people:

> "The right to own land is one of the most important rights for indigenous groups. Land is an economic and frequently cultural necessity. As one writer puts it, *when indigenous groups lose their land 'their cultures disintegrate and they are dispersed among the general population or they simply die.*"[2098][2099] [Emphasis added.]

K. Parker and L. Neglon also make the connection between land dispossession issues and physical and cultural annihilation of indigenous peoples:

> "While genocide clearly violates *jus cogens*, there has been little judicial guidance on what acts constitute genocide. *One key issue is the removal of indigenous peoples from their lands or the destruction of their lands.* In the United States, for instance, *these acts cause physical and cultural annihilation because land is an integral part of American Indian religion and cultural cohesiveness.*"[2100] [Emphasis added.]

H. Burgess of the World Council of Indigenous Peoples confirms the "killing" impact of separating indigenous peoples from their territories:

> "*Next to shooting indigenous peoples, the surest way to kill us is to separate us from our part of the Earth. Once separated, we will either perish in body or our minds and spirits will be altered so that we end up mimicking foreign ways, adopt foreign languages, accept foreign thoughts*...Over time, we lose our identity and...eventually die or are crippled as we are stuffed under the name of 'assimilation' into another society."[2101] [Emphasis added.]

J. Burger compares indigenous peoples' loss of land to "genocide in slow motion":

> "*The land is the physical and spiritual core that binds communities together.* When indigenous peoples lose their land, they lose their language, their complex social and political systems, and their knowledge. At a deeper level traditions are eroded with their sacred beliefs. Although some may integrate and recover meaning to their lives, the *removal of first peoples from their land can be likened to genocide in slow motion.*"[2102] [Emphasis added.]

G. Nettheim suggests that if genocide criteria prove difficult to apply to various situations affecting indigenous peoples, the criteria pertaining to ethnocide may still prove relevant:

> "Indigenous peoples in many parts of the world have experienced genocide in the past. Some still do so...
>
> .....
>
> If the concept of genocide as defined in the 1951 [Genocide] Convention does not cover the destruction of a people's 'peoplehood', the concept of ethnocide may be

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[2097] Id. at 181.

[2098] L. Swepston, *The Indian in Latin America: Aproaches to Administration, Integration and Protection*, (1978) 27 Buffalo L.Rev. 715 at 729.

[2099] P. Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991) at 362.

[2100] K. Parker and L. Neglon, *Jus Cogens: The Compelling Law of Human Rights*, (1989) 12 Hastings Int'l & Comp. L. R. 411 at 430.

[2101] Cited in J. Burger, *The Gaia Atlas of First Peoples*, note 1820, *supra*, at 122.

[2102] J. Burger, *The Gaia Atlas of First Peoples*, note 1820, *supra*, at 122.

appropriate."[2103]

In the draft *United Nations Declaration on the Rights of Indigenous Peoples*, the right of indigenous peoples to protection from "ethnocide" or "cultural genocide" is defined in the following terms:

> "Indigenous people have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:
>
> (a) Any action which has the aim *or effect* of *depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities*;
>
> (b) Any action which has the aim or effect of *dispossessing them of their lands, territories or resources*;
>
> (c) *Any form of population transfer* which has the aim or effect of violating or undermining any of their rights;
>
> (d) *Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures*;
>
> (e) Any form of propaganda directed against them".[2104] [Emphasis added.]

The phrase "or effect" makes clear that, in contrast with the criteria for genocide, "intention" is not required in order for states to be guilty of ethnocide.[2105] Moreover, in terms of extinguishment of aboriginal title, it would appear that the above paras. (a)-(d) would be highly relevant to such a context.

"Ethnocide" has also been defined in the UNESCO *Declaration of San José*[2106]:

> "Ethnocide means that an ethnic group is *denied the right to enjoy, develop and transmit its own culture and its own language, whether collectively or individually*. This involves an extreme form of massive violations of human rights and, *in particular, the right of ethnic groups to respect for their cultural identity*, as established by numerous declarations, covenants and agreements of the United Nations and its Specialized Agencies...". [Emphasis added.]

Again, both the "right to enjoy, develop and transmit its own culture" and the "right to respect for their cultural identity" would be relevant considerations in the context of extinguishment of an indigenous people's status or rights.

R. Stavenhagen describes the process of ethnocide as follows:

> "Ethnocide may be defined, briefly, as *the process whereby a culturally distinct people...loses its identity due to policies designed to erode its land and resource base*, the use of its language, its own social and political institutions, as well as its traditions, art forms, religious practices, and cultural values.When such practices are *carried out systematically by governments (whatever the pretext: social progress, national unity, economic development, military security), then such governments are guilty of ethnocide....*
>
> ...when governments are responsible for ethnocidal policies, *and when such policies are carried out without the consent and the participation of the ethnies involved*, then it is likely that the State engages in specific violations of internationally recognized human

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[2103] G. Nettheim, "'Peoples' and 'Populations' - Indigenous Peoples and the Rights of Peoples" in J. Crawford, (ed.), *The Rights of Peoples* (Oxford: Clarendon Press, 1988) 107 at 116.

[2104] Art. 7 of the draft Declaration.

[2105] See also C. Tennant & M.E. Turpel, *A Case Study of Indigenous Peoples: Genocide, Ethnocide and Self-determination*, [1991] Nordic J. Int'l Law 287 at 297.

[2106] *Declaration of San José*, December 11, 1981, UNESCO, Doc. FS 82/WF.32 (1982). The Declaration is reproduced in J. Crawford, (ed.), *The Rights of Peoples* (Oxford: Clarendon Press, 1988) at 202-204.

rights..."[2107] [Emphasis added.]

Ethnocide or cultural genocide can be equivalent to genocide.[2108] In terms of its consequences, C. Tennant and M.E. Turpel caution that ethnocide can be as tragic for indigenous peoples as genocide:

> "*The consequences of ethnocide are as tragic as the consequences of genocide. When the culture of a people is destroyed, the group enters a dramatic downward spiral of destruction.* In Canada, the effects of ethnocide are evident in patterns of family violence, sexual and physical abuse, suicide, and alcohol and drug addiction. The degree to which indigenous people in Canada suffer from these problems has been called a national tragedy by the Canadian Human Rights Commission."[2109] [Emphasis added.]

Taking into account the above international standards, it is submitted that indigenous peoples are often the victims of cultural genocide as a consequence of extinguishment of their title to lands and resources. While direct acts of genocide against indigenous peoples are more rare in the contemporary context, the incidence of ethnocide continues to be widespread. This is no less true in respect to extinguishment of indigenous peoples' status and rights.

There is little question that indigenous peoples' societies are extremely vulnerable and not only have faced but continue to face ethnocide or, in some cases, genocide. Extinguishment of aboriginal title, may not be the only factor contributing to ethnocide or genocide in a particular situation, but extinguishment does serve to further weaken indigenous societies and contribute to their demise.

In concluding the discussion under this sub-heading, it may be useful to reflect on the words of R. Wright. As a historical reminder, R. Wright passionately states that non-indigenous peoples must not become "accessories" to processes that are destructive to indigenous peoples and their societies:

> "The Delawares are gone from Delaware, the Massachusetts from Massachusetts. There are no Ottawas in Ottawa, nor Manhattans in Manhattan. A name on a map is often the only tombstone of a murdered people. In many places, from Newfoundland to Patagonia, even the names are dead. But...there are also millions who survive. To ignore their existence and their wishes is to become accessories to murder. They are too many to die."[2110]

[2107] R. Stavenhagen, *The Ethnic Question [:] Conflicts, Development and Human Rights*, note 1849, *supra*, at 87. See also G. Weiss, "The Tragedy of Ethnocide: A Reply to Hippler" in J.H. Bodley ed., *Tribal Peoples and Development Issues: A Global Overview* (Mountain View: Mayfield Publishing Co., 1988) at 124-133.

[2108] See *Declaration of San José*, UNESCO, Doc. FS 82/WF.32 (1982), para. 1: "We declare that ethnocide, that is, cultural genocide, is *a violation of international law equivalent to genocide*, which is condemned by the United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 1948." [Emphasis added.]

[2109] C. Tennant & M.E. Turpel, *A Case Study of Indigenous Peoples: Genocide, Ethnocide and Self-determination*, note 2105, *supra*, at 298.

[2110] R. Wright, *Stolen Continents [:] The New World Through Indian Eyes Since 1492*, note 2090, *supra*, at 345.

8.2.10 Right to development[2111]

In the U.N. *Declaration on the Right to Development*, it is provided:

> "The right to development is an *inalienable human right* by virtue of which *every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development*, in which all human rights and fundamental freedoms can be fully realized."[2112] [Emphasis added.]

The above Declaration also makes clear that the right to development "implies the full realization of the right of peoples to self-determination".[2113] States are required to "take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from...colonialism...and refusal to recognize the fundamental right of peoples to self-determination."[2114] Moreover, it is confirmed that all human rights and fundamental freedoms are "indivisible and interdependent"[2115] and states should "take steps to eliminate obstacles to development resulting from failure to observe"[2116] such rights.

The right to development has been recently affirmed in the *Rio Declaration on Environment and Development*:

> "The right to development must be fulfilled so as to *equitably* meet developmental and environmental needs of present and future generations."[2117] [Emphasis added.]

In the context of indigenous peoples and the question of extinguishment of their fundamental status and rights, the right to development is relevant for a number of reasons. First, if it were not for indigenous peoples' land and resources that governments seek to develop, it is unlikely that most extinguishments of aboriginal title would ever take place.[2118] Second, the right to development is a right that is possessed and enjoyed by indigenous peoples for all aspects of their development and based on their own values, perspectives and priorities. If indigenous peoples are of the view that extinguishment is prejudicial to their development, this position must be respected.

Third, the right to development must be fulfilled "equitably" (see above). From an indigenous viewpoint, it would not be equitable for non-indigenous governments to impose or

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[2111] The human right to development is discussed in R.L. Barsh, "*The Right to Development as a Human Right: Results of the Global Consultation*, (1991) 13 Human Rights Q. 322; R. Kiwanuka, *Developing Rights: The UN Declaration on the Right to Development*, (1988) 35 Netherlands Int'l L. R. 257; P. Alston, *Making Space for New Human Rights: The Case of the Right to Development*, (1988) 1 Harv. Human Rts. Yrbk. 3; R. Rich, *The Right to Development as an Emerging Human Right*, note 1936, *supra*; H. Espiell, *The Right of Development as a Human Right*, note 1936, *supra*. For an opposing view to the right to development, see J. Donnelly, *In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development*, (1985) 15 Cal. W. Int'l L. J. 473.

[2112] *Declaration on the Right to Development*, adopted by the U.N. General Assembly, Dec. 4, 1986, U.N.G.A. Res. 41/128, 41 U.N.GAOR, Supp. (No. 53) U.N. Doc. A/41/925 (1986), art. 1, para. 1.

[2113] Id., art. 1, para. 2.

[2114] Id., art. 5.

[2115] Id., art. 6, para. 2.

[2116] Id., art. 6, para. 3.

[2117] *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.. 151/5/Rev. 1, June 13, 1992, reprinted in (1992) 31 I.L.M. 874, Principle 3.

[2118] See, generally, R. Bartlett, *Resource Development and the Extinguishment of Aboriginal Title in Canada and Australia*, (1990) 20 Univ. W. Aus. L. Rev. 453.

insist upon extinguishment in order to improve indigenous peoples' conditions or enhance their own development in certain respects.

Fourth, in undertaking development projects of their own initiative (e.g. James Bay hydroelectric project), governments must not seek to ignore or deny the human rights of indigenous peoples, including their right to self-determination. Requirements by government that there be an extinguishment of aboriginal title in order to reach an "agreement" on development issues, is contrary to the notion of the right to development, as adopted by the U.N. General Assembly. As indicated in the *Global Consultation on the Realization of the Right to Development as a Human Right*, "a development strategy that disregards or interferes with human rights is the very negation of development."[2119]

As indicated in the *Global Consultation* report, human rights abuses are most suffered by indigenous peoples when developments are at issue:

> "The experience of indigenous peoples and development clearly demonstrated that human rights and development are inseparable, for *the abuse of the rights of indigenous peoples is principally a development issue.* Forced development has deprived them of their human rights, in particular the right to life and the right to their own means of subsistence...*Indigenous peoples have been, in fact, victims of development policies which deprive them of their economic base - land and resources...*"[2120] [Emphasis added.]

In regard to development and indigenous peoples, the World Commission on Environment and Development has indicated that "a more careful and sensitive consideration of [indigenous peoples'] interests is a touchstone of a sustainable development policy."[2121] Morever, in the context of development policy, the Commission has concluded that the "traditional rights" of indigenous peoples to land and other resources should be recognized and protected (rather than extinguished):

> "*The starting point for a just and humane policy for [indigenous peoples] is the recognition and protection of their traditional rights to land and the other resources that sustain their way of life* - rights they may define in terms that do not fit into standard legal systems."[2122] [Emphasis added.]

In the *Indigenous and Tribal Peoples Convention, 1989* (No. 169), indigenous peoples' rights are elaborated in relation to development matters:

> "*The peoples concerned shall have the right to decide their own priorities for the process of development*[2123] as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and *to exercise control, to the extent possible, over their own economic, social, and cultural development.* In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly."[2124]

[2119] *Global Consultation on the Realization of the Right to Development as a Human Right [:] Report prepared by the Secretary-General pursuant to Commission on Human Rights resolution 1989/45*, U.N. Doc. E/CN.4/1990/9/Rev. 1, 26 September 1990, at 41, para. 145.

[2120] Id. at 29, para. 104.

[2121] World Commission on Environment and Development, *Our Common Future* (New York: Oxford University Press, 1987) at 116.

[2122] Id. at 115.

[2123] See also the *Rio Earth Charter*, Principle 3: "*States shall recognize* the special relationship of indigenous peoples to the environment and *the right to decide their own priorities for the process of development*...[Emphasis added.]

[2124] Art. 7, para. 1 of Convention No. 169.

The Convention also makes clear that, in applying the provisions of this instrument, governments shall "establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose."[2125] Further, the "importance of sustainable and equitable development"[2126] is to be taken into account in indigenous peoples' development issues.

In the draft *U.N. Declaration on the Rights of Indigenous Peoples*, colonization and land and resource dispossession is explicitly viewed as preventing indigenous peoples from exercising their right to development:

> "...indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting *inter alia*, in their colonization and dispossession of their lands, territories and resources, thus *preventing them from exercising, in particular, their right to development in accordance with their own needs and interests*".[2127] [Emphasis added.]

In addition, the draft Declaration provides for indigenous peoples' right to development in the following terms - all of which are relevant to extinguishment questions:

> "Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities..."[2128]

> "Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development..."[2129]

> "Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used..."[2130]

Rather than insist on extinguishment of indigenous peoples' rights, states have an obligation[2131] under the draft Declaration to provide indigenous peoples with access to financial and other assistance in the realization of their development initiatives:

> "Indigenous peoples have the right to have access to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development and for the enjoyment of the rights and freedoms recognized in this Declaration."[2132]

As evident from the above, the right of indigenous peoples to development (including

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[2125] Art. 6, para. 1(c).

[2126] Art. 23, para. 2.

[2127] Id., fifth preambular para.

[2128] Id., art. 21.

[2129] Id., art. 23. See also art. 30: "Indigenous peoples have the right to determine and develop priorities and strategies for the development and use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to approval of any project affecting their lands..."

[2130] Id., art. 26.

[2131] See also art. 37: "States shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration..."

[2132] Id., art. 38.

control over development projects affecting them) is not in any way subject to "agreement" that indigenous peoples' rights to their lands and resources will be extinguished. Rather, the above norms make clear that indigenous peoples are entitled to the full enjoyment of their human rights and must not be subjected either directly or indirectly to land and resource dispossessions.

It is generally accepted that the right to development is intimately linked to and interdependent with environmental safeguards.[2133] International environmental norms are examined under the following sub-heading.

8.2.11 Right to a healthy environment

Indigenous peoples view themselves as an integral part of the ecosystems in their respective territories. In this setting, their aboriginal rights include rights to manage and safeguard their environment and ensure its integrity.[2134] Moreover, the relationship of indigenous peoples to their environment should be recognized and supported by states.[2135]

As J. Bodley points out, there appear to be important links between maintenance of natural ecosystems and the health of indigenous societies:

> "Can the world be made safe for ethnic and cultural diversity, local autonomy, and social equality? *Can natural ecosystems be maintained? In many respects, the disappearance of tribal cultures is an early warning device, because as tribal cultures have disappeared, the natural ecosystems that they occupied have become endangered* and poverty, social inequality, and global insecurity have increased."[2136] [Emphasis added.]

Similarly, W. Shutkin emphasizes the interdependence between "environment" and human life and culture:

> "...international society has come to understand that human communities themselves are threatened, especially indigenous peoples. Problems still conceived as 'environmental' are in reality profoundly anthropocentric: the preservation of human life and culture."[2137]

[2133] See, for example, the *Rio Declaration on Environment and Development*, Principle 4: "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."; and Principle 25: "Peace, development and environmental protection are interdependent and indivisible." See also draft *U.N. Declaration on the Rights of Indigenous Peoples*, ninth preambular para.: "*Recognizing also* that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment".

[2134] See, for example, R. Kapashesit and M. Klippenstein, *Aboriginal Group Rights and Environmental Protection*, (1991) 36 McGill L. J. 925. See also M. Jackson, *A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements*, Report submitted to the Royal Commission on Aboriginal Peoples, February 1994, at 77, where the ownership and stewardship elements in the rights of Aboriginal peoples are described as follows: ...rights of ownership entail responsibility, the duty to enter into a relationship of reciprocity with all the living forces of that place, to use the place well - both materially and spiritually - such that it is left in good condition for unborn generations. Ownership relates to the rights associated with social, cultural and economic activities on the land, and *stewardship relates to the obligations entailed in those rights: obligations of respect and sustainability towards all living things embedded in the land, sea and river, and thus to the unborn generations who, in turn, would have the right to enjoy the wealth of the land.*" [Emphasis added.]

[2135] In this regard, see the *Rio Earth Charter*, Principle 3: "*States shall recognize the special relationship of indigenous peoples to the environment* and the right to decide their own priorities for the process of development. States shall take special measures to safeguard the environment of indigenous peoples and to ensure the right to be consulted at all levels of decision-making in matters pertaining to the environment." [Emphasis added.]

[2136] J. Bodley, *Victims of Progress*, note 2082, *supra*, at 207.

[2137] W. Shutkin, *International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment*, note 2060, *supra*, at 483-484.

Despite these realities, indigenous peoples are still being dispossessed of their power[2138] to safeguard their environment. In the context of extinguishment of aboriginal title, governments often invoke extinguishment as reason for denying or limiting the participation of indigenous peoples in environmental matters.[2139] This is not done with a view to protecting or enhancing the natural environment through expanded governmental measures. Rather, the objective is to limit indigenous peoples' rights and recourses in defending the environment, when faced with proposed development projects that may significantly affect them or their territories.[2140]

The notion of seeking to deprive indigenous peoples of effective control over developmental and environmental matters is especially serious, in view of their dependence upon and relationship with their lands and environment. Consequently, international (and national) norms concerning the environment are highly significant to indigenous peoples, particularly in the context of any purported extinguishment of their land and resource rights. These existing and emerging standards do not support any policies or actions that would serve to undermine indigenous peoples' capacity to safeguard the integrity of their environment.

Under international law, there are differing opinions as to whether a right to a healthy environment[2141] is an established human right or an emerging right.[2142] Whatever position

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[2138] See *Agenda 21*, note 2152, *infra*, adopted at the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, which declares the following objective in part 26.3: "In full partnership with indigenous people and their communities, Governments and, where appropriate, intergovernmental organizations should aim at fulfilling the following objectives: (a) *Establishment of a process to empower indigenous people and their communities through measures that include:*...(ii) Recognition that the lands of indigenous people and their communities should be protected from activities that are environmentally unsound or that the indigenous people concerned consider to be socially and culturally inappropriate." [Emphasis added.]

[2139] A contemporary example is the James Bay and Northern Quebec Agreement, where the environmental assessment regime is so constraining that the government parties felt compelled, after intense international lobbying by the Crees, to negotiate more suitable arrangements to assess the Great Whale hydro-electric project. In addition, the Agreement provides (s. 8.18) that the James Bay hydro-electric project (Le Complexe La Grande) is in effect approved by the federal authorities, even though it never went through adequate environmental and social impact assessment.

[2140] Governments sometimes take the position that indigenous peoples have no legal rights in regard to environmental protection and, therefore, any limited powers agreed to in land claims agreements represent new benefits to the peoples concerned.

[2141] In regard to a right to a healthy environment, see World Commission on Environment and Development, *Our Common Future* (New York: Oxford University Press, 1987) at 348 (Annex 1), principle 1: "All human beings have the fundamental right to an environment adequate for their health and well-being." It is also worth noting that the Organization of American States adopted in 1988 an *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador)*, November 17, 1988, O.A.S.T.S. 69, (1989) 28 I.L.M. 698. Not yet in force. Art. 11 of the Protocol provides:

> "1. *Everyone shall have the right to live in a healthy environment* and to have access to basic public services.
>
> 2. The State Parties shall *promote the protection, preservation and improvement of the environment.*" [Emphasis added.]

Canada joined the OAS by signing the *Charter of the Organization of American States*, (1952) 119 U.N.T.S. 4, and ratifying it on January 8, 1990. This entails Canada to abide by the terms of the *American Declaration on the Rights and Duties of Man*, (1949) 43 A.J.I.L. 133, O.A.S. Off. Rec. OEA/Ser. L./V/II.23, doc. 21, rev. 6. However, Canada has not ratified the *American Convention on Human Rights*, (1965) 59 A.J.I.L. 679, Pan American Treaty Series 36, (1970) 9 I.L.M. 673.

See also the first human rights treaty to recognize the right of environment of "all peoples", the *African Charter on Human and Peoples' Rights* (Banjul Charter), OAU Doc. CAB/LEG/67/3/Rev. 5, reprinted in (1982) 21 I.L.M. 58. Art. 24 provides: "All peoples shall have the right to a generally satisfactory environment favourable to their development."

[2142] See, for example, J. Downs, *A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right*, (1993) 3 Duke J. Comp. & Int'l L. 351 (the right to a healthy environment is a "third generation" human right); M.L. Schwartz, *International Legal Protection for Victims of Environmental Abuse*, (1993) 18 Yale J. Int'l L. 355 (right to a healthy environment as an emerging human right); I. Hodkova, *Is There a Right to a Healthy Environment in the International Legal Order?*, (1991) 7 Conn. J. Int'l L. 65 (concluding that there is such a right, but that acceptance has been slow in view of its collective nature); A. Kiss, "Le droit à une protection efficace de l'environnement [:] Le point de vue français et européen" in Institut canadien d'études juridiques supérieures, *Droits de la personne [:] l'émergence de droits*

is taken, it is clear that there is a growing body of environmental norms at the international level.[2143]

The Stockholm Declaration of 1972 was one of the first international instruments to establish a link between human rights and environmental protection, but it does not expressly declare a right to a healthy environment. Principle 1 in part provides:

> "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a *responsibility to protect and improve the environment for present and future generations*..."[2144]

However, in regard to the Stockholm Declaration, A. Kiss and D. Shelton suggest that the concept of a right to a healthy environment is "inherent" in recognizing the interests of future generations:

> "*The concept of a right to environment also is inherent in recognizing the interests of future generations*...Obviously, economic, social and cultural rights cannot be enjoyed in a world where resources are inadequate due to the waste of irresponsible generations. Thus, *the right to environment as one form of the expression of human dignity may be seen as a necessary precondition to the realization of other rights in the future*."[2145] [Emphasis added.]

The concept of protecting the rights of both present and future generations is of primary importance and interest to indigenous peoples, since they have always described their stewardship responsibilities in these terms. As described in the 1991 Report of the British Columbia Claims Task Force:

> "The land, sea and resources have supported [First Nations'] families, communities and governments for centuries, and form the basis of the aboriginal spiritual, philosophical, and cultural views of the world. *Stewardship of the land, sea, and resources is for the First Nations a sacred trust, with immense responsibilities to be exercised, with care and diligence, for the benefit of future generations.*"[2146]

At the international level, it is now being said that "few could deny that the concept of intergenerational responsibility is a fundamental tenet of international public policy"[2147] if not also international law. The related notion of "intergenerational equity" has been highlighted as a fundamental principle by the World Commission on Environment and Development[2148] and

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nouveaux (Cowansville, Québec: Les Éditions Yvon Blais, 1993) 517 at 521 (concluding there is a right to "conservation" of the environment).

[2143] For a review of many of the international environmental instruments, including those making reference to indigenous peoples, see generally A. Kiss & D. Shelton, *International Environmental Law* (New York: Transnational Publishers, 1991), c. VI; H. Mann, "International Environmental Law and Aboriginal Rights" in Proceedings of the 1993 Conference of the Canadian Council on International Law, *Aboriginal Rights and International Law*, note 1915, *supra*, 144; F. Harhoff, "International Environmental Law and Aboriginal Rights" in Proceedings of the 1993 Conference of the Canadian Council on International Law, *Aboriginal Rights and International Law*, note 1915, *supra*, 155.

[2144] *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/Conf. 48/14 (Stockholm 1972), (1972) 11 I.L.M. 1416. Canada participated in the drafting of the Declaration, which was adopted by acclamation.

[2145] A. Kiss & D. Shelton, *International Environmental Law*, note 2143, *supra*, at 22.

[2146] *Report of the British Columbia Claims Task Force* (Vancouver: June 28, 1991) at 24-25.

[2147] G. Handl, *Environmental Security and Global Change: The Challenge to International Law*, (1990) 1 Yrbk. of Int'l Env. L. 3 at 27.

[2148] See World Commission on Environment and Development, *Our Common Future* (New York: Oxford University Press, 1987) at 348 (Annex 1), principle 2 on inter-generational equity: "States shall conserve and use the environment and natural resources for the benefit of present and future generations."

is elaborated in the *Goa Guidelines on Intergenerational Equity* as follows:

> "...all members of each generation of human beings, as a species, inherit a natural and cultural patrimony from past generations, both as beneficiaries and custodians under the duty to pass on this heritage to future generations. As a central point of this theory *the right of each generation to benefit from and develop this natural and cultural heritage is inseparably coupled with the obligation to use this heritage in such a manner that it can be passed on to future generations in no worse condition that it was received from past generations.*"[2149] [Emphasis added.]

The Guidelines go on to emphasize that "*conservation of cultural diversity is as important as the conservation of environmental diversity to ensure options for future generations.*"[2150] [Emphasis added.]

"Developmental and environmental needs of present and future generations" are referred to in the *Rio Declaration on Environment and Development.*[2151] In addition, the Rio Declaration includes the following provisions that are particularly relevant to indigenous peoples[2152]:

> "Indigenous people and their communities, and other local communities, have *a vital role in environmental management and development* because of their knowledge and traditional practices.[2153] *States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.*"[2154] [Emphasis added.]
>
> "The environment and natural resources of people under oppression, domination and occupation shall be protected."[2155]

[2149] *Goa Guidelines on Intergenerational Equity*, adopted by the Advisory Committee to the United Nations University Project on "International Law, Common Patrimony, and Intergenerational Equity", Goa, February 15, 1988. Cited in E.B. Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (New York: Transnational Publishers, 1989) at 293-295 (Appendix A).

[2150] Id.

[2151] See Principle 3 of the Rio Declaration.

[2152] In regard to indigenous peoples, the 1992 United Nations Conference on Environment and Development (UNCED) also adopted the *Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests*, (1992) 31 I.L.M. 882, which includes a number of useful principles specifically pertaining to indigenous peoples.

In addition, *Agenda 21*, U.N. Doc. A/CONF. 151/26 (Vol. 1-3), 12 August 1992, was adopted by UNCED as a comprehensive framework for international environmental protection. The principles in both the *Rio Declaration* and the *Statement on Forestry Principles* are reinforced through *Agenda 21*. Chapter 26 of *Agenda 21* is devoted to indigenous peoples' concerns and, it is said, "may be used to interpret the less specific language contained in the other contemporaneous documents." See H. Mann, "International Environmental Law and Aboriginal Rights" in Proceedings of the 1993 Conference of the Canadian Council on International Law, *Aboriginal Rights and International Law*, note 1915, *supra*, at 147.

[2153] In this regard, see also the *Convention on Biological Diversity*, June 5, 1992, (1992) 31 I.L.M. 822, art. 8(j): "Each Contracting Party shall, as far as possible and as appropriate:...(j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices."

[2154] Principle 22 of Rio Declaration. See also *Convention on Biological Diversity*, art. 10(c), which creates the obligation to: "Protect and encourage customary uses of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements." It is worth noting that the "customary uses" and "traditional cultural practices" of indigenous peoples are often intimately linked to their aboriginal title and land tenure systems, which are directly prejudiced by extinguishment.

[2155] Principle 23 of Rio Declaration.

In the draft *U.N. Declaration on the Rights of Indigenous Peoples*, the responsibilities of indigenous peoples to future generations is provided as follows:

> "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and *to uphold their responsibilities to future generations in this regard.*"[2156] [Emphasis added.]

Other environment-related provisions in the draft Declaration provide for: the "right to...develop, control and use the lands and territories, including the total environment of the lands, air, waters,...which they have traditionally owned or otherwise occupied or used";[2157] right to conservation, restoration and protection of the total environment and the productive capacity of their lands...";[2158] right to "measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact";[2159]and the right to autonomy or self-government in matters relating to their internal and local affairs, including...environment...".[2160]

In the *Indigenous and Tribal Peoples Convention, 1989* (No. 169), environment-related provisions include: "special measures shall be adopted [by states] as appropriate for safeguarding the...property,...cultures and environment of [indigenous] peoples"[2161] which "shall not be contrary to the freely-expressed wishes of the peoples concerned";[2162] "studies [shall be] carried out, in cooperation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities";[2163] "governments shall take measures, in cooperation with the peoples concerned, to protect and preserve the environment of the territories they inhabit";[2164] and the "right of [indigenous] peoples to participate in the use, management and conservation" of natural resources pertaining to their lands.[2165]

In the context of environmental norms, it is worth noting the emerging notions of "environmental racism"[2166], which suggest that indigenous peoples, among others, may be

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[2156] Art 25 of the draft Declaration.

[2157] Art. 26.

[2158] Art. 28.

[2159] Art. 30.

[2160] Art. 31.

[2161] Art. 4, para. 1.

[2162] Art. 4, para. 2.

[2163] Art. 7, para. 3.

[2164] Art. 7, para. 4.

[2165] Art. 15, para. 1.

[2166] See, generally, O. Saleem, *Overcoming Environmental Discrimination: The Need for a Disparate Impact Test and Improved Notice Requirements in Facility Siting Decisions*, (1994) 19 Colum. J. Env'tal L. 211; S. Foster, *Race(ial) Matters: The Quest for Environmental Justice*, (1993) 20 Ecol. L.Q. 721; G. Torres, *Introduction: Understanding Environmental Racism*, (1992) 63 U. Colo. L. Rev. 839; V. Been, *What's Fairness Got To Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, (1993) 78 Cornell L. Rev. 1001; R. Godsil, Note, *Remedying Environmental Racism*, (1991) 90 Mich. L. Rev. 394. In relation to recent efforts by the U.S. Environmental Protection Agency to combat environmental racism, see "EPA targets minority areas [:] Environmental racism in region condemned" in *The Boston Globe*, May 9, 1994, p. 13.

In regard to "environmental racism" concerning development projects on or affecting aboriginal lands, see F. Mowat & E. May, "James Bay or The Largest Hydro Development in North America?" in *Wild Earth*, Fall 1991, 20 at 23; "Matthew Coon Come [:] An interview with the chief of The Grand Council of the Cree" in *Earthkeeper*, May/June 1991, 37 at 38.

being compelled by governments to assume an excessive burden of the environmental (and social) costs of development in a manner that is racially discriminatory.

In describing "environmental racism", S. Foster provides:

> "There is no distinct phenomenon of environmental racism, if seen as a manifestation of historical racism and antecedent structural forces influenced by that racism. Environmental racism is...more descriptive of forces that manifest themselves in racially disparate outcomes in hazardous environmental exposure. In that sense, 'environmental' not only modifies 'racism,' but ultimately corroborates it."[2167]

And Foster concludes:

> "Environmental racism has given new recognition to the fact that the structural oppression of people of color in this society manifests itself in more ways than traditional civil rights based paradigms have previously recognized...There remains the nagging reality that, *despite calls for a race-neutral consciousness, racial differences continue to exist in the distribution of benefits and burdens borne by individuals in this society.*"[2168] [Emphasis added.]

Therefore, international norms pertaining to racial discrimination may also prove relevant to indigenous peoples, in regard to certain issues concerning environmental questions and extinguishment.

8.2.12 Recognition of economic and social rights, including essential services

> "It is unthinkable that any group of Canadians should have to buy into the public services which citizens expect - e.g., schooling for their children in their own language, community services, etc. In fact, *it becomes all the more scandalous when the price that is paid constitutes of a people's ancestral lands. Yet this is how [government] officials have often seen claims settlement.*"[2169] [Emphasis added.]
>
> Makivik Corporation, 1985

In relation to land claims agreements, the policy of the Canadian government is to include programs and services that might reduce serious disparities facing indigenous peoples and raise existing levels of health and medical care, education, and the quality of community life to acceptable standards.[2170]

[2167] S. Foster, *Race(ial) Matters: The Quest for Environmental Justice*, note 2166, *supra*, at 735.

[2168] Id., at 753.

[2169] Makivik Corporation, *Submission from Makivik Corporation to the Task Force to Review Comprehensive Claims Policy* (October 1985) at 26.

[2170] A most vivid example of where this was done is the James Bay and Northern Québec Agreement. Both the federal and Québec governments had neglected their responsibilities to the Crees and Inuit for decades, sometimes leading to life-threatening situations at the community level.

While such initiatives are in many instances urgently needed by indigenous peoples in Canada, it is unfair to offer these basic rights or benefits as an incentive or *quid pro quo* for extinguishing their aboriginal title. Yet, this is precisely what is effectively done in the case of land claims agreements.

Similarly, it can be argued that such incentives were used to encourage indigenous peoples to enter into the historic treaties. In view of the vulnerable situation that many indigenous peoples were in when the treaties were signed, government representatives offered basic utensils, equipment and ammunition to assist them in their struggle for survival and subsistence. While the Indian nations concerned believed the benefits in the treaties were offered in friendship and peace in return for sharing their territories with incoming European settlers, it was subsequently discovered that purported land cession provisions in the treaties had, in the government's view, extinguished aboriginal rights and transferred most of indigenous nations' lands to the Crown.[2171]

At the international level, numerous instruments recognize the rights to physical and mental health[2172] and medical care[2173], education[2174], and an adequate standard of living[2175] as basic human rights. Enjoyment of these fundamental human rights cannot be withheld from indigenous peoples in Canada on the basis that arrangements will in effect only be negotiated through treaties that purport to extinguish their land rights.[2176] No other peoples in Canada are required to surrender their land and resource rights in order to enjoy economic and social rights and benefits of a fundamental or essential nature.

Consequently, it is most unjust, if not discriminatory, for governments to insist on or otherwise secure purported extinguishments of aboriginal title in order to ensure the enjoyment of such basic economic and social rights and provide such benefits as essential services, through land claims agreements or other treaties.

[2171] For a different view of existing provisions that purport to effect a surrender of an Aboriginal people's lands, see P. Macklem, *First Nations Self-Government and the Borders of the Canadian Legal Imagination*, (1991), 36 McGill L. R. 382 at 444: "...a treaty involving the surrender of land by native people should not be viewed as automatically stripping native people of continued use and enjoyment of the land in question. Instead of viewing a surrender as a relinquishment of all native rights to the land, *a surrender should be treated as the granting of consent to a system whereby land could be shared by native and nonnative people*, with priority of use attaching to one party by virtue of the surrender." [Emphasis added.] However, the above view appears to assume the basic validity of surrender provisions which, in the view of the present study, is a highly debatable question.

[2172] See, for example, *Universal Declaration on Human Rights*, art. 25, para. 1; *International Covenant on Economic, Social and Cultural Rights*, art. 12; *Convention on the Elimination on All Forms of Racial Discrimination*, art. 5(e)(iv); *Indigenous and Tribal Peoples Convention, 1989* (No. 169), art. 25, 7, para. 2; draft *U.N. Declaration on the Rights of Indigenous Peoples*, arts. 22-24, 31.

[2173] See, for example, *Universal Declaration on Human Rights*, art. 25, para. 1; *International Covenant on Economic, Social and Cultural Rights*, art. 12, para. 2(d); *Convention on the Elimination on All Forms of Racial Discrimination*, art. 5(e)(iv); *Indigenous and Tribal Peoples Convention, 1989* (No. 169), arts. 25, para. 2, & 7, para. 2; draft *U.N. Declaration on the Rights of Indigenous Peoples*, art. 24.

[2174] See, for example, *Universal Declaration on Human Rights*, art. 26; *International Covenant on Economic, Social and Cultural Rights*, arts. 13 -14; *Convention on the Elimination on All Forms of Racial Discrimination*, art. 5(e)(v); *Indigenous and Tribal Peoples Convention, 1989* (No. 169), arts. 26-31, 7, para. 2; draft *U.N. Declaration on the Rights of Indigenous Peoples*, arts. 15, 31.

[2175] See, for example, *Universal Declaration on Human Rights*, art. 25, para. 1; *International Covenant on Economic, Social and Cultural Rights*, art. 11; *Indigenous and Tribal Peoples Convention, 1989* (No. 169), art. 2, para. 2(c); draft *U.N. Declaration on the Rights of Indigenous Peoples*, art. 22.

[2176] This is not stated as official federal government policy in Canada. However, many Aboriginal peoples in Canada are aware that their economic and social conditions will not be adequately upgraded, unless the government is publicly embarassed or they "choose" to enter into land claims agreements where extinguishment of their land and resource rights becomes an essential requirement. This situation, of course, does not mean that government monies are not increasingly spent for economic and social purposes at the community level.

8.2.13 Right to an effective legal remedy and to restitution

In the context of land and resource issues and the purported extinguishment of the aboriginal rights concerned, there are many instances where Aboriginal peoples in Canada were denied an effective legal remedy. This has occurred either because: (i) indigenous peoples were legislatively prohibited from access to the courts for the purposes of safeguarding their land rights;[2177] (ii) in practice, effective access to the justice system was not made possible for a variety of economic, social and cultural reasons;[2178] or (iii) the national judicial system was to a large degree uninformed of the nature of aboriginal title and little justice could be reasonably expected for the indigenous peoples concerned.[2179]

Yet, in relation to international norms, an effective legal remedy is required under a number of international human rights instruments.[2180] These standards are especially relevant to the extinguishment context. For example, the *Universal Declaration of Human Rights* provides:

> "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[2181]

In addition, the *Indigenous and Tribal Peoples Convention, 1989* (No. 169) provides:

> "The [indigenous and tribal] peoples...shall be safeguarded against the abuse of their rights and shall be able to take *legal proceedings*, either individually or through the representative bodies, *for the effective protection of these rights*..."[2182] [Emphasis added.]

Further, the draft *U.N. Declaration on the Rights of Indigenous Peoples* provides:

> "Indigenous peoples have the right to have *access to and prompt decision through mutually acceptable and fair procedures* for the resolution of conflicts and disputes with States, as well as to *effective remedies for all infringements of their individual and collective rights*. Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous peoples concerned."[2183] [Emphasis added.]

The lack of effective remedies, the repeated discrimination and other violations of the human rights of indigenous peoples provide both justification of, and reinforcement for, the need for adequate restitution of their aboriginal rights. In the the draft *U.N. Declaration on the Rights of Indigenous Peoples*, restitution is provided in the following terms:

> "Indigenous peoples have the *right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used*, and which have been

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[2177] See discussion under sub-heading 1.5.2 *supra*.

[2178] See discussion under sub-heading 10.4.2 *infra*.

[2179] Some indigenous peoples in Canada would take the position that Canadian judges, while more informed, still do not demonstrate sufficient understanding of the full significance of, nor accord adequate weight to, aboriginal title.

[2180] See, for example, *International Covenant on Civil and Political Rights*, art. 2, paras. 2 & 3; *Convention on the Elimination on All Forms of Racial Discrimination*, art. 6.

[2181] Art. 8. See also art. 10: "Everyone is entitled to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations..."

[2182] Art. 12. See also art. 14, para. 3 (adequate procedures to resolve land claims); and 18 (adequate penalties for unauthorized intrusion upon indigenous peoples' lands).

[2183] Art. 39. See also arts. 13, para. 2; 14, para. 2; 26 and 37.

> confiscated, used or damaged without their free and informed consent. *Where this is not possible*, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the people concerned, *compensation shall take the form of lands, territories and resources equal in quality, size and legal status.*"[2184] [Emphasis added.]

Similarly, restitutionary provisions are found in the *Indigenous and Tribal Peoples Convention, 1989* (No. 169)[2185] and in the *International Convention for the Elimination of All Forms of Racial Discrimination*[2186].

8.3 Canadian Charter of Rights and Freedoms

A full analysis of human rights norms under the *Canadian Charter of Rights and Freedoms* is beyond the scope of this study. However, it is important to at least provide some indication how some of these norms would be relevant to the issue of extinguishment and how their interpretation, in regard to Aboriginal peoples, is directly affected by values and perspectives included in aboriginal and treaty[2187] rights.

8.3.1 Relevance of aboriginal rights and s. 25 to interpretation of Charter rights

In analysing the significance of the *Canadian Charter of Rights and Freedoms* to questions pertaining to the extinguishment of aboriginal title of Aboriginal peoples, it is critical to begin with the relevant non-derogation and interpretive clauses of the Charter.

In relation to Aboriginal peoples, two essential clauses in this regard are ss. 25 and 26 of the Charter. Section 25 provides:

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

In addition, section 26 provides that:

> "The guarantee in this Charter of certain rights and freedoms shall not be construed as

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[2184] Art. 27. See also art. 12 (restitution of cultural, spiritual, etc. property, including archaeological and historical sites).

[2185] Arts. 16, paras. 3 & 4 (concerning removals of indigenous peoples from their lands).

[2186] Art. 6.

[2187] Although the treaty rights of Aboriginal peoples are safeguarded to the same degree as aboriginal rights in the interpretation of the *Canadian Charter of Rights and Freedoms*, the following discussion will focus for the most part on aboriginal rights.

> *denying the existence of any other rights or freedoms* that exist in Canada."[2188] [Emphasis added.]

In the present context, s. 25 is of particular importance. In relation to Aboriginal peoples, this constitutional provision makes clear that the guarantee in the Charter of certain rights and freedoms cannot be interpreted so as to "abrogate or derogate" from any aboriginal, treaty or other rights or freedoms (including rights and freedoms recognized in the *Royal Proclamation of 1763*).

It is important to note that, as used in s. 25, the phrase "guarantee in this Charter of certain rights and freedoms" has two broad aspects. First, the phrase refers to the guarantee made to *non-Aboriginal persons*. In this regard, s. 25 indicates that the rights and freedoms they are said to enjoy under the Charter cannot be construed so as to abrogate or derogate from aboriginal and treaty rights of Aboriginal peoples.[2189]

Second, the phrase also refers to the guarantee made to *Aboriginal persons*. Section 25 stipulates that the rights and freedoms that Aboriginal people are said to enjoy under the Charter cannot be construed so as to abrogate or derogate from their aboriginal or treaty rights. In other words, the Charter rights of Aboriginal peoples must be interpreted in a manner consistent with their aboriginal and treaty rights, which have important collective and individual rights dimensions.

In *Edmonton Journal* v. *A.-G. Alberta*, the Supreme Court of Canada highlights that a "contextual approach" could lead to different interpretations of Charter rights in different situations. As Madame Justice Wilson indicates:

> "One virtue of the contextual approach...is that it recognizes that a particular right or freedom may have a different value depending on the context..."[2190]

This would suggest that generally the rights guaranteed in the Charter, through different interpretations, can accommodate the distinct context of Aboriginal peoples, as well as that of non-Aboriginal Canadians.

In view of s. 25, it is important to consider briefly some important elements included in the framework of aboriginal rights that are also included as guarantees in the *Canadian Charter of Rights and Freedoms*. In particular, reference is being made here to the notions of "liberty" and "security" that are found in both contexts. The occurrence of these notions in both contexts provides further reinforcement to the legal perspective that aboriginal rights constitute fundamental human rights.

The human rights concepts of liberty and security are discussed under the following sub-heading. This is followed by a brief consideration of equality guarantees and the principle of non-discrimination under the Canadian Charter.

[2188] It is said that "the *Canadian Bill of Rights* clearly remain[s] applicable by virtue of section 26 of the Charter." See P. Garant, "Fundamental Rights and Fundamental Justice (section 7)" in G.-A. Beaudoin & E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed. (Toronto: Carswell, 1989) 331 at 373. Similarly, in regard to customary law, A.F. Bayefsky, *International Human Rights Law [:] Use in Canadian Charter of Rights and Freedoms Litigation*, note 1869, *supra*, at 17: "Hence, rights or freedoms embodied in customary international law and which under an adoption theory exist as part of the law of Canada continue to exist with the enactment of the Charter."

[2189] For example, it would not be open to non-Aboriginal peoples to argue that, based on equality guarantees owed to them under the Charter (s. 15), the harvesting rights that Aboriginal peoples possess as a part of their aboriginal and treaty rights could only be exercised to an equal extent as that accorded to non-Aboriginal peoples.

[2190] *Edmonton Journal* v. *A.-G. Alberta*, [1989] 2 S.C.R. 1326 (S.C.C.) at 1355-1356. Wilson J. indicates that the "contextual approach" emanates from the interpretation clause in s. 1 of the *Canadian Charter of Rights and Freedoms*.

8.3.2 Rights to liberty and security[2191]

In addition to international instruments,[2192] section 7 of the *Canadian Charter of Rights and Freedoms* provides for both the rights to liberty and security as follows:

> "Everyone[2193] has the right to life, liberty and security[2194] of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice[2195]."[2196]

Right to liberty under s. 7

In *R.* v. *Morgentaler*, Wilson J. of the Supreme Court of Canada indicates that the right to liberty under s. 7 is "inextricably tied to the concept of human dignity"[2197] and the right must be interpreted broadly:

[2191] In regard to rights of liberty and security of the person, see also the *Canadian Bill of Rights*, R.S.C. 1985, App. III, art. 1(a).

[2192] At the international level, rights to liberty and security are enshrined with varying scope in such human rights instruments as the *Universal Declaration of Human Rights*, (art. 3) and the *International Covenant on Civil and Political Rights*, (art.9).

In relation to indigenous peoples, existing and emerging international instruments provide for both collective and individual aspects of the rights to liberty and security. The *Indigenous and Tribal Peoples Convention, 1989* does not refer specifically to these two rights, but affirms the right of indigenous and tribal peoples "to enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination" (art. 3, para. 1). Convention No. 169 also refers to government responsibility to protect the rights of indigenous peoples and "guarantee respect for their integrity" (art. 2, para. 1).

In the draft *U.N. Declaration on the Rights of Indigenous Peoples*, the "collective right to live in freedom, peace and security as distinct peoples" and the "individual rights to life, physical and mental integrity, liberty and security of the person" are explicitly provided (art. 6). The draft Declaration also includes the right "to be secure in the enjoyment of their own means of subsistence and development" (art. 21).

[2193] In *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 202 (per Wilson J.), the Supreme Court of Canada has interpreted the meaning of "everyone" in s. 7 in the following terms: "Counsel for the Minister concedes that "everyone" is sufficiently broad to include the appellants in its compass and I am prepared to accept that *the term includes every human being who is physically present in Canada and by virtue of that presence amenable to Canadian law.*" [Emphasis added.]

[2194] The rights to life, liberty and security of the person constitute three separate fundamental rights: see P. Garant, "Fundamental Rights and Fundamental Justice" in G.-A. Beaudoin & E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, note 2188, *supra*, at 331, 335. The authors cite the following jurisprudence in support: *Singh* v. *Min. of Employment and Immigration*, [1985] 1 S.C.R. 177 at 204; *Re Section 94(2) of the Motor Reference Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486 at 500; *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30 at 45.

[2195] Since 1985, the Supreme Court of Canada has not retricted the phrase "principles of fundamental justice" to matters of procedure and has extended it to substantive law. See *Reference re Section 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486. See P. Garant, "Fundamental Rights and Fundamental Justice (Section 7)" in G.-A. Beaudoin & E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, note 2188, *supra*, at 375-383; and P. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992), vol. 2, at 44-30: "...s. 7 goes far beyond natural justice, which is a requirement that administrative tribunals observe rules of *procedural* fairness." [Emphasis in original.]

[2196] Section 7 applies to administrative and quai-judicial issues and it not restricted to criminal matters. See P. Hogg, *Constitutional Law of Canada*, note 2195, *supra*, vol. 2, at 44-1: "...s. 7 in particular spills over into civil justice as well."

[2197] I. Cotler, "Human Rights Advocacy and the NGO Agenda" in I. Cotler & F.P. Eliadis, (eds.), *International Human Rights Law [:] Theory and Practice*, note 1848, *supra*, at 65, where it is said that the rights in s. 7 "constitute a very fundamental set of rights which at its core relate to the right to physical and personal integrity, and which may be said to be *associated with a generic concept of human dignity.*" [Emphasis added.] At 81, Cotler adds: "A fourth issue - which really goes to the question of human dignity in a very existential sense - is that of *aboriginal rights.*" [Emphasis in original.]

"The Charter and the right to individual liberty guaranteed under it are inextricably tied to the concept of *human dignity*.

.....

Thus, an aspect of the respect for human dignity on which the Charter is founded *is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty*. Liberty, as was noted in *Singh*,[2198] is a phrase capable of a broad range of meaning. In my view, *this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance*."[2199] [Emphasis added.]

In *R.* v. *Jones*, Wilson J. further defines "liberty" as follows:

"I believe that the framers of the Constitution in guaranteeing "liberty" as a fundamental value in a free and democratic society had in mind the freedom of the individual to *develop and realize his potential to the full, to plan his own life and to suit his own character, to make his own choices* for good or ill, to be non-conformist, idiosyncratic and even eccentric — to be, in today's parlance, "his own person" and accountable as such."[2200] [Emphasis added.]

Canadian courts have also held that the right to liberty in s. 7 is not limited to physical liberty[2201] and extends to such matters as the right to use the public highways.[2202] If the right of an individual "to use the public highways" is included in the right to liberty in s. 7 of the Charter, one would have to conclude that the fundamental use and occupation by Aboriginal people of their traditional or historical territories would also be intimately linked with a liberty right.[2203]

Right to security under s. 7

In s. 7 of the Charter, the term "security" has been said not to include "security of property" or the "protection or enjoyment of property".[2204] However, as indicated by Mitchell J. in *Reference re Lands Protection Act (Prince Edward Island)*, "that does not mean that s. 7 has no property content at all":

[2198] See Wilson J. in *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 206-7, where she indicated that like "liberty", the phrase "security of the person" is capable of a broad range of meaning.

[2199] *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30 at 164, 166.

[2200] *R.* v. *Jones*, [1986] 2. S.C.R. 284 per Wilson J. (dissenting) at 318.

[2201] In relation to s. 7, Canadian courts have "give[n] 'liberty' a broader meaning than physical liberty": see P. Garant, "Fundamental Rights and Fundamental Justice (Section 7)" in G.-A. Beaudoin & E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, note 2188, *supra*, at 342, and cases cited therein.

[2202] See *Re Rowland and R.*, (1984), 10 D.L.R. (4th) 724 (Alta. Q.B.) at 733: "*I am not persuaded that the right to liberty guaranteed by s. 7 should be limited to matters of physical restraint of the person*...[S.] 7 stands alone, unless it can be said to be qualified by ss. 8 to 14 inclusive. In my opinion, there is nothing in the latter sections, read together with s. 7, which indicates that the rights protected therein are definitive or descriptive of the right to liberty...I am of the view...that the *right of an individual to use the public highways is a right which comes within the concept of the right to liberty guaranteed by the Charter.*" [Emphasis added.] See also *Ginther* v. *Sask. Government Insurance*, [1987] 5 W.W.R. 350 (Sask. Q.B.). Generally, in regard to the scope of the right to liberty under the Canadian Charter, see J. Gosselin & G. Laporte, *La Charte canadienne des droits et libertés: Les grands énoncés de la Cour suprême* (Cowansville, Québec: Les Éditions Yvon Blais, 1994), Part VIII, at 1-28 *et seq.*

[2203] This point is made in Assembly of First Nations, *Violations of Law and Human Rights by the Government of Canada and Newfoundland in Regard to the Mushuau Innu [:] A Documentation of Injustice in Utshimasits (Davis Inlet)*, note 1922, *supra*, at 45.

[2204] See P. Garant, "Fundamental Rights and Fundamental Justice (Section 7)" in G.-A. Beaudoin & E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, note 2188, *supra*, at 346-347; P. Hogg, *Constitutional Law of Canada*, note 2195, *supra*, vol. 2, at 44-10.

> "Unlike its counterparts in the *Constitution of the United States* and the *Canadian Bill of Rights*, s. 7 of the Charter does not include an express reference to property. In fact, it is well-known that property was quite deliberately left out of s. 7. Thus, it does not include any right to acquire property for its own sake, and it certainly is not concerned with business profits or economic viability as such.
>
> *That does not mean that s. 7 has no property content at all but it does mean that any such content must fall within the context of one or another of the expressed rights.* Any rights respecting property must be found within one or another of the concepts of 'life', 'liberty', or 'security of the person'..."[2205] [Emphasis added.]

In relation to extinguishment issues, it is important to note that the term "security of the person" in the Charter has been interpreted to include both physical and mental integrity. This includes such aspects as dignity and personal autonomy,[2206] and possibly "the economic capacity to satisfy certain basic human needs"[2207, 2208]

Accommodation of Aboriginal perspectives in s. 7 guarantees

As already indicated, s. 25 of the Charter requires that the s. 7 guarantee of the rights to liberty and security be read in a manner that is consistent with the aboriginal, treaty or other rights and freedoms of Aboriginal peoples, including the rights and freedoms in the Royal Proclamation of 1763. Therefore, in relation to Aboriginal people, the above formulations of "liberty" and "security" in terms of dignity and autonomy must necessarily consider collective perspectives.

It has also been described in other portions of this study that the aboriginal rights of Aboriginal peoples in Canada are protected in such constitutional enactments as the *Royal Proclamation of 1763*, the *Rupert's Land and North-Western Territory Order* (and accompanying terms and conditions), the *Constitution Act, 1930* and the *Constitution Act, 1982* (s. 35).

[2205] *Reference re Lands Protection Act (Prince Edward Island)*, (1987), 40 D.L.R. (4th) 1.

[2206] See P. Garant, "Fundamental Rights and Fundamental Justice (Section 7)" in G.-A. Beaudoin & E. Ratushny, eds., *The Canadian Charter of Rights and Freedoms*, note 2188, *supra*, at 349-352.

In *R.* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295 at 318-9, Dickson C.J.C. indicates that the right to "security of the person" includes both physical and psychological aspects: "[t]he concept 'life, liberty and security of the person' addresses itself to the human person. A person means more than the body or parts of the body of a human being. A human person is composed of the corporeal, the body, and incorporeal, the mind...It is fair to conclude that when the Charter speaks of 'life' it speaks of more than the ability to draw breath; *when it speaks of 'liberty', it speaks of more than the freedom of physical movement; and when it speaks of 'security of the person' it speaks of more than the integrity of an individual's body and its parts.*" [Emphasis added.]

In *R.* v. *Videoflicks Ltd.*, (1984), 15 C.C.C. (3d) 353, it is stated by Tarnopolsky J.A. that the right to life, liberty and security of the person "would appear to relate to *one's physical or mental integrity and one's control over these*". This view was cited with approval in *R.* v. *Morgentaler*, (1988) 62 C.R. (3d) 1. See also Wilson J. in *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 at 206-7, where she indicated that "like liberty", the phrase 'security of the person' "is capable of a broad range of meaning"; and *Rodriguez* v. *A.G. British Columbia*, [1993] 3 S.C.R. 519 at 583-589 (Sopinka J.).

[2207] See P. Hogg, *Constitutional Law of Canada*, note 2195, *supra*, vol. 2, at 44-9, where in support of this statement he cites *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, 207 per Wilson J. (obiter dictum, with supporting citations); *Irwin Toy* v. *Quebec*, [1989] 1 S.C.R. 927, 1003 per Dickson J. (obiter dictum, leaving issue open).

[2208] These points ares made in Assembly of First Nations, *Violations of Law and Human Rights by the Government of Canada and Newfoundland in Regard to the Mushuau Innu [:] A Documentation of Injustice in Utshimasits (Davis Inlet)*, note 1922, *supra*, at 50. Generally, in regard to the scope of the right to security under the Canadian Charter, see J. Gosselin & G. Laporte, *La Charte canadienne des droits et libertés: Les grands énoncés de la Cour suprême* (Cowansville, Québec: Les Éditions Yvon Blais, 1994), Part VIII, at 1-39 *et seq.*

These enactments provide for, or safeguard, broad elements of liberty[2209] and security as they pertain to the aboriginal rights of Aboriginal peoples. For example, in the Royal Proclamation, the rights of Aboriginal peoples to liberty and security are affirmed as follows:

> "And whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our protection, *should not be molested or disturbed* in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them..."[2210] [Emphasis added].

As B. Clark underlines, the right to liberty of Aboriginal peoples became an integral part of British policy in the 18th century:[2211]

> "Faced with numerous and warlike tribes, and not being entirely impervious to sentiments of natural justice, *the imperial government of Great Britain in the eighteenth century recognized the liberty of the indigenous peoples not to be molested or disturbed on their unceded territories*. This liberty received constitutional protection throughout British North America."[2212] [Emphasis added.]

In addition, in the treaties entered into between Aboriginal peoples and the Crown, rights to liberty and security are inherently included in favour of the Aboriginal parties. These were clearly essential elements that were consistently sought by Aboriginal peoples through the treaty-making process. Assurances repeatedly given by the Crown's representatives to the effect that their rights will be recognized and respected "as long as the sun shines and the river flows"[2213] confirm and reinforce collective and individual notions of liberty and security.

Furthermore, the notion of security appears to be an inherent element in the fiduciary responsibility of the Crown towards Aboriginal peoples. As B. Slattery describes:

> "The Crown has *a general fiduciary duty toward native people to protect them in the enjoyment of their aboriginal rights* and in particular in the possession and use of their lands."[2214] [Emphasis added.]

[2209] See also P. Kulchyski, (ed.), *Unjust Relations: Aboriginal Rights in Canadian Courts* (Toronto: Oxford University Press, 1994) at 12: "Other political rights like *freedom of movement*, the right to spirituality...can be seen...as rights derived from prior occupancy." [Emphasis added.]

[2210] A further expression of the notion of security in the Royal Proclamation is found in its aboriginal provisions, especially those pertaining to the prevention of "great Frauds and Abuses" from being committed against Aboriginal peoples.

[2211] Even well prior to the 18th century, Pope Paul III issued the Bull *Sublimis Deus* in 1537 which states in part: "...[Indians] may and should, freely and legitimately, *enjoy their liberty* and the possession of their property; nor should they be in any way enslaved; should the contrary happen, it shall be null and of no effect." [Emphasis added.] Cited in P. Cummings & N. Mickenburg, *Native Rights in Canada* (Toronto: General Publishing, 1972) at 14.

[2212] See B. Clark, *Native Liberty, Crown Sovereignty [:] The Existing Aboriginal Right of Self-Government in Canada* (Montreal: McGill-Queen's Univ. Press, 1990) at 3. At 38, Clark adds: "This liberty, as it were, from colonial government interference left the aboriginal peoples with their pre-Columbian right of self-government intact."

[2213] See, generally, R. Fumoleau, *As Long as This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939* (Toronto: McClelland & Stewart, 1973). See also A. Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories, including the Negotiations on which they were based* (Toronto: Belfords, Clarke & Co., 1880) (reprint Saskatoon, Saskatchewan: Fifth House Publishers, 1991) at 46, where Mawe-do-pe-nais, the chief speaker of the Indians in regard to the North-West Angle Treaty (No. 3), is quoted as follows: "...in taking your hand I hold fast all the promises you have made, and I hope they will last as long as the sun rises and the water flows, as you have said."

At 96, A. Morris, who was Lieutenant-Governor of the North-West Territories, stated the following during the negotiation of Treaty No. 4 at Fort Qu'Appelle in 1874: "I told my friends...the promises we have to make to you are not for today only but for to-morrow, *not only for you but for your children born and unborn, and the promises we make will be carried out as long as the sun shines above and the water flows in the ocean.*" [Emphasis added.]

[2214] B. Slattery, *Understanding Aboriginal Rights*, (1987) 66 Can. Bar Rev. 727 at 753.

According to Canadian common law, "vulnerability" is a vital element in determining the existence of a fiduciary relationship.[2215] Within the context of any existing fiduciary duty, it can be argued that there exists a corresponding right of security possessed by the beneficiary. In relation to Aboriginal peoples, the fiduciary relationship is said to be "grounded in historical practices that emerged in dealings between the British Crown and Aboriginal nations".[2216] This relationship, including its fiduciary aspects, are reflected in the Royal Proclamation of 1763 and continue to be a part of Canadian law.

As indicated by the Assembly of First Nations, in relation to Aboriginal peoples, their right to security is primarily collective in nature:

> "[T]he notion of security is first and foremost a collective one. In other words, the right to security of Aboriginal peoples is above all referring to a collective security."[2217]

B. Slattery confirms that the "Aboriginal trust relationship is collective in nature"[2218] and adds:

> "The Crown's fiduciary obligations are owed to Aboriginal nations as corporate entities, even if the individual members of the nations are also affected."[2219]

The fiduciary relationship is said to be of a constitutional nature based on the guarantee of aboriginal and treaty rights in the *Constitution Act, 1982*[2220] and would necessarily include a broad notion of collective security. As the Assembly of First Nations describes:

> "...it must be concluded that the guarantee of Aboriginal and treaty rights in s. 35 of the *Constitution Act, 1982* necessarily includes a collective (and individual[2221]) right to security. In light of the broad nature and scope of Aboriginal rights, it would hardly be possible for governments or third parties to respect Aboriginal rights without respecting a corresponding broad collective right to security."[2222]

In regard to Aboriginal peoples, the Assembly of First Nations adds that the notion of security is "intimately linked to the enjoyment of aboriginal rights to land and culture":

> "*...Aboriginal peoples derive their collective and individual security in ways related to their lands and culture*. It is through their relationship with their traditional territories and culture that Aboriginal peoples may ensure the integrity of their societies. In this way, the notion of security (including security of the person) is intimately linked to the enjoyment of aboriginal rights to land and culture."[2223]

[2215] *International Corona Resources Ltd.* v. *Lac Minerals Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14 (S.C.C.) per Sopinka J. at 62-63.

[2216] B. Slattery, *First Nations and the Constitution: A Question of Trust*, (1992) 71 Can. Bar Rev. 261 at 271.

[2217] Assembly of First Nations, *Violations of Law and Human Rights by the Government of Canada and Newfoundland in Regard to the Mushuau Innu [:] A Documentation of Injustice in Utshimasits (Davis Inlet)*, note 1922, *supra*, at 48.

[2218] B. Slattery, *First Nations and the Constitution: A Question of Trust*, note 2216, *supra*, at 273.

[2219] Id.

[2220] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 at 1108-1109.

[2221] Since Aboriginal rights are both collective and individual in nature, so would the right to security that pertained to Aboriginal rights.

[2222] Assembly of First Nations, *Violations of Law and Human Rights by the Government of Canada and Newfoundland in Regard to the Mushuau Innu [:] A Documentation of Injustice in Utshimasits (Davis Inlet)*, note 1922, *supra*, at 48.

[2223] Id.

Based on the above, it is submitted that the right to security as it applies to Aboriginal peoples must be consistent with the aboriginal and treaty rights of Aboriginal peoples and with their own values and perspectives of culture and collective identity.[2224]

It has already been demonstrated that the right to security under s. 7 encompasses elements concerning both a person's physical and mental integrity. For Aboriginal people, these are the very elements that are linked in profound and interrelated ways to matters relating to land, culture and identity.[2225]

While it has been indicated that s. 7 does not *per se* recognize a right to security of property or enjoyment of property, the property of Aboriginal peoples can be included as part of the right to security under s. 7.[2226] This is because aboriginal lands and resources are central components of their aboriginal and treaty rights, from which s. 25 of the Charter allows no derogation. As already illustrated, for Aboriginal people, notions of security are inextricably tied to land and resource issues.

In view of the profound links of rights of liberty and security to lands and resource matters, it is clear that these Charter norms are most relevant to extinguishment questions affecting Aboriginal peoples. To the extent that extinguishment of aboriginal title significantly affects the security and liberty rights or interests of Aboriginal peoples, it is most difficult to conceive how a Canadian government policy that insisted on extinguishment could be consistent with such norms under the *Canadian Charter of Rights and Freedoms*.

A remaining question is whether Charter rights can be interpreted differently for different people. This aspect will be pursued further under the following sub-heading.

8.3.3 Equality guarantees and the principle of non-discrimination

In determining whether rights or norms under the *Canadian Charter of Rights and Freedoms* can be interpreted differently for different people, there are a number of reasons why the response would have to be an affirmative one.

First, it has already been demonstrated that s. 25 of the Charter requires that the guarantees in the Charter not be construed so as to derogate from aboriginal, treaty or other rights and freedoms of the Aboriginal peoples of Canada. This non-derogation and interpretation clause alone would require an interpretation of Charter guarantees for Aboriginal people that may necessarily differ from those for non-Aboriginal people.

[2224] In *R.* v. *Oakes*, [1986] 1 S.C.R. 103, at 136, Dickson C.J. indicated that "respect for cultural and group identity" would be an example of the values a "free and democratic society" referred to in s. 1 of the Charter could take into account in interpreting Charter rights. In this regard, it is said in P. Hogg, *Constitutional Law of Canada*, note 2195, *supra*, vol. 2, at 35-20: "This suggested that the Court would be willing to use s. 1 to enable the national norms of the Charter to accommodate at least some of the diversity that is the role of the federal system to permit." At page 35-21, Hogg also indicates that the Supreme Court of Canada was willing in *Attorney General of Quebec* v. *Ford*, [1988] 2 S.C.R. 712, to "take into account Quebec's distinctness despite the absence of a distinct society clause in the Constitution."

[2225] Assembly of First Nations, *Violations of Law and Human Rights by the Government of Canada and Newfoundland in Regard to the Mushuau Innu [:] A Documentation of Injustice in Utshimasits (Davis Inlet)*, note 1922, *supra*, at 51.

[2226] Even in a case not involving Aboriginal peoples, physical and mental integrity has been linked in terms of s. 7 to property use. See *Reference re Lands Protection Act (Prince Edward Island)*, (1987), 40 D.L.R. (4th) 1 (P.E.I. C.A.): "We know that men and women by nature have certain basic physical and psychological needs, which require support if they are to enjoy, in any meaningful way, the dignity due them as human beings. *Support for one's physical integrity requires utilization of property in one form or another.*" [Emphasis added.]

Second, different interpretations may be required, so as to be "consistent with the preservation and multicultural heritage of Canadians."[2227]

Third, the equality guarantees[2228] in the Charter may dictate the need to interpret Charter guarantees differently for Aboriginal peoples, since it is well-established that equality cannot always be achieved through identical treatment. As indicated by Dickson C.J. in *R. v. Big M Drug Mart Ltd.*:

> "The equality necessary to support religious freedom does not require identical treatment of all religions. *In fact, the interests of true equality may well require differentiation in treatment.*"[2229] [Emphasis added.]

Similarly, L. Cullen states that "[e]very legislative distinction between individuals or groups does not in itself constitute an infringement to the right to equality":[2230]

> "S. 15(1) [of the Charter] prohibits the breach of legislative equality not by the mere fact of a 'distinction' but rather by that of 'discrimination'. This nuance is of the utmost importance...[Otherwise], there would be contradictions between the purpose of s. 15 and that of several other provisions designed to safeguard certain distinctions."[2231]

Fourth, it has already been mentioned that values in a "free and democratic society" as contemplated in s. 1 of the Charter may give rise to interpretations that take into account the distinctiveness of a person or people.[2232]

In regard to the principle of non-discrimination, the Supreme Court of Canada has provided the following definition of "discrimination" under s. 15(1) of the Charter:

> "...a distinction, *whether intentional or not* but based on grounds relating to personal characteristics of the individual or group, which has the effect of *imposing burdens, obligations, or disadvantages on such individual or group not imposed on others*, or which withholds or limits access to opportunities, benefits, and advantages to other members of society."[2233] [Emphasis added.]

[2227] Section 27 of the Charter.

[2228] The four equality guarantees in s. 15 are: equality before the law; equality under the law; right to equal protection; and right to equal benefit under the law. See P. Hogg, *Constitutional Law of Canada*, note 2195, *supra*, vol. 2, at at 52-12; L. Cullen, "The Burden of Proof Facing a Person Who Invokes S. 15(1) of the Canadian Charter" in W. Tarnopolsky, J. Whitman & M. Ouellette, (eds.), *Discrimination in the Law and the Administration of Justice*, note 1859, *supra*, at 534.

[2229] *R. v. Big M Drug Mart Ltd.*, [1985] 3 W.W.R. 481 (S.C.C.) at 486. See also *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 171 (McIntyre J., dissenting in part, but with majority on this point); *Conway v. The Queen*, [1993] 2 S.C.R. 872 (S.C.C.) at 877, per La Forest J.: "The jurisprudence of this court is clear: equality does not necessarily connote identical treatment and, in fact, different treatment may be called for in certain cases to promote equality"; A.F. Bayefsky & M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1985) at 2, 223; B. Vizkelety, *Proving Discrimination in Canada* (Toronto: Carswell, 1987) at 41.

In the U.S., see *University of California Regents v. Bakke*, (1978) 438 U.S. 265 (U.S.S.C.) at 407-8, per Blackmun J.: "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently...These precepts of breadth and flexibility and ever-present modernity are basic to our constitutional law."

[2230] L. Cullen, "The Burden of Proof Facing a Person Who Invokes S. 15(1) of the Canadian Charter" in W. Tarnopolsky, J. Whitman & M. Ouellette, (eds.), *Discrimination in the Law and the Administration of Justice*, note 1859, *supra*, at 537.

[2231] Id. At 538, n. 100, the author gives s. 25 (aboriginal and treaty rights) as an example of Charter provisions designed to safeguard certain distinctions.

[2232] See *R. v. Oakes*, [1986] 1 S.C.R. 103, at 136, per Dickson C.J.

[2233] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 (S.C.C.) at 174.

As reflected under the Charter and Canadian law, there are a number of aspects of discrimination that should at least be highlighted. Concerning discriminatory practices, it is said that, since 1985, it is recognized that there are at least three different methods of proving discrimination: "direct discrimination"[2234], "adverse effect discrimination"[2235], and "systemic discrimination"[2236].[2237] B. Vizkelety contrasts the difference between the "direct" and "adverse effect" discrimination as follows:

> "There is a shift in emphasis between these two kinds of discrimination which is fundamental: in [direct discrimination] it is the *cause* of a given decision or practice which is subject to scrutiny whereas, in [adverse effects discrimination], it is the *effect* upon the protected group members which is of utmost concern."[2238] [Emphasis added.]

In cases of direct discrimination, "intention" no longer need be not be established in order to prove discrimination. In 1985, in *O'Malley* v. *Simpsons-Sears Ltd.*, the Supreme Court of Canada concluded that "an intention to discriminate is not a necessary element of the discrimination generally forbidden in Canadian human rights legislation".[2239]

In previous years, "intention" was sometimes required by the courts in determining whether direct discrimination had occurred.[2240] However, this eventually came to mean that a person had "knowledge of the consequences of his or her act". As B. Vizkelety explains:

> "Under this criterion, intentional discrimination was meant to denote either that the respondent *desired* to cause a disadvantage to a protected group or that he was *conscious* of the fact that such a consequence would result from his actions. This meaning was suffiently broad to include...*discriminatory acts which were motivated by neutral or even positive considerations, but which were known to cause a disadvantage to a protected class.*"[2241] [Emphasis added.]

In addition, in order for there to be discrimination under Canadian law, it is unnecessary

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[2234] "Direct discrimination" has been defined by the Supreme Court of Canada as "practice or rule which on its face discriminates on a prohibited ground": see *O'Malley* v. *Simpson-Sears Ltd.*, [1985] 2 S.C.R. 536 at 551.

[2235] "Adverse effect discrimination" is also referred to as "indirect discrimination" or "constructive discrimination": B. Vizkelety, "Discrimination, the Right to Seek Redress and the Common Law: A Century-Old Debate" in W. Tarnopolsky, J. Whitman & M. Ouellette, (eds.), *Discrimination in the Law and the Administration of Justice*, note 1859, *supra*, at 567.

[2236] "Systemic discrimination" can occur in any institutionalized forum. In the employment context, in *Action Travail des Femmes* v. *Canadian National*, [1987] 1 S.C.R. 1114 at 1139, Dickson C.J. of the Supreme Court of Canada has described systemic discrimination as follows: "Systemic discrimination in an employment context is discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination. The discrimination is then reinforced by the very exclusion of the disadvantaged group because the exclusion fosters the belief, both within and outside the group, that the exclusion is the result of 'natural' forces...To combat systemic discrimination, it is essential to create a climate in which both negative practices and attitudes can be challenged and discouraged."

[2237] B. Vizkelety, "Discrimination, the Right to Seek Redress and the Common Law: A Century-Old Debate" in W. Tarnopolsky, J. Whitman & M. Ouellette, (eds.), *Discrimination in the Law and the Administration of Justice*, note 1859, *supra*, at 567.

[2238] B. Vizkelety, *Proving Discrimination in Canada*, note 2229, *supra*, at 58. At 176, the author adds that the adverse effects theory "prefers to measure equality in terms of results rather than in terms of means or process."

[2239] *O'Malley* v. *Simpsons-Sears Ltd.*, (1985) 7 C.H.R.R. D/3102 (S.C.C.), at 3105-3106; [1985] 2 S.C.R. 536; see also *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 (S.C.C.) at 172; L. Cullen, "The Burden of Proof Facing a Person Who Invokes S. 15(1) of the Canadian Charter" in W. Tarnopolsky, J. Whitman & M. Ouellette, (eds.), *Discrimination in the Law and the Administration of Justice*, note 1859, *supra*, at 540.

[2240] B. Vizkelety, *Proving Discrimination in Canada*, note 2229, *supra*, at 62.

[2241] Id, at 71-72.

in every circumstance[2242] to establish motive, whether through prejudice[2243], ill-will, malice or bad faith.[2244] Rather, the essential element is that the persons or peoples concerned were being discriminated against.[2245]

As in the case of international norms, the norms under the Canadian Charter pertaining to equality guarantees and the principle of non-discrimination can be highly relevant to extinguishment questions.

The aboriginal titles of Aboriginal peoples constitute collective rights that also include individual rights dimensions. These rights and the land tenure systems of the peoples concerned are quite different from those of non-Aboriginal peoples within Canada. In order to achieve equality and ensure non-discrimination in such situations, the answer is not to compel Aboriginal peoples, through extinguishment of aboriginal title, to conform to conventional conceptions of property (as reflected by the dominant legal system). Such "identical treatment" would violate equality guarantees under the Charter that call for different treatment for different people, so as to achieve real equality.[2246]

As already indicated in this study,[2247] it would also appear to violate equality guarantees and the prohibition against discrimination for federal or provincial governments in Canada to continue to insist upon extinguishment of aboriginal title, in order to resolve land and resource issues relating to Aboriginal peoples. Such insistence also runs counter to s. 35 of the *Constitution Act, 1982* that obliges governments to recognize and affirm the aboriginal and treaty rights of Aboriginal peoples.

It is discriminatory that Aboriginal peoples are the sole peoples in Canada that are "requested" by government to extinguish their fundamental titles in order to enjoy fundamental rights and participate in the Canadian federation.[2248] In particular, Aboriginal peoples should

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[2242] However, see B. Viskelety, *Proving Discrimination in Canada*, note 2229, *supra*, at 67-68, where it suggested that proof of prejudice can still be worthwhile in situations where one is "unable to provide a credible or plausible explanation for [someone's] behaviour". The person's "state of mind or the discriminatory reasons for the behaviour can in some circumstances be inferred from overt statements of prejudice."

[2243] Id. at 64: "The term 'prejudice' is by no means synonymous with 'discrimination', even in the narrowest sense of this word. *Whereas prejudice is a state of mind, discrimination implies an act which may or may not be the result of prejudice.*" [Emphasis added.] At 67, B. Vizkelety adds: "... individual prejudice is a state of mind which may or may not result in action towards another. Discrimination, on the other hand, implies an act which in some instances is motivated by prejudice but in other instances is spurred by considerations of an altogether different nature, *including well-intentioned and even laudable motives.* It is quite right, therefore, to say that 'proof of prejudice alone is neither sufficient nor necessary in order to prove discrimination.'" [Emphasis added.]

[2244] Id. at 65: "Perhaps because of the confusion between prejudice and discrimination, there has been a tendency to somewhat rashly associate discrimination with some sign of ill-will or malice, and to require a showing of bad faith on the part of the respondent." And at 70, Vizkelety concludes: "In sum, *except in the determination of the appropriate remedy*, boards have refused, in general, to consider proof of prejudice, malice or bad faith as a prerequisite to showing intentional discrimination. This being the case, *motive should certainly not be considered necessary when proving direct discrimination.*" [Emphasis added.]

[2245] Much of the above analysis is found in Assembly of First Nations, *Violations of Law and Human Rights by the Government of Canada and Newfoundland in Regard to the Mushuau Innu [:] A Documentation of Injustice in Utshimasits (Davis Inlet)*, note 1922, *supra*, at 82-83.

[2246] L. Cullen, "The Burden of Proof Facing a Person Who Invokes S. 15(1) of the Canadian Charter" in W. Tarnopolsky, J. Whitman & M. Ouellette, (eds.), *Discrimination in the Law and the Administration of Justice*, note 1859, *supra*, at 542: "The right to equality serves to affirm human dignity in that it guarantees the *right of everyone to be treated equally and not the right to equal treatment.*" [Emphasis added.] Different treatment is especially required in the case of Aboriginal peoples since, as recognized and affirmed in the *Constitution Act, 1982*, s. 35(1), they have different rights from non-Aboriginal peoples, namely aboriginal and treaty rights.

[2247] See note 34 *supra*.

[2248] For a similar view, see, for example, Makivik Corporation, *Submission from Makivik Corporation to the Task Force to Review Comprehensive Claims Policy* (October 1985) at 19: "[Extinguishment] is discriminatory in that no other people are required to extinguish or abandon their rights in order to join or participate in the Canadian Federation". [Emphasis in original.]

not in effect be compelled to surrender aboriginal title through land claims agreements, in order for them to gain economic opportunities, reduce regional disparities and receive essential services of reasonable quality. Under the *Constitution Act, 1982*, federal and provincial governments and legislatures are constitutionally committed to promoting equal opportunities, reducing regional disparities, and providing essential services to all people in Canada.[2249] Further, these commitments must be carried out without discrimination.[2250]

9. GROUNDS FOR RECONSIDERING EXTINGUISHMENT

> "[I]l faut, en matière de développement du territoire et des richesses naturelles, mettre de côté de façon définitive la politique du fait accompli et de l'extinction préalable des droits".[2251]
>
> Commission des droits de la personne du Québec, 1993

There are a number of grounds or rationales for reconsidering the notion and practice of extinguishment, with a view to establishing constructive alternatives. The reasons advanced are extremely diverse and pervasive. They affect virtually all Aboriginal peoples in their present and future development, as well as their ongoing relations with federal and provincial governments.

Basic reasons for reconsidering extinguishment include:

i) Extinguishment of aboriginal rights imposes the values and perspectives of the dominant culture and legal system, rendering the land tenure systems of Aboriginal peoples increasingly irrelevant. Equally important, in view of the profound relationship Aboriginal peoples have with their lands, resources and environment, their collective and individual identities may also be significantly affected.

ii) The notion of extinguishment runs counter to the fundamental values and norms, recently established through the collaborative efforts of Aboriginal peoples and non-Aboriginal governments, in Canada's Constitution. In particular, extinguishment is antithetic to the recognition and affirmation of Aboriginal rights in s. 35 of the *Constitution Act, 1982*.[2252] It also goes against the protection of aboriginal rights provided in s. 25 of the *Canadian Charter of Rights and Freedoms*, so that certain guarantees in the Charter cannot abrogate or derogate

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[2249] *Constitution Act, 1982*, s. 36(1).

[2250] *Canadian Charter of Rights and Freedoms*, s. 15(1).

[2251] One of the principal recommendations in Commission des droits de la personne du Québec, *Mémoire de la Commission des droits de la personne présenté à la Commission royale sur les peuples autochtones* (Montréal: novembre 1993) at 43. An unofficial translation reads: "[I]t is necessary, in matters of territorial and natural resource development, to put aside in a definitive manner the policy of *fait accompli* and of the prior extinguishment of rights".

[2252] Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy* (Ottawa: Department of Indian Affairs and Northern Development, 1985), at 23: "...comprehensive claims policy should be consistent with the recognition and affirmation of aboriginal rights. *The policy should not seek to extinguish, in claims negotiations, rights that the Constitution has so recently affirmed.*" [Emphasis added.]

from such rights.[2253]

iii) It is not clear that aboriginal rights, as collective and individual human rights, can be subjected to wholesale elimination or destruction (e.g. through extinguishment). Both internationally and domestically in Canada, human rights may be subject to certain limitations. However, there is no explicit authority that would permit the purported destruction of fundamental human rights.[2254]

iv) Further, extinguishment runs counter to the minimum universal standards explicitly pertaining to the human rights[2255] of Aboriginal peoples that are established or emerging at the international level.[2256] These standards are clearly intended to ensure that states recognize and respect the distinctive status and rights of Aboriginal peoples,[2257] rather than eliminate cultural differences. Depending on the extent and impact of extinguishment, such action may be in violation of the right of indigenous peoples to be protected from *cultural genocide*.[2258] The contemporary orientation of international standards clearly requires enhanced recognition of aboriginal rights and not their extinguishment.[2259]

v) No other people in Canada are required to extinguish their human rights in order to participate in the Canadian federation and exercise basic freedoms. As already described in this study, this could be a violation of peremptory international norms and Canadian constitutional guarantees, such as the prohibition against racial discrimination.[2260]

[2253] See, generally, discussion under sub-heading 8.3.1 *supra*. In regard to s. 25, aboriginal and treaty rights, including the rights and freedoms in the Royal Proclamation of 1763, serve as fundamental constitutional standards. These rights and freedoms determine to a significant extent how the rights and freedoms in the Charter will be construed in relation to Aboriginal peoples, and how the guarantees in the Charter in favour of non-Aboriginal peoples must be construed so as not to abrogate or derogate from Aboriginal and treaty rights.

[2254] See discussion under sub-heading 8.2.5 *supra*.

[2255] Since the fundamental rights of Aboriginal peoples are generally significantly affected, consideration of the validity and impact of extinguishment policies should include in-depth evaluations from a human rights perspective. The links between deprivation of human rights, land dispossessions, and poverty are described in the draft *United Nations Declaration on the Rights of Indigenous Peoples*, in E.-I. Daes, Chairperson/Rapporteur, *DISCRIMINATION AGAINST INDIGENOUS PEOPLES [:] Report of the Working Group on Indigenous Populations on its eleventh session*, E/CN.4/Sub.2/1993/29, 23 August 1993, 50 (Annex I), fifth preambular para.: "...indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, *inter alia*, in their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests."

[2256] See, generally, discussion under heading 8 *supra*. In particular, extinguishment is inconsistent with aboriginal land rights recognized in art. 26 of the draft *United Nations Declaration on the Rights of Indigenous Peoples*, which rights include "the right to the *full recognition of their laws, traditions and customs, land-tenure systems* and institutions for the development and management of resources...".

[2257] See, for example, the draft *United Nations Declaration on the Rights of Indigenous Peoples*, *supra*, art. 4: "Indigenous peoples have the *right to maintain and strengthen their distinct political, economic, social and cultural characteristics*, as well as their legal systems..."; art. 8: "Indigenous peoples have the *collective and individual right to maintain and develop their distinct identities and characteristics*, including the right to identify themselves as indigenous and to be recognized as such"; and the *Indigenous and Tribal Peoples Convention, 1989*, No. 169, art. 2: "1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to *protect the rights of these peoples and to guarantee respect for their integrity*. 2. Such action shall include measures for:...(b) promoting the full realisation of the social, economic and cultural rights of these peoples with respect to their social and cultural identity, their customs and traditions and their institutions;..."; and art. 5: "(a) the social, cultural, religious and spiritual values and practices of [indigenous] peoples shall be recognized and protected...; (b) the integrity of the values, practices and institutions of these peoples shall be respected;..."

[2258] See discussion under sub-heading 8.2.9 *supra*.

[2259] Draft *United Nations Declaration on the Rights of Indigenous Peoples*, art. 44: "Nothing in this Declaration may be construed as *diminishing or extinguishing* existing or future rights indigenous peoples may have or acquire". [Emphasis added.]

[2260] See discussion under sub-headings 6.5.1, 8.2.2 & 8.3.3 *supra*. It is worth noting that other colonial notions associated with Aboriginal land dispossession and injustice, such as *terra nullius*, have been categorized as racial discrimination: see *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 at 28, per Brennan J.

vi) To date, purported cessions or extinguishments implemented by Canadian governments have been associated with, or resulted in, large-scale land dispossessions and denial of self-government[2261]. This has been the outcome in most instances, regardless of whether such actions have taken place in the context of treaties[2262] or legislation[2263]. The resulting legacy of government dependency[2264] and acute poverty has severely undermined the integrity of the Aboriginal societies affected.

vii) In regard to long-standing practices that contribute to Aboriginal land dispossession and oppression, such as *terra nullius*, the courts have recently indicated that there is a "*duty*" to re-examine such questions despite legal precedents in favour of such doctrines.[2265] Similarly, if extinguishment is associated with Aboriginal land dispossession, then there is an obligation to reconsider its validity and application.

viii) Federal extinguishment policies include a double standard[2266] whereby *residual rights* of Aboriginal peoples in and to land are purportedly extinguished. However, the residual rights of federal or provincial governments are not extinguished. This could seriously undermine the capacity of Aboriginal peoples to safeguard and advance their interests in the future, in respect to any key matter not foreseen at the time of the negotiations or which government parties refused to address adequately for whatever reason.

ix) It is far from clear that the federal government had the constitutional authority to seek and obtain blanket surrenders of Aboriginal land rights (as were allegedly obtained through historic or contemporary land claims treaties). As already indicated, the "cessions" or "purchases" referred to in the *Royal Proclamation of 1763* appear to be highly limited or circumscribed, since they are permitted solely in a context that safeguards Aboriginal peoples and their territories.[2267] Similarly, under the terms and conditions of the *Rupert's Land and North-Western Territory Order*, government duties to protect Aboriginal peoples serve to constitutionally limit the power of the Canadian government to insist upon or otherwise secure blanket extinguishment of Aboriginal title.[2268]

x) The fiduciary relationship of Aboriginal peoples with the Crown does not permit extinguishments to be carried out that are detrimental to the rights and interests of the Aboriginal

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[2261] Right Hon. Joe Clark, "Most substantial reforms ever to meet Aboriginal concerns" in *Canadian Speeches: Issues of the day*, January 1992, vol. 5, Issue 9, 23 at 25: "As I have stated repeatedly across this country, Aboriginal Peoples governed themselves successfully long before Europeans arrived. *Wittingly or unwittingly, generations of non-Aboriginal Canadians acted to destroy or debilitate those systems of government and the peoples they represented...Not only is that a history of injustice. It is also a track record of failure.*" [Emphasis added.]

[2262] Reference is, in particular, being made here to the historic or "numbered" treaties, signed in Canada between 1871 and 1921.

[2263] In regard to the Metis, a primary example is the "extinguishment" of "Indian title" in the *Manitoba Act, 1870* and the *Dominion Lands Acts*. Despite the provisions of s. 31 of the *Manitoba Act* that provided for 1.4 million acres of land, the Metis in Manitoba have been left with no discernable land base.

[2264] See Canadian Human Rights Commission, *Annual Report 1990* (Ottawa: Minister of Supply and Services Canada, 1991), at p. 16: "Our 'Third World', as these native communities have come to be known, is a reminder of the price that aboriginal peoples continue to pay for a historic lack of imagination and *for policies that fostered economic dependence rather than autonomy and self-reliance.*" [Emphasis added.]

[2265] *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 at 82, per Deane and Gaudron JJ.

[2266] See the Report of the Special Committee, *Indian Self-Government in Canada* (Ottawa: Queen's Printer, 1983) ("Penner Report"), at 116, where this double standard was explicitly criticized.

[2267] See discussion under sub-heading 1.2 and heading 2 *supra*.

[2268] See discussion under sub-heading 2.3 *supra*.

peoples concerned.[2269] In particular, insistence by the federal government that Aboriginal peoples give their consent to extinguish their rights (in order to benefit from the comprehensive claims process) appears to be inconsistent with the fiduciary relationship of the Crown.[2270] Such a demand serves to exploit the vulnerability and impoverished conditions of Aboriginal peoples, which the claims process is supposed to redress.

xi) It is also not clear that free and informed consent to the "extinguishment" of Aboriginal land rights was validly obtained through treaties with Indians or Inuit, or through processes contemplated in early Canadian legislation affecting the Metis. As already indicated,[2271] legal doctrines relating, *inter alia*, to fraud, unconscionability, duress, misrepresentation, lack of meeting of the minds, and judicial rules of interpretation in favour of Aboriginal parties appear, in many instances, to put into serious doubt the purported extinguishment of aboriginal land rights.

xii) In the absence of valid statutory authority and the valid consent of the Aboriginal peoples concerned, there is substantial doubt as to whether the Canadian government had the legal capacity to extinguish aboriginal rights. For example, the land cession provisions in the historic treaties were included pursuant to orders in council, without any statutory authority.[2272] It is not clear that, in the absence of full and informed Aboriginal consent, such orders in council provided governments with the legal capacity to eliminate or restrict the liberty interests of Aboriginal peoples through treaties and confine Aboriginal peoples on reserves.[2273]

xiii) It is the express will of Aboriginal peoples that their aboriginal and treaty rights be fully recognized and respected, and not extinguished. For non-Aboriginal governments in Canada to ignore Aboriginal peoples in this regard is wholly inconsistent with their right to self-determination[2274] and their right to exercise control over their own political, economic, social and cultural development. The sovereignty of Aboriginal peoples should not continue to be undermined through policies and practices of extinguishment.

xiv) The need to seek alternatives to federal extinguishment policies has been consistently reinforced by successive government-commissioned investigatory task forces and parliamentary committees.[2275]

For the most part, the above list of fundamental problems and concerns with extinguishment give rise to discrete or independent justifications for seeking alternative solutions. If so, it would be more beneficial to focus on new and equitable approaches rather than simply document past and continuing injustices. Consequently, new and equitable approaches are explored and elaborated upon under the next heading.

[2269] See, generally, discussion under sub-heading 6.4 *supra*. A fiduciary is required to act according to the highest standards, which entail "good faith", "honesty" and "loyalty" to its beneficiaries; and equity will not support "unconscionable" behaviour in a fiduciary. See *Guerin* v. *The Queen*, [1984] 13 D.L.R. (4th) 321, at 344; G.H.L. Fridman, *Restitution*, 2nd ed. (Toronto: Carswell, 1992) at 370-371; M.V. Ellis, *Fiduciary Duties in Canada* (Toronto: Carswell, 1993) at 1-2 and 1-3.

[2270] See discussion on the constitutionality of "insistence" by government in the text accompanying note 34 *supra*. See also the *Indigenous and Tribal Peoples Convention, 1989* (No. 169), art. 4: "1. Special measures shall be adopted as appropriate for safeguarding the *persons*, institutions, *property*, labour, *cultures* and environment of the peoples concerned. 2. Such special measures *shall not be contrary to the freely-expressed wishes of the peoples concerned*." [Emphasis added.]

[2271] In relation to legal factors affecting "consent", see authorities cited under sub-heading 3.4 *supra*.

[2272] See discussion under sub-heading 6.2.1 *supra*.

[2273] See discussion under sub-headings 6.2.1 & 8.2.3 *supra*.

[2274] See discussion under sub-heading 8.2.5 *supra*.

[2275] See Introduction *supra* of this study.

10. NEW AND EQUITABLE APPROACHES

> "The ongoing implementation of state extinguishment policies constitutes a very serious threat to indigenous societies. It is another relic of colonialism. Extinguishment is used to ensure state domination of indigenous peoples and to sever their ancestral ties to their own territories. *No other people are pressured to "extinguish" their rights to lands. This is racial discrimination. The practice of extinguishment must be eliminated.*"[2276] [Emphasis added.]
>
> D. Sambo, 1993

> Tant qu'on n'aura pas trouvé de solution satisfaisante pour dénouer l'impasse de la cession des droits en échange de compensations, il faut prévoir que les progrès [sur des revendications territoriales] seront extrêmement lents."[2277]
>
> R. Dupuis, 1993

As this study demonstrates, extinguishment is not perceived as an equitable approach on which the future development of Aboriginal societies can be built, nor on which durable relationships between Aboriginal and non-Aboriginal governments can be sustained. Extinguishment policies and practices do not allow for genuine co-existence of and equality between Aboriginal and non-Aboriginal peoples in Canada. These findings are not only evident among Aboriginal peoples. They are equally consistent with the conclusions of the 1983 Special Committee of the House of Commons, the federally-appointed Task Force to Review Comprehensive Claims Policy, and other entities that have studied extinguishment.[2278]

The Report of the Special Committee on Indian Self-Government ("Penner Report") highlights the double standard imposed by government in its extinguishment policy:

> "The Committee is...critical of the present policy of extinguishment in native claims settlements whereby all residual aboriginal rights not specifically recognized in the settlement are terminated and extinguished. *By contrast, the government's residual rights are not subject to extinguishment.*"[2279] [Emphasis added.]

Therefore, the Special Committee concluded with the following recommendation:

> "The Committee recommends that *the doctrine of extinguishment be eliminated from the settlement of claims*; settlement agreements should be limited to those matters specifically

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[2276] D. Sambo, *Indigenous Peoples and International Standard-Setting Processes: Are State Governments Listening?*, (1993) 3 Transnat'l L. & Contemp. Probs. 13, at 31.

[2277] R. Dupuis, *Historique de la négotiation sur les revendications territoriales du Conseil des Atikamekw et des Montagnais (1978-1992)*, (1993) 23 Recherches amérindiennes au Québec 35 at 48: "As long as we will not find a satisfactory solution to break the impasse of ceding rights in exchange for compensation, we must anticipate that progress [on land claims negotiations] will be extremely slow." [Unofficial translation.]

[2278] See Introduction *supra*.

[2279] Report of the Special Committee, *Indian Self-Government in Canada* (Ottawa: Queen's Printer, 1983) ("Penner Report") at 116.

negotiated."[2280] [Emphasis added.]

Anachronistic precepts and precedents have been disavowed or discredited to such a degree that many of the most basic assumptions concerning aboriginal rights can no longer be adhered to with any sense of confidence.[2281] As has already been demonstrated,[2282] Aboriginal peoples were often considered as independent nations and treated in a similar fashion as foreign nations. Yet with the passage of time, as Aboriginal peoples could withstand less and less the forces of colonization, their status and rights were consistently and repeatedly eroded by governments. This situation was further compounded in the courts - where the Aboriginal people affected were often not represented.[2283]

However, in early times, Euro-American states and courts were sufficiently aware of the status and rights of Aboriginal peoples to realize that aboriginal rights and titles limited the competing claims of the Crown. For example, the Supreme Court of Georgia recognized that it was the Crown who derived rights of beneficial use from the Aboriginal peoples and not the other way around:

> "*...instead of Georgia's being the grantor*, and limiting a particular estate to the Indians, which is to have a specific duration, *the very reverse is true. The Indians are the original grantors*, and reserve to themselves in the grant, to wit, the treaties, an interest which is unlimited as to time, and not to end without their *consent*."[2284] [Emphasis added.]

Moreover, even when the Crown was presumed to have radical title, the land rights of Aboriginal peoples were legally recognized, as evidenced by the treaty-making process. In *Minter* v. *Shirley*, it was said by the Supreme Court of Mississippi in 1871 that the treaty process showed:

> "the government never regarded the absolute title to the soil as resting in the United States, as the proprietors in fee, until ceded by the Indians. Nor did they undertake to dispose of them by grants until the acquisition of the Indian title."[2285]

It is clear that, in addition to the need for adequate norms in international and domestic constitutional instruments, the rights of Aboriginal peoples can best be addressed through just and equitable processes of negotiation. This view is reinforced in *McMillan Bloedel Limited* v. *Mullin et al.*, (per Macfarlane J., B.C. Court of Appeal):

> "I think it fair to say that, in the end, the public anticipates that the claims will be resolved by negotiation and by settlement. This judicial proceeding is but a small part of the whole of a process which will ultimately find its solution in a reasonable exchange

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[2280] Id.

[2281] See especially heading 5 *supra*.

[2282] See sub-heading 4.6 *supra*.

[2283] Sub-heading 1.5.1 *supra*.

[2284] *Georgia (State)* v. *Canatoo*, *Washington National Intelligencer* 8/24 (1843)(per Clayton J.), cited in B. Clark, *Indian Title in Canada*, (Toronto: Carswell, 1987) at 75. For a contemporary Aboriginal view of a similar nature, see Makivik Corporation, *Submission from Makivik Corporation to the Task Force to Review Comprehensive Claims Policy* (October 1985) at 17: "*The land claims process is then one of determining what land, what resources and what jurisdictions will be shared by the aboriginal group with the government, not the other way around.* The process is one of negotiating equitable agreement on sharing, not a process of extinguishing the constitutionally guaranteed aboriginal rights which the Inuit have as a result of their historical occupation and use of the land. [new para.] It is therefore untrue to say that the government is giving land and other benefits to the Inuit - it is the other way around." [Emphasis added.]

[2285] *Minter* v. *Shirley*, 3 Miss. 376 at 384 (Miss. 1871) (per Simrall J.), cited in B. Clark, *Indian Title in Canada*, note 2284, *supra*, at 77.

between governments and the Indian nations."[2286]

However, the question remains as to how Aboriginal peoples and non-Aboriginal governments can attain mutually satisfactory levels of accommodation. An important first step would appear to include a frank acknowledgement that purported surrenders or extinguishments of past and contemporary eras are fraught with constitutional, human rights, and other legal problems. Moreover, extinguishment never has been, nor is it now, a concept that is beneficial or acceptable to the Aboriginal peoples concerned.

As described in various parts of this study, valid extinguishments of aboriginal title cannot be said to have been clearly obtained through pre-Confederation treaties, the numbered treaties, or the so-called modern treaties, such as the James Bay and Northern Quebec Agreement.[2287] Similarly, valid extinguishments of Metis aboriginal title, as a result of the "treaty" under the *Manitoba Act, 1870* or more particularly the scrip system, are of questionable constitutionality to say the least.[2288]

In many instances, the Canadian government did not carry out its constitutional duties in purporting to satisfy aboriginal claims. In particular, in seeking surrenders or extinguishments of aboriginal title, the government did not act in a manner consistent with its fiduciary obligations, despite their constitutional nature.

Further, for a variety of reasons relating to essential legal questions pertaining to free and informed consent, it cannot be concluded with any reasonable degree of certainty that Aboriginal peoples validly agreed to extinguish all their aboriginal rights in and to land. In many instances, there is strong evidence of duress, fraud, misrepresentations or other unconscionable actions on the part of government representatives. In particular, in most cases, there does not appear to be convincing evidence of any meeting of the minds or common understanding between Aboriginal and government parties to treaties, in regard to "cessions" that purport to extinguish Aboriginal rights in and to land.

A renegotiation of parts or all[2289] of existing treaties would be advantageous and would ultimately be the least costly and most beneficial alternative. This could be accomplished through jointly-established processes for treaty renovation, amendment, implementation, adhesion to existing treaties, or by entering into new treaties to replace, clarify or supplement existing treaty arrangements. The option of what course to follow and which treaty provisions need to be addressed should be determined by the Aboriginal peoples concerned.

Government policies in respect to the renegotiation of treaties must be clear in recognizing the inadequacies of past actions. Governments, in conjunction with the Aboriginal peoples concerned, should formulate acceptable and equitable processes for redress in this regard.

New policies and practices in Canada must ensure effective recognition of aboriginal title

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[2286] At 607, cited in Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy* (Ottawa: Department of Indian Affairs and Northern Development, 1985) at 10.

[2287] Unless Aboriginal peoples truly sought to surrender their aboriginal land rights, it is difficult to envisage how any of the "modern" treaties could be said to include valid provisions for surrender or extinguishment. Constitutional instruments in Canada -from the time of the *Royal Proclamation of 1763*, to the 1870 *Rupert's Land and North-Western Territory Order*, to the *Constitution Act, 1982* - have never recognized that the Crown can "insist" on the surrender or extinguishment of aboriginal title as a pre-condition for satisfying the claims of Aboriginal peoples. Instead, these instruments call for the recognition and affirmation of aboriginal rights and oblige non-Aboriginal governments to act in conformity with equitable principles. Even the extinguishment contemplated in the *Manitoba Act, 1870* (but never validly implemented) was the product of negotiation and not imposed on the Metis.

[2288] See, generally, heading 3 *supra*.

[2289] While Aboriginal peoples seek to revisit their treaties in various ways, there is little indication that they wish to renegotiate all of the existing provisions.

and aboriginal land tenure systems. This approach would be consistent with Canada's Constitution, co-existence and equality of peoples, and national objectives of reconciliation, mutual respect and trust that all parties concerned generally seek to achieve. In addition, such recognition would be compatible with the notion of a Canadian federation made up of sovereign federal, provincial and Aboriginal governments. Equally important is the need to proceed in a manner that is wholly consistent with existing and emerging international norms pertaining to indigenous peoples.

It is with these orientations and precepts in mind that a framework for the development of alternatives to surrender and extinguishment will be further pursued below. First, however, the shortcomings in some existing alternative approaches are briefly examined below.

10.1 Shortcomings in Existing Alternatives

Prior to devising an alternative to the extinguishment of aboriginal rights, it is useful to briefly examine some existing options. In this way, insights might be obtained as to how to provide for more effective alternatives.

10.1.1 Federal comprehensive claims policy (1986)

On December 18, 1986, the federal government announced a revised comprehensive land claims policy.[2290] Revisions had been made to its previous policy, at least in part as a response to the recommendations contained in the 1985 Report of the Task Force to Review Comprehensive Claims.[2291]

The 1986 federal claims policy retained the previous policy of purported extinguishment and grant-back. That is, there would have to be "cession and surrender of aboriginal title throughout the settlement area in return for the grant to the beneficiaries of defined rights in specified or reserved areas and other defined rights applicable to the entire settlement area".[2292] However, the 1986 policy put forward a second option as follows that required:

"cession and surrender of aboriginal title in non-reserved areas, while:

- allowing any aboriginal title that exists to continue in specified or reserved areas;
- granting to beneficiaries defined rights applicable to the entire settlement area."[2293]

The shortcomings of this second option may be summarized as follows:

[2290] This revised policy is set out in Indian and Northern Affairs Canada, *Comprehensive Land Claims Policy* (Ottawa: Indian Affairs and Northern Development, 1987).

[2291] Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy*, note 2286, *supra*.

[2292] Indian and Northern Affairs Canada, *Comprehensive Land Claims Policy*, note 2290, *supra*, at 12.

[2293] Id.

i) The above "option" is not necessarily an assured option for Aboriginal peoples, if the lands concerned are within a province. As stated in the federal policy, "[i]n those cases where provincial lands are involved, the province must play a major part in determining the approach to be followed";[2294]

ii) a purported extinguishment of aboriginal title would still have to be effected in regard to all "non-reserved areas". This means that aboriginal title in most[2295] of an Aboriginal people's traditional territories would still have to be ceded or surrendered, if Aboriginal peoples wished to reach any agreement with the Crown. In this sense, the option set out in the 1986 policy does not qualify as a genuine "alternative" to extinguishment;

iii) in particular, it appears that in areas where rights are not exclusively aboriginal but agreed to be shared, aboriginal rights and title to land would be purportedly extinguished;

iv) even for the reserved lands where aboriginal title might be retained, there is no clear conceptual framework of basic principles that would serve to support aboriginal title and the further development of aboriginal land tenure systems, in accordance with Aboriginal peoples' own values, perspectives and laws;

v) the 1986 federal policy fails to provide a uniform policy for the recognition and affirmation of aboriginal rights. Instead, it merely allows some minimal remaining pockets of aboriginal land rights to possibly continue to exist on an expansive landscape of purportedly extinguished aboriginal title; and

vi) taking into account the above points, the 1986 federal claims policy does not appear to meet the justification tests set out in *Sparrow* v. *The Queen*,[2296] in relation to actions[2297] of the Crown as a fiduciary.[2298] In this regard, a particularly relevant question posed by the Supreme Court is "whether there has been as little infringement as possible in order to effect the desired result"[2299].[2300]

The failure of the federal claims policy to recognize and affirm aboriginal rights is highlighted by the fact that, since the inception of the 1986 policy, only one set of land claims agreements has resulted in aboriginal rights being clearly retained for limited portions of traditional territory. However, even in the case of the Yukon land claims agreements, aboriginal title on "reserved" lands are retained only in respect to surface rights. As M. Jackson explains:

> "Therefore, in relation to the core settlement lands to which in the preamble to the Agreement Indian First Nations state they wish to retain their Aboriginal rights, ***this holds true only with respect to surface rights***...The rights which Yukon Indian First Nations have in the *mines and minerals in Category A Settlement Land are not retained Aboriginal title but a grant back of the fee simple title*. Similarly, the rights recognized in the Fee Simple Settlement Lands are not retained aboriginal rights but the fee simple

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[2294] Id.

[2295] Especially in cases where Aboriginal lands are situated within the boundaries of a province, the percentage of "reserved" Aboriginal lands has often been approximately 1% - 2% of the traditional territory of the Aboriginal people concerned. The proportion of traditional lands retained by Aboriginal peoples is significantly higher in the Yukon and Northwest Territories.

[2296] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 (S.C.C.).

[2297] Government "actions" as well as legislation are subject to the justifications tests laid down in *Sparrow*: Id. at 1114.

[2298] The Supreme Court indicated in *Sparrow* that the Crown may bear a "heavy burden" in justifying its actions: Id. at 1119.

[2299] Id. This point is also made in M. Jackson, *A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements*, note 2299, *supra*, at 74.

[2300] In regard to the effects of the Crown's fiduciary duties on any powers to extinguish, see sub-heading 7.4 *supra*.

grant of the surface interest."[2301] [Emphasis added.]

Consequently, Jackson concludes:

> "[I]n terms of a spectrum which has extinguishment and grant-back of rights at one end and affirmation of aboriginal rights at the other, *the Yukon Agreement cannot be said to have pulled away from the gravitational orbit of the extinguishment model.*"[2302] [Emphasis added.]

10.1.2 Parti Québécois policy (1994)

For a number of years, the programme of the Parti Québécois (PQ) has included a commitment to enter into agreements without the extinguishment of the rights of Aboriginal peoples. In this regard, the 1994 version of the PQ programme provides:

> "Le gouvernement du Parti Québécois donnera priorité à la conclusion d'ententes dont les grandes lignes ont été décrites précédemment, qui définiront les pouvoirs de chacun des gouvernements. *Ces ententes seront conclues sans extinction des droits autochtones et seront réévaluées à la lumière des décisions des cours de justice québécoises et des amendements à la Constitution québécoise.*"[2303] [Emphasis added.]

Any commitment in the PQ programme would not be legally binding on the Parti Québécois as a government (should the PQ be elected as the government in Québéc). Nevertheless, it would be useful to assess the above commitment in the present context, in light of the positive implications that a non-extinguishment policy could potentially bring.

The 1994 PQ programme does not indicate why the PQ is taking the position that agreements will be concluded with Aboriginal peoples, without extinguishment of their aboriginal rights. Is it simply because Aboriginal peoples in Québec are opposed to extinguishment of their rights? Is it because extinguishment is viewed by the PQ as a severe prejudice to Aboriginal peoples and cultures? Is it because extinguishment is viewed as incompatible with the recognition of and respect for human rights? Or, most importantly, is it because the PQ is of the view that most, if not all, Aboriginal peoples in Québec have no existing aboriginal rights? If so, the PQ commitment would have little or no real consequence.

If the Parti Québécois recognizes that Aboriginal peoples in Québec have aboriginal rights, it would be important that the PQ explicitly affirm this position. Moreover, if the PQ takes the position that the extinguishment of aboriginal rights is for whatever reason harmful to Aboriginal peoples, then why has the PQ never asserted its position in relation to the 1975 James Bay and Northern Quebec Agreement (JBNQA) or the 1978 Northeastern Quebec Agreement (NEQA)?

[2301] M. Jackson, *A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements*, note 2299, *supra*, at 62. At 63-64, Jackson adds: "In relation to the sub-surface interests, the federal government has maintained its position that these interests, if they are to be recognized in land claims agreements, must be by way of a grant from the Crown. *It seems on this point the federal negotiators made it clear there was no room for negotiation.*"[Emphasis added.]

[2302] Id. at 72.

[2303] Parti Québécois, *Programme du Parti Québécois [:] Des idées pour mon pays* (Montréal: Parti Québécois, 1994) at 21: "The government of the Parti Québécois will give priority to the conclusion of agreements, the broad lines of which have been previously described, which will define the powers of each of the governments. *These agreements will be concluded without extinguishment of aboriginal rights and will be evaluated in light of decisions of the Québec courts of justice and amendments to the Québec Constitution.*" [Unofficial translation, emphasis added.]

It is worth noting that the PQ (as the official opposition party in Québec at that time) did not insist on any amendment to the JBNQA , when dissident Inuit communities actively opposed the purported extinguishment of their aboriginal rights in and to their traditional lands.[2304] Nor did the Parti Québécois government, after it was elected in 1976, ever seek or propose any *specific* alternative to extinguishment in relation to land claims agreements in Québec.

To date, the Parti Québécois has not repudiated the concept of extinguishment of the rights of Aboriginal peoples or sought to redress its consequences. This has been the case even in relation to the unilateral extinguishment of the rights of Aboriginal third parties that were purportedly carried out in connection with the JBNQA.[2305] Instead, the leader of the PQ, its Members of the National Assembly and other official representatives repeatedly rely on and invoke the alleged extinguishment of aboriginal rights in land claims agreements, as a basis for denying Aboriginal peoples in Québec their right to self-determination.[2306] In the view of the PQ, it would appear that purported extinguishment clauses that were negotiated in a federalist context and that provide for perpetual federal arrangements can be used in the totally different context of Québec secession from Canada.[2307]

In referring to the rights of Aboriginal peoples, there is no reference in the PQ party programme to inherent aboriginal rights.[2308] What is stated is that "agreements" may be negotiated on a specified list of fundamental matters.[2309] In the absence of these negotiated agreements, it is unclear from the PQ policy what rights Aboriginal peoples would be recognized to have. This uncertain aspect of the PQ policy raises vital questions, with potentially far-reaching human rights implications, and the Parti Québécois should clarify their position in this regard.

The PQ programme indicates that a commitment was made by the Québec National Assembly in a Resolution, dated March 20, 1985, to conclude agreements guaranteeing the exercise of these matters. However, the 1985 Québec National Assembly Resolution entitled, *Motion for the recognition of aboriginal rights in Québec*, was unilaterally imposed by the PQ government and the National Assembly at that time, against the express objections of Aboriginal peoples in Québec.[2310] Therefore, it would hardly seem to serve as a legitimate basis for the PQ's aboriginal policy. Yet, even today, PQ leaders hold out the 1985 Québec National

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[2304] For the position of the dissident Inuit, see the Case Study of the James Bay and Northern Quebec Agreement under heading 11 *supra*.

[2305] In regard to extinguishment of Aboriginal third party rights, see discussion under heading 7 *supra*.

[2306] See discussion under sub-heading 4.6.3 *supra*.

[2307] Id.

[2308] See also Commission des droits de la personne du Québec, *Mémoire de la Commission des droits de la personne présenté à la Commission royale sur les peuples autochtones* (Montréal: novembre 1993) at 24, where it is pointed out that the right to autonomy, referred to in the 1985 Québec National Assembly Resolution on aboriginal rights (discussed below) is not recognized as an inherent right but conditional upon negotiations.

[2309] Parti Québécois, *Programme du Parti Québécois [:] Des idées pour mon pays*, note 2303, *supra*, at 18, where the PQ programme lists such fundamental matters for negotiation as the right to autonomy within Québec; the right to their cultures, language and traditions; the right to hunting, fishing, trapping, gathering and to participate in the management of wildlife resources; and the right to participate in economic development and to benefit from it.

[2310] See Assemblée Nationale, *Journal des débats*, March 19, 1985, at 2504, where MNA John Ciaccia conveys the objections of the various First Nations to the tabling of the Resolution by Premier Lévesque. The opposition of the Crees, Inuit, Micmacs and Naskapis is specifically mentioned. In addition, Mohawk and Cree objections to the Resolution are mentioned by MNA Maximilien Polak at 2527-2528.

For further discussion of the unilateral imposition of the National Assembly Resolution on aboriginal rights, see Grand Council of the Crees (of Quebec), *Status and Rights of the James Bay Crees in the Context of Quebec's Secession from Canada*, note 2310, *supra*, at 165-168.

Assembly Resolution as a model of an "open attitude" that English Canada should adopt.[2311]

The National Assembly Resolution, as tabled by the PQ government in 1985, unilaterally removed any reference to the fiduciary relationship between Aboriginal peoples and the federal Crown.[2312] Unilateral actions towards compelling Aboriginal peoples to move away from their fiduciary relationship with the federal Crown, or which seek to terminate federal jurisdiction in respect to Aboriginal lands within the province of Québec, cannot be countenanced on any grounds. Nor are such actions in keeping with emerging international standards. As the draft *United Nations Declaration on the Rights of Indigenous Peoples* provides:

> "...indigenous peoples have the right freely to determine their relationships with States in a spirit of co-existence, mutual benefit and full respect".[2313]

Yet, in connection with the James Bay and Northern Quebec Agreement, Parti Québécois leaders have called in the past for implementation of former Prime Minister Trudeau's White Paper of 1969,[2314] so as to eliminate all federal jurisdiction in regard to James Bay Cree lands. In this regard, J.-Y. Morin, leader of the Opposition, indicated to a Québec National Assembly Standing Committee that was considering the land provisions applicable to the Crees under the Agreement:

> "...M. le Président, *ceci n'est même pas conforme à la politique fedérale, telle qu'elle a été énoncéee dans le livre blanc du gouvernement du Canada sur les Affaires indiennes, publié en 1969*...On énonce, n'est-ce pas, une nouvelle politique, à l'égard des Indiens: *le gouvernement... féderal...entend proposer, aux gouvernements provinciaux, qu'ils assument, envers les Indiens, les mémes responsabilites qu'envers les autres citoyens situés sur leur territoire*. Ce transfert de pouvoirs - vous voyez qu'on ne mâche pas les mots - s'accompagnera de virements de fonds fédéraux...
>
> ...Je suis obligé de vous demander comment il se fait que l'entente ne tienne pas compte de cet accord, ce qui est rare entre le gouvernement fedéral et le gouvernement du Québec, surtout sur des questions celles-là. Il semblait qu'on eût fait l'unanimité...*[N]ous faisions partie de cette unanimité puisque nous avions réclamé la même chose*.
>
> Mais je dois constater que ce n'est pas la solution qui est retenue au chapitre 5 [de la Convention]. Alors, j'attends...des explications."[2315] [Emphasis added.]

Today, references are no longer made by the PQ to Trudeau's White Paper of 1969. However, there is little indication that the objective of eradicating the historical relationship of Aboriginal

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[2311] See, for example, J.-Y. Morin, "Quelques sujets de réflexion pour Gordon Robertson" in *La Presse*, July 16, 1994, at B3.

[2312] Specific reference to the federal fiduciary relationship had been included in earlier draft texts being negotiated by the PQ government and Aboriginal peoples in Québec.

[2313] Draft *U.N. Declaration on the Rights of Indigenous Peoples*, twelth preambular paragraph.

[2314] Indian and Northern Affairs Canada, *Statement of the Government of Canada on Indian Policy, 1969* (Ottawa: Minister of Indian Affairs and Northern Development, 1969). This White Paper was presented to the Parliament of Canada, but after vehement opposition from Indians across Canada, was withdrawn by the federal government.

[2315] Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 7, 1975, No. 177, at B-6076 (J.-Y. Morin, Leader of the Opposition). Unofficial English translation: "...Mr. Chair, *this does not even conform to the federal policy, which was announced in the White Paper of the government of Canada on Indian affairs, published in 1969*...They announced, didn't they, a new policy, in regard to Indians: *The...federal... government...agrees to propose, to the provincial governments, that they assume, towards the Indians, the same responsibilities as towards other citizens situated on their territory*. This transfer of powers - you see that they do not mince their words - will be accompanied by a transfer of federal funds...[new para.] I am obliged to ask you how is it that the Agreement does not take into account this agreement, that which is so rare between the federal government and the government of Québec, above all on such questions as this. It seemed that we had had unanimity...*[W]e were part of this unanimity because we had claimed the same thing*. [new para.] But I must conclude that this is not the solution which is retained in chapter 5 [of the Agreement]. Therefore, I await...some explanations." [Emphasis added.]

peoples with the federal Crown, or eliminating federal jurisdiction on Aboriginal lands within the province of Québec, has been significantly altered.

In addition, the 1985 National Assembly Resolution does not specify that future negotiations would be based on the official letters of the Aboriginal peoples in Québec that elaborate their fundamental positions. Rather, such negotiations are to be based on, but not limited to, the response of the Québec government of February 9, 1983.[2316] In this way, the National Assembly Resolution also incorporated the position of the PQ government in its February 9, 1983 response that the rights to be exercised by Aboriginal peoples "could not imply sovereign rights that could jeopardize the territorial integrity of Québec".[2317]

In negotiating future agreements, the starting point appears to be based on the lands *presently* used or occupied by Aboriginal peoples, and not on the full extent of their traditional or historical territories which they have occupied or otherwise used. Unless agreements are reached to the contrary, the PQ's limited recognition for lands currently used or occupied constitutes a policy of *de facto* extinguishment of most of the land rights claimed by Aboriginal peoples concerning their traditional or historical territories.

For example, rights of self-government are to be based on the lands Aboriginal peoples presently possess or occupy as Indian reserves, Aboriginal establishments, Category I lands,[2318] or lands which have been ceded to them following negotiations with the Québec government.[2319] Similarly, future agreements for the participation of Aboriginal peoples in joint land use and management would be based on the lands where they presently exercise their traditional activities.[2320]

A further limitation is the PQ position in respect to treaties and existing treaty rights. The PQ policy does not make clear that a PQ government within Canada, or within a future sovereign Quebec, would be a party[2321] to or enter into treaties with Aboriginal peoples. Instead, the PQ programme provides:

> "Le gouvernement du Parti Québécois respectera les traités et les acquis des nations autochtones *jusqu'a ce qu'ils soient remplacés par de nouvelles ententes entre le gouvernement du Québec et les nations autochtones.*"[2322] [Emphasis added.]

It is not clear how a PQ government in a sovereign Québec could respect the James Bay and Northern Quebec Agreement or the Northeastern Quebec Agreement that call for a perpetual

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[2316] Specifically, the Resolution "[u]rges the Government [of Québec] to pursue negotiations with the aboriginal nations based on, but not limited to, the fifteen principles it approved on 9 February 1983, subsequent to proposals submitted to it on 30 November 1982..." As MNA John Ciaccia commented at that time: "Ce n'est pas une façon d'avoir une ouverture d'esprit et de permettre une négotiation équitable et ouverte." Unofficial English translation: "This is not a way of allowing for an openness of spirit and of permitting an equitable and open negotiation." See Assemblée Nationale, *Journal des débats*, March 19, 1985, vol. 28, No. 38, at 2500.

[2317] See Letter, dated Feb. 10, 1983, from Premier René Lévesque to representatives of the Aboriginal nations of Québec, and accompanying government response to the Aboriginal peoples' positions. (On file with the authors.) The actual date of the PQ government's response was February 10, 1983 (not Feb. 9).

[2318] Category I lands refer to lands for the most part owned by the Crees and Inuit under the James Bay and Northern Quebec Agreement. This would not include areas where the Aboriginal peoples concerned have exclusive or preferential harvesting rights (i.e. Category II or III lands).

[2319] Parti Québécois, *Programme du Parti Québécois [:] Des idées pour mon pays*, note 2303, *supra*, at 19.

[2320] Id. at 20.

[2321] As a provincial government, the Quebec government does not appear to have capacity as a maker of treaties but it can be a party to a treaty involving Aboriginal peoples and the federal Crown.

[2322] Id. at 21. An unofficial translations reads: "The government of Québec will respect existing treaties and acquired rights *until they are replaced by new agreements between the government of Québec and the Aboriginal nations.*" [Emphasis added.]

federalist arrangement. If the Aboriginal peoples involved did not choose to negotiate a new agreement, would the PQ government unilaterally determine how both these treaties would be implemented?[2323]

Further, if a PQ government is not prepared to enter into treaties with Aboriginal peoples, but only some other form of agreement,[2324] then this could have far-reaching implications for both their status and rights. First, the treaty-making powers of Aboriginal peoples could be rendered irrelevant (at least by a sovereign Québec). Second, in order to improve their existing situations, Aboriginal peoples would be required to enter into new agreements that would replace any existing treaties. Third, even if the rights of Aboriginal peoples in such agreements were entrenched in a sovereign Québec Constitution,[2325] it would be difficult to ensure the same level of protection as under a federal Constitution.[2326]

Taking into account all of the above factors, it cannot be concluded that the alternative to extinguishment referred to in the PQ programme would be in any way adequate in terms of recognizing and affirming aboriginal rights. Rather, it would appear that, as a whole, the PQ policy concerning Aboriginal peoples is highly problematic, lacks a conceptual framework, and is in need of major fundamental reforms.

Further, the recently-elected Parti Québécois government in Québec has already indicated through its leader, Jacques Parizeau, that it will seek a renunciation from the Atikamekw and the Montagnais of their aboriginal rights, in return for financial compensation.[2327] Therefore, the PQ government is already departing from the articulated policy of its own political party on this important issue.

10.1.3 Task Force to Review Comprehensive Claims (1985)

The Report of the Task Force to Review Comprehensive Claims (Coolican Report)[2328]

[2323] This issue is discussed under sub-heading 4.6.3 *supra*.

[2324] It is worth noting that, in 1987, the Liberal government in Québec introduced *An Act respecting agreements between Native nations and Québec*, (Bill 50) 1st Sess., 33rd Legis. This Bill would have served to divert Aboriginal peoples in Québec away from constitutionally-protected treaty and other rights in Canada's Constitution towards non-constitutional rights in "agreements", subject to the sovereign authority of the Québec National Assembly. Bill 50 was unanimously opposed by the Aboriginal peoples in Quebec and was therefore withdrawn by the Québec government.

[2325] It is not clear from the PQ programme that the rights of Aboriginal peoples in agreements on fundamental matters would be entrenched in the Constitution of a sovereign Québec.

[2326] Two major problems are: i) in the constitution of a unitary state, there are not the same checks and balances that currently exist under the Canadian Constitution. Presently, in view of the existing amending formulas, the Quebec legislature does not have the constitutional capacity to unilaterally amend the constitutional rights of Aboriginal peoples in Quebec under the *Constitution Act, 1982*; ii) in a unitary state, the judges appointed to its courts would all come from Québec and would, as a result, have a uniquely Québec perspective. Consequently, there would be a lot less assurance that judges appointed by a sovereign Québec government would be sufficiently sensitive to Aboriginal peoples' rights and concerns. Presently, the judges on the Supreme Court of Canada are appointed from the various regions of Canada, which allows for a more balanced perspective.

[2327] M. Venne, "Des terres, des pouvoirs et des droits pour les Attikamekw et les Montagnais" in *Le Devoir*, October 29-30, 1994, A1 at A14: "...lors de la conclusion d'une entente finale, Québec verserait des compensations financières en échange de la renonciation par eux des droits ancestraux protégés par la Constitution canadienne." Unofficial English translation: "...in concluding a final agreement, Québec will give financial compensation in exchange for the renunciation by [Attikamekw and Montaignais] of the aboriginal rights protected by the Canadian Constitution."

[2328] Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy*, note 2286, *supra*.

proposed three alternatives to extinguishment. For easy reference, the three alternatives of the Task Force are reproduced below with a minimum of commentary. They are as follows:

1st alternative

> "One alternative would be to return to the legal technique of the pre-Confederation treaties. *Starting from a broad recognition of aboriginal rights, it provides certainty through the surrender of limited rights in relation to particular areas.* Thus, aboriginal groups might retain their aboriginal title or aspects of it in relation to certain traditional areas, and surrender it or parts of it in relation to other areas. At the same time they might retain other rights - such as wildlife harvesting rights, a partial interest in the subsurface, or revenue sharing entitlements - over the entire area. When title or partial title is retained, they might wish to have their land rights described in ways that are easily recognizable under Canada's legal system (for example, the form of tenure they hold). This description could provide certainty for their land rights within the system that defines the land rights of other Canadians. *The acceptability of this approach in the negotiations will depend to some degree upon the nature and extent of rights that are to be retained, compared with those that are to be surrendered.*"[2329] [Emphasis added.]

This first alternative is similar to that already discussed in the federal comprehensive claims policy of 1986.[2330] Therefore, most of the shortcomings identified in relation to the federal policy are applicable here. Perhaps one important distinguishing feature that might be implied here is that what is being recommended by the Task Force is a "broad recognition of aboriginal rights" as compared with a "surrender of limited rights in relation to particular areas". The Task Force rightfully highlights that the proportion of retained v. surrendered rights is certainly a critical factor.

2nd alternative

> "A second, related alternative, which could be used in combination with the one described above, is premised on the assumption that aboriginal rights have a much broader content than land-related rights (embracing matters such as cultural, social, political, linguistic, and religious rights). Thus, *even if aboriginal title to land and resources is surrendered specifically, other rights that might eventually receive definition through the courts or constitutional process could be preserved.* Because some or all of these other rights might play no part in a land claims agreement, they would be unaffected by it. *Certainty as to land and resources would be achieved*, however, because the agreement would deal explicitly with aboriginal title to land and resources."[2331] [Emphasis added.]

With respect, this second alternative to extinguishment of aboriginal rights is not an "alternative" at all. What is being suggested here is a total surrender of aboriginal title to land and resources, but other aboriginal rights would be preserved. This option appears to leave intact the federal land claims policy in 1985. It can be strongly argued that the purported land cession clauses employed by the Crown in the past did not extend to rights other than those in or to the lands concerned. Moreover, to achieve "certainty" at the total expense of Aboriginal peoples is not a solution at all.

[2329] Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy*, note 2286, *supra*, at 41-42.

[2330] See sub-heading 10.1.1 *supra*.

[2331] Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy*, note 2286, *supra*, at 42.

3rd alternative

> "*A third alternative would be to set aside the issue of aboriginal rights in land claims agreements*. This might be appropriate when one of the parties to the agreement (such as a provincial government) refuses to admit that aboriginal rights exist. An approach similar to this has been used successfully in the context of offshore oil and gas rights. The federal and Nova Scotia governments held differing legal views as to their proprietary and legislative rights in relation to the offshore, but agreed to set these differences aside for the sake of a co-operative management regime, with neither party conceding its legal position. *The agreement, which has a specified term and is intended to survive any judicial determination of the parties' rights*, has been accepted by industry as sufficiently certain to permit large investments in offshore petroleum exploration and development.
>
> This approach to aboriginal rights would leave unresolved the existence and content of these rights in a particular case. *For the term of the agreement, the rights would be defined by the agreement itself.* Parties to the agreement would retain the ability to litigate about their rights; however, in doing so, they would renounce all the rights defined within the agreement. Thus, as long as the satisfaction with the operation of the agreement was sufficiently high, there would be strong motivation to keep it working."[2332] [Emphasis added.]

This third alternative includes some interesting aspects that serve as a true alternative to extinguishment of aboriginal title. A most interesting component in this option is that the agreement concerned is for a limited term. Some elements of this approach are incorporated in the alternative to extinguishment that is proposed by this study. However, it would not be necessary or advisable in regard to land claims treaties or agreements to preclude judicial determination of the rights of the parties under these treaties, unless effective alternative dispute resolution mechanisms had been established to their mutual satisfaction. A further concern that merits further reflection is that Canada's Constitution calls for recognition and affirmation of aboriginal rights and not simply avoiding this important issue through agreement.

It is worth noting that the Task Force Report recognized that its own proposals are not the only approaches that may be taken and encouraged others to devise their own alternatives:

> "...once having removed the constraints of the existing approach, creative negotiators will devise other acceptable alternatives. Both government and aboriginal groups should be encouraged to propose other alternatives at the bargaining table provided that they meet all four of the foregoing criteria."[2333]

In encouraging others to devise additional alternatives, the Report of the Task Force to Review Comprehensive Claims Policy suggests four characteristics for any alternative to extinguishment:

> "To be workable, an alternative to extinguishment must have at least four characteristics. First, it must be acceptable to the aboriginal people concerned, for their rights cannot be altered without their consent. Secondly, to encourage investment in, and development of, property rights, it must enable the granting of secure rights to lands and resources. *Thirdly, it must be simple, because complex approaches promote legal uncertainty. Fourthly, it must be familiar, so that rights can be defined to fit comfortably into the dominant property law system.*"[2334] [Emphasis added.]

[2332] Id. at 42.

[2333] Id.

[2334] Task Force To Review Comprehensive Claims Policy, *supra*, note 2286, at 41.

This study agrees with the first two characteristics, but takes exception with the last two criteria for being unnecessarily restrictive.

In regard to the third criterion that any alternative be kept simple (in order to avoid legal uncertainty), the question it raises is what would constitute "simple". First, the field of aboriginal law is generally highly complex, so it would be difficult to stipulate that any alternative must be simple. Second, there are concepts or mechanisms pertaining to conventional property law (e.g. trusts, estates, condominiums, etc.) that can be far from simple, so it would be inequitable to create a different standard for Aboriginal peoples.

Third, simplicity cannot override the constitutional obligation that calls for recognition and affirmation of aboriginal rights.[2335] If there is a useful way to meet this obligation that is less than simple, there would be no legal justification for rejecting such a solution because it was not sufficiently simple. Therefore, while simplicity is often an objective that would be beneficial to attain, it would not be fair to impose such a criterion as mandatory in respect to any alternative to extinguishment.

In relation to the fourth characteristic identified by the Task Force that any alternative be "familiar" so that "rights can be defined so as to fit comfortably into the dominant property law system", M. Jackson has emphasized the overly restrictive nature of this requirement as follows:

> "The reason why...[it]...is unduly restrictive and ought not to be a pre-requisite for a retained rights model is that it holds up as the standard of reference for the definition of aboriginal rights, the common (or civil) law system of land tenure. This is an approach where courts have expressly guarded against. Thus, the Privy Council in *Amodu Tijani* v. *Southern Nigeria* stated:
>
> > 'Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria but other parts of the British Empire, much caution is essential. *There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.*'[2336]"[2337] [Emphasis added.]

Additional reasons for rejecting the criterion of "familiarity" include: i) "Familiarity" cannot prevail over the constitutional obligation to recognize and affirm aboriginal rights; ii) equality guarantees under the *Canadian Charter of Rights and Freedoms* include the right to be different. Different treatment may in fact be required to safeguard aboriginal rights and the different land tenure systems that they entail;[2338] and iii) the requirement of "familiarity" and "fit[ting] comfortably into the dominant property law system" tends to push Aboriginal peoples towards assimilative notions, rather than enable them to assert their own cultural distinctiveness.

With the above considerations in mind, an alternative to extinguishment is proposed under the following sub-heading.

[2335] *Constitution Act, 1982*, s. 35(1). See also *Report of the British Columbia Claims Task Force* (Vancouver: June 28, 1991) at 29: "First Nations should not be required to abandon fundamental constitutional rights simply to achieve certainty for others. Certainty must be achieved without extinguishment."

[2336] *Amodu Tijani* v. *Southern Nigeria*, [1921] A.C. 399 at 402.

[2337] M. Jackson, *A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements*, note 2299, *supra*, at 93-94.

[2338] See sub-heading 8.3.3 *supra*.

10.2 Proposed Alternative to Extinguishment

As established throughout this study, the notion of extinguishment is not justifiable from a constitutional, human rights, or equitable viewpoint. In addition, it runs counter to existing and emerging international standards pertaining to Aboriginal peoples that are considered to be minimum human rights norms. Further, the extinguishment policies of the government of Canada are inconsistent with its fiduciary obligations towards Aboriginal peoples and directly contradict the wishes of the peoples themselves.

Similar conclusions have been reached by the Inuit Tapirisat of Canada:

> "*The extinguishment of aboriginal title under land claims agreements is contrary to principles of international law, principle of Canadian constitutional law and is inconsistent with the Crown's fiduciary obligations towards the aboriginal peoples of Canada*. This is so because the policy seeks to deprive the aboriginal peoples of their rights and relationship to their lands and resources; *destroys rather than recognizes and affirms aboriginal rights and title*; and seeks to secure for the benefit of the Crown, the full aboriginal interest in land in a confrontational and adversarial negotiation in which the balance of power rests with Crown."[2339] [Emphasis added.]

The purpose of attaining one or more alternatives to extinguishment should not be considered *in isolation* as an objective in itself. Rather, the primary purpose is to recognize and affirm the aboriginal rights of Aboriginal peoples. According to s. 35(1) of the *Constitution Act, 1982* and other constitutional instruments applicable in Canada since the time of the *Royal Proclamation of 1763*, this is the constitutional obligation that all governments and peoples in Canada must respect. Equally important, the recognition and affirmation of aboriginal rights is necessary, if Canada is to uphold new and emerging human rights standards at the international level.

Consequently, the proposed alternative to extinguishment is comprised of two critical dimensions: i) objectives and principles for the overall context of recognition and affirmation of aboriginal rights; and ii) specific elements for a proposed alternative to extinguishment. Both these aspects are discussed under the following sub-headings.

10.2.1 Objectives and principles for a new approach

> "If a new relationship between Canada and aboriginal peoples is to be established, then the policy of extinguishment must be abandoned. The outdated precepts on which the policy is founded must be questioned and re-evaluated - not simply accepted and perpetuated."[2340]
>
> Inuit Tapirisat of Canada, 1994

[2339] Inuit Tapirisat of Canada, *Submission of the Inuit Tapirisat of Canada to the Royal Commission on Aboriginal Peoples* (Ottawa: ITC, March 31, 1994), at 63.

[2340] Inuit Tapirisat of Canada, *Submission of the Inuit Tapirisat of Canada to the Royal Commission on Aboriginal Peoples*, note 2339, *supra*, at 64.

As indicated, it is essential to ensure that the overall context pertaining to Aboriginal peoples in Canada include objectives and principles that recognize and affirm their aboriginal rights. This overall conceptual framework is important, since aboriginal rights have a bearing on most aspects of Aboriginal peoples' lives. Aboriginal land rights and titles go to the core of who Aboriginal peoples are and how they view themselves. Although recognition and affirmation of aboriginal rights is guaranteed by Canada's Constitution, they have not been sustained to any adequate degree in the policies and practices of non-Aboriginal governments.

It is not enough to provide for specific alternatives to extinguishment, if the overall legal and political context in Canada is hostile or unaccommodating to the survival and further development of Aboriginal peoples' own rights, perspectives, practices and laws. In regard to the overall context, it is worth noting that the Royal Commission on Aboriginal Peoples has generally identified "four touchstones" for change, which it describes as follows:

> "*The four touchstones - a new relationship, self-determination, self-sufficiency, and healing - are deeply interdependent.* Reconciliation between Aboriginal and non-Aboriginal people will elude us unless conspicuous progress is made toward self-determination, self-sufficiency and healing for all First Peoples."[2341] [Emphasis added.]

The Royal Commission adds that "[t]he touchstones are core ideas - starting points and end points for many participants in the [public] hearings."[2342]

This study fully agrees with the fundamental importance that the Royal Commission is placing on these touchstones. Moreover, in relation to the issue of extinguishment, all four parameters are profoundly affected by the extinguishment of aboriginal rights. A new and lasting relationship, as well as healing, is unlikely to be achieved, if the policy of extinguishment is not renounced and appropriate principles and new approaches implemented. Nor is self-determination and self-sufficiency attainable if the integrity of Aboriginal societies is impaired.

The formulation of common principles can provide a solid framework for determining effective and balanced alternatives to extinguishment. In devising these precepts, the broader objective (highlighted by the Royal Commission) of establishing new and equitable Aboriginal/Crown relationships should also be a primary consideration.

The pathways to new and equitable relationships between Aboriginal peoples and the Crown are more likely to be achieved through the creation of a legal and political environment that accommodates all peoples in Canada, and fosters understanding and trust. Such an environment requires a solid conceptual framework that casts aside domination and dispossession, and is built on such pillars as justice, human rights, equity and true partnership.[2343]

Principles recommended by this study to establish a balanced, secure and just framework include:

i) **Integrity of Aboriginal societies.**[2344] In resolving land and resource issues through

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[2341] Royal Commission on Aboriginal Peoples, *Focusing the Dialogue [:] A Summary* (Ottawa: RCAP, 1993), at 2.

[2342] Id. at 1.

[2343] The view that a "framework" of objectives and principles is needed in relation to a new federal comprehensive claims policy is expounded in Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy*, note 2286, *supra*, at 29-32.

[2344] See draft *United Nations Declaration on the Rights of Indigenous Peoples*, art. 7, where the right to be protected against cultural genocide is said to include "prevention of and redress for: (a) Any action which has the aim or effect of depriving [indigenous peoples] of their *integrity as distinct societies*..."; and the *Indigenous and Tribal Peoples Convention, 1989* (No. 169), art. 2: "1. Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to *protect the rights of these peoples and guarantee respect for their integrity*";

treaties or other agreements, it is critical that the integrity of Aboriginal societies, including territory[2345], be maintained as a fundamental principle.[2346] This should apply not only to the substantive arrangements agreed upon, but also to the rules of interpretation applicable to such treaties or agreements in the future.

ii) **Inherent nature of aboriginal rights**. As confirmed by the Supreme Court of Canada, aboriginal rights are pre-existing rights not dependent for their existence on any executive order or legislative enactment.[2347] The inherent nature of aboriginal rights, including the right to self-government[2348], should be unequivocally recognized.[2349] In this context, the significance of collective rights should be appropriately highlighted.

iii) **Recognition of Aboriginal sovereignty**. At the time of European exploration and settlement, Aboriginal nations were regarded as independent peoples, or at least treated as such by European nations.[2350] Although Aboriginal sovereignty has been eroded through anachronistic doctrines and unjust actions, Aboriginal peoples are increasingly acknowledged as having international personality, as subjects of international law.[2351]

Consistent with this historical and contemporary context, it should be explicitly recognized that Aboriginal governments[2352] are one of three orders of government in

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art. 5(b): "the *integrity of the values, practices and institutions of these peoples shall be respected*". [Emphasis added.]

[2345] Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy*, note 2286, *supra*, at 52: "...the federal government should encourage and support the *territorial integrity of aboriginal communities* whose traditional territory crosses jurisdictional boundaries...[M]any problems could be avoided in the future if the federal government were to take into account the territorial integrity of aboriginal societies when accepting a claim."

[2346] In regard to the value of community and the importance of group preservation, see D. Johnston, *Native Rights as Collective Rights: A Question of Group Preservation*, (1989) 2 Can. J.L. & Juris. 19.

[2347] *Guerin* v. *The Queen*, [1984] 6 W.W.R. 481 at 497, 13 D.L.R. (4th) 321 at 335, per Dickson J.; *Calder* v. *A.G. British Columbia*, [1973] S.C.R. 313 at 390, per Hall J.

[2348] Report of the Special Committee, *Indian Self-Government in Canada* (Ottawa: Queen's Printer, 1983) ("Penner Report"), at 44: "The Committee recommends that the right of Indian peoples to self-government be explicitly stated and entrenched in the Constitution of Canada." See also draft *United Nations Declaration on the Rights of Indigenous Peoples*, article 3: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

In addition, see Canadian Human Rights Commission, *Annual Report 1993* (Ottawa: Minister of Supply and Services Canada, 1994) at 23: "...the inherent right of self-government must be agreed to exist; but more formal constitutional recognition of the fact would nevertheless contribute to the creation of a successful partnership."

[2349] See also Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy*, note 2286, *supra*, at iii: "The new policy should encourage aboriginal communities not only to become *economically self-sufficient* but also allow them to become *self-governing*. The two must develop together because political power is meaningless without the backing of financial resources." [Emphasis added.]

[2350] See, generally, sub-heading 4.6 *supra*. See also *R.* v. *Sioui*, [1990], 1 S.C.R. 1025, at 1052-1053; B. Slattery, *Aboriginal Sovereignty and Imperial Claims*, (1991) 29 Osgoode Hall L.J. 681; and *Report of the British Columbia Claims Task Force* (Vancouver: June 28, 1991), at 17: "First Nations, *exercising their inherent sovereign authority*, have a long history of concluding treaties with Canada." [Emphasis added.]

[2351] See *Draft Declaration on Indigenous Rights*, operative para. 26, 28, 31 and 32, cited in C. Scott, "Dialogical Sovereignty: Preliminary Metaphorical Musings", in Proceedings of the 1992 Canadian Council on International Law, *State Sovereignty: The Challenge of a Changing World* (Ottawa: Canadian Council on International Law, 1992), at 288. In the latest version of the draft *United Nations Declaration on the Rights of Indigenous Peoples*, these provisions are now 19 &20; 32 & 33; 36; and 39 respectively. See also E.-I. Daes, Special Rapporteur, *The Status of the Individual and Contemporary International Law*, U.N. Doc. E/CN.4/Sub.2/1988/33, July 18, 1988, at 84, para. 507, where it is concluded that "Indigenous Peoples and Nations" should be accorded recognition as subjects of contemporary international law.

[2352] Aboriginal governments are, or can be, constituted as ethnic or non-ethnic models of government, according to the wishes of the Aboriginal peoples concerned.

Canada.[2353] In view of section 35 of the *Constitution Act, 1982*, the principle of "contending sovereignties" (federal/provincial/Aboriginal) is most likely implicitly included in Canada's constitutional framework.[2354] Nevertheless, an adequate constitutional framework should be explicitly assured in regard to Aboriginal status and rights.[2355]

iv) **Aboriginal rights as human rights**. As international instruments demonstrate,[2356] aboriginal collective and individual rights are human rights.[2357] Yet , what is often missing from analyses or debates on extinguishment is the human rights dimension. A human rights perspective underlines the seriousness of eliminating aboriginal rights through the notion of extinguishment.[2358] A further significance of the human rights approach is that these rights bridge the gap between domestic and international law. Aboriginal human rights are more than domestic because they are being recognized and assured in international instruments. In seeking alternatives to extinguishment, the human rights implications should be fully evaluated.

v) **Principle of equal rights and self-determination of peoples**. It is essential that the negotiation of arrangements pertaining to lands, resources, and jurisdiction through land claims agreements or treaties be based on the principle of equal rights and self-determination[2359] of peoples.[2360] This principle constitutes a fundamental international norm[2361] that also

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[2353] In view of the constitutional division of powers in Canada and the constitutional entrenchment of fundamental rights, Parliamentary supremacy or sovereignty is limited and not absolute: see R. Dussault and L. Borgeat, *Administrative Law [:] A Treatise*, 2nd ed. (Toronto: Carswell, 1985), vol. 1, at 232. See also *Coon Come* v. *Comm. Hydro-Électrique de Québec (sub nom. Canada (A.G.) v. Coon Come)*, [1991] R.J.Q. 922, where "the Quebec Court of Appeal found s. 35(1) to introduce a third element into the functioning of Canadian federalism which must be taken into account in the distribution of powers between the provincial legislatures and the Parliament of Canada": J. Woodward, *Native Law* (Toronto: Carswell, 1989), at S5-12.

[2354] See sub-heading 4.6.1 *supra*. See also *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) at 319, per Lambert J. (dissenting): "Existing aboriginal rights, *including aboriginal title and aboriginal rights of self-government and self-regulation*, are those that were not extinguished before 1982. Rights that were dormant, suspended, or regulated, but still in existence in 1982, together with those rights which were in full force and vigour in 1982, received the constitutional protection given by s. 35." [Emphasis added.] It is also arguable that the right to self-government was recognized in the *Royal Proclamation of 1763* ("Nations or Tribes of Indians...should not be molested or disturbed" in their possession of lands reserved for them).

[2355] See C. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, (1992) 24 Case W. Reserve J. of Int'l L. 199, at 311: "Where a solution involves accommodating different peoples or 'nations' within a state, it should have a constitutional framework that is devised specifically to achieve the self-determination of all separate peoples within the state, rather than aggregating them and assuming that they will achieve self-determination as an amorphous whole." See also A. Pratt, *Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?*, (1992) 2 N.J.C.L. 163, at 194: Until the Constitution of Canada explicitly recognizes the inherent right of self-government, Canadian law will provide an incomplete basis for the political process of reconciliation and reempowerment which must occur."

[2356] See the draft *United Nations Declaration on the Rights of Indigenous Peoples*; and the *Indigenous and Tribal Peoples Convention, 1989*, (No. 169). See also B. Hocking, (ed.), *International Law and Aboriginal Human Rights* (Toronto: Carswell, 1988).

[2357] See generally sub-heading 8.2.1.3 *supra*. See also I. Cotler, "Human Rights Advocacy and the NGO Agenda" in I. Cotler & F.P. Eliadis, (eds.), *International Human Rights Law [:] Theory and Practice* (Montreal: Canadian Human Rights Foundation, 1992) 63, at 66: "...a ninth category [of human rights], one distinguishably set forth in the Canadian *Charter* - and increasingly recognized in international human rights law - is the category of *aboriginal rights*."

[2358] For example, in relation to the purported unilateral extinguishment of rights of Aboriginal third parties in connection with the James Bay and Northern Quebec Agreement, see discussion under heading 7 *supra*. See also Commission des droits de la personne du Québec, *The Rights of Aboriginal Peoples [:] Native rights in Québec: the need to raise the level of discussion* (Québec: September 1980) (Document 5) at 21-22; *Report of the Fourth Russell Tribunal on The Rights of the Indians of the Americas* (Rotterdam: November 1980).

[2359] See discussion under sub-heading 8.2.5 *supra*.

[2360] Inuit Tapirisat of Canada, *Submission of the Inuit Tapirisat of Canada to the Royal Commission on Aboriginal Peoples*, note 2339, *supra*, at 64 (Recommendation #19): "The negotiation of land claims settlement agreements must be based on the principles of equal rights and self-determination of peoples..."

requires application within the Canadian federation.[2362]

vi) **Continuation of historical treaty-making process**. Consistent with the objective of establishing a constructive Aboriginal/Crown relationship, treaties and treaty-making should continue to have both a sacred and central role.[2363] Treaties and the processes that precede them should retain the historic symbolism of peace, friendship, honour and trust intended by Aboriginal peoples. At the same time, constitutive and fundamental arrangements for the effective exercise of rights, sharing, and cooperation, in regard to such matters as lands, resources and jurisdiction, should be carried out freely through the treaty-making process.

Any notion that treaties are for the purpose of surrendering or extinguishing Aboriginal rights should be repudiated. The anachronistic requirement that land questions be dealt with by first surrendering or ceding Aboriginal rights to the Crown should necessarily be eliminated.[2364] At the same time, procedural and other safeguards will likely be essential.

vii) **Treaty interpretation**. In order to maintain an environment of trust and cooperation, it would be useful to build upon the judicial rules of interpretation confirmed to date by the Supreme Court of Canada. In particular, in view of the unequal bargaining power, vulnerability and other disadvantageous factors still faced by Aboriginal peoples, the liberal rules of construction should not be altered simply because Aboriginal peoples have access to legal counsel.[2365] As indicated in the 1985 Report of the Task Force to Review Comprehensive Claims:

> "...*the bargaining powers of the two sides are unequal.* In the absence of imminent litigation that threatens major development prospects, the patience of the federal government in negotiations can seem limitless, whereas the opposite is usually true for

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[2361] See, for example, the *Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations*, adopted by the U.N. General Assembly, Oct. 24, 1970. U.N.G.A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1971), reprinted in (1970) 9 I.L.M. 1292: "Every State has the duty to promote, through joint and separate action, the realization of the principle of equal rights and self-determination of peoples, in accordance with the principles of the Charter [of the United Nations]".

[2362] See, for example, P. Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, (1993) 45 Stanford L. Rev. 1311 at 1315, where the author indicates in relation to Aboriginal peoples and their governments: "...the appropriate measure of distributions of sovereignty is equality of peoples, not equality of individuals."

[2363] See, for example, R. Barsh & J. Henderson, *International Context of Crown-Aboriginal Treaties in Canada*, Report prepared for the Royal Commission on Aboriginal Peoples, March 15, 1994, at 253, where the sacred role of treaties is described: "Treaties formed a sacred vision of human equality and equal dignity, which Aboriginal peoples themselves had held for millenia. When the immigrant's government abandoned treaties, they rejected this sacred vision and replaced it with racism, utilitarianism, and 'policy'. Where there is no sacred vision, the people's vitality perishes."

At 254, the authors also underline the importance of treaties in regard to future arrangements between Aboriginal peoples and the Crown: "Where there is a Treaty vision of Canada, there is a nation-to-nation relationship...There is no meaningful alternative to this sacred vision within Aboriginal society in North America. *Experience, custom, and worldview provides the basis of stability for Aboriginal peoples under the treaties. The treaties are the starting point for renewal and change.*" [Emphasis added.]

[2364] See P. Hogg, *Constitutional Law of Canada*, (Toronto: Carswell, 1992), vol. 1, at 27-23: "The [*Simon* and *Sioui*] cases make clear that the surrender of aboriginal rights is not a requirement of a valid treaty."

[2365] Legal counsel, while often essential and beneficial, cannot reverse or eliminate the acute, disadvantageous conditions faced by Aboriginal peoples or establish a truly level playing field in negotiations vis-à-vis non-Aboriginal governments.

It is also worth noting that, even in regard to ordinary contracts, the *Québec Civil Code* (Montreal: Wilson & Lafleur Ltée, 1994), art. 1432 provides: "In case of doubt, a contract is interpreted in favour of the person who contracted the obligation and against who stipulated it. In all cases, it is interpreted in favour of the adhering party or the consumer." Although a treaty involving Aboriginal peoples constitutes much more than an ordinary contract, it is still worth noting that, especially in regard to purported clauses of cession or extinguishment in such treaties, it is always the Crown who insists upon and stipulates any such provisions.

aboriginal groups."[2366] [Emphasis added.]

Also, international law rules in respect to treaties, *as modified by equitable principles*, should be applicable to aboriginal treaties. Such a measure is fully compatible with the growing recognition of international personality of Aboriginal peoples and has some precedent.[2367]

viii) **Principle of aboriginal consent.** Consistent with the *Royal Proclamation of 1763* and s. 35 of the *Constitution Act, 1982*, the principle of aboriginal consent should be an essential aspect of any alternatives to extinguishment. The importance of this principle is reinforced in light of the human rights implications. The current insistence by the federal government that Aboriginal peoples must consent to extinguishment, if they wish to benefit from the federal claims program, is not compatible with its fiduciary role, exploits their vulnerable position and detracts from the notion of free and informed consent. Moreover, such a policy may violate the rights to security and other human rights of Aboriginal peoples.[2368] In regard to consent, as already discussed, there may be questions as to its validity if the resulting arrangements have the effect of depriving an Aboriginal people of its means of subsistence.[2369]

ix) **Repudiation of notion of extinguishment.** Extinguishment policies and practices, in relation to Aboriginal peoples and their status and rights, should be expressly repudiated.[2370] Extinguishment is increasingly associated with deprivation of human rights, land and resource dispossessions, and denial of aboriginal identity, culture and self-determination[2371].[2372]

[2366] Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy*, note 2286, *supra*, at 79. The Report adds in the same paragraph: "For [Aboriginal peoples], the settlement of claims is a major issue that consumes most of their time and energy. Except for grants and loans from the government, *their financial resources are practically non-existent*. In contrast to labour-management relations, aboriginal groups have *little bargaining leverage*, and, at best, they can appeal to public sympathy. Their only other tool is to threaten *litigation, but...this option is seldom realistic*." [Emphasis added.]

[2367] B. Kingsbury, "The Treaty of Waitangi: some international law aspects" in I. Kawaharu, (ed.), *Waitangi [:] Māori and Pākehā Perspectives of the Treaty of Waitangi* (Auckland: Oxford University Press, 1989), at 134: "As the Treaty of Waitangi Act 1975 requires, the Tribunal does not confine itself to interpreting the Treaty. Its duty is to distill the principles of the Treaty, and to make recommendations intended to give modern effect to these principles. *The discharge of this duty takes it into areas where other principles and approaches found in international and comparative law are relevant.*" [Emphasis added.]

[2368] For example, it may be argued that collective rights to security are an integral part of aboriginal rights, as confirmed in the *Royal Proclamation of 1763* and in s. 35 of the *Constitution Act, 1982*. Moreover, in regard to the *Canadian Charter of Rights and Freedoms*, s. 25 requires that the right of aboriginal persons to security in s. 7 be construed in a manner that does not abrogate or derogate from aboriginal and treaty rights, including the rights and freedoms in the Royal Proclamation. For a discussion of the possible unconstitutionality of the federal government's policy of extinguishment as a necessary pre-condition to entering into land claims agreements, see note 34 *supra*.

[2369] See discussion under sub-heading 6.5.2 *supra*.

[2370] This action would be consistent with the recommendations of the following reports: Report of the Special Committee, *Indian Self-Government in Canada* (Ottawa: Queen's Printer, 1983) ("Penner Report"), at 116; Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy*, note 2286, *supra*, at 43; Report of the Aboriginal Justice Inquiry of Manitoba, *The Justice System and Aboriginal People* (Winnipeg: Queen's Printer, 1991), vol. 1, at 183; and *Report of the British Columbia Claims Task Force* (Vancouver: June 28, 1991) at 29. See also discussion in the Introduction, *supra*, of this study.

[2371] The importance of the right of self-determination, in regard to Aboriginal peoples, has been emphasized in Australia by the Royal Commission into Aboriginal Deaths in Custody, c. 38, per Commissioner Elliot Johnson: ""The process of reconciliation if it is to be successful will, in my opinion, follow closely *the principle of self-determination which, as I have said in this report, should be the guiding principle for all changes in aboriginal affairs*. The principle provides a safeguard for aboriginal people by ensuring that the diversity of aboriginal opinion is recognised and at the same time imposes a restraint on aboriginal leaders which they well appreciate." [Emphasis added.] Cited with approval in *Statement by Mr. Robert Tickner, MP, Minister for Aboriginal Affairs*, Working Group on Indigenous Peoples, Geneva, August 1, 1991, at 7.

Generally, in regard to the positive impact of self-determination, see O. Kimminich, "A 'Federal' Right of Self-Determination?" in C. Tomuschat, (ed.), *Modern Law of Self-Determination* (Boston: Martinus Nijhoff Publishers, 1993) 83 at 100: "[A] closer look reveals that misery was brought upon peoples not by the correct exercise of the right of self-determination, but by the denial of this right. And legal analysis shows that trouble will come only for those multi-ethnic States that suppress ethnic groups and for those States that try to dominate others."

Further, the current orientation of international human rights standards is enhanced recognition of Aboriginal rights and not their extinguishment.[2373] Also, based on constitutional, common law, and human rights considerations, it is not clear what is the legal capacity of government to extinguish aboriginal rights.[2374] In such a context of legal uncertainty, and in view of the fiduciary duty of government, it is paramount that the honour of the Crown be unequivocally upheld.[2375]

x) **Establishment of a new relationship**. It should be made clear that the creation of a new relationship as partners in Confederation[2376] is a consensual, not unilateral, process.[2377] In regard to extinguishment, it is not entirely within the government's discretion to choose what kind of relationship it wishes to have with Aboriginal peoples.[2378] In light of the fiduciary role of the government (especially in relation to land issues) and the vulnerable position of Aboriginal peoples, it is not appropriate for government to make extinguishment a pre-requisite to benefitting from the land claims process.[2379] Moreover, the right of Aboriginal peoples to "full recognition of their own laws, traditions and customs, land-tenure

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[2372] See Indian and Northern Affairs Canada, *Comprehensive Land Claims Policy*, note 2290, *supra*, at 5: "There is no clear definition of the term 'aboriginal title'. For aboriginal peoples, the term is bound up with a concept of identity and self-determination."

[2373] See generally draft *United Nations Declaration on the Rights of Indigenous Peoples*; and *Indigenous and Tribal Peoples Convention, 1989* (No. 169), preamble: "Considering that the developments which have taken place since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it *appropriate to adopt new standards...with a view to removing the assimilationist orientation of the earlier standards*". [Emphasis added.]

[2374] See generally heading 6 *supra*. It is also worth underlining in this regard that "strict proof" of extinguishment is required by the courts, and the burden of proving a valid extinguishment rests with the Crown. See *Simon* v. *The Queen*, [1985] 2 S.C.R. 387 at 405-406 (per Dickson C.J.): "Given the serious and far-reaching consequences of a finding that a treaty right has been extinguished, *it seems appropriate to demand strict proof of the fact of extinguishment in each case where the issue arises*. As Douglas J. said in *United States* v. *Santa Fe Pacific Ry. Co.*...extinguishment cannot be lightly implied." This ruling is cited in Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements Report of the Task Force to Review Comprehensive Claims Policy*, note 2286, *supra*, at 8-9.

[2375] See *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1107-1108, 1114. At 1108: "In our opinion, *Guerin*, together with *R.* v. *Taylor and Williams* (1981), 34 O.R. (2d) 360, ground a general guiding principle for s. 35(1). That is, the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trustlike, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship." At 1114: "*...the honour of the Crown is at stake in dealings with aboriginal peoples*. The special trust relationship and the responsibility of the government vis-à-vis aboriginals must be the *first* consideration in determining whether the legislation or action in question can be justified." [Emphasis added.]

[2376] The notion of partnership is highlighted in Royal Commission on Aboriginal Peoples, *Partners in Confederation[:] Aboriginal Peoples, Self-Government, and the Constitution* (Ottawa: Minister of Supply and Services, 1993). As to what such a relationship of partners must entail, see *Report of the British Columbia Claims Task Force* (Vancouver: June 28, 1991), at 16: "Recognition and respect for First Nations as *self-determining and distinct nations* with their own spiritual values, histories, languages, territories, political institutions and ways of life must be the hallmark of this new relationship." [Emphasis added.]

[2377] Draft *United Nations Declaration on the Rights of Indigenous Peoples*, twelth preambular para.: "...indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect".

[2378] In Indian and Northern Affairs Canada, *Federal Policy for the Settlement of Native Claims* (Ottawa: Indian Affairs and Northern Development, 1993), at 16, it is indicated that the federal government accepted all 19 recommendations in the Report of the British Columbia Claims Task Force. Recommendation 2 (p. 82 of the B.C. Report) provides: "Each of the parties be at liberty to introduce any issue at the negotiation table which it views as significant to the new relationship."

[2379] *Mabo et al.* v. *State of Queensland*, *supra*, at 160, per Toohey J.: "*...extinguishment would involve a breach of the fiduciary obligation owed by the Crown to the [Aboriginal] people.*" [Emphasis added.] See also M. Cassidy in M. Cassidy, (ed.), *Aboriginal Self-Determination* (B.C./Montreal: Oolichan Books/Institute for Research on Public Policy, 1991) at 133: "An appropriate [land claims] *policy cannot be based on the idea of extinguishment of aboriginal rights or title*. It cannot force a detachment of aboriginal self-government arrangements from matters that relate to lands and resources." [Emphasis added.] For discussion of the federal government's policy of insisting on extinguishment as a pre-condition to entering into land claims agreements, see note 34 *supra*.

systems and institutions for the development and management of resources"[2380] should be appropriately respected.

xi) **Affirmation of constitutional standards**. Aboriginal and treaty rights are considered so fundamental to the values of Canada that they are recognized and affirmed in the *Constitution Act, 1982*. This latest entrenchment continues a constitutional tradition in Canada of safeguarding Aboriginal peoples' rights since the time of the *Royal Proclamation of 1763*. Further, even the guarantees of certain rights in the *Canadian Charter of Rights and Freedoms* are not to be construed as derogating from aboriginal and treaty rights, including the rights and freedoms recognized in the *Royal Proclamation*. These constitutional values and norms must be respected in seeking any alternatives to extinguishment.[2381] Of particular interest in this regard, are the rights to liberty and security that are embodied and confirmed in the Royal Proclamation.[2382]

xii) **Relationship of Aboriginal peoples with lands, resources and environment**. The profound relationship that Aboriginal peoples have with their lands, resources and environment should be recognized and respected.[2383] Extinguishment of aboriginal rights is viewed by Aboriginal peoples as severing their relationship with their territories. Subsequent to purported extinguishments of their rights, Aboriginal peoples often find themselves with diminished legal capacity to safeguard the environment. In any alternative arrangements to extinguishment, the right of Aboriginal peoples to control and participate in the development in their territories, and in the management of resources and the environment, should be confirmed.[2384]

xiii) **Right to restitution**. Consistent with the establishment of a new and equitable relationship, the right of Aboriginal peoples to restitution or redress in respect to their lands and territories should be unequivocally recognized.[2385] As suggested by the *Report of the British Columbia Claims Task Force*, alternatives to extinguishment should be devised in a framework that acknowledges that serious questions remain as to the "making of the treaties, their interpretation and their implementation".[2386] These questions necessarily relate to whether there were valid Aboriginal consents to purported land cessions. The basis for such restitution should be based on acknowledged rights, equitable principles, and the need to redress historical and ongoing injustices. To date, federal claims policies, both "comprehensive" and "specific",

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[2380] Draft *United Nations Declaration on the Rights of Indigenous Peoples*, art. 26.

[2381] In Indian and Northern Affairs Canada, *Federal Policy for the Settlement of Native Claims*, note 2378, *supra*, at 1-2, the federal government acknowledges the relevance and applicability of the Royal Proclamation in the context of its land claims policy and treaty-making.

[2382] E.g., *Royal Proclamation of 1763*. "...that the several Nations or Tribes of Indians...who live under our Protection, *should not be molested or disturbed in the Possession* of such [lands] as, *not having been ceded or purchased by Us*, are reserved to them..." [Emphasis added.] See also discussion of the Proclamation under sub-heading 8.3.2 *supra*.

[2383] Draft *United Nations Declaration on the Rights of Indigenous Peoples*, art. 25: "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard." *Indigenous and Tribal Peoples Convention, 1989*, art. 13: "...governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship." See also discussion under sub-heading 8.2.6 *supra*.

[2384] Draft *United Nations Declaration on the Rights of Indigenous Peoples*, art. 26 (right to own, control, and use lands); art. 28 (right to conservation, restoration and protection of the total environment and the productive capacity of their lands); art. 30 (right to require States to obtain Aboriginal consent prior to commencement of any project affecting their lands, territories and other resources); art. 21 (indigenous peoples' right to development); *Indigenous and Tribal Peoples Convention, 1989*, art. 7, para. 1 (right to decide own priorities for development and exercise control over their own development); art.7, para. 4 (obligation of governments to protect environment of aboriginal territories in cooperation with peoples concerned); art. 15, para. 1 (rights of indigenous peoples to natural resources to be specially safeguarded, including rights to participate in use, management and conservation of such resources). See also discussion under headings 8.2.10 & 8.2.11 *supra*.

[2385] Draft *United Nations Declaration on the Rights of Indigenous Peoples*, art. 27. The issue of restitution is discussed under sub-heading 10.4 *infra*.

[2386] *Report of the British Columbia Claims Task Force*, (Vancouver: June 28, 1991), at 48.

have to a large degree been shaped by unilateralism, bureaucratic categorization, and conspicuous self-interest.

xiv) **Rights to non-interference and an adequate land and resource base.** Since at least the time of the Royal Proclamation and repeatedly during treaty negotiations, assurances have been given by the Crown and its representatives that the Aboriginal nations concerned would be ensured security and protections in the future for their people and territories. The "right to effective measures by States to prevent any interference with, or alienation of or encroachment upon these [territorial and other] rights" is currently being confirmed in the draft *United Nations Declaration on the Rights of Indigenous Peoples.*[2387] Yet, in most instances, Aboriginal peoples with or without treaties have suffered dispossession of their lands, resources and territories. In any alternative to extinguishment, it should be recognized as a clear objective that Aboriginal peoples have the right to an adequate land and resource base.[2388] In particular, equitable arrangements should be ensured to expand the land and resource base of Indian peoples on reserves.

xv) **Inappropriateness of statutory limitations to sue and the defences of laches and acquiescence.** There are compelling reasons[2389] for eliminating such barriers as statutes of limitations (i.e. prescriptive delays to initiate legal action) and the defence of laches[2390] and acquiescence[2391], in regard to cases concerning aboriginal title, surrenders and the Crown fiduciary relationship. Otherwise, the legitimate rights of Aboriginal peoples may in effect be extinguished for lack of a legal recourse.

xvi) **Importance of flexibility.** In seeking alternatives to extinguishment, it is essential that the principle of flexibility be included as an integral part of the overall framework. In establishing conditions upon which territory may be shared between co-existing partners, *it would be unrealistic to think in terms of a single mechanism that would apply to all Aboriginal peoples.*[2392] Flexibility in determining future new or remedial arrangements is critical, in view of the diverse circumstances and distinctive values, priorities, laws and cultures among Aboriginal peoples.[2393]

[2387] Article 26.

[2388] Royal Commission on Aboriginal Peoples, *Partners in Confederation[:] Aboriginal Peoples, Self-Government, and the Constitution*, note 2376, *supra*, at 42: "...for many Aboriginal peoples, self-government will have little authentic meaning without secure, long-term fiscal arrangements *as well as increased access to lands and resources to allow for greater self-sufficiency*. The abstract power of self-government is an empty vessel without the material ability to carry on the normal functions of a modern government *and an adequate land and resource base to cope with current and future populations.*" [Emphasis added.]

[2389] For a discussion of the reasons, see sub-heading 10.4.2 *infra*.

[2390] The doctrine of laches is said to be available as a defence in cases involving equitable claims, such as breach of fiduciary duties, where there has been a lapse of time or delay affecting another party. In a leading case, *Lindsay Petroleum Co.* v. *Hurd*, (1874), L.R. 5 P.C. 221, the defence is described as requiring more than a mere delay in instituting action: "Where it would be practically unjust to give a remedy, either because the party has by his conduct, done that which might fairly be regarded as a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material."

[2391] "Acquiescence...consists, in effect, of an affirmation of the impugned conduct by the plaintiff. [See, e.g. *Allcard* v. *Skinner*, (1887), 36 Ch. D. 145 (C.A.).] Accordingly, while delay may assist in the establishment of acquiescence, it is not a necessary element in the defence.": P. Maddaugh & J. McCamus, *The Law of Restitution* (Aurora, Ontario: Canada Law Book, 1990) at 64.

[2392] For example, the history and present circumstances of the Metis would suggest that distinctive arrangements suitable and acceptable to the Metis would be required to redress past and recurring injustices.

[2393] See, for example, Inuit Tapirisat of Canada, *Submission of the Inuit Tapirisat of Canada to the Royal Commission on Aboriginal Peoples*, note 2339, *supra*, at 65: "...workable alternatives to extinguishment do exist and the parties involved in a particular negotiation will have to determine for themselves what might be appropriate and acceptable....The approach must be mutually acceptable and arrived at through fair negotiations between equals."

In summary, the above objectives and principles are proposed to ensure an adequate conceptual framework for the recognition and affirmation of aboriginal rights. This overall context can accommodate Aboriginal and non-Aboriginal views and interests, and can provide a solid foundation for specific alternatives to extinguishment. The need for a new doctrinal framework, which accommodates and respects both Aboriginal and non-Aboriginal perspectives, is underlined by P. Monture as follows:

> "A doctrinal framework which holds these two valid theoretical perspectives, the First Nations view and the established Canadian view, on Aboriginal Rights must be constructed. This *new legal doctrine which will enhance the validity of both perspectives, is essential to establishing fair, just, and peaceable relations in this country*. Both of the equally valid legal traditions of this country must be willing to participate to each others' mutual satisfaction and agreement."[2394] [Emphasis added.]

Based on the above objectives and principles, specific elements for an alternative to extinguishment are proposed under the following sub-heading.

10.2.2 Specific elements for a proposed alternative

Any alternative to extinguishment must have as both its objective *and its result* the recognition and affirmation of aboriginal rights. As a general rule, this should apply to all categories of land within a land claims agreement or treaty.

In practical terms, recognition and affirmation of aboriginal rights should mean that Aboriginal peoples have accessible opportunities and means to live and provide for their ongoing development, according to their own values, priorities and laws. Any proposed alternative to extinguishment should take place in a context that facilitates and supports the effective exercise of aboriginal rights, as well as the further growth or evolution of Aboriginal land tenure systems.

The alternative to extinguishment proposed by this study seeks to adapt some of the positive features of existing models, but places them in an overall framework that clearly recognizes and affirms Aboriginal peoples' status and rights.[2395] Subject to possible exceptions, the objective generally would be to have two broad classifications or categories of land or territory that included aboriginal rights. The first land category would pertain to exclusive or predominant rights and jurisdiction of Aboriginal peoples; and the second land category would relate to shared rights or jurisdiction[2396] with non-Aboriginal peoples and governments.

These two classifications of land would, as a general rule, pertain to the traditional or historical territories of the Aboriginal peoples concerned. Specific exceptions to these classifications and the right to replacement lands (based on aboriginal title) are also important and are discussed below.

[2394] P. Monture, *Now that the Door is Open: First Nations and the Law School Experience*, (1990) 15 Queen's L. J. 179 at 191.

[2395] For an elaboration of the overall framework, see discussion under the previous sub-heading.

[2396] Reference is made here to "rights *or* jurisdiction", because in shared areas Aboriginal peoples may recognize that others have exclusive rights of ownership of lands in significant areas. However, certain jurisdictional aspects of Aboriginal title would still be retained in varying degrees through cooperative arrangements. This issue is discussed further below.

Exclusive or predominant rights and jurisdiction (Class I lands)

In the first land category, the objective being proposed is that Aboriginal peoples would have virtually *exclusive* rights and jurisdiction in respect to certain land (including inland water and offshore) areas or territories, or else have the *predominant* rights and jurisdiction in relation to all or most matters relevant to the Aboriginal peoples concerned. Territory to be included within this classification would be determined by each of the interested Aboriginal peoples, through their negotiations with one or more non-Aboriginal governments.

Emphasis is put on the "objective", since the Aboriginal peoples involved in negotiating arrangements may wish to either assume jurisdiction for various subject matters in a phased manner, or else negotiate different issues at different stages or periods of time.[2397] These important considerations are elaborated in the *Report of the British Columbia Claims Task Force* as follows:

> "Parties should develop a timetable for the phased implementation of the terms of the treaty that takes into account the availability of resources and their capacity to implement the treaty in an orderly manner.
>
> Parties may wish to negotiate several less comprehensive or single-issue treaties which may either stand alone or be incorporated in a comprehensive treaty. This would be practical where parties are prepared to ratify and sign a treaty with respect to a limited number of important issues rather than await the negotiation of a comprehensive treaty. Such treaties would allow several First Nations to negotiate together on a single or limited number of issues should they so choose."[2398]

Shared rights or jurisdictions with non-Aboriginal peoples or governments (Class II lands)

In the second land classification, the explicit objective being suggested in this study is that Aboriginal peoples would *share rights or jurisdictions* with non-Aboriginal governments and peoples, as deemed appropriate by the parties concerned.[2399] In some cases, it may be agreed by all parties that the land rights are exclusively owned by non-Aboriginal people or non-Aboriginal governments. However, as a rule, Aboriginal peoples would still retain some aboriginal rights in a context of sharing,[2400] including those pertaining to jurisdiction.[2401]

In regard to retained aboriginal rights within this second classification, jurisdictional aspects that may be shared to varying degrees would likely pertain to use, management and

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[2397] Until Aboriginal peoples actually assume government authority over the different subject matters involved, this first classification may well resemble the second category of land which is best characterized as an area of shared jurisidiction and rights.

[2398] *Report of the British Columbia Claims Task Force*, note 2386, *supra*, at 31-32.

[2399] See also Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy*, note 2286, *supra*, at iv: "We recommend a new policy based upon a relationship of sharing of power and resources."

[2400] Makivik Corporation, *Submission from Makivik Corporation to the Task Force to Review Comprehensive Claims Policy*, note 2284, *supra*, at 22: "[A]n alternative model or framework for land claims agreements would include the following elements: i) Existence of aboriginal title and rights would continue, subject to an agreement based on sharing..." [Emphasis in original.]

[2401] See Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy*, note 2286, *supra*, at 72: "*Governments should come to the negotiations with a commitment to share a range of powers with the aboriginal peoples*...Excluding political matters from the claims process has led to a situation in which aboriginal groups have had to negotiate with a number of bureaucracies to obtain limited advisory and administrative powers. The resulting system...is inappropriate to the needs of the aboriginal communities." [Emphasis added.]

conservation of lands and resources and the right to benefit from proposed developments.[2402] In particular, environmental stewardship by Aboriginal peoples in regard to their traditional or historical territories would be continued and strengthened (if so desired by them).

The degree of participation and control by Aboriginal peoples in development and environment issues could vary in different portions of their traditional or historical territories, in accordance with the relevant circumstances. In some areas, the consent of Aboriginal peoples may be required in order for proposed developments to proceed. In other areas, Aboriginal peoples may solely have rights of participation in a process administered or controlled by others.

M. Jackson emphasizes that "[t]here is no principled reason nor legally binding precedent why the right to share in revenues generated from the development of resources cannot be defined as a benefit flowing from a retained aboriginal title."[2403] Jackson adds:

> " The existing land claims agreements also acknowledge the legitimate claims of First Nations to participate in harvesting, management and conservation regimes...
>
> .....
>
> Once it is accepted that the present constitutional arrangements do not preclude the existence of an Aboriginal right to self-government, *there is no good reason why Aboriginal governments' participation in joint management cannot be expressed as the exercise of a retained Aboriginal right, regardless of the degree of joint management*, which could range from a veto on any new development to a requirement of prior consultation. *By this method the agreement would build into the concept of Aboriginal rights the necessary bridge of accommodation. Put another way, the agreement would be making contemporary the exercise of Aboriginal rights while taking into account, but not capitulating to the changing economic and political realities.*"[2404] [Emphasis added.]

Consistent with the above, retained aboriginal rights or jurisdiction in shared portions of Aboriginal peoples' traditional or historical territories would, in varying degrees,[2405] include cooperative arrangements concerning such matters as: i) use, management and conservation of lands and resources (both surface and subsurface); ii) control, participation in and benefit from proposed developments; iii) determination of, or participation in, place-naming within such territories; iv) maintenance of spiritual and material relationship with traditional or historical territories, including the lands, resources and environment; and v) use and management of archaeological and other cultural property and sites, pertaining to the Aboriginal people or culture concerned.

In addition, M. Jackson suggests that one might also build on Aboriginal peoples' historical and spiritual relationship to their respective territories through significant normative arrangements tied to aboriginal title:

> "One example would be to *acknowledge as flowing from aboriginal title the right of a First Nation to host, as a matter of diplomatic protocol, significant events of a civic, national or international nature which take place in their territory* and to participate as a matter of right, in delegations involving the future of the territory, such as the planning of a world fair, an olympiad or commonwealth games. This role of diplomatic host is an appropriate measure of respect for and recognition of First Nations' special relationship

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[2402] Id. at 32: "Agreements should enable aboriginal peoples and the government to *share both the responsibility for the management of land and resources and the benefits from their use.*" [Emphasis added.] In particular, resource revenue-sharing is discussed in the Task Force Report at 65-68.

[2403] M. Jackson, *A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements*, note 2299, *supra*, at 96.

[2404] Id. at 97-98.

[2405] As previously indicated, the nature and extent of recognition of such shared rights or jurisdiction would be determined in each case by the parties through negotiation, taking into account the relevant circumstances.

to their territory..."[2406] [Emphasis added.]

Exceptions and the right to replacement lands

Despite the general regime described above, there may be land areas where the interested parties determine that recognition and affirmation of aboriginal title is not possible or appropriate even on a limited and shared basis. In some cases, it may be *mutually agreed* that established cities or towns (in whole or in part) are no longer to be linked to an Aboriginal people's traditional or historical territory. In other instances, such as in the case of some Metis, the Aboriginal peoples concerned may have been irreversibly dispossessed of their original lands or territories.

In such cases, special-tailored solutions may be required that depart in some respects from the principles outlined above. These situations should be addressed on an exceptional basis, in a manner fully acceptable to the Aboriginal people affected.

However, those Aboriginal peoples who have been irreversibly dispossessed, for whatever reason, of their traditional or historical lands need not be left devoid of their aboriginal land rights and jurisdiction. It is suggested by this study that, as a key part of an Aboriginal people's right to restitution,[2407] an adequate land and resource base be negotiated by the parties. Unless the Aboriginal people concerned indicate preference for an alternative solution, it should then be expressly agreed through an appropriate treaty that these *replacement lands* constitute lands held according to aboriginal title.

Similarly, where Aboriginal peoples are presently confined to an inadequate land and resource base (e.g. Indian reserve), any additional lands that serve to extend that land and resource base should, if so desired by the Aboriginal people affected, also be expressly agreed through treaty to constitute lands held according to aboriginal title. This would not necessarily mean that the federal *Indian Act* would apply, but would be up to the parties involved to determine what legal regimes were best suited to meet the objectives, priorities and needs of the Aboriginal people concerned.

Through such restoration of Aboriginal peoples' rights and titles, the concept of aboriginal rights and aboriginal land tenure systems can have increased opportunities to grow and develop according to each Aboriginal people's own perspectives, values and laws. In addition, appropriate constitutional recognition of aboriginal title in respect to replacement lands (e.g. through treaty rights) would serve to effectively counter the erroneous and prejudicial idea expressed in the Supreme Court of Canada in *Smith* v. *The Queen*[2408] that aboriginal rights, once extinguished, disappear forever.[2409]

Additional elements for a specific alternative to extinguishment

The above elaboration of a specific alternative to extinguishment of aboriginal rights is only a partial description. Additional elements that form an integral part of the proposed alternative include the following:

[2406] M. Jackson, *A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements*, note 2299, *supra*, at 108.

[2407] Restitutionary rights and remedies are discussed under sub-headings 8.2.13 *supra* and 10.4 *infra*.

[2408] *Smith* v. *The Queen*, (1984) 147 D.L.R. (3d) 237 (S.C.C.).

[2409] See discussion of the *Smith* case under sub-heading 1.5.1 *supra*.

i) **Assurance of an adequate land and resource base**. As previously indicated, an adequate land and resource base must be assured for present and future generations, in any land claims agreement or treaty, to the Aboriginal peoples concerned. This principle should be central to any resolution of land and resource issues, whether the people involved be Indian, Metis or Inuit. The Aboriginal land and resource base would be recognized as including virtually all of Class I and at least a part of Class II lands. Mechanisms to review the adequacy of land and resource bases, after specified time periods, should be included in treaties relating to land and resource matters.

ii) **Alienation of Aboriginal lands**. Recognition and affirmation of aboriginal rights does not mean that no parcel of land can ever be sold or otherwise alienated. However, in view of the collective rights and responsibilities of Aboriginal peoples, the continuing vulnerability of Aboriginal cultures, and the central importance of lands and resources to them, any alienation of aboriginal title should be addressed with the highest degree of caution.

Permanent alienations of Aboriginal lands or resources should be viewed as an exception and subject to clear procedural safeguards. A paramount principle must be to secure and maintain an adequate land and resource base for present and future generations. For example, any alienation that would threaten the maintenance of a sufficient land and resource base, or an Aboriginal people's means of subsistence,[2410] should not be considered to be in the interests of the Aboriginal people affected.

iii) **Granting of rights by Aboriginal peoples for proposed development projects.** There is no compelling reason to always sell aboriginal lands in the event of a proposed hydroelectric development or mining project.[2411] If acceptable to all the parties concerned, legal arrangements could be made to enable a particular development to proceed and be maintained for the life of the project (or some lesser term[2412]). Such an approach would be consistent with the principle that permanent alienations of Aboriginal lands and resources should be an exception to the general rule of recognition of aboriginal title. Moreover, the above approach provides an example of the different possibilities available within the notion of sharing, without requiring Aboriginal peoples to forever surrender their aboriginal title.

iv) **Consent of Aboriginal peoples to land alienations.** It should be explicitly recognized that the free and informed consent of the Aboriginal people concerned must be obtained in order for there to be a valid alienation of any portion of Aboriginal land. Consent should be accorded by the people themselves and not by a council, band, chief or organization - unless such entity or person has been clearly mandated by the people in this regard.

No mandate should be solicited from the people, unless one or more public meetings have been held to inform them of the advantages and disadvantages of a proposed alienation and the full implications of any such action. The burden of proving that such a meeting was held and that free and informed consent was obtained from the people should be on those who claim that a valid alienation of Aboriginal land has been effected.

It should be clearly determined by each Aboriginal people what level of consent would

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[2410] See discussion under sub-heading 8.2.7 *supra*.

[2411] See, for example, S. Paquerot, *SM-3 [:] Choix de développement et droits territoriaux* (1994) 13 (No. 3) Bulletin de la Ligue des droits et libertés 37, where the author describes the agreement reached between some of the Montagnais (Innu) in northern Québec and Hydro-Québec on the construction of a 600-MW dam on the Sainte-Marguerite river, without basing the agreement on the extinguishment of rights of the Montagnais concerned. This agreement has however seriously divided the Uashat community, since only a very slim majority of the voters have approved the contents of the deal.

[2412] Any agreement for a term less than the life of a development project would have to fully take into account the fact that the project may already be built and operating at the end of the designated term.

be required to alienate any portion of Aboriginal land.[2413] It would appear that, in view of the continuing importance of land and resources to Aboriginal peoples and their cultures, survival and quality of life, a higher percentage of approval than a simple majority should be required in order to permanently alienate any Aboriginal lands. The rights of the people in regard to consent should be appropriately reflected in any treaty on land and resource matters.

v) **Third party rights**. The principle of safeguarding the rights of third parties in land and resource disputes is an important element in the proposed alternative to extinguishment. However, this should not mean that third party rights automatically always prevail over those of Aboriginal peoples. Every case should be determined on its merits.[2414] Compensation to innocent third parties should not be at the expense of the Aboriginal peoples concerned. Moreover, supersession by law should be disavowed as having any validity in terms of eliminating Aboriginal rights in favour of a private third party or a non-Aboriginal government.[2415] Where it is agreed that the rights of third parties should continue to prevail, replacement lands or other form of compensation that is acceptable to the Aboriginal people affected should be provided.

vi) **Flexibility in forms of Aboriginal peoples' governments**. The recognition and affirmation of Aboriginal title include not only property rights,[2416] but important jurisdictional elements. In this regard, Aboriginal peoples must have the option to negotiate treaties pertaining to self-government, whose institutions are open to the participation of all residents - Aboriginal or non-Aboriginal - within the territory affected.[2417] For example, Inuit in various regions of northern Canada have expressed a preference for this form of self-government. These principles are consistent with the right of Aboriginal peoples to self-determination, including the right to determine their own institutions.[2418]

vii) **Limitations of "certainty"**. Certainty is not always a positive or desirable element. This is especially true, if it is accomplished in an inequitable manner and primarily at the expense of Aboriginal peoples. In relation to constitutional issues, it is generally accepted that there necessarily will always be a certain degree of uncertainty in matters pertaining to the division of powers and to fundamental rights under the *Canadian Charter of Rights and Freedoms*. If constitutional relationships (e.g. federal/provincial) are best left in a flexible

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[2413] See also Makivik Corporation, *Submission from Makivik Corporation to the Task Force to Review Comprehensive Claims Policy*, note 2284, *supra*, at 30: "To further ensure the legality of this approval [of a land claims agreement], the vote should be by secret ballot and *the necessary majority should be determined by the aboriginal group*." [Emphasis added.]

[2414] See discussion under sub-heading 10.4.1 *infra*, where it is said that the traditional equitable defence of *bona fide* purchase for value is available to third parties who committed no wrongdoing. For example, this defence to a claim for restitution is only available if it can be established that a third party gave consideration for the transfer of property and had no notice of another party's equitable interest in the property.

See also Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy*, note 2286, *supra*, at 62: "...in certain cases the third-party interest may have to be interfered with for the resolution of the claim. Thus, *when meaningful land and resource selection for an aboriginal community is precluded by third-party interests or when an aboriginal group wishes to maintain or re-establish its territorial integrity, then the group's original occupation should be respected*." [Emphasis added.]

[2415] See Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy*, note 2286, *supra*, at iv: "We cannot accept that aboriginal peoples should have their land rights taken or superseded without their consent." This issue is discussed further in the Task Force Report at 45-46. In regard to "supersession by law", see discussion under sub-headings 5.6 and 10.4.6.

[2416] See discussion of Aboriginal peoples' property rights under sub-heading 1.5.2.1 *supra*.

[2417] Federal land claims policies should not seek to exclude self-government aspects from the negotiation of land claims agreements or treaties.

[2418] See also Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy*, note 2286, *supra*, at 72: "The [federal comprehensive] claims process should provide an opportunity for aboriginal peoples to create their own political institutions in negotiations with representatives of the appropriate governments. *In principle, aboriginal peoples should be free to determine the form of government best suited to them*..." [Emphasis added.]

situation and similarly Charter rights, then the same principle should apply to Aboriginal rights and jurisdictions.[2419]

Just as the residual rights of federal or provincial governments are not extinguished, an equivalent standard must apply to the *residual rights* of Aboriginal peoples.[2420] The lack of residual rights could seriously undermine the capacity of Aboriginal peoples to safeguard and advance their interests in the future, in respect to any key matter not foreseen at the time of the negotiations or which government parties refused to address for whatever reason. In this respect, certainty of rights could generate a great deal of insecurity and uncertainty in the future for the Aboriginal peoples affected.

viii) **Use of a contextual clause.** In regard to a land claims agreement or treaty, it can be beneficial to all parties to specifically elaborate on some of the rights and jurisdictions of the Aboriginal people concerned. However, instead of only listing various rights or powers, it may be highly useful to include a contextual clause[2421] that indicates as well what the exercise of Aboriginal authority is intended to achieve. This type of approach reinforces the perspective that there continue to exist residual and other aboriginal rights essential to Aboriginal peoples.

ix) **Finality of agreements.** An issue closely linked to certainty is the question of finality. However, "finality" in regard to land claims treaties is an artificial issue that seriously impairs the natural evolution of the relationship between Aboriginal peoples and the Crown.[2422] As articulated by the Inuit Tapirisat of Canada:

> "One of the objectives of extinguishment policy is to achieve finality of claims, a once and for all settlement. However, from an Inuit viewpoint, the nature of land claims

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[2419] Aboriginal rights are constitutional rights that, in the view of Aboriginal peoples and a number of jurists, include both jurisdictional and fundamental rights dimensions. During the Charlottetown negotiations, Aboriginal peoples opted for describing the jurisdictional aspects of their inherent right to self-government in a "contextual" clause, rather than a limitative list of powers so as to retain the necessary flexibility to deal with unforeseen circumstances in the future. In this regard, see A. Bissonnette, *Analyse posthume d'un accord mis à mort*, (1993) 23 Recherches Amérindiennes au Québec 80, at 81.

See also P. Kulchyski, (ed.), *Unjust Relations: Aboriginal Rights in Canadian Courts* (Toronto: Oxford University Press, 1994) at 4: "There can be no answer to the question 'what are aboriginal rights?' that is not in the terms of the dominant, non-Native society, a society that strives for fixity, for the definite and for definitions...[A]ny answer to th[is] question...is already an attempt to confine, constrain, demarcate, and delimit those rights and consequently a part of the process of confining, constraining, demarcating, and delimiting Aboriginal peoples. *Aboriginal rights become a growing body of interpretations of a limited set of documents as opposed to a shifting basis for negotiations founded upon the primacy of the notion of mutual respect.*" [Emphasis added.]

[2420] See, for example, Makivik Corporation, *Submission from Makivik Corporation to the Task Force to Review Comprehensive Claims Policy*, note 2284, *supra*, at 20: "The Canadian legal system has not yet fully formulated a complete list of aboriginal rights. Therefore, no lawyer can say with complete certainty what rights the courts may in the future find included in the phrase 'existing aboriginal rights'. Accordingly, the Inuit are being asked to give up matters which have not even been identified."

[2421] For example, a contextual clause was included in a substantive provision of the now defunct Charlottetown Accord. See Draft Legal Text, October 9, 1992, s. 35.1 (3) (contextual statement) in K. McRoberts & P. Monahan, (eds.), *The Charlottetown Accord, the Referendum and the Future of Canada* (Toronto: Univ. of Toronto Press, 1993) at 348. In s. 35.1 (3) of the Draft Legal Text, it was provided that:

> "The exercise of the [inherent] right [of self-government within Canada] includes the authority of duly constituted legislative bodies of the Aboriginal peoples, each within its own jurisdiction,
>
> (a) to safeguard and develop their languages, cultures, economies, identities, institutions and traditions, and
>
> (b) to develop, maintain and strengthen their relationship with their lands, waters and environment,
>
> so as to determine and control their development as peoples according to their own values and priorities and to ensure the integrity of their societies."

[2422] See, for example, D. Sanger, "Self-government deal might lead to additional power for Inuit: Sirros" in the Montreal *Gazette*, July 22, 1994, at A4 "...the James Bay and Northern Quebec Agreement [was signed] almost twenty years ago - a deal then hailed as the first modern land-claim settlement, but since described as outdated."

> agreements is to define a relationship that will continue in perpetuity...Thus, *notwithstanding the surrender and extinguishment provisions, there is no finality. This is because comprehensive land claims agreements are large social and political contracts, not once and for all land conveyances."*[2423] [Emphasis added.]

The notion of finality can have specific consequences in regard to ensuring that the Crown honour its treaty commitments. As those Aboriginal peoples with historic or "modern" treaties have experienced, it is often most difficult to obtain an effective government response to treaty grievances after the treaty is signed.[2424] Should there be critical shortcomings in the written terms of a treaty or in its implementation, the problems that arise tend to adversely affect successive generations of Aboriginal peoples.[2425]

The principle reason for this adverse consequence is the utilisation of the notion of extinguishment. Extinguishment is intended to ensure finality at least on the Aboriginal side. Regardless of what future events might justify treaty termination by an Aboriginal party, the Aboriginal rights (if validly extinguished) are said to disappear.[2426] Once governments are of the view that Aboriginal rights are extinguished, there is often little incentive to meet their treaty obligations.[2427] By eliminating the notion of extinguishment of aboriginal rights in the proposed alternative, the door is open to taking further concrete measures towards balancing the treaty relationship.

x) **Rules for treaty termination.** It is generally recognized that parties to a treaty have the right to terminate the treaty (even if the treaty is silent on this question), based on recognized grounds.[2428] However, in regard to treaties concerning Aboriginal peoples, it would be beneficial if the rules were expressly clarified.[2429] If international rules for treaty termination were to be applied, it would be important to incorporate equitable principles relevant to the

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[2423] Inuit Tapirisat of Canada, *Submission of the Inuit Tapirisat of Canada to the Royal Commission on Aboriginal Peoples*, note 2339, *supra*, at 62-63. At 63, ITC adds: "The lack of finality is evident in the great number of amending and complementary agreements that have followed the original 'Final Agreement'. *Neither governments nor aboriginal peoples are omniscient and both sides know that circumstances and relationships can and will change.*" [Emphasis added.]

[2424] See, for example, House of Commons, *Statement from the House of Commons Standing Committee on Indian Affairs and Northern Development to the Ministers of Indian Affairs and Health and Welfare on the Government's Failure to Implement Major Provisions in the James Bay and Northern Quebec Agreement of 11 November 1975*, March 31, 1981, at 5: "[T]he Standing Committee on Indian Affairs respectfully requests both [federal and Quebec] governments to cease their intransigence and instead, further the spirit as well as the letter of the Agreement."

[2425] To counter such adverse effects of finality, it has been suggested that it may be worth examining the possibility of "[land claim] agreements having a specified, finite term for their duration, such as fifty or ninety-nine years, for example": see Makivik Corporation, *Submission from Makivik Corporation to the Task Force to Review Comprehensive Claims Policy* (October 1985) at 23.

[2426] *R.* v. *Smith*, [1983] 1 S.C.R. 554, 47 N.R. 132 (*sub nom. Can.* v. *Smith*), reversing [1981] 1 F.C. 346, cited in J. Woodward, *Native Law* (Toronto: Carswell, 1989), at 221.

[2427] History has demonstrated that serious interpretation and implementation problems generally remain ignored. See, for example, Makivik Corporation, *Submission from Makivik Corporation to the Task Force to Review Comprehensive Claims Policy* (October 1985) at 20: "[Extinguishment] undermines the enforcement of the government's commitments under the agreement". [Emphasis in original.] Even with the entrenchment of treaty rights in Canada's Constitution, enforcement of treaty obligations is a most time-consuming and costly endeavour by Aboriginal peoples that appears to be never-ending. This imbalance in the treaty relationship, as a consequence of extinguishment, must be redressed.

[2428] In regard to the grounds for treaty termination under international law, see *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, concluded May 23, 1969, in force for Canada Jan. 27, 1980, arts. 56 (denunciation of a treaty containing no provision for denunciation), 60 (breach), 61 (supervening impossibility of performance), 62 (fundamental change of circumstances (*rebus sic stantibus*)); I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester: Manchester University Press, 1984), at 181-197; C. Emanuelli, *Droit international public [:] Les fondements, les sources, les États*, 2ième éd. (Montréal: Éditions Wilson & Lafleur Ltée, 1993), tome 1, at 77-80.

[2429] The importance of equal capacity to terminate treaties between Aboriginal peoples and the U.S. government is highlighted in Note, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, (1987) 22 Harv. C.R.-C.L. L. Rev. 507, at 555: "Past treaties between the Indians and the federal government, long subject to abrogation by the United States, should be recognized as being subject to abrogation by either party, thus providing a context for their bilateral renegotiation."

Aboriginal context.

By setting out the grounds for treaty termination in a particular treaty, it could serve to reinforce the equal status of the negotiating parties; instill increased incentive for non-Aboriginal governments to honour the treaty terms; provide a reasonable degree of certainty as to what acts or events would justify treaty termination by one of the parties; and confirm that the aboriginal rights of the Aboriginal people concerned would no longer be affected by the terms of the treaty.

In light of the above considerations, it is the view of this study that an effective alternative to extinguishment should include equitable rules for terminating a particular treaty based on specified grounds.

xi) **Fundamental breach of treaty obligations.**[2430] In *Simon* v. *The Queen*, it has been suggested by the Supreme Court of Canada that under certain circumstances a treaty involving Aboriginal peoples could be terminated by the breach of one of its fundamental provisions.[2431] The inequities faced by Aboriginal peoples as a result of fundamental breaches of treaty obligations have been expressed by Makivik Corporation in the following terms:

> "Should government fail to respect the terms of a land claims agreement, it would be unfair to expect aboriginal peoples to continue to agree to limit the exercise of their aboriginal rights under such agreement. In other words, *governments should not be able to rely upon the terms of a land claims agreement, in order to limit the full exercise of aboriginal title, if these same governments have committed a fundamental breach of the agreement.*"[2432] [Emphasis added.]

Under the general law of restitution in Canada, it is said that "if the innocent party wants to disaffirm the contract [then] an alternative claim in restitution is available, for unless the agreement is discharged, it will provide the exclusive avenue of redress for the innocent party."[2433] If the objective of Aboriginal peoples in certain situations is to seek to disaffirm and terminate a treaty for failure to perform fundamental treaty obligations,[2434] then a claim in restitution rather than an action in damages for breach of a contract would be the appropriate

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[2430] In relation to breach of a fundamental term under the law of contract, see G.H. Treitel, *The Law of Contract*, 8th ed. (London: Sweet & Maxwell, 1991), at 704, 207-213. Aside from breach of a fundamental term, it is worth noting that, under the law of contract, a "substantial breach" can lead to recission of the agreement. In this regard, see G.H. Treitel, *The Law of Contract*, *supra*, at 707: "*[I]f the breach has the effect of substantially depriving the injured party of what he bargained for*, it is not necessary to show that the party in breach intended not to fulfil the contract. But proof of such intention may be sufficient to establish the right to rescind where the effect of the breach is less drastic." [Emphasis added.]

[2431] *Simon* v. *The Queen*, [1985] 2 S.C.R. 387 at 404: "It may be that under certain circumstances a treaty could be terminated by the breach of one of its fundamental provisions." See also P. Hogg, *Constitutional Law of Canada*, note 2364, *supra*, at 27-24: "...it is probable that treaty rights would be at least voidable in the event of a fundamental breach by one of the parties."

[2432] Makivik Corporation, *Submission from Makivik Corporation to the Task Force to Review Comprehensive Claims Policy* (October 1985) at 25. It is also worth noting that fundamental breach has been raised by the Crees in recent litigation concerning the James Bay and Northern Quebec Agreement: see P. Hutchins, "International Law and Aboriginal Domestic Litigation" in Proceedings of the 1993 Conference of the Canadian Council on International Law, *Aboriginal Rights and International Law* (Ottawa: Canadian Council on International Law, 1992) 11 at 22.

[2433] P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 422. See also *Morrison-Knudsen Co. Inc.* v. *British Columbia Hydro & Power Authority*, (1978), 85 D.L.R. (3d) 186 (B.C.C.A.) at 229: "If no such acceptance or election be shown, the contract remains open and alive and is the source of any remedy open to the injured party."

[2434] In some cases, Aboriginal peoples have indicated that fundamental breaches of land claims agreements should give rise to legal actions based on aboriginal title - even if these agreements contain purported surrender and extinguishment clauses. See, for example, Inuit Tapirisat of Canada, *Submission of the Inuit Tapirsat of Canada to the Royal Commission on Aboriginal Peoples*, note 2339, *supra*, at 66 (Recommendation #22): "Surrender and extinguishment of aboriginal rights or title should not bar the commencement of legal action against the Crown on the basis of aboriginal rights and title in the event of a fundamental breach of comprehensive claims agreements." For a similar position, see Makivik Corporation, *Submission from Makivik Corporation to the Task Force to Review Comprehensive Claims Policy* (October 1985) at 26.

course of action and may be easier to prove.[2435]

At the same time, it is important to underline that the law of restitution in Canada has not developed with land claims agreements or treaties specifically in mind and could prove most difficult to apply. Consequently, it would be useful to specify clearly in a given treaty the types of acts (or failures to act) that would constitute a fundamental breach, providing grounds for terminating the treaty concerned.

xii) **Effective rejection of "frozen rights" concepts.** In *Sparrow* v. *The Queen*, the Supreme Court of Canada rejected any approach that would result in freezing aboriginal rights (as recognized in the *Constitution Act, 1982*) in a context of any earlier period of history:

> "*...the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time*...[T]he word 'existing' suggests that those rights are 'affirmed in a contemporary form rather than in their primeval simplicity and vigour'. Clearly, then, *an approach which would incorporate 'frozen rights' must be rejected.*"[2436] [Emphasis added.]

However, under the 1986 federal land claims policy, any Aboriginal rights retained would in effect be "frozen" according to the meaning they are given in a land claims agreement.[2437] This notion of freezing the meaning of aboriginal rights in a land claims agreement has most recently been affirmed in the 1993 federal policy on comprehensive claims.[2438]

In any proposed alternative to extinguishment, the notion of freezing the nature and scope of aboriginal rights through land claims treaties should be rejected.[2439] Although some element of certainty can be built into land claims agreements, it must at the same time be recognized that the full range and scope of aboriginal rights have yet to be determined by the courts or otherwise. Therefore, it is unfair for non-Aboriginal governments to continue to seek to truncate or arrest, through such treaties, the natural growth and evolution of aboriginal rights. Such a policy is especially unjust, in light of the repressive history that Aboriginal peoples and their rights have faced in Canada.[2440]

[2435] P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 422-423: "The claim in restitution may be a more attractive alternative to the innocent party for a number of reasons. First,...the restitutionary measure of relief may yield a higher quantum of recovery than contractual damages. Second, there may be problems of proof associated with the damages claim, such as inability to prove the loss with a reasonable degree of certainty. Further, the claim in restitution may simply be more convenient to prove than the claim for contractual damages."

[2436] *Sparrow* v. *The Queen*, [1990] S.C.R. 1075 at 1093.

[2437] In regard to the 1986 option, see Indian and Northern Affairs Canada, *Comprehensive Land Claims Policy*, note 2290, *supra*, at 12. As already described in this study, under the 1986 federal claims policy, Aboriginal rights would be retainable on whatever portion of land Aboriginal people held following a "settlement".

[2438] Indian and Northern Affairs Canada, *Federal Policy for the Settlement of Native Claims*, note 2378, *supra*, at 9: "Under the 1986 Comprehensive Land Claims Policy a claimant group may retain any Aboriginal rights that it may have with respect to the lands it will hold following a settlement, *so long as such rights are not inconsistent with the final agreement*." [Emphasis added.]

[2439] See also M. Jackson, *A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements*, note 2299, *supra*, at 70: "This freezing of rights is not only disturbing in terms of taking away from Aboriginal parties the benefits of an evolving domestic jurisprudence but also negates the considerable and important developments that may accrue to Aboriginal peoples as a result of international human rights standard-setting processes such as the [draft *United Nations Declaration on the Rights of Indigenous Peoples*]...A Canadian claims policy which, by freezing rights to the date of Settlement Agreements, would deny Aboriginal peoples the benefits of these important international developments require rather more justification than the need 'to avoid ambiguity and uncertainty'."

[2440] Additional factors that reinforce the view that it would be unjust to permanently limit the nature and scope of aboriginal rights include:

- Disadvantaged communities of Aboriginal peoples often feel there is no choice but to negotiate land claims agreements, if they are to place themselves in a better position to address acute social and economic problems confronting them. In negotiating treaties or agreements, Aboriginal peoples are at a severe disadvantage in terms of unequal bargaining power. Non-Aboriginal governments should not be expoiting this situation, by seeking to eternally limit aboriginal rights in

xiii) **Provision of appropriate review mechanisms.**[2441] In order to address this serious problem of frozen rights, mitigating measures should be devised in regard to land claims treaties. One useful approach would be to build in mechanisms in treaties that would deal with changing circumstances and needs.[2442] In particular, such treaties should explicitly acknowledge the evolving understanding of the judiciary and others of aboriginal rights, and legally entitle Aboriginal peoples to a periodic review of their treaties. A mandatory objective of such reviews would be to reinterpret rights or alter treaty arrangements, so as to fully comply with new human rights, judicial[2443] or other identified norms[2444]. In the event of disagreement, dispute resolution mechanisms agreed to by the parties could be put into effect. Similar review mechanisms are used in international agreements, such as the *Canada-U.S. Free Trade Agreement*,[2445] and could prove useful in ensuring that Aboriginal treaties remain

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this context. Such government action is hardly consistent with the role of a fiduciary.

- Negotiations of land claims agreements are generally based on the understanding of what aboriginal rights entail at the time of the negotiations. Since the courts have not yet pronounced on the full meaning and scope of aboriginal rights, it is premature to permanently fix their meaning according to contemporary understandings.

- As judicial decisions on aboriginal rights and more enlightened legal norms compel change, federal policies on comprehensive claims are repeatedly being altered as a result. In addition, international human rights standard-setting processes are in the process of establishing minimum universal norms pertaining to the rights of indigenous peoples and the corresponding conduct of non-Aboriginal governments. If a *uniform and balanced policy* in relation to Aboriginal peoples is to be achieved and maintained, then each land claims treaty should not be seeking to fix the meaning of aboriginal rights according to whatever federal policies and norms may exist at that time.

[2441] See, for example, the *Canada - Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing*, commenced on March 1, 1982, para. 2 b): "The parties shall review the Objectives at the end of every five year period, or at any time upon the request of either party. The Objectives may be amended at any time, with the agreement of the parties." Para. 2 a) provides that the Objectives "constitute a framework for oil and gas resource management decisions in the offshore region."

[2442] See also Makivik Corporation, *Submission from Makivik Corporation to the Task Force to Review Comprehensive Claims Policy* (October 1985) at 39: "*...we must consider the establishment of mechanisms whereby settlements may be revised and amended to suit a change of circumstances, Inuit political will and Inuit needs.* To this end, we recommend the following mechanisms: 1) a bi-annual revision of certain provisions of the [James Bay and Northern Quebec Agreement] to determine, by mutual consent, the amendments imposed by new circumstances or supplementary agreements..." [Emphasis added.]

[2443] In view of the constitutional nature and fundamental importance of aboriginal rights, the judicial norms referred to here would be those established by the Supreme Court of Canada rather than the lower courts.

[2444] For example, more favourable terms in subsequent treaties of other Aboriginal peoples, in respect to certain identified subject matters, might be considered as grounds for revision. This type of provision is sometimes known as the most-favoured-nation principle. In regard to this principle in the field of international trade, see D. McRae & J. Thomas, "The Development of the Most-Favoured-Nation Principle: Treaties of Friendship, Navigation and Commerce and the GATT" in M. Irish & E. Carasco, (eds.), *The Legal Framework for Canada-United States Trade* (Toronto: Carswell, 1987) 225; M. Irish, "The Most-Favoured-Nation Principle and Developing Countries" in M. Irish & E. Carasco, (eds.), *The Legal Framework for Canada-United States Trade*, *supra*, 249; A. Samet, "The Future of the Most-Favored-Nation Principle" in M. Irish & E. Carasco, (eds.), *The Legal Framework for Canada-United States Trade*, *supra*, 265.

Most-favoured-nation treatment is found in the *North American Free Trade Agreement*, signed on December 17, 1992 by the governments of United States, Canada, and Mexico, and entered into force on January 1, 1994, at arts. 1103 (investment); 1204 (cross-border trade); and 1406 (financial services). These aspects are discussed in B. Appleton, *Navigating NAFTA [:] A Concise User's Guide to the North American Free Trade Agreement* (Toronto: Carswell, 1994) at 82, 93, and 107 respectively.

In respect to a "most favoured province" clause, see the *Canada - Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing*, commenced on March 1, 1982, para. 25: "With respect to any comprehensive agreement on offshore oil and gas resource management and revenue sharing concluded with a province other than Nova Scotia before January 1, 1985, the Nova Scotia government may substitute the latter agreement in its entirety for the present agreement in its entirety."

[2445] See *Canada-U.S. Free Trade Agreement*, [1989] C.T.S. no. 3, c. 15, signed Jan. 2, 1988, entered into force Jan. 1, 1989, where a number of review mechanisms are provided. For example, in regard to trade in goods, see art. 303: "*The Parties shall consult regularly* to ensure that the provisions of this Chapter are administered effectively, uniformly and consistently with the spirit and intent of this Agreement. *If either Party concludes that the provisions of this Chapter require revision to take account of developments in production processes or other matters, the proposed revision along with supporting rationale and any studies shall be submitted to the other Party for consideration and any appropriate action...*" [Emphasis added.]

"living treaties" and "lasting agreements".

xiv) **Dispute resolution mechanisms.** In the event that agreements cannot be reached on how to resolve specific disputes or conflicts, it would be important for interested parties to have access to mechanisms or processes to resolve these disputes.[2446] Such mechanisms might not only serve to enhance the exercise of aboriginal rights under a treaty, but also contribute to attaining certainty, through a jointly agreed upon process.[2447]

Dispute resolution mechanisms should be devised in a collaborative manner, with equal participation of government and the Aboriginal peoples concerned. Different mechanisms could serve different objectives or purposes. The goal of such processes should be to expedite the achievement of a solution to identified problems. In this context, Aboriginal values, perspectives, priorities and laws should be accorded appropriate importance in devising interpretive and other rules.[2448]

In regard to arrangements between Aboriginal peoples and private third parties, dispute resolution mechanisms could also be established that meet the specific requirements of the parties.

xv) **Additional mechanism for resolution of differences.** There may be occasion during the negotiation of a land claims treaty that both Aboriginal and non-Aboriginal government parties prefer not to specify what is the nature of the aboriginal rights in respect to a specific area (e.g. offshore). In such cases, it is still possible to reach agreement by setting aside the question of the nature of aboriginal title, preserving the positions of each party in this regard, and providing for a regime for cooperative management and rights in the disputed area.

This type of arrangement was used with success in the *Canada - Nova Scotia Agreement on Offshore Oil and Gas Resource Management and Revenue Sharing*[2449] and was cited as an alternative to extinguishment by the 1985 Report of the Task Force to Review Comprehensive Claims Policy.[2450]

However, it is the view of this study that, as a general rule, an alternative to extinguishment should not avoid the obligation in the *Constitution Act, 1982* and other constitutional instruments that call for recognition and affirmation of aboriginal rights. Therefore, the approach used in the Canada-Nova Scotia Agreement should only be employed in exceptional circumstances and not to circumvent any recognition of aboriginal rights. In other words, the

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[2446] In relation to alternative dispute mechanisms, see generally H. Brown & A. Marriott, *ADR - Principles & Practice* (London: Sweet & Maxwell, 1993); A. Bevan, *Alternative Dispute Resolution* (London: Sweet & Maxwell, 1992). However, existing ADR mechanisms would have to be tailored to meet the objectives and requirements within the Aboriginal context. The need for negotiating parties in land claims agreement to develop dispute resolution mechanisms is highlighted in *Report of the British Columbia Claims Task Force*, note 2386, *supra*, at 32.

[2447] In relation to disputes and conflicts concerning treaties, consideration should be accorded to international dispute resolution mechanisms, as well as those of a national or regional nature. See, for example, the draft *United Nations Declaration on the Rights of Indigenous Peoples*, art. 36: "Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent...*Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.*" [Emphasis added.]

[2448] See, for example, the draft *United Nations Declaration on the Rights of Indigenous Peoples*, art. 39: "Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. *Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous peoples concerned.*" [Emphasis added.]

[2449] According to para. 23(a) of the Agreement, it commenced on March 1, 1982. Para. 1 of the Agreement provides in part: "This political settlement of the issues between the two governments has been reached without prejudice to and notwithstanding their respective legal positions. It is the intention of the parties that this settlement shall survive any decision of a court with respect to ownership and jurisdiction in the geographic area identified...[as] the 'offshore region'."

[2450] Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy*, note 2286, *supra*, at 42. See also discussion under sub-heading 10.1.3 *supra*.

approach might be used in certain instances to avoid elaborating on the *nature and scope* of aboriginal title, if the parties so desire, but it should not be used to deny generally the *existence* of aboriginal rights *per se*.

In summary, the "objectives and principles for a new approach" (sub-heading 13.2.1) and the "specific elements for a proposed alternative" (sub-heading 13.2.2) are put forward in this study as a viable alternative to the extinguishment of aboriginal rights. As demonstrated, recognition and affirmation of Aboriginal peoples' rights can be achieved and, at the same time, provide fair accommodation of the rights and interests of non-Aboriginal peoples and governments. As M. Jackson rightfully concludes:

> "It would be a mistake, and an unnecessary one, to measure the bridge of accommodation by the yardstick of extinguishment."[2451]

10.3 Anticipated Benefits to be Derived

> "...I think that ultimately Canada will be judged by how it treats its Native peoples, *and by the manner it gives expression to, and protection of, aboriginal rights*."[2452]
>
> I. Cotler, 1992

In proposing the above alternative to extinguishment of the rights of Aboriginal peoples, it is useful to identify the potential benefits that may be derived. This is done under the following sub-headings in relation to Aboriginal peoples, as well as non-Aboriginal governments and Canadians as a whole.

10.3.1 By Aboriginal peoples

In regard to the alternative to extinguishment proposed in this study, the benefits to be derived by Aboriginal peoples may include some or all of the following (according to the circumstances[2453]):

* the fundamental status and rights of present and future generations of Aboriginal peoples could be safeguarded, and, where justice and equity require, be appropriately restored

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[2451] M. Jackson, *A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements*, note 2299, *supra*, at 111.

[2452] I. Cotler, "Human Rights Advocacy and the NGO Agenda" in I. Cotler & F.P. Eliadis, (eds.), *International Human Rights Law [:] Theory and Practice*, note 2357, *supra*, at 81.

[2453] In assessing the potential benefits that may accrue to Aboriginal peoples should an effective alternative to extinguishment be implemented, it is necessary to acknowledge that Aboriginal peoples in Canada are subject to different circumstances. Depending on historical and existing factors in each situation, it may be easier or more difficult to reverse the damage that has resulted from policies of extinguishment and dispossession.

* Aboriginal land tenure systems could be protected and facilitated in their further development, according to Aboriginal peoples' own values, perspectives and laws

* the essential relationship that Aboriginal peoples have with their lands, resources and environment could be maintained and most likely strengthened in the future

* measures for the exercise of self-determination and self-government could be substantially enhanced, particularly if an adequate land and resource base be ensured

* treaties addressing land and resource matters could be implemented with honour, according to their spirit and intent, as understood by the Aboriginal peoples concerned

* Aboriginal peoples could assume their rightful place in the Canadian federation, based on principles of equality of peoples and sovereignty[2454], without prejudice to their increasing international role

* healing in Aboriginal communities could take place, based on a solid constitutional and legal framework that recognizes and respects Aboriginal peoples' status and rights

* Aboriginal peoples could further their own development as distinct cultures and societies and enhance their protections against assimilation

* the principle of free and informed consent, especially in regard to land and resource issues, could be a fundamental tenet in the relationship of Aboriginal peoples with the Crown.

10.3.2 By non-Aboriginal governments and Canadians as a whole

In regard to the alternative to extinguishment proposed in this study, the anticipated benefits to be derived by non-Aboriginal governments and by Canadians as a whole would include:

* Through effective policies of recognition and affirmation of aboriginal rights, Canada could meet its international and constitutional obligations, in regard to human rights and other fundamental matters

* in particular, the commitment, since the time of the *Royal Proclamation of 1763*, to ensure the liberty and security of Aboriginal peoples within their own territories could be fulfilled

* a uniform policy of recognition and affirmation of aboriginal rights in Canada (including restitutionary aspects) could also serve as the foundation for an effective decolonization process in Canada (e.g. elimination of the *Indian Act*)

[2454] See the discussion on "Contending Sovereignties" under heading 4 *supra*. See also Note, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, (1987) 22 Harv. C.R.-C.L. L. Rev. 507, at 555, where the authors recognize the importance of accommodating the sovereignty of Aboriginal peoples within the U.S. constitutional framework and provide: "...the Indians' newly recaptured sovereignty would be a spur to their political and economic development."

* durable relationships with Aboriginal peoples, based on cooperation and partnership, could be achieved in a context of genuine reconciliation

* by strengthening Aboriginal peoples and societies, Canada as a federation could itself be strengthened

* in regard to land and resource rights, a sufficient degree of legal certainty could be attained in a balanced and equitable manner that respects Aboriginal cultures and laws

* human and financial resources incurred by governments could be substantially diminished, in relation to extensive and complex litigation and other long-standing disputes and conflicts

* costs could also be significantly reduced, by eliminating extinguishment and other practices that disempower Aboriginal peoples and contribute to a cycle of severe social and economic problems in Aboriginal communities[2455]

* honourable and just treatment of Aboriginal peoples in Canada could be a source of deep pride for all Canadians and set a most positive example for the international community at large.

10.4 Issue of Restitution

> "Governments must be willing to honour the principle that the Agreement is intended to be a living and flexible document that can be amended when required. If amendments to the [James Bay and Northern Quebec] Agreement are to be made, I would suggest that the following measures be considered, among others...*introducing alternatives to the surrender and extinguishment of aboriginal rights in and to lands, consistent with the spirit of section 35 of Canada's Constitution*."[2456] [Emphasis added.]
>
> Mary Simon, President, Inuit Circumpolar Conference, 1985

[2455] The causal link between denial of the fundamental rights of Aboriginal peoples and the damage to their physical and psychological health has been highlighted by health professionals. See, for example, R. Scott & S. Conn, *The Failure of Scientific Medicine: Davis Inlet as an Example of Sociopolitical Morbidity*, (1987) 33 Can. Family Physician 1649 at 1653: "Self-determination, cultural, economic and political considerations are truly the central issues in health care. *That most of the problems which present themselves as 'medical' to the nursing station are the result of socio-political pathology is clear*...Using any other than an extremely blinkered scientific medical perspective, it is difficult to deny the validity of this causal sequence." [Emphasis added.]

See also Canadian Medical Association, *Bridging the Gap [:] Promoting Health and Healing for Aboriginal Peoples in Canada* (Ottawa: Canadian Medical Association, 1994) at 14: "It is recognized that self-determination in social, political and economic life improves the health of Aboriginal peoples and their communities. Therefore, the CMA encourages and supports the Aboriginal peoples in their quest for resolution of self-determination and land use." And at 13: "The health status of Aboriginal peoples in Canada is a measurable outcome of social, biological, economical, political, educational and environmental factors."

[2456] S. Vincent & G. Bowers, (eds), *Baie James et Nord québécois: dix ans après/James Bay and Northern Québec: Ten Years After* (Montréal: Recherches amérindiennes au Québec, 1985), at 192-193.

> "*If there is to be a new relationship, we must look at redressing the past, not just the past of hundreds of years ago, but the recent past of fifteen and twenty years ago.* We await the results of [the Royal Commission's] examination of the question of extinguishment, and your recommendation that these past injustices be promptly and honourably addressed."[2457] [Emphasis added.]
>
> Grand Chief Matthew Coon Come, Grand Council of the Crees (of Quebec), 1993

The consideration of Aboriginal status and rights by the courts, whether by the Privy Council in Britain or by the courts in Canada and the United States, has had a chequered history. Common law concepts of Aboriginal rights have for the most part failed to fully take into account the implications of Aboriginal sovereignty, the *Royal Proclamation of 1763* and other constitutional instruments, human rights, and in many instances, the fiduciary responsibility of the Crown. Moreover, the courts have relied on anachronistic and discriminatory doctrines, such as *terra nullius*, that have served to deny Aboriginal peoples their fundamental status and rights. In particular, aboriginal title to territory has been mischaracterized and devalued, with particularly adverse consequences in relation to surrender and extinguishment.[2458]

The judicial history concerning the determination of aboriginal title is sufficiently questionable as to add to the many reasons why restitution in regard to aboriginal rights is a necessary and urgent matter.[2459]

In *Guerin*, Dickson J. acknowledges with perhaps some reluctance the inconsistencies and confusions generated in the common law, when he attempts to reconcile cases that characterize aboriginal title as a "beneficial interest" with those that view such title as a "personal, usufructuary right":

> "It appears to me that there is no real conflict between the cases which characterize Indian title as a beneficial interest[2460] of some sort, and those which characterize it

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[2457] Grand Council of the Crees (of Quebec), *Presentation to the Royal Commission on Aboriginal Peoples*, Montreal, November 18, 1993, at 8.

[2458] See, for example, *Smith* v. *The Queen*, (1984) 147 D.L.R. (3d) 237 (S.C.C.).

[2459] See "Take action or native unrest will grow: ex-justice" in *The Gazette*, Montreal, August 10, 1994, at A10, where it is reported by Canadian Press that, in an address to the Canadian Bar Association, former Supreme Court of Canada Justice, Bertha Wilson, commented that land had been stolen from Aboriginal peoples, with some assistance from the law. The article states: "When Europeans first came to Canada, they effectively stole land from aboriginal people and backed up their actions with the force of law, Wilson said, so it's no wonder they feel cheated and have lost confidence in the courts."

[2460] See, for example, *A.G. Quebec* v. *Sioui*, [1990] 1 S.C.R. 1025 at 1055 per Lamer J. (on behalf of the Supreme Court): "The British Crown recognized that the Indians had certain *ownership rights over their land*, it sought to establish trade with them which would rise above the level of exploitation and give them a fair return. It also allowed them autonomy in their internal affairs, intervening in this area as little as possible." [Emphasis added.] See also *Canadian Pacific Limited* v. *Paul*, [1988] 2 S.C.R. 654 at 677, where the Supreme Court suggested that "Indian title" can "compete on an equal footing with other proprietary interests"; and *Benoame* v. *Canada (Minister of Indian and Northern Affairs)*, [1993] 2 C.N.L.R. 97 (F.C.T.D.) at 100 per Rouleau J.: "Traditionally, English common law has always recognized that Canada's Indigenous peoples were the sole original owners and occupants of what is now known as Canada and that Aboriginal title had to be purchased by the Crown through treaties or land surrender agreements. Aboriginal title can be asserted throughout the vast majority of the Northwest Territories..."

See also *A.G. Ontario* v. *Francis*, (1889) 2 C.N.L.C. 6 per Ferguson H.C.J. at 23-25, where it is said that the Indians have a beneficial interest in their unsurrendered lands, entitling them to the timber growing on such lands. This case is cited and briefly discussed in K. McNeil, *The High Cost of Accepting Benefits From the Crown: A Comment on the Temagami Indian Land Case*, [1992] 1 C.N.L.R. 40 at 60, n. 114.

> a personal, usufructuary right. *Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law.* There is a core of truth in the way that each of the two lines of authority has described native title, but an appearance of conflict has none the less arisen because in neither case is the categorization quite accurate."[2461] [Emphasis added.]

With deep respect to former Chief Justice Dickson, there is still significant confusion and mischaracterization as to the nature of aboriginal title in the common law. This confusion, misunderstanding and lack of consistency in judicial decisions has served to unfairly diminish the fundamental rights of Aboriginal peoples under Canadian law. In particular, the "real property" dimensions of aboriginal title have too often been circumvented by the courts.[2462] Moreover, courts have been too quick to validate purported surrenders or extinguishments of aboriginal title.

In regard to the property rights aspects of aboriginal title, K. Lysyk provides that, in his view, even the Privy Council in *St. Catherine's Milling* considered Aboriginal title to be a beneficial interest:

> "While in the *St. Catherine's Milling* case Lord Watson declined to enter upon a discussion of the precise nature of the Indian title, his reasons in that case,[2463] and those delivered subsequently in the first *Indian Annuities* case[2464], indicate that he considered the *Indian title to constitute a beneficial interest in the lands*...The clear implication is that the beneficial interest in the lands was not available to the province *until* the Indian title was extinguished."[2465]

K. McNeil indicates that, from the moment that a territory was acquired by settlement, the presumptive "common law aboriginal title" would be that of a fee simple estate (ownership):

> "It would entitle the indigenous possessors to fee simple estates, for possession is prima-facie evidence of seisin in fee simple, rebuttable only by proof that the possessor in fact holds a lesser estate. *Since no other estate could have existed at the time the Crown acquired sovereignty, the estate which vested in the indigenous possessors would have to be the fee.*"[2466] [Emphasis added.]

P. Macklem describes the inadequacy of judicial treatment of Aboriginal peoples in the following terms:

> "*The law has constructed Native people as different when to acknowledge their similarities would threaten basic organizing categories of the Anglo-Canadian legal imagination*, but it simultaneously has viewed Native people as similar to non-Native people when to acknowledge difference would threaten basic legal categories of the Anglo-Canadian legal imagination. This interplay of similarity and difference constitutes the rhetoric of justification that has legitimated the imposition of non-Native legal norms onto Native society by the judiciary...[and] has been *critical to the establishment and*

[2461] *Guerin* v. *The Queen*, [1984] 13 D.L.R. (4th) 321 at 339.

[2462] See discussion under sub-heading 1.5.2.1 *supra*.

[2463] *St. Catherine's Milling and Lumber Co. Ltd.* v. *The Queen*, (1889) 14 A.C. 46 at 59: "The fact that the power of legislating for Indians, and for lands which are reserved to their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue *whenever the estate of the Crown is disencumbered of the Indian title.*" [Emphasis added.]

[2464] *A.G. Canada* v. *A.G. Ontario*, [1897] A.C. 199 (P.C.) at 205 per Lord Watson. See also *Ontario Mining Co. Ltd.* v. *Seybold*, [1903] A.C. 73 (P.C.) at 79 per Lord Davey.

[2465] K. Lysyk, *The Indian Title Question in Canada: An Appraisal in the Light of Calder*, (1973) 51 Can. Bar Rev. 450 at 473.

[2466] K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989), at 208; see also p. 221.

> *maintenance of legal relationships of dependence between Aboriginal peoples and the Canadian state."*[2467] [Emphasis added.]

Macklem adds that such imposition of hierarchical legal values can be considered as "racist", as illustrated by the use of the concept of "Canadian sovereignty" and "private property" in relation to Aboriginal peoples:

> "The use to which similarity and difference are put can be said to be *racist to the extent that it legitimates racial or cultural inequalities between Native and non-Native people.* Such is the case with Canadian law and the continued imposition of non-Native categories of legal understanding onto Native reality.
>
> *Two legal categories that have been imposed onto Native reality by the Canadian judiciary are Canadian sovereignty and private property."*[2468] [Emphasis added.]

What must be realized are the serious limitations to date of the common law. As B. Slattery provides:

> "Rules are needed to determine which facts are relevant and to assess their significance. *At least three legal systems are available for the task: international law, the domestic law of the claimant European state, and the domestic law of the native people whose lands are claimed.* The resolution of the issues depends in part on which system is chosen as an initial vantage point."[2469] [Emphasis added.]

B. Richardson comments:

> "The law has proven to be a doubtful ally for aboriginal nations...In fact, *some court judgements of the late 1980s and early 1990s have been almost feudal in the contempt they have shown for aboriginal life and rights.*
>
> ...Some courts, notably the Supreme Court of Canada, have begun to respond to the aboriginals' argument that they have always had rights, even under Euro-Canadian law, and that historically these rights have been persistently denied in an effort to impoverish and marginalize aboriginal people. Taken all in all, however, one has to admit that from the aboriginal point of view *the law has shown itself capricious - its view of aboriginal reality dependent to a remarkable extent on the preconceptions of individual judges."*[2470] [Emphasis added.]

In addition, the Inuit Tapirisat of Canada has challenged the fairness, Eurocentricity, and accuracy of the common law's perspective on "aboriginal rights" as follows:

> "The very notion of a *common law* doctrine of aboriginal rights raises a fundamental query about the extent to which such rights are truly 'aboriginal' in the sense of reflecting aboriginal peoples perspectives. The concept of 'rights' is a western democratic invention and the legal system that defines aboriginal rights in Canada is one created, shaped and

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[2467] P. Macklem, "Ethnonationalism, Aboriginal Identities, and the Law" in M. Levin, (ed.), *Ethnicity and Aboriginality: Case Studies in Ethnonationalism* (Toronto: University of Toronto Press, 1993) 9 at 11.

[2468] Id. at 12.

[2469] B. Slattery, *Understanding Aboriginal Rights*, (1987), 66 Can. Bar Rev. 727 at 735. See also P. Hutchins, "International Law and Aboriginal Domestic Litigation" in Proceedings of the 1993 Conference of the Canadian Council on International Law, *Aboriginal Rights and International Law* (Ottawa: Canadian Council on International Law, 1992) 11 at 18: "The fact is that the interrelationship between Europeans and aboriginal peoples should be examined not through the looking glass of the common law or civil law exclusively but rather through a legal prism of a number of legal systems - domestic, civil and common law, First Nation customary law and, not the least, international law."

[2470] B. Richardson, *People of Terra Nullius [:] Betrayal and Rebirth in Aboriginal Canada* (Vancouver: Douglas & McIntyre, 1993) at 288. At 293, the author adds: "...for the aboriginals, any approach to the law is a kind of crap-game dependent on the attitudes of individual judges, who often take wildly differing approaches, even on the same case."

dominated by non-aboriginal people. *Aboriginal rights may be 'aboriginal' in the sense of having to do with aboriginal people but it is doubtful that traditional or modern aboriginal perspectives have been equitably or substantially reflected in Canadian common law.*"[2471] [Emphasis added.]

J. Henderson puts the shortcomings of the judiciary in even blunter terms:

"*The courts became caretakers of the racism of the late nineteenth and twentieth centuries. Such cowardice incurs an enormous cost.* When governments act in a disorderly and lawless way, the courts save face by classifying oppression as justice and or confiscation as a political question. Either way, they remove the cause of action from their jurisdiction. Their decisions do not pretend to have any generality or stability, nor can they sensibly speak of fixed entitlements or duties. *As a result, Aboriginal people are deprived of the rule of law.*"[2472] [Emphasis added.]

H. Berman highlights the limitations of the common law determination of Aboriginal peoples' status and rights as follows:

"Common law concepts are easily disembodied and manipulated. The record of the United States Indian law is unusually complex because of the ad hoc self-serving nature of many of these decisions.[2473]

.....

As previously noted, the judicial system is an aspect of the national authority...The court system and the selection process of the common law have often been used as an instrument of power in the relations between the United States and the Indian nations."[2474]

J. Singer indicates that the courts must assume responsibility and not rely on "convenient ambiguities" of older cases:

"...the courts continue to cite, or miscite, the older cases as a way to remove responsibility from themselves. Those Marshall Court opinions contain convenient ambiguities that can be cited for both broad and narrow interpretations of Indian rights."[2475]

Despite the fundamental differences in the Canadian and U.S. legal systems, the same comments appear to be valid in Canada, as they are in the United States[2476].

What must be redressed is the casual manner in which governments and the courts have allowed extinguishment of aboriginal and treaty rights to be presumed. K. McNeil provides:

[2471] Inuit Tapirisat of Canada, *Submission of the Inuit Tapirisat of Canada to the Royal Commission on Aboriginal Peoples*, note 2339, *supra*, at 26.

[2472] J. Henderson, "The Doctrine of Aboriginal Rights in Western Legal Tradition" in M. Boldt and J.A. Long, *The Quest for Justice [:] Aboriginal Peoples and Aboriginal Rights* (Toronto: Univ. of Toronto Press, 1985) at 220.

[2473] H. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, (1978) 27 Buffalo L.R. 637, at 637.

[2474] Id., at 667.

[2475] J. Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, (1994) 28 Georgia L. Rev. 481 at 529.

[2476] For example, the U.S. Supreme Court ruling in *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955) has been described as a "perfidious rationalization for the outright theft of private property by the United States Government.": see N. Mickenberg, *Aboriginal Rights in Canada and the United States*, (1971) 9 Osgoode Hall L.J. 119 at 136. *Tee-Hit-Ton* is said to have had "a dramatic effect on the land claims of other indigenous peoples, especially in the British Commonwealth.": see N. Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, (1980) 31 Hastings L. J. 1215 at 1254, n. 221.

> "Land is too valuable, and certainty of title too important, for casual dealings to be sanctioned."[2477]

McNeil further criticizes the "constitutional colonialism under which the Aboriginal peoples have suffered since 1867", as a result of judicial interpretations.[2478] As discussed in this study, there are clear international norms that prohibit colonialism that should be respected in Canada in regard to the treatment of Aboriginal peoples.[2479]

Some people may believe that past injustices to Aboriginal peoples is past history that must be forgotten and is too late to change. However, T.R. Berger provides a different, more compelling historical perspective that should be the basis for future action, if we are to rely on and truly respect the rule of law:

> "The Europeans came to America...they occupied lands that belonged to the Native peoples...If we wish to live in a world based on the rule of law, we must acknowledge that the claims of the Native peoples of the New World are not ancient, half-forgotten, and specious. They are, in fact, current and contemporary. *Arguments for the rule of law in international relations can never be soundly based until the nations that have dispossessed and displaced indigenous peoples accept the precepts of international law that now require a fair accommodation of indigenous peoples in their own nations.*"[2480]

In recent times, there have been some acknowledgements that past treaties need to be revisited in a restitutionary context. In particular, it is increasingly conceded that past treaties do raise fundamental questions as to their making, interpretation and implementation.[2481] For example, the Report of the British Columbia Claims Task Force provides:

> "The existence of [the 'Douglas Treaties' and Treaty 8] should not exclude First Nations from the negotiation process. *Not only are there questions concerning the making of these treaties, their interpretation and their implementation*, but more importantly, the new relationship will encompass a wider range of issues than do these treaties."[2482] [Emphasis added.]

It is also significant that all recommendations in the Task Force Report have been accepted by the federal government.[2483]

[2477] K. McNeil, *The High Cost of Accepting Benefits From the Crown: A Comment on the Temagami Indian Land Case*, [1992] 1 C.N.L.R. 40 at 60.

[2478] K. McNeil, *Envisaging Constitutional Space for Aboriginal Governments*, (1993) 19 Queen's L.J. 95 at 119. See also references to "colonialism" at 114, 126. At 133, McNeil provides: "...despite s. 35(1), *the Supreme Court of Canada is still operating within a colonial paradigm of constitutional law insofar as the rights of the Aboriginal peoples are concerned*. In *Sparrow*, the Court reaffirmed the standard colonial view that 'there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to [Aboriginal] lands vested in the Crown.' Moreover, the colonial paradigm does not envisage an alternative to this denial of Aboriginal sovereignty, as the complementary principles of parliamentary sovereignty and the rule of (Euro-Canadian) law exclude Aboriginal governments from their legitimate place within the Canadian Constitution." [Emphasis added.]

[2479] See discussion under sub-heading 8.1 *supra*.

[2480] T.R. Berger, *Village Journey [:] The Report of the Alaska Native Review Commission* (New York: Hill and Wang, 1985) at 182.

[2481] The intention here is not to suggest that past treaties, as a whole, were of questionable legality. Rather, it is to highlight that the purported land cession clauses in some treaties are of questionable validity. In fact, in most instances, Aboriginal peoples continue to regard their treaties in a most sacred and solemn manner, even if they continue to strongly oppose specific government interpretations or implementation of treaty provisions.

[2482] *Report of the British Columbia Claims Task Force*, note 2386, *supra*, at 48.

[2483] Indian and Northern Affairs Canada, *Federal Policy for the Settlement of Native Claims*, note 2378, *supra*, at 16.

Nevertheless, it is to be anticipated that concerns will be expressed that the opening up of the extinguishment question, particularly in relation to existing treaties and Metis land rights, has far-reaching implications that would be most challenging to address. However, any possible redress of extinguishment matters should involve two discrete stages of determination. **The first issue to determine is whether there are serious, fundamental grounds for reexamining and seeking alternatives to extinguishment.** If the grounds for reconsidering extinguishment are deemed to be compelling (based on considerations of law, justice, equity, and human rights), then there is a duty to redress this central matter.

The next step is then how can changes be made that are consistent with order and the rule of law. In 1982, when the equality guarantees in s. 15 were enshrined in the *Constitution Act, 1982*, it was recognized that a wide range of federal and provincial laws would have to be amended. Therefore, a three-year delay was provided in s. 32(2) of the Act so as to allow federal and provincial governments to "review its body of laws and make those amendments that were necessary to bring the laws into conformity with s. 15."[2484] In other words, the magnitude of the legislative reform process did not deter the need to entrench the prohibition against discrimination and the equality guarantees in Canada's Constitution.

Similarly, in the *Manitoba Language Rights Reference*,[2485] the "integrity of Canada's Constitution, with its protections for the French-speaking minority"[2486], was at stake. In recognizing the language rights of francophones in Manitoba, the Supreme Court of Canada balanced two important aspects of the rule of law: the first was to ensure that the rule of law remained supreme over government officials as well as private individuals; the second was to recognize that "law and order are indispensable to civilized life"[2487] As a result, the Supreme Court found an innovative solution that enabled the existing laws in Manitoba to have temporary force until its laws could be appropriately translated into French.

It is the view of this study that imaginative and equitable approaches are also required concerning redress of the purported surrenders or extinguishments of aboriginal rights. As indicated, solid precedents exist in Canada - such as the measures taken in regard to ensuring conformance of federal and provincial laws with equality guarantees in s. 15 of the *Constitution Act, 1982*, and by the Supreme Court of Canada in the *Manitoba Language Rights Reference*.

In regard to redress of extinguishment matters, judicial or other findings of unconstitutional or illegal actions on the part of non-Aboriginal governments should not be compromised, on the basis that such conclusions could well include far-reaching implications in a number of instances. Rather, it is at the second stage - how required changes can be made that are consistent with order and the rule of law - that appropriate solutions can be tailored to existing situations.

In regard to Aboriginal peoples, the right to restitution of their aboriginal rights requires careful consideration. Restitutionary remedies in Canadian law have not developed to date with the situation of Aboriginal peoples specifically in mind. Consequently, some flexibility will be required in ensuring that Aboriginal peoples have full and equitable access to these important remedies.

Under the following sub-headings, the bases for restitution of Aboriginal peoples' rights, the inappropriateness of statutory limitations to sue and other barriers, and other relevant aspects are examined.

[2484] P. Hogg, *Constitutional Law of Canada*, note 2364, *supra*, vol. 2, at 52-9.

[2485] *Manitoba Language Rights Reference*, [1985] 1 S.C.R. 721.

[2486] P. Hogg, *Constitutional Law of Canada*, note 2364, *supra*, vol. 2, at 55-16.

[2487] *Manitoba Language Rights Reference*, [1985] 1 S.C.R. 721, at 750, cited in P. Hogg, *Constitutional Law of Canada*, note 2364, *supra*, at 55-17.

10.4.1 Bases for restitution

> "*Nemo debet locupletari ex aliena jactura* - No one should grow rich through another person's loss."[2488]
>
> Ancient maxim of Roman law

> "*The restoration of land to Aboriginals is not only a possibility, it is a necessity*. It is a necessity not merely in terms of the needs and aspirations of Aboriginal people themselves, it is a necessity in terms of creating a broader Australian society which can come to terms with its own history, face up to a somewhat genocidal past and, *on that basis, seek to redress some of the wrongs that have occurred*."[2489] [Emphasis added.]
>
> C. Holding, former Federal Minister of Aboriginal Affairs, Australia, 1988

It is said that the modern law of restitution, independent from the law of contract and the law of tort, first gained acceptance in the United States and not Great Britain.[2490] A general principle for granting restitutionary relief was based largely on the principle of preventing unjust enrichment:

> "A person who has been unjustly enriched at the expense of another is required to make restitution to the other."[2491]

R. Goff and G. Jones elaborate on the notion of unjust enrichment as follows:

> "[Unjust enrichment presupposes three things: first, that the defendent has been enriched by the receipt of a benefit; secondly, that he has been so enriched at the plaintiff's expense; and thirdly, that it would seem unjust to allow him to retain the benefit."[2492]

The need to remedy cases where unjust benefit has transpired is emphasized by Lord Wright in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* as follows:

[2488] Cited in P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 3.

[2489] C. Holding, "National policy and sovereignty of Aboriginals" in B. Hocking, (ed.), *International Law and Aboriginal Human Rights* (Toronto: Carswell, 1988) 178 at 185. In regard to the need for redress, see also S.J. Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, (1994) 28 Georgia L. R. 309.

[2490] P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 11.

[2491] American Law Institute, *Restatement of the Law of Restitution: Quasi-Contracts and Constructive Trusts* (St. Paul: American Law Institute Publishers, 1937), s. 1. Cited in P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 11.

[2492] R. Goff & G. Jones, *The Law of Restitution*, 3rd ed. (London: Sweet & Maxwell, 1986) at 16. Cited by the Supreme Court of Canada in *Peel* v. *A.G. Ontario*, (1992) 144 N.R. 1 (S.C.C.) at 22.

> "...*any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit*, that is to prevent a man from retaining the money of or some other *benefit derived from another which it is against conscience that he should keep*. Such remedies in English law are generically different from remedies in contract or tort,[2493] and are now being recognized to fall within a third category of the common law which has been called quasi-contract or restitution."[2494] [Emphasis added.]

Unjust benefit can result directly from a transfer of wealth from one party to another. It can also acquired through breach of fiduciary duty owed to a beneficiary. As P. Maddaugh & J. McCamus provide:

> "...the benefit may have been acquired by the defendant through a breach of a duty owed to the plaintiff, such as the fiduciary's duty of loyalty...Such benefits are acquired at the plaintiff's expense in the sense that they have been *acquired through breach of a duty owed to the plaintiff or*, one might say, *through infringement of an interest of the plaintiff*."[2495] [Emphasis added.]

Unjust enrichment often occurs in what is referred to as quasi-contract. In the case of Aboriginal peoples, "unjust enrichment" has often taken place at the expense of Aboriginal peoples through treaties or agreements that, especially in regard to purported land cessions, do not appear to reflect a meeting of the minds or are subject to some other consensual defect.[2496] This does not necessarily pose a problem, since it is said that "modern Canadian cases have expanded the scope of restitutionary relief well beyond that permitted by the traditional law of quasi-contract."[2497]

Although fiduciary obligation is said to be the principal source of independent restitutionary liability for wrongful conduct,[2498] there are other areas where the wrongfulness of a party's conduct gives rise to restitution. In this regard, P. Maddaugh & J. McCamus indicate:

> "The granting of recovery for benefits acquired by coercion in the form of *duress* or *undue influence* appears to come within this category, as do the restitutionary liabilities imposed in cases of *unconscionable transactions*, *equitable fraud* and *various other species of wrongdoing*..."[2499] [Emphasis added.]

In order to benefit from the doctrine of restitution, it is unnecessary to fit into any precise legal category. As indicated in *James More & Sons Ltd.* v. *University of Ottawa* by Morden J.,

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[2493] In P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 36: "Although these different theories of obligation intersect and overlap in a variety of contexts, their underlying general principles and objectives are very different, as are the available remedies. Whereas the central objective of the law of restitution is the prevention of an unjust enrichment, the central objective of the law of contract is to ensure the performance of promises and that of the law of tort is to ensure that wrongdoers compensate those who are harmed by their wrongful conduct...*In restitution, of course, the object is to grant to the plaintiff recovery of the value of the benefit or enrichment acquired by the defendant in circumstances making its retention by the defendant unjust.*" [Emphasis added.]

[2494] *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.*, [1943] A.C. 32 (H.L.) at 61.

[2495] P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 44.

[2496] P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 46: "Where the enrichment results from the performance of a valid contractual obligation, the general policy favouring the security of transactions weighs against the intervention of restitutionary claims. *Only if the transaction can be found to be unenforceable for a reason recognized either at law or in equity can the possibility of a restitutionary claim for the value of benefits conferred be entertained.*" [Emphasis added.]

[2497] P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 74.

[2498] Id. at 53.

[2499] Ibid.

the categories of restitution are not closed:

> "...where a Court, on proper grounds, holds that the doctrine of restitution is applicable, *it is not necessary to fit the case into some exact category*, apparently established by a previous decision, giving effect to the doctrine. Just as the categories of negligence is never closed, neither can those of restitution."[2500] [Emphasis added.]

That Canadian law, in particular, may be prepared to accommodate the distinctive situations faced by Aboriginal peoples appears promising from the following commentary by P. Maddaugh & J. McCamus:

> "The principal feature of [a distinctively Canadian] jurisprudence is the *recognition of a general right to restitution in the absence of compelling reasons for the denial of relief.* At the operational level, this has meant that Canadian courts in recent decades have engaged in a *greater degree of innovation and creative development of the law in this area* than may be evident in other areas of Canadian private law jurisprudence."[2501] [Emphasis added.]

Further, in *Peel* v. *A.G. Ontario*, the Supreme Court of Canada has indicated that restitution is fundamentally a matter of redressing injustices and inequalities:

> "The *concept of 'injustice'* in the context of the law of restitution harkens back to the Aristetolian notion of correcting a balance or equilibrium that had been disrupted. The restitutive form of justice is distinct from the analysis particular to tort or contract law, in the sense that questions of duty, standards, and culpability are not a central focus in restitution...Thus, *restitution*, more narrowly than tort or contract, *focuses on re-establishing equality as between two parties, as a response to a disruption of equilibrium through a subtraction or taking.*"[2502] [Emphasis added.]

In relation to traditional areas of recovery, the Supreme Court of Canada has indicated that "something must have been given, whether goods, services or money. The thing which is given must have been received and retained by the defendent. And the retention must be without juristic justification".[2503] However, the Supreme Court has stated that the law of restitution has gone beyond this and can continue to develop in a flexible way:

> "The tripartite principle of general application which this court has recognized as the basis of the cause of action for *unjust enrichment is thus seen to have grown out of the traditional categories of recovery*. It is informed by them. It is *capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice.*"[2504] [Emphasis added.]

Thus, Canadian restitutionary law appears to be increasingly fluid and flexible. However, additional equitable considerations will still need to be considered in order to make the law of restitution both relevant to and effective in the Aboriginal context.

P. Macklem emphasizes that redress for past and ongoing inequality of treatment is imperative in relation to Aboriginal peoples and it should take place in a context of recognition of Aboriginal sovereignty:

[2500] *James More & Sons Ltd.* v. *University of Ottawa*, (1974), 49 D.L.R. (3d) 666 (Ont. H.C.) at 676.

[2501] P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 27.

[2502] *Peel* v. *A.G. Ontario*, (1992) 144 N.R. 1 (S.C.C.) at 42.

[2503] Id. at 23.

[2504] Id. (per McLachlin J.)

"*Formal equality requires the recognition of Indian sovereignty* because Indian nations were not treated as equal to settling and colonial nations, with respect to the distribution of sovereignty in North America, at the time of contact."[2505] [Emphasis added.]

In addition, R. Falk underlines the importance of land rights and financial resources and facilities in providing restitution:

"the notions of restitution, as well as protection, have to be introduced into this [indigenous peoples self-determination] regime in the form of land rights and the financial resources and facilities that might be needed to overcome the distress many of these peoples have and are experiencing..."[2506]

Similarly, N. Rouland makes a strong case for restitution, including the restoration of indigenous peoples' rights:

"...l'homme blanc n[']a-t-il pas détruites [les sociétés autochtones] par les génocides sanglants et les ethnocides culturels qui ont accompagné l'érection des empires coloniaux? La culpabilité de l'homme blanc en est accrue d'autant. *Il lui faut donc réparer*. C'est-à-dire tout d'abord considérer avec respect ces sociétés autrefois méprisées, puis *reconnaître et restaurer leurs droits, leur permettre de survivre*."[2507] [Emphasis added.]

I. Brownlie also provides:

"...land rights questions may, and usually does, involve issues of title, historic justice and restitution."[2508]

The capacity to restore aboriginal rights, in a restitutionary context, will be examined further below. However, first, the inappropriateness of statutory limitations to sue and other barriers will be discussed briefly.

10.4.2 Statutory limitations to sue and other barriers

Both in common law and in equity, doctrines developed through judicial rulings and through legislation to prevent unreasonable delay in initiating lawsuits.[2509] Generally, it is said there are three underlying rationales for limitations of actions legislation: certainty, evidentiary

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[2505] P. Macklem, *Distributing Sovereignty: Indian Nations and Equality of Peoples*, (1993) 45 Stanford L. Rev. 1215, at 1363.

[2506] R. Falk, "The Rights of Peoples (In Particular Indigenous Peoples)" in J. Crawford, (ed.), *The Rights of Peoples* (Oxford: Clarendon Press, 1988), at 35.

[2507] N. Rouland, *Les Inuit du Nouveau-Québec et la Convention de la Baie James* (Québec: Association Inuksiutiit & Centre d'études nordiques de l'Université Laval, 1978), at 5. Unofficial English translation: "...has not the white man destroyed [Aboriginal societies] by bloody genocide and cultural ethnocide which have accompanied the building of colonial empires? The culpability of the white man is increased accordingly. *He must then redress the situation*. That is to say above all to consider with respect these societies otherwise looked down on, then to *recognize and restore their rights, to permit them to survive*." [Emphasis added.]

[2508] I. Brownlie (F.M. Brookfield, ed.), *Treaties and Indigenous Peoples [:] The Robb Lectures 1991* (Oxford: Clarendon Press, 1992) at 39.

[2509] P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 60.

concerns, and diligence in taking action.[2510] Aside from legislation, the equitable doctrines of laches[2511] and acquiescence[2512] were formulated and applied by the courts to protect parties against stale claims and other problematic situations.

The application of the relevant doctrines to the law of restitution can be quite complex[2513] and it is not within the scope of this study to engage in an in-depth analysis.[2514] However, it is of vital importance to briefly describe the reasons for not applying either limitations of actions legislation or the above doctrines against Aboriginal peoples.[2515]

Recently, the applicability of statutes of limitations has been reconsidered by the Supreme Court of Canada in child sexual abuse cases.[2516] Analogously, it has been suggested in the Federal Court of Appeal that such limitation statutes do not appear to be appropriate in cases involving Aboriginal surrenders where the Crown acts as a fiduciary.[2517]

In relation to Aboriginal peoples, factors that militate against the appropriateness of statutory limitations and the doctrine of laches and acquiescence include:

[2510] For a most useful analysis of the three underlying rationales to limitation of actions legislation, see generally ***K.M.*** v. ***H.M.***, (1992) 142 N.R. 321 (S.C.C.). At pages 399 - 405, the Supreme Court also reviews the equitable doctrine of laches.

[2511] The doctrine of laches is said to be available as a defence in cases involving equitable claims, such as breach of fiduciary duties, where there has been a lapse of time or delay affecting another party. In a leading case, *Lindsay Petroleum Co.* v. *Hurd*, (1874), L.R. 5 P.C. 221, the defence is described as requiring more than a mere delay in instituting action: "Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be described as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material."

[2512] "Acquiescence...consists, in effect, of an affirmation of the impugned conduct by the plaintiff. [See, e.g. ***Allcard*** v. ***Skinner***, (1887), 36 Ch. D. 145 (C.A.).] Accordingly, while delay may assist in the establishment of acquiescence, it is not a necessary element in the defence.": P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 64.

[2513] P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 60.

[2514] For a more detailed examination, see J.S. Williams, *Limitation of Actions in Canada* (Toronto: Butterworths, 1980); and R.P. Meagher, W.M.C. Gummow & J.R.F. Lehane, *Equity: Doctrines and Remedies*, 2nd ed. (Toronto: Butterworths, 1984).

[2515] It is worth noting that in *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 (S.C.C.) at 344-345, the Supreme Court of Canada considered defences based on statutes of limitation and laches. Dickson J. held that equitable fraud prevented the Indians concerned from having actual or constructive knowledge until March 1970, which put the Indians within the six-year period allowed by the *Statute of Limitations*, R.S.B.C. 1960, c. 370. In addition, in regard to the defence of laches, it was stated that the Crown was not prejudiced by reason of the delay between March 1970 and December 1975 when the suit was filed.

On the other hand, in *Apsassin* v. *Canada (Dept. of Indian Affairs & Northern Development)*, [1993] 2 C.N.L.R. 20 (Fed. C.A.), at 59-65, 72, the B.C. statute of limitations proved to be fatal to the claim of the Aboriginal peoples concerned. In this regard, Marceau J.A. provides at 72: "...the Act also includes a provision establishing an ultimate limitation period of 30 years which *applies to any cause of action and cannot be extended for any reason*, with the result that the appellant's allegations of disability and equitable fraud and their appeal to the discoverability doctrine (allegations which were repudiated by the trial judge on the facts) are irrelevant." [Emphasis added.] See also *Kruger* v. *The Queen*, [1985] 3 C.N.L.R. 15 (Fed. C.A.), where the statute of limitations in B.C. was also upheld against the Aboriginal plaintiffs.

[2516] *K.M.* v. *H.M.*, (1992) 142 N.R. 321 (S.C.C.).

[2517] *Apsassin* v. *Canada (Dept. of Indian Affairs & Northern Development)*, [1993] 2 C.N.L.R. 20 (Fed. C.A.), at 95-96 (per Isaac C.J., dissenting): "I think one can draw an analogy between the coercion involved in the concealment of sexual abuse cases and the Crown's failure to disclose material information relating to a surrender. In both cases, the superior party to a fiduciary relationship is playing on the dependence and trust of the disadvantaged party."

See also A. Pratt, *Aboriginal Self-Government and the Crown's Fiduciary Duty: Squaring the Circle or Completing the Circle?*, note 2355, *supra*, at 173, n. 23: "At the very least, the applicability of provincial procedural and limitations laws (perhaps including those which might otherwise be incorporated by reference to s. 39 of the *Federal Court Act*, R.S.C. 1985, c. F-7) is very much open to question, perhaps by analogy to the reasoning of the U.S. Supreme Court in *Oneida County* v. *Oneida Indian Nation of New York State*, 470 U.S. 226 (1985)."

i) **Far-reaching impact on relationship to land.** Aboriginal peoples have a profound relationship with their ancestral territories. The adverse impacts that land dispossessions have on Aboriginal peoples, their identity, cultures and integrity as distinct societies are generally complex, devastating and far-reaching. Such impacts far outweigh the effects that may be caused to governments and others, through any delay in the litigation of the land and resource rights of Aboriginal peoples.

ii) **Inappropriate application to and effect on collective rights.** The land and resource rights of Aboriginal peoples constitute primarily collective rights. Consequently, any legislative or judicial barriers to the commencement of lawsuits by Aboriginal peoples have an inordinate impact on them, as compared to the effect on non-Aboriginal people involved in individual rights cases.

iii) **Perpetuation of prejudice and suffering of Aboriginal peoples.** It would be an injustice to perpetuate Aboriginal suffering and countenance any dishonourable conduct or "sharp dealing"[2518] by the Crown.

iv) **Delays in taking legal action a result of government laws and policies.** Previous legislative prohibitions against litigation of Aboriginal rights and claims by Aboriginal peoples have unfairly and discriminatorily contributed to delays in taking legal action.[2519]

v) **Ongoing lack of access to justice system.** Historical and contemporary injustices have created a situation whereby Aboriginal peoples, as a class, generally lack access to a justice system that is both relevant and equitable.

vi) **Denial and misunderstanding of Aboriginal land rights and tenure systems.** Aboriginal rights and land tenure systems too often have been misunderstood, misconstrued and denied by both governments and the courts. As a result of such ethnocentrism and discrimination, many Aboriginal peoples have been reluctant to seek recourse and justice through the courts.

vii) **Passage of time often a benefit to Aboriginal peoples.** Evidence concerning the true nature and scope of aboriginal title is most often neither lost nor made "stale" by the passage of time. Rather, there are gains in terms of understanding and opportunity, as the courts incorporate more equitable principles for the recognition and affirmation of aboriginal title.

viii) **Acquiescence not a genuine factor.** "Failure" to take legal action is not acquiescence, but generally a result of a wide range of factors. These include the control by government over the lives and affairs of Aboriginal peoples, formidable expense and complexity of Aboriginal title litigation, and the dependence on government assistance to offset the debilitating costs of litigation.

ix) **Conflicting role of the Crown.** Unlike other peoples in Canada, Aboriginal peoples are confronted with a most unusual situation vis-a-vis government defendants. The Crown is often the defendant in cases involving aboriginal title, while also having the discretion of providing financial assistance to Aboriginal plaintiffs for the initiation of such legal actions.

x) **Incompatibility with fiduciary relationship of Crown.** The fiduciary relationship of the Crown with Aboriginal peoples should preclude the government from avoiding responsibility, through the adoption of statutes of limitations or raising of "equitable" defences. In particular, it is the Crown who, despite its fiduciary obligations, persists in

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[2518] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 at 1107 per Dickson C.J.: "...no appearance of 'sharp dealing' should be sanctioned".

[2519] See discussion under sub-heading 1.5.2 *supra*.

denying that Aboriginal peoples have valid title to lands and resources.

In addition, in regard to the historical injustices inflicted on Aboriginal peoples and the "passage of time", it is worth noting the comments of Lambert J.A. in *Delgamuukw* v. *British Columbia*:

> "...when the history shows that the Indian people were formally and legislatively prevented from asserting their rights, though they gave many indications that they wished to do so, *it would, in my opinion, be thoroughly unjust and improper to say that the passage of time and the weight of history has eliminated those rights.* As Chief Justice Dickson said in *Mitchell* v. *Peguis Band*, the burden of history must be shared by all Canadians, not by the Indians alone."[2520] [Emphasis added.]

Consequently, Lambert J.A. "resolutely rejected" the declaration of the Vermont Supreme Court in *Vermont* v. *Elliott*,[2521] to the effect that events had overtaken an Indian claim and the weight of history had crushed and obliterated the claim.

In light of the above factors, limitation periods applied to Aboriginal peoples and the equitable doctrines of laches and acquiescence generally serve to operate as arbitrary instruments of injustice that are wholly insensitive to historical realities and essential cross-cultural differences. What might ordinarily be taken as acquiescence or unreasonable delay is, in an aboriginal context, the result of a complex set of factors beyond the control of the Aboriginal peoples concerned (see reasons outlined above).

In this regard, it is worth noting the federal government's decision in 1981 to not apply *statutes of limitations* or the *doctrine of laches*, in regard to the federal policy on specific claims.[2522] This is a positive precedent that should be applied or extended to a much broader range of aboriginal claims. As indicated in the Report of the Task Force on Comprehensive Claims:

> "It is unfair for the government to invite aboriginal groups to the negotiating table, yet to reserve the right to rely upon defences that operate by virtue of the passage of time. Such a stance cannot help detracting from the atmosphere within which claims negotiations proceed."[2523]

In addition, provincial limitation statutes across Canada tend to vary in their requirements and prohibitions. This makes uniformity of policy pertaining to the rights of Aboriginal peoples more difficult to maintain. Moreover, since Aboriginal traditional territories often transcend provincial boundaries, the hurdles in regard to legal recourses for Aboriginal peoples may be further compounded.

In *Apsassin* v. *Canada*,[2524] the incorporation of provincial statutes of limitation and

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[2520] *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.) at 370.

[2521] *Vermont* v. *Elliott*, (1992) 616 A. 2d 210 (Vermont Supr. Ct.). For strong criticism of this ruling, see J. Lowndes, *When History Outweighs Law: Extinguishment of Abenaki Aboriginal Title*, (1994) 42 Buffalo L. Rev. 77; and J. Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, (1994) 28 Georgia L. Rev. 481.

[2522] See Indian and Northern Affairs Canada, *Federal Policy for the Settlement of Native Claims*, note 2378, *supra*, at 20. In addition, in regard to the suspension of the statute of limitations so that indigenous peoples of Guatemala might be restored their communal lands, see *Agreement on Identity and Rights of Indigenous Peoples*, in *Letter dated 5 April 1995 from the Secretary-General to the President of the General Assembly and to the President of the Security Council*, U.N. Doc. A/49/882, S/1995/256, 10 April 1995, Annex, section F, para. 7.

[2523] Task Force to Review Comprehensive Claims Policy, *Living Treaties: Lasting Agreements [-] Report of the Task Force to Review Comprehensive Claims Policy*, note 2286, *supra*, at 77.

[2524] *Apsassin* v. *Canada (Dept. of Indian Affairs & Northern Development)*, [1993] 2 C.N.L.R. 20 (Fed. C.A.), at 59-65 (per Stone J.A.).

provincial laws on prescription in s. 38(1) of the *Federal Court Act*[2525] was considered by the Federal Court of Appeal. Section 38(1) provides:

> "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 such province*, and a proceeding in the Court in respect of a cause of action arising otherwise than in a province shall be taken within and not after six years after the cause of action arose." [Emphasis added.]

No constitutional arguments concerning s. 38 were raised in the *Apsassin* case. However, it is the view of this study that the above provision may be unconstitutional and, therefore, inoperative in relation to Aboriginal peoples (at least since 1982[2526]). Such a finding of unconstitutionality is based on many of the same reasons put forward in this study in regard to s. 88 of the *Indian Act*.[2527] In particular, by incorporating by reference provincial laws that exist or may be adopted at any given point in time, s. 38 does not allow the application of the justification tests laid down by the Supreme Court in *Sparrow* v. *The Queen*[2528]. Like s. 88, section 38(1) of the *Federal Court Act* is excessively open-ended, general and uncertain, in that it allows for a wide range of provincial laws to adversely affect or otherwise interfere with the exercise of aboriginal rights, without being able to know in advance what the nature and effect of such laws might entail for Aboriginal peoples.

From a constitutional viewpoint, it is submitted that Canadian courts have a duty to ensure that ordinary statutes of limitation (or certain equitable defences) not be applied, so as to deny the rights of Aboriginal peoples that are recognized and affirmed in s. 35(1) of the *Constitution Act, 1982*, s. 35(1), or to deny the rights and obligations in the *Royal Proclamation of 1763* and in other constitutional instruments. For the diverse reasons outlined above, it would be inappropriate and unjust to perpetuate the dispossession of Aboriginal peoples of their land and resource rights through limitation statutes or unsuitable judge-made rules.

In addition, it can be argued that the *Canadian Charter of Rights and Freedoms* provides additional constitutional safeguards that preclude the use of limitation of actions statutes or equitable defences to deny Aboriginal peoples their right to effective legal remedies through the courts. Under s. 7[2529] of the Charter, Aboriginal people have the rights to liberty and security that must be interpreted in a manner that does not derogate from their aboriginal and treaty rights, including their rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763. This non-derogation is guaranteed by ss. 25[2530] and 26[2531] of the

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[2525] Reference was made by the Federal Court of Appeal to the *Federal Court Act*, S.C. 1970 (2nd Supp.), c. 10.

[2526] Since 1982, section 35(1) of the *Constitution Act, 1982* has provided constitutional protection to aboriginal and treaty rights. However, it is the conclusion of this study that the *Royal Proclamation of 1763* is a constitutional instrument that also safeguards aboriginal rights. In view of the constitutional status of the Proclamation, the fiduciary responsibility of the Crown, as reflected in this instrument, is also of a constitutional nature. Consequently, the principles enunciated in *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, would also be relevant to fiduciary obligations arising from constitutional instruments in force prior to 1982.

[2527] See arguments on the question of constitutionality of s. 88, *supra*, at note 1447.

[2528] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075.

[2529] Section 7 of the Charter provides: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[2530] Section 25 of the Charter provides:"The guarantee in this Charter of certain rights and freedoms shall not be construed so as to *abrogate or derogate* from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763;..." [Emphasis added.]

Even in the absence of s. 25 of the Charter, it would not be in any way incongruous to interpret s. 7 in a manner that is consistent with the Aboriginal rights of Aboriginal peoples and with their own notions of culture and collective identity. See *R.* v. *Oakes*, [1986] 1 S.C.R. 103 at 136, where Dickson C.J. gave examples of the values of a "free and

Charter.

As outlined in other parts of this study,[2532] aboriginal and treaty rights include broad notions of liberty and security that have collective and individual dimensions.[2533] The interpretation of Aboriginal peoples' rights to liberty and security in a manner consistent with their own cultural heritage is also required by s. 27[2534] and s. 15 (equality guarantees)[2535] of the Charter. In addition, the fiduciary relationship between Aboriginal peoples and the Crown necessarily includes notions of security in providing the required protections.[2536]

As indicated above, the rights of Aboriginal peoples to liberty and security under s. 7 of the Charter must be interpreted in a manner that is consistent with their aboriginal and treaty rights, including their rights and freedoms recognized under the Royal Proclamation. If these rights have been infringed or denied, Aboriginal peoples are entitled to an effective legal remedy as specified in s. 24(1)[2537] of the Charter. The remedy in s. 24(1) is stipulated to be what

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democratic society" (referred to in s. 1 of the Charter) as including "respect for cultural and group identity". This evoked the following comment in P. Hogg, *Constitutional Law of Canada*, 3rd ed., note 2364, *supra*, vol. 2, at 35-20: "This suggested that the Court would be willing to use s. 1 to enable the national norms of the Charter to accommodate at least some of the diversity that is the role of the federal system to permit."

[2531] Section 26 of the Charter provides:"The guarantee in this Charter of certain rights and freedoms shall not be construed as *denying the existence of any other rights or freedoms* that exist in Canada." [Emphasis added.]

[2532] See discussion under sub-heading 8.3 *supra*.

[2533] The liberty and security interests of Aboriginal peoples are affirmed in the Royal Proclamation of 1763 and are a part of the constitutional law of Canada today: "And whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our protection, *should not be molested or disturbed* in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them..." [Emphasis added].

As indicated in B. Clark, *Native Liberty, Crown Sovereignty [:] The Existing Aboriginal Right of Self-Government in Canada* (Montreal: McGill-Queen's Univ. Press, 1990) at 3, the right to liberty of Aboriginal peoples was an integral part of British policy even in the 18th century: "Faced with numerous and warlike tribes, and not being entirely impervious to sentiments of natural justice, the imperial government of Great Britain in the eighteenth century recognized the liberty of the indigenous peoples not to be molested or disturbed on their unceded territories. *This liberty received constitutional protection throughout British North America.*" [Emphasis added.]

Similarly, it would hardly be possible to for governments to respect aboriginal and treaty rights under s. 35(1) of the *Constitution Act, 1982*, without respecting collective and individual rights to liberty and security. Aboriginal peoples' notions of liberty and security are intimately linked to the enjoyment of aboriginal and treaty rights to land, resources and culture. It is through their relationship with their traditional territories and culture that Aboriginal peoples seek to ensure the integrity of their respective identities and cultures.

[2534] Section 27 of the Charter provides: "This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

[2535] To achieve equality under s. 15, it can mean treating different people differently (as opposed to identical treatment). This is especially important when, as recognized and affirmed in the *Constitution Act, 1982*, s. 35(1), Aboriginal peoples have different rights from non-Aboriginal peoples, namely aboriginal and treaty rights. See also *Tharp* v. *Lornex Mining Corporation* (Board of Inquiry, British Columbia, 1975) at 13: "It is a fundamentally important notion that identical treatment does not necessarily mean equal treatment or the absence of discrimination"; *R.* v. *Big M Drug Mart Ltd.*, [1985] 3 W.W.R. 481 (S.C.C.) at 486 (former Chief Justice Dickson): "The equality necessary to support religious freedom does not require identical treatment of all religions. *In fact, the interests of true equality may well require differentiation in treatment.*" [Emphasis added.]

[2536] B. Slattery, *Understanding Aboriginal Rights*, (1987) 66 Can. Bar Rev. 727 at 753: "The Crown has a general fiduciary duty toward native people to protect them in the enjoyment of their aboriginal rights and in particular in the possession and use of their lands."

[2537] Section 24(1) of the Charter provides: "Anyone whose rights and freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers *appropriate and just in the circumstances*." [Emphasis added.]

It is important to note that the remedy set out in s. 24(1) of the Charter is for violations of Charter rights and is said rarely to apply to an action based on s. 52(1) of the *Constitution Act, 1982*. In this regard, see *Peel* v. *A.G. Ontario*, (1992) 144 N.R. 1 (S.C.C.) at 47 per Lamer C.J., where it is said: "The two forms of relief, restitution and a remedy under s. 24(1) of the *Canadian Charter of Rights and Freedoms*, must not be confused. See also *Schacter* v. *Canada*, [1992] 2

"the court considers appropriate and just in the circumstances". Consequently, s. 24 provides the necessary latitude for Canadian courts to declare the inappropriateness of limitation of actions statutes or judge-made rules that would deprive Aboriginal peoples of a just remedy.

In summary, Aboriginal peoples have rights and freedoms that are recognized and affirmed in a number of constitutional instruments. These include the *Royal Proclamation of 1763*, the *Manitoba Act, 1870*,[2538] the *Constitution Act, 1982*,[2539] and the *Canadian Charter of Rights and Freedoms*.[2540] Moreover, the fiduciary relationship of Aboriginal peoples with the Crown, gives rise to Crown duties of a constitutional nature. Consequently, it would be inconsistent and *ultra vires* for Parliament or the provincial legislatures to adopt ordinary legislation whose effect would be to deny Aboriginal peoples their constitutional rights and freedoms, or enable governments and legislatures to circumvent their own constitutional obligations to Aboriginal peoples.

10.4.3 Capacity to restore aboriginal rights

The central importance of restoring aboriginal title where it has been purportedly extinguished is highlighted by Makivik Corporation in the following terms:

> "*The restoration of extinguished aboriginal title is essential in the fulfillment of two main objectives of native settlements: uniformity across Canada, and enforceability of the agreements*. In addition, it may be the framework of a revision of settled claims for an improvement of the aboriginal peoples' condition.
>
> *The Inuit feel it is imperative to ensure a uniform federal policy across Canada in respect to such a fundamental principle as the continued recognition of aboriginal rights*. This uniformity is required by the nature of aboriginal title itself, i.e., a title which is inherent to the existence of a people and therefore bears too great importance to be negotiated according to mere economic circumstances. Beacuse *aboriginal title is inherent to 'aboriginalness'* all aboriginal people should see their title respected according to the same moral and legal considerations. *Therefore, if rights have been effectively extinguished as a result of past agreements or treaties, it is essential to determine how they can be revived*."[2541] [Emphasis added.]

Restoration of aboriginal land and resource rights is probably in most situations best resolved through negotiations. However, if litigation does occur, restoration of such aboriginal rights requires a remedy that is proprietary[2542] (*in rem*) rather than personal[2543] (*in*

S.C.R. 679 at 720 per Lamer C.J.: "An individual remedy under s. 24(1) of the *Charter* will *rarely* be available under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available." [Emphasis added.]

[2538] Sections 31 and 32 of the Act.

[2539] Section 35(1).

[2540] Sections 7, 15, 24, 25, 26 and 27 of the Charter.

[2541] Makivik Corporation, *Submission from Makivik Corporation to the Task Force to Review Comprehensive Claims Policy* (October 1985) at 41.

[2542] "[P]roprietary or *in rem* remedies [grant] either a right of ownership in a specific asset or creat[e] a security interest in an asset to ensure payment of a money judgement": P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 67.

personam).[2544]

Generally, the law of restitution does provide for both proprietary and personal remedies. It is said that "[p]roprietary restitutionary remedies are granted principally, though not exclusively, through the device of the constructive trust."[2545] P. Maddaugh & J. McCamus describe the notion of a "constructive trust" as follows:

> "Despite the general lack of precision in definition, there is one feature of a constructive trust upon which all would agree. *It is imposed by a court without any regard whatsoever to the intention of the parties, whether express or implied.*"[2546] [Emphasis added.]

Maddaugh & McCamus point out that "since 1980, with the decision of the Supreme Court of Canada in *Pettkus* v. *Becker*,[2547] the constructive trust has been clearly and unequivocally recognized as *a general remedial device founded squarely on the principle of preventing an unjust enrichment.*"[2548] [Emphasis added.]

In determining appropriate and effective remedies for Aboriginal peoples in relation to purported land surrenders and extinguishments, the constructive trust could prove to be of significant use and benefit. As confirmed by D.M.W. Waters, "[a]ny property in the hands of a fiduciary can be the subject-matter of a constructive trust".[2549] Moreover, in some provincial jurisdictions, constructive trustees are exposed to perpetual liability.[2550]

In *Guerin* v. *The Queen*,[2551] it was held that that a surrender of aboriginal reserve lands[2552] did not give rise to a constructive trust. In this regard, Dickson J. provides:

> "Nor does surrender give rise to a constructive trust. As was said by this court in *Pettkus v. Becker* (1980, 117 D.L.R. (3d) 257 at p. 273, [1980] 2 S.C.R. 834 at p. 847, 19 R.F.L. (2d) 165: 'The principle of unjust enrichment lies at the heart of the constructive trust.'...Any similarity between a constructive trust and the Crown's fiduciary obligation to the Indians is limited to the fact that both arise by operation of law; the former is

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[2543] "[P]ersonal or *in personam* remedies giv[e] rise to a judgement requiring the defendant to pay a sum of money": P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 67.

[2544] The exercise of personal legal remedies could possibly lead to a settlement that involved *replacement* lands and resources. In such instances, the rights on such lands might not be considered as "aboriginal" *per se* (if the lands were outside of the traditional territory of the people concerned). However, rights on replacement lands could nevertheless be negotiated as treaty rights. It is the view of this study that, in those cases where replacement lands are intended to fulfill the same objectives and purposes as the original aboriginal lands, the rights on replacement lands should still be characterized as "aboriginal".

[2545] P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 37.

[2546] Id. at 80.

[2547] *Pettkus* v. *Becker*, [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257.

[2548] P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 79.

[2549] D.M.W. Waters, *Law of Trusts in Canada*, 2nd ed. (Toronto: Carswell, 1984) at 408. See also P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 575: "A claimant seeking restitution of benefits accruing to a defendant as a result of a breach of his duty of loyalty as a fiduciary is in a most advantageous position. A whole range of equitable remedies are potentially available to him - recission, an accounting of profits, *a constructive trust*, an equitable lien, or, possibly, even a tracing order." [Emphasis added.]

[2550] P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 80, n. 16.

[2551] *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 (S.C.C.).

[2552] In the *Guerin* case, 162 acres of land within a reserve of the Musqueam Indian Band were being considered for lease to the Shaughnessy Heights Golf Club of Vancouver.

essentially a restitutionary remedy, while the latter is not."[2553]

If Dickson J. was stating that no aboriginal land surrenders can give rise to a constructive trust under any circumstances, then with respect he appears to have erred in his judgment.[2554] The notion of a constructive trust is sufficiently fluid and flexible to accommodate situations pertaining to aboriginal land issues, where an unjust enrichment is involved. Moreover, a fiduciary in particular can be held by the courts to be a constructive trustee.[2555]

It might well be, however, that Dickson J. was not making a general conclusion regarding all aboriginal land surrenders involving the Crown as fiduciary, but only responding to the particular fact situation in the *Guerin* case. In regard to the case at bar, Dickson J. states:

> "*In the present case, for example, the Crown has in no way been enriched by the surrender transaction*, whether unjustly or otherwise, but the fact that this is so cannot alter either the existence or the nature of the [fiduciary] obligation which the Crown owes."[2556] [Emphasis added.]

The Crown in *Guerin* obtained a land surrender from the Aboriginal people concerned, in order to lease the property to a private third party Golf Club. It would appear that Dickson J. believed that it was solely the third party who unjustly benefitted from the terms of the lease, but was considered to be a *bona fide* lessee for value. Although the Aboriginal plaintiffs did not appear to seek any recourse against the Golf Club, it is not entirely clear that the Golf Club was exempt from restitution, under a constructive trust analysis.

The traditional equitable defence of *bona fide* purchase for value is available to third parties who committed no wrongdoing.[2557] However, this defence is only available if it can be established that a third party gave consideration for the transfer of property and had no notice of another party's equitable interest in the property.[2558] It would appear that the third party Golf Club was fully aware of the equitable interest that the Aboriginal people concerned had in the property being proposed for lease to the Club.[2559]

[2553] Id. at 342.

[2554] It is worth noting that, in *Guerin*, Wilson J. at 361 concludes that the fiduciary duty of the Crown had crystallized into an "express trust": "...the fiduciary duty which existed at large under the section [18 of the Indian Act] to hold the land in reserve for the use and benefit of the band crystallized upon the surrender into an express trust of specific land for a specific purpose." See also *Mabo et al.* v. *State of Queensland*, (1988) 83 A.L.R. 14 (High Court of Australia) at 159 per Toohey J.: "To say that, where traditional title exists, it can be dealt with and effectively alienated or extinguished only by the Crown, but that it can be enjoyed only by the traditional owners, may be tantamount to saying that the legal interest in the traditional rights is in the Crown whereas the beneficial interest in the rights is in the indigenous owners. *In that case the kind of fiduciary obligation imposed on the Crown is that of a constructive trustee.*"

[2555] D.M.W. Waters, *Law of Trusts in Canada*, note 2549, *supra*, at 404: "...a fiduciary relationship gives rise to the placing of trust and confidence by the claimant in the fiduciary, it was said [by the courts], and Equity would impose express trust obligations upon the fiduciary who abused that trust and confidence. *The fiduciary therefore became, and was described as, a constructive trustee.*" [Emphasis added.] See also P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 82: "...a common ground for the imposition of a constructive trust, at least historically, has been fraud. But even here, *the majority of cases today involve the breach of some fiduciary duty*" [Emphasis added.]; and at 85: "...to the extent that English and Canadian courts have tended to apply strict, trust-like consequences to...breach [of fiduciary duties], this has inevitably led to the imposition of a constructive trust in analogous non-trust situations." At 617, the authors cite *Int'l Corona Resources Ltd.* v. *Lac Minerals Ltd.*, (1987), 44 D.L.R. (4th) 592 at 649 (Ont. C.A.), rev'd on the finding of a fiduciary relationship [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14: "...once it is established that a fiduciary relationship existed between the parties and that one party has obtained property for his or her *benefit and gain as a result of a breach of his or her fiduciary obligation to the detriment of the other party, then such fiduciary becomes a constructive trustee of the property* for the benefit of the other party and the other party is entitled to have the property by way of restitution *in specie* if the property is still available for transfer." [Emphasis added.]

[2556] *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 (S.C.C.), at 342.

[2557] P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 57-58 and 127.

[2558] Id. at 58.

[2559] It is also not clear whether the exception of a *bona fide* purchaser for value extends to the case of a lessee.

Generally, in any given situation concerning the Crown, in order for there to be a constructive trust it must be determined whether the Crown (or in some cases a third party) benefitted from an unjust enrichment. This study suggests that the Crown is in a position to wrongfully gain from purported land surrenders or extinguishments.

In *Peel* v. *A.G. Ontario*, McLachlin J. indicates that, to date, the cases have recognized two types of benefit:

> "The most common case involves the positive conferral of a benefit upon the defendant, for example the payment of money. But *a benefit may also be 'negative' in the sense that the benefit conferred upon the defendant is that he or she was spared an expense which he or she would have been required to undertake, i.e., the discharge of a legal liability.*"[2560] [Emphasis added.]

In regard to Aboriginal peoples, the Crown has in a number of instances affirmative constitutional obligations. This is especially evident in cases involving the 1870 *Rupert's Land and North-Western Territory Order.*[2561] As already indicated in this study,[2562] the terms and conditions attached to this Order provide for an affirmative duty on the part of the Canadian government to satisfy the territorial claims of Aboriginal peoples "in conformity with equitable principles"[2563] and to safeguard the Aboriginal peoples, "whose interests and well-being are involved in the transfer" of the two vast northern territories.[2564]

Even in cases concerning Aboriginal people, where substantial profits from a land transaction accrue to a third party, the Crown may often still benefit as well. For example, there are numerous provisions[2565] in the *Indian Act* that provide for a role of care and management by the federal Crown. Following the surrender or extinguishment of aboriginal title or rights to reserve lands, the federal Crown may be liberated from (a significant part at least of) its legal and adminstrative responsibilities in regard to the affected lands.[2566] From a government viewpoint, a diminution or off-loading of responsibilities would carry with it beneficial legal, political and financial consequences. Certainly, the less legal responsibilities the federal government has as a result of land surrenders or extinguishments, the less financial outlays it will incur on an ongoing basis in respect to such lands.

Similar benefits can accrue to the federal Crown in regard to land surrenders outside Indian reserves. In the case of surrenders or extinguishments of aboriginal title to lands in Aboriginal traditional territories, the federal government benefits financially and otherwise by

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[2560] *Peel* v. *A.G. Ontario*, (1992) 144 N.R. 1 (S.C.C.) at 25.

[2561] R.S.C. 1985, App. II, No. 9, confirmed as part of the Constitution of Canada in Item 3 of the Schedule to the *Constitution Act, 1982*.

[2562] See discussion under sub-heading 2.3 *supra*.

[2563] *Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada*, Schedule (A), R.S.C. 1985, App. II, No. 9, 8 at 8-9.

[2564] *Address*, Schedule (B), R.S.C. 1985, App. II, No. 9, 14 at 16.

[2565] See, for example, ss. 18-41 and 53-60 of the *Indian Act*, R.S.C. 1985, c. I-5, as amended. See P. Salembier, *How Many Sheep Make a Flock? An Analysis of the Surrender Provisions of the Indian Act*, [1992] 1 C.N.L.R. 14 at 30: "...Parliament has enacted sections 18 to 41 and 53 to 60 of the *Indian Act*...These constitute a fairly comprehensive property regime for the management and control of Indian lands."

[2566] See, for example, N. Rouland, *Les Inuit du Nouveau-Québec et la Convention de la Baie James* (Québec: Association Inuksiutiit & Centre d'études nordiques de l'Université Laval, 1978) at 169-170, where the author lists a number of significant advantages accruing to the federal government from satisfying Aboriginal claims through the James Bay and Northern Quebec Agreement. In this regard, the author refers to the reduction in federal economic responsibilities, including the transfer of some services to Québec, the elimination of existing duplication of services, the absence of new federal programs, among other aspects.

diminishing its ongoing role, jurisdiction and responsibilities.[2567] If the federal government violated its fiduciary responsibility or otherwise acted wrongfully in effecting such surrenders, then it can be said that the Crown has been unjustly enriched by these surrender transactions.

In addition, for most of Canada's history, agents of the Crown were for the most part representing non-Aboriginal settlers and taking steps to ensure their welfare and enrichment. In this sense, the enrichment of the settlers and the governments who represented them appeared almost synonymous. It must be remembered that until 1960 Indians[2568] did not even have the right to vote in Canada. Moreover, meaningful participation by Aboriginal peoples in Canada's political and other institutions is only currently beginning to be a reality.

In the case of the Crown in right of the province, it cannot be concluded that generally it should be exempt from the duty to make restitution to the Aboriginal people affected, in the event of wrongful conduct by the federal Crown. In the context of a constructive trust, the Crown in right of a province, even in the capacity as a third party, does not generally constitute a *bona fide* purchaser for value of lands subject to aboriginal title.

First, in cases of aboriginal land surrenders within the boundaries of a province, the province is said by the courts to gain beneficial title regardless of whether it has paid any valuable consideration.[2569] If in fact no consideration was given in return for such title, it cannot be said that the provincial Crown is a *bona fide* "purchaser for value" and would be outside the equitable defence that is provided in the case of constructive trusts.

Second, the Crown in right of a province generally has notice or is fully aware of the equitable right or interest of Aboriginal peoples in impending land transactions within provincial boundaries.[2570] This notice or awareness by the provincial Crown does not permit it to raise the equitable defence of a *bona fide* purchaser for value to a restitutionary claim by Aboriginal peoples.[2571]

Third, in many instances, it would not be accurate to describe the provincial Crown as a "third party" to the proposed surrender of aboriginal title. Although such surrender may from a legal viewpoint be made directly to the federal government, the provincial government often plays a significant role in the negotiation process.[2572] In such cases, the provincial Crown

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[2567] J. Woodward, *Native Law* (Toronto: Carswell, 1989), at 212: "Upon surrender [of title to aboriginal lands], both the Indian burden and the federal jurisdiction under s. 91(24) are suddenly lifted."

[2568] While it may be that Inuit were accorded the right to vote possibly in the 1930s, it would appear that, in practice, Inuit were often treated similarly to Indians in terms of having a fair opportunity to vote. Voting rights, in any event, did not ensure effective participation within the Canadian federation. In regard to Inuit, Metis and Indians, see generally R. Milen, "Aboriginal Constitutional and Electoral Reform" in R. Milen, (ed.), *Aboriginal Peoples and Electoral Reform in Canada* (Toronto: Dundurn Press, 1991), vol.9, (research program of the Royal Commission on Electoral Reform and Party Financing).

[2569] See *St. Catherine's Milling and Lumber Co.* v. *The Queen*, (1888), 14 A.C. 46 (P.C.); *A.G. Canada* v. *A.G. Ontario*; *A.G. Quebec* v. *A.G. Ontario*, [1897] A.C. 199 (P.C.); *Ont. Mining Co.* v. *Seybold*, [1903] A.C. 73 (P.C.); *Dom. of Can.* v. *Ontario*, [1910] A.C. 637 (P.C.); *Smith* v. *The Queen*, (1984) 147 D.L.R. (3d) 237 (S.C.C.).

[2570] Since 1891, the governments of Ontario and Canada have had an agreement pertaining to management and title of Indian reserves in Ontario. Under this arrangement, any land surrenders would require the concurrence of the government of Ontario. See S. Aronson, *The Authority of the Crown to Make Treaties With Indians*, [1993] 2 C.N.L.R. 1 at 12. The Ontario-Canada agreement was approved by legislation: see *An Act for the Settlement of Certain Questions Between the Governments of Canada and Ontario respecting Indian Lands*, S.O. 1891, c. 3; and, under the same title, S.C. 1891, c. 5. In regard to other provinces, a number of federal-provincial agreements exist that have generally ensured provincial input and accommodation of provincial concerns.

[2571] P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 57-58 and 127.

[2572] This appears to be especially true in regard to the federal land claims process. See J. Woodward, *Native Law* (Toronto: Carswell, 1989), at 212: "The federal government maintains the position that provincial governments should contribute to claims settlements in exchange for the certainty of title they receive through them. But since the federal government cannot force the provinces to pay, the result is that claims can only be settled if the provincial government becomes involved in the negotiations."

would also have a fiduciary duty to the Aboriginal peoples concerned[2573] and may also have engaged in wrongful conduct. Such conduct would not allow the provincial Crown to raise the equitable defence of a *bona fide* purchaser for value.[2574]

The above analysis has demonstrated that i) the Crown often is unjustly enriched in a surrender transaction; ii) the notion of a constructive trust should be imposed by the courts in instances of unjust enrichment; iii) under such circumstances, a restitutional remedy should be made available to Aboriginal peoples in a flexible manner, so as to redress past injustices and inequalities; and iv) the Crown in right of a province, as well as private third parties, should be made to provide restitution, unless they legitimately can raise the equitable defence of a *bona fide* purchaser for value.

In the 1983 decision by the Supreme Court of Canada in *Smith* v. *The Queen*[2575], it was held that aboriginal rights in property would be deemed to forever disappear upon surrender, even though the Crown in right of Canada violated its fiduciary responsibility in carrying out the land surrender. This far-reaching conclusion, which was reached by the Court without Aboriginal peoples being party to the litigation, is in the view of this study erroneously decided.[2576]

In particular, the ruling in *Smith* does not seem to be consistent with the Court's statement in *Canadian Pacific Ltd.* v. *Paul*,[2577] where the Supreme Court did not accept the interpretation that *St. Catherine's Milling* decided 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."[2578] Therefore, it is possible that the Supreme Court has subsequently changed the view it expressed in *Smith* that aboriginal rights, as personal and not proprietary rights, disappear upon surrender.[2579]

If the *Smith* view were to prevail, then it would not appear possible for Aboriginal peoples to avail themselves of a proprietary remedy in regard to previous surrenders.[2580] Restitution of the whole or a part of aboriginal lands would not be attainable through Canadian courts.[2581] Aboriginal peoples would be unfairly denied proprietary remedies, regardless of

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[2573] For a discussion of the fiduciary duties of provincial Crowns, see sub-heading 6.4.3 *supra*.

[2574] P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 57-58 and 127.

[2575] *Smith* v. *The Queen*, (1984) 147 D.L.R. (3d) 237 (S.C.C.).

[2576] The Supreme Court's ruling in the *Smith* case is examined in some detail under sub-heading 1.5.2.1 *supra*.

[2577] *Canadian Pacific Ltd.* v. *Paul*, [1988] 2 S.C.R. 654.

[2578] *Canadian Pacific Ltd.* v. *Paul*, [1988] 2 S.C.R. 654, at 677. This point is made in K. McNeil, *The High Cost of Accepting Benefits From the Crown: A Comment on the Temagami Indian Land Case*, [1992] 1 C.N.L.R. 40 at 59-60.

[2579] See *Mabo et al.* v. *State of Queensland*, (1988) 83 A.L.R. 14 (High Court of Australia) at 165, where Toohey J. applies the principle that possession of traditional lands by indigenous peoples is presumed to be a fee simple estate until shown otherwise. In this regard, Toohey J. provides: "In sum, English land law, in 1879 and now, conferred an estate in fee simple on a person in possession of land enforceable against all the world except a person with a better claim. Therefore, since the Meriam people became British subjects immediately upon annexation, they would seem to have then acquired an estate in fee simple...The question then arises - does the Crown have a better title?"

[2580] However, if a surrender were illegally obtained or did not conform to procedures required by law, then it would still be possible to restore the land concerned to Aboriginal people.

In the case of the James Bay and Northern Quebec Agreement, a further step was taken by Parliament to extinguish by legislation the aboriginal rights of the Crees and Inuit (as well as those of other Aboriginal peoples not party to the Agreement) and to legislatively declare that the Agreement was "approved, given effect to and declared valid". As discussed in this study, the constitutional validity of such legislation is subject to serious challenge.

[2581] In the event of a valid surrender, an "aboriginal" right in property would forever disappear, according to the *Smith* case. Yet, in a non-Aboriginal situation, according to *Int'l Corona Resources Ltd.* v. *Lac Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.) at 676 per Laforest J., a court could "create" a property right through imposition of a constructive trust: "...it is not in all cases that a pre-existing right of property will exist when a constructive trust is ordered. *The imposition of a constructive trust can both recognize and create a right of property.*" This disparity in treatment appears both arbitrary and

any injustice that may have occurred and despite the paramount importance of their lands to their identities, societies and future development.

In such a case, the only way to circumvent the judicial perspective of aboriginal rights in *Smith* would be through parliamentary action. Surrenders or extinguishments of aboriginal title that were wrongfully and illegally secured would have to be declared by federal legislation to have been wrongfully obtained and null and void from the beginning (*ab initio*).

If the *Smith* ruling were to retain any validity, it would suggest that Aboriginal peoples would be the only peoples in Canada who could not have proprietary rights or proprietary remedies (based on their own land tenure systems) recognized by the Canadian system of law. This would have far-reaching implications for both Aboriginal peoples and Canadian society at large. It would mean that the vulnerability of Aboriginal societies would be perpetuated. It would suggest that full and equal opportunities for justice would not be attainable, as compared to non-Aboriginal peoples in Canada. The equality guarantees enshrined in Canada's Constitution and in international human rights instruments would ring hollow. Under such circumstances, confidence in Canada's legal system and the rule of law would be seriously undermined.

In general terms, it is clear that restitutionary remedies available to Aboriginal peoples must be flexible and responsive to the stark realities and needs facing the peoples concerned. In numerous situations, restoring parties to their original positions (*restitutio in integrum*) may be neither possible nor desirable. Restitution should not be dependent on whether full restitution is always possible.[2582]

Under the law of restitution in Canada, it is quite possible that recissionary relief be denied for additional reasons. As P. Maddaugh & J. McCamus describe:

> "Relief will not be allowed if the impugned transaction has been *affirmed*, if there has been *laches*, or *undue delay in seeking relief*, or if *third party rights* have intervened. The precise application of these limitations may vary to some extent from one context to the next."[2583] [Emphasis added.]

However, as already described, the situations facing Aboriginal peoples are unlike those of other peoples in Canada. In view of the fundamental importance that an adequate land and resource base represents for Aboriginal peoples, it is critical that restitutional remedies not be limited to monetary compensation or damages. In virtually all cases of prior land and resource dispossessions, the Crown has been centrally involved. Consequently, in cases where restitution of traditional lands is no longer possible, legal remedies should be available whereby replacement lands and resources are equitably secured by Aboriginal peoples from the Crown for past wrongdoings.

The availability of such a range of proprietary remedies would be consistent with the rights of indigenous peoples recognized in the draft *U.N. Declaration on the Rights of Indigenous Peoples*:

> "Indigenous peoples have the *right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used*, and which have been confiscated, used or damaged without their free and informed consent. *Where this is not*

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discriminatory against Aboriginal peoples.

[2582] See P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 105: "The remedy of recission is an instrument of restitutionary relief in that it normally involves a restoration of the value of benefits conferred by each party. Indeed, it is commonly said that it is a condition of the availability of such relief that it is possible to effect a *restitutio in integrum* of both parties - there must be a restoration of the *status quo ante*." At 106, the authors suggest that courts have some discretion in determining a practical and just solution: "...this requirement is not strictly interpreted to require a precise restitution *in specie*. *Courts of equity possess broad powers to make any necessary allowances...in order to do what is 'practically just'*." [Emphasis added.]

[2583] P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 106-107.

> *possible*, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the people concerned, *compensation shall take the form of lands, territories and resources equal in quality, size and legal status.*"[2584] [Emphasis added.]

It is likely that in many instances, aggrieved parties may seek to retain existing treaties or other agreements, and seek to sever solely those offending provisions that were never validly agreed to in a free and informed manner. In other cases, perhaps more rarely, Aboriginal peoples might seek to void the treaties or agreements themselves. Canadian law must be capable of responding effectively to the full range of urgent situations facing Aboriginal peoples in Canada today.

In restoring aboriginal land and aboriginal land rights to Aboriginal peoples, there are diverse histories and circumstances to take into account. Some of the principal types of situations are discussed briefly below.

10.4.4 Aboriginal third parties and unilateral extinguishment

As already described in this study,[2585] one of the boldest examples of governments purportedly extinguishing the rights of Aboriginal third parties has occurred through federal legislation that approved the James Bay and Northern Quebec Agreement.

Reasons that justify full restitution of the rights of third parties include: i) there are most serious doubts about the constitutionality of the federal statutory provisions that purport to deny Aboriginal third parties to the Agreement their fundamental rights; ii) the actions taken were highly inconsistent with the federal and Québec governments' role as fiduciaries; iii) the unilateral actions taken were morally and legally reprehensible; iv) the actions were not consistent with the recognition and respect for human rights; v) in particular, it is discriminatory to treat Aboriginal third parties differently through unilateral denial and elimination of their fundamental rights; vi) the federal government has in effect recognized that such actions are ill-advised and unacceptable and currently requires, in regard to overlapping claims, that an agreement be reached between all interested parties.[2586]

In regard to Aboriginal third parties, the federal and Québec governments should unequivocally acknowledge that there is no legal or moral basis for having taken such unilateral action. Steps should be taken by Parliament to appropriately amend the legislation that purports to extinguish third party rights.

Responsibility for such action should be assumed by both the federal and Québec governments. They are the parties who actively sought to attain the extinguishment of the rights of Aboriginal third parties and collaborated to carry out such acts. Those Aboriginal peoples who have signed land claims agreements, in regard to the northern territory where third parties were unjustly affected, should be accorded assurances through appropriate legal measures that the rights and obligations they have negotiated in their favour will not be affected without full compensation.[2587]

[2584] Art. 27.

[2585] See discussion under sub-headings 7.1 & 7.1.1 *supra*.

[2586] All of these issues are discussed under sub-headings 7.1 & 7.1.1 *supra*.

[2587] For greater certainty, the term "compensation" includes land, resource and other rights, as well as redress in financial terms.

10.4.5 Aboriginal signatories to treaties

It is well established that treaties have been entered into between Aboriginal peoples and the Crown for centuries. The historic treaties include both pre-Confederation treaties[2588] and post-Confederation or numbered treaties[2589]. In addition, there are the so-called "modern"[2590] treaties by way of land claims agreements.

Both in the case of historic treaties and "modern" treaties, there continue to exist a wide range of concerns that challenge the validity or legitimacy of purported surrenders and extinguishments. In reference to the historic and contemporary treaties, there are serious constitutional and human rights questions as to the validity of extinguishment - especially in those instances where the government alleges there has been blanket extinguishment of the rights of Aboriginal peoples.

Regardless of whether the Aboriginal parties have had access to legal counsel, the Aboriginal parties have been and continue to be in a position of unequal bargaining power. This has resulted in non-Aboriginal governments maintaining adversarial rules and principles based on a mentality of domination, assimilation and colonization. In most instances, to say the least, it would be difficult to conclude that the Crown acted in the manner required of a fiduciary.

The questionable policies and practices of extinguishment that have occurred, as well as their ongoing impacts on Aboriginal peoples, call for imaginative and effective measures of restitution or redress. For this essential purpose, this study has proposed both a conceptual framework and specific elements for an alternative to extinguishment. A principal objective of these proposals is to establish a legal and political context in Canada where the aboriginal rights of all Aboriginal peoples are not only recognized and affirmed but able to flourish.

In relation to both the historic and contemporary treaties, there remains a determination on the part of Aboriginal peoples that their aboriginal rights and land tenure systems not be eliminated through purported extinguishments. If a new relationship between Aboriginal peoples and non-Aboriginal governments is to be attained, if genuine reconciliation is to be achieved in Canada, and if healing is to take place in Aboriginal communities - then, a uniform policy must be adopted based on recognition and affirmation of aboriginal rights. In this context, government policies of extinguishment must not only be repudiated but previous purported extinguishments be redressed.

Under the following sub-headings, additional reasons are highlighted as to why it is imperative to recognize the aboriginal rights of those peoples who have signed treaties and redress purported surrenders or extinguishments.

[2588] See, for example, B. Wildsmith, "Pre-Confederation Treaties" in B. Morse, (ed.), *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (Ottawa: Carleton University Press, 1985) 122.

[2589] N. Zlotkin, "Post-Confederation Treaties" in B. Morse, (ed.), *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (Ottawa: Carleton University Press, 1985) 272.

[2590] The term "modern" is a somewhat ironic description of land claims treaties. The colonial relic of extinguishment remains an integral part of federal claims policy in Canada and a pre-requisite for entering into such land claims agreements.

10.4.5.1 Historic treaties

"...the reports of the Treaty Commissioners make it very clear that the Cree people resisted some of their ideas, and that they did not want to sign an agreement that did not protect their rights. They signed [Treaty No. 5] because they were promised a better future. When my people later read the treaty, it did not say what we had been promised. It did not represent what we understood were the commitments made to my people at treaty time."[2591]

Ovide Mercredi, National Chief, 1993

"There is room for doubt as to whether the written terms of the numbered treaties accurately express the Indian understanding of their terms, and whether there was fully informed consent to the apparent extinguishment of rights".[2592]

P. Hogg, 1992

For decades, Aboriginal peoples have strongly disputed government claims that they agreed to surrender or extinguish their aboriginal rights and titles through their treaties.[2593]

[2591] O. Mercredi & M.E. Turpel, *In The Rapids [:] Navigating the Future of First Nations* (Toronto: Viking, 1993) at 73.

[2592] P. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1992), vol. 1, at 27-21, n. 109. See also ***Re Paulette***, (1973), 42 D.L.R. (3d) 8 (N.W.T.S.C.).

[2593] See, for example, J.J. Borrows, *A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government*, (1992) 30 Osgoode Hall L.J. 291, where the author discusses duress (at 323,326), undue influence (326), and lack of consent (322) in regard to Treaty No. 72 with the Chippewas. See also *R. v. Batisse*, (1978) 9 C.N.L.C. 429 (Ont. Dist. Ct.): "When Treaty No. 9 was negotiated, the parties to the Agreement were on grossly unequal footings...As a result, approximately 90,000 square miles of resource-rich land was acquired by the Crown, free of any beneficial Indian interest, for an absurdly low consideration (even for that time). *It is still not clear whether Indian treaties are to be considered basically as private contracts or as international agreements. If the former, then the very validity of this treaty might very well be questioned on the basis of undue influence as well as on other grounds.*" [Emphasis added.]

Further, in regard to Treaties 8 and 11, see R. Fumoleau, *As Long as This Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939* (Toronto: McClelland & Stewart, 1973), at 19: "The Indian people did know that they could not stop the white people from moving into their territory, and *in their minds the treaties primarily guaranteed their freedom to continue their traditional lifestyle and to exchange mutual assistance and friendship with the newcomers.* By Treaties 8 and 11, the Canadian Government intended to extinguish the Indian title to the immense Athabaska-Mackenzie District. The Indian people intended to sign friendship treaties...*In spite of the hands clapsed in agreement as depicted on the treaty medal, it is very probable that the two parties neither understood each other nor agreed on what the treaty meant.*" [Emphasis added.]

Legal counsel for the federal government has also raised doubts as to the validity of government practices in regard to treaties. See W. Binnie, *The Sparrow Doctrine: Beginning of the End or the End of the Beginning?*, (1990) 15 Queen's L.J. 217 at 231: "...it is still an open question whether many of the 'extinguishment treaties' will stand up to judicial scrutiny. In some instances treaties may be vulnerable on the basis of *sharp practice* alleged against Crown negotiators. In other cases *absence of consent* is alleged or *non-fulfillment of treaty promises.*" [Emphasis added.]

Governments, on the other hand, have sought to diminish the significance of treaty-making and the status of Aboriginal peoples in this historical process.

Yet, as this study suggests, there is strong evidence that Aboriginal peoples did not consent to the massive surrenders or blanket extinguishments often alleged to be contained in the so-called "land cession provisions" in many of their treaties. At the time of the historic treaties, Indian tribes were seeking security, friendship and often assistance as waves of white settlers threatened to displace Aboriginal peoples, take up their lands, and otherwise undermine the integrity of Aboriginal peoples' societies and nations. In this setting, it would be most difficult to conclude that the First Nations concerned agreed to surrender to the Crown their territories, lands and resources.[2594]

It is less than surprising that land-cession clauses found their way in the historic treaties. First, it was always the government that put in written form the understandings that had been reached in treaty negotiations. Second, governments often exploited the fact that Indian nations were facing difficult times and were often fighting for their very survival at the time of the treaties. Third, the degree of literacy among Aboriginal peoples at that time and their understanding of the English language and Euro-Canadian legal systems were highly limited to say the least. In other words, in regard to land cessions, there appears to be no real meeting of the minds.

Further, the treaty negotiations were often tainted by government representations or actions amounting to duress, misrepresentation, undue influence, fraud or other elements that give grounds for vitiating specific terms (if not the whole) of the treaties concerned. The result of all of these practices has been to virtually confine Indian nations in southern Canada to reserves without an adequate land and resource base to support their development.[2595] This outcome is precisely the opposite of the commitments and requirements included in favour of Aboriginal peoples in the *Royal Proclamation of 1763* and in the various treaty negotiations themselves.

This situation of inequality and injustice may have motivated Madame Justice Wilson of the Supreme Court of Canada to make the following declaration in *R.* v. *Horseman:*

> "*These treaties were the product of negotiation between very different cultures and the language used in them probably does not reflect, and should not be expected to reflect, with total accuracy each party's understanding of their effect at the time they were entered into.* This is why the courts must be *especially sensitive* to the broader historical context in order to ensure that they reach a proper understanding of the meaning that particular treaties held for their signatories at the time."[2596] [Emphasis added.]

[2594] See, for example, B. Slattery, *Understanding Aboriginal Rights*, (1987) 66 Can. Bar Rev. 727 at 734, n. 27: "The written texts of [the historic] treaties must be read with a critical eye. Usually, they were accompanied by extensive oral exchanges, which may have constituted the true agreement. The written version was translated orally to the Indians in a process that allowed ample opportunity for misunderstanding and distortion"; and D. Gormley, *Aboriginal Rights as Natural Rights*, (1984) 4 Can. J. Native Studies 29 at 41: "Some descriptions of treaty signings suggest that the encouragement of fear or ignorance sometimes played a large role in obtaining the surrender of lands. *The mere existence of a treaty does not conclusively establish that aboriginal title is no longer an issue within a given territory.*" [Emphasis added.]

See also D. Delâge, *Epidemics, Colonization, Alliances: Natives and Europeans in the Seventeenth and Eighteenth Centuries*, Draft report submitted to the Royal Commission on Aboriginal Peoples, August 18, 1994, at 24: "In retrospect, can we assert that the Natives surrendered their land irrevocably with these treaties? The answer is no..."

[2595] In regard to the importance of restoring the land and resource bases of Aboriginal peoples, see, for example, Liberal Party of Canada, *The Aboriginal Peoples of Canada [:] Summary* (Ottawa: Liberal Party of Canada, September 1993) at 10: "The restoration of a land and resource base sufficient to sustain Aboriginal societies, through the equitable resolution of land claims, is the key to the future and long-term cultural and economic success of self-government. *The dispossession of their traditional territories is one of the root causes of the contemporary social and economic ills and inequities that exist amongst Aboriginal peoples in Canada.*" [Emphasis added.] An appropriate policy of restoration of such land and resource bases must be made accessible to Indian nations who have signed historic treaties.

[2596] *Horseman* v. *The Queen*, [1990] 1 S.C.R. 901 at 907 per Wilson J. dissenting.

Recently, it would appear that governments may be beginning to acknowledge the problems and unfairness in seeking to maintain that vast surrenders or extinguishments validly took place through the historic treaties. In this regard, the Report of the British Columbia Claims Task Force provides:

> "The existence of [the 'Douglas Treaties' and Treaty 8] should not exclude First Nations from the negotiation process. *Not only are there questions concerning the making of these treaties, their interpretation and their implementation*, but more importantly, the new relationship will encompass a wider range of issues than do these treaties."[2597] [Emphasis added.]

In the view of this study, it is imperative that the historic treaties be accorded their proper significance and status. These living instruments for cooperation, friendship and trust should rightfully be viewed as agreements for sharing - not dispossession, and for mutual respect - not duplicity.[2598] Equally important, historic treaties should be celebrated, maintained and, where desired by the Indian nation concerned, updated, in conformance with the spirituality, sacredness and solemnity in which they were made. Resititution in regard to the aboriginal rights of the First Nations involved would constitute a major step in this regard.

10.4.5.2 Land claims agreements[2599]

> "...extinguishment is the root cause of many of the problems and imbalances found in the resulting [land claims] agreements. Its tentacles stretch into all areas of peoples' lives and it is a long, painful climb back into any position of authority or power."[2600]
>
> L. Brooke, 1994

> *"[Les ententes sur les revendications territoriales] ne peuvent...avoir un...caractère de permanence, elles ne peuvent avoir un caractère de finalité que si elles sont justes*. Les ententes qui auraient pour effet de donner à certain groupes Indiens ou Inuit le sentiment qu'ils ont été repoussés ou laissés de côté n'auraient

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[2597] *Report of the British Columbia Claims Task Force*, note 2386, *supra*, at 48.

[2598] See, for example, A. Lajoie & P. Verville, *Treaties of Alliance Between the French and the First Nations Under the French Regime*, Draft report submitted to the Royal Commission on Aboriginal Peoples, August 31, 1994 (translation of French original version), at 50-51, where it is concluded: "...the Amerindians, while considering themselves masters of the land, were not its 'its jealous possessors'. *According to their culture, they were offering hospitality* to those who wished to settle thereon, provided the settlors did not attempt to transform their lifestyle through coercive means, in short *to the degree that common occupation was compatible*..." [Emphasis added.]

At 50, Lajoie & Verville cite C. Jaenen, *The French relationship with the Amerindians*, paper presented at IV Convegno Internazionale dell'Associazione Italiana di Studi Canadesi, Universita di Messina, Messina, March 25-28, 1981, at 20: "They made grants without any thought of alienating their lands, but with the idea simply of extending the rights and privileges to others which they themselves enjoyed on ancestral lands given them by the Great Spirit."

[2599] Generally, in regard to the development of equitable land claims processes in Canada, see *Special Issue on Land Claims Reform*, [1995] 2 Indian Claims Commission Proceedings.

[2600] L. Brooke, *Experiences of the Inuit of Nunavik (northern Québec) with Wildlife Managment and the James Bay and Northern Québec Agreement (1975-1993)*, Report prepared for the Royal Commission on Aboriginal Peoples, January 1994, at 34.

> pas, dans notre esprit, un caractère vraiment permanent. Il y aurait constamment une épine au flanc qui pourrait aboutir à la remise en question, après cinq ans, dix ans, ou après un quart de siècle, des ententes conclues..."[2601] [Emphasis added.]
>
> J.-Y. Morin, PQ member of the National Assembly, 1975

It is worth reflecting on the above words of J.-Y Morin. For Aboriginal peoples to have their rights extinguished through land claims agreements, as this study shows, generates feelings of being subordinated, pushed away or left aside. If through these agreements, non-Aboriginal governments opt for extinguishment rather than recognition and affirmation of aboriginal rights, then there is in effect little or no respect being shown for Aboriginal peoples' identity and their profound relationship with their lands.

Since the inception of the first federal comprehensive claims policy in 1973, it is also worth noting that all agreements signed to date have been in northern areas of Canada subject to the *Rupert's Land and North-Western Territory Order*.

The first "modern" land claims agreement was the James Bay and Northern Quebec Agreement in 1975. This Agreement and the related Northeastern Quebec Agreement, signed with the Naskapis of Québec in 1978, were the only comprehensive land claims agreements entered into by Canada, prior to the recognition and affirmation of aboriginal rights in Canada's Constitution in 1982.

The James Bay and Northern Quebec Agreement came about primarily as a result of the James Bay hydroelectric project (Le Complexe La Grande),[2602] which Premier Bourassa had sought to impose in Cree and Inuit territory in 1971.[2603] As the Case Study on the James Bay and Northern Quebec Agreement suggests, the threat of the hydro project and the initiation of the construction that was going to flood significant portions of their lands, among other factors, put the Crees in a position of duress.[2604] Under the circumstances, the Cree leaders felt that they had no choice but to negotiate a settlement even if the governments insisted on the surrender and extinguishment of their rights in and to the land.

Even prior to the recognition and affirmation of aboriginal rights in the *Constitution Act, 1982*, the *Rupert's Land and North-Western Territory Order* obliged the Canadian government to protect Aboriginal peoples whose rights and interests were affected by the transfer of these territories to Canada. In addition, Aboriginal peoples' claims were to be satisfied in accordance with equitable principles. These constitutional obligations were even more onerous, when one

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[2601] Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 5, 1975, No. 174, at B-5940 (J.Y. Morin, member of National Assembly Standing Committee). Unofficial English translation: "*[Land claims agreements can only...have a...character of permanence, they can only have a character of finality if they are fair.* Agreements that would have the effect of giving certain Indian and Inuit groups the feeling of being pushed away or left aside would not have, in our view, a true permanent character. There would constantly be a thorn in the side which could succeed to put into question, after five years, ten years, or after a quarter of a century, concluded agreements..." [Emphasis added.]

[2602] Société d'énergie de la Baie James, *The La Grande Rivière Hydroelectric Complex: Phase One Development* (Montréal: SEBJ, 1988). For a technical description of the Complexe La Grande, see "Description Technique - Le Complexe La Grande (1975)" which is reproduced in Schedule 1, c. 8 of the James Bay and Northern Quebec Agreement.

[2603] See R. Bourassa, *Power From the North* (Scarborough: Prentice-Hall, 1985); B. Richardson, *Strangers Devour the Land* (Vancouver: Douglas & McIntyre, 1991).

[2604] See Case Study in Part II of this study, sub-heading 11.5 *infra*.

also takes into account the fiduciary duties of the Crown.[2605] In view of these constitutional duties, there are serious doubts as to the validity of the surrender and extinguishment clauses pertaining to the James Bay and Northern Quebec Agreement.

Even after governments in Canada were obliged to recognize and affirm aboriginal rights according to s. 35(1) of the *Constitution Act, 1982*, the federal government has continued to insist as a pre-condition that Aboriginal peoples "agree" to surrender or extinguish their land rights in order to reach agreement on land claims. Therefore, the constitutionality of government actions pertaining to these purported surrenders or extinguishments in land claims agreements signed subsequent to 1982[2606] may also be challenged on the basis of the *Rupert's Land and North-Western Territory Order*. In addition, the constitutionality of the federal government's policy of "insistence" on surrender or extinguishment may be disputed on the basis of s. 35(1) of the *Constitution Act, 1982*[2607] and specific guarantees under the *Canadian Charter of Rights and Freedoms*.[2608]

Aside from the need for non-Aboriginal governments to respect their existing constitutional and fiduciary obligations, it is important to ensure effective restitution of aboriginal rights in contemporary treaties for many of the other reasons outlined throughout this study. Aboriginal rights are repeatedly declared by Aboriginal peoples to be of critical and ongoing importance to them. Also, the adverse impacts that result from extinguishment only increase the vulnerability of Aboriginal peoples and undermine the integrity of their societies.[2609] In addition, there are essential human rights considerations.[2610] Finally, as treaties, land claims agreements must be based on notions of cooperation, sharing, friendship, and trust.[2611]

[2605] All of these constitutional considerations are discussed in relation to the James Bay and Northern Quebec Agreement under sub-headings 7.1 & 7.1.1 *supra*. See also sub-heading 3.3 *supra* for an analysis of the Aboriginal provisions in connection with the *Rupert's Land and North-Western Territory Order*.

[2606] Comprehensive land claims agreements entered into after the coming into force of s. 35(1) of the *Constitution Act, 1982* include those in the Yukon and N.W.T. The first land claims agreement to be signed after 1982 was in the Northwest Territories. The *Inuvialuit Final Agreement* was entered into on June 5, 1984 and approved by the *Western Arctic (Inuvialuit) Claims Settlement Act*, S.C. 1984, c. 24.

In the Yukon, a number of Yukon First Nations have signed separate land claims agreements, in accordance with the *Umbrella Final Agreement [:] Council for Yukon Indians* (Ottawa: Minister of Supply and Services, 1993). Agreement between the Council of Yukon Indians, Government of Canada, and Government of the Yukon, signed May 29, 1993.

In the N.W.T., see *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada* (Ottawa: Indian and Northern Affairs Canada, 1993). Signed on May 25, 1993. The Nunavut Agreement was approved by the *Nunavut Land Claims Agreement Act*, S.C. 1993, c. 29. See also *Sahtu Dene and Metis Comprehensive Claims Agreement* (Ottawa, 1993); *Gwich'in Comprehensive Land Claim Agreement* (Ottawa: Minister of Supply and Services, 1992). Agreement between Her Majesty the Queen in right of Canada and the Gwich'in as represented by the Gwich'in Tribal Council, signed April 22, 1992.

A draft land claims agreement that did not reach finalization, primarily as a result of Aboriginal objections to surrender and extinguishment, is the *Comprehensive Land Claim Agreement Between Canada and the Dene Nation and the Metis Association of the Northwest Territories*. The Agreement was initialled in Ottawa, Ontario, April 9, 1990, by the chief negotiators of Government and the Dene/Metis signifying their intent to recommend the agreement for ratification in accordance with the provisions of Chapter 37, following completion of land selection, chapters 32, 33, and 34, and the implementation plan, and subject to any amendments arising out of the implementation plan. This agreement has never been signed and, according to the government, will not be re-negotiated.

[2607] Acknowledgement that the federal government's policy of insistence on extinguishment of rights may not be constitutional is at least implied in Liberal Party of Canada, *The Aboriginal Peoples of Canada [:] Summary* (Ottawa: Liberal Party of Canada, September 1993) at 12: "In order to be consistent with the Canadian Constitution which now 'recognizes and affirms' Aboriginal and treaty rights, a Liberal government will not require *blanket* extinguishment for claims based on Aboriginal title." [Emphasis added.]

[2608] See discussion of these issues in notes 34 and 1309 *supra*.

[2609] In regard to the integrity of Aboriginal societies, see discussion under sub-heading 8.2.4 *supra*.

[2610] See generally sub-headings 8.2 & 8.3 *supra*.

[2611] See discussion under the previous sub-heading.

As G. Erasmus highlights, there remain seriously divergent visions[2612] and objectives in regard to modern day treaties between Aboriginal peoples and the Crown:

> "One of the little tricks that the federal government has learned in modern day treaties is that they put right in the fine print that our inherent rights are gone. So *the vision of Canada continuing to come forth from the federal government is one of extinguishment.* One representing all kinds of negatives. In contrast, the visions of the indigenous people are based on caring, recognition, affirmation, two sovereignties, two sources of responsibility, and a proper sharing of the land base."[2613] [Emphasis added.]

If a new relationship between Aboriginal peoples and the Crown is to be developed and maintained through contemporary treaties, then the axis of that relationship must no longer be founded on the extinguishment of rights of the Aboriginal peoples concerned.[2614]

10.4.6 Aboriginal peoples and supersession by law[2615]

In the 1993 federal claims policy, the measuring stick is still to reject "claims" if it is deemed by the government that unilateral extinguishments in the past were technically legal. Although the government is undertaking a review of claims rejected on the basis of supersession by law, the principal or sole criterion being used for such review appears to be "clear and plain intention":

> "This decision [in *Sparrow* by the Supreme Court of Canada] established a test for the unilateral ending of Aboriginal rights by lawful means. *In order to establish that such lawful elimination has occurred, it must be demonstrated that the Crown exercised a clear and plain intention to do so.* In response to the court's guidance, the federal government has undertaken a review of claims which have been rejected on the basis of supersession by law to determine if the *Sparrow* test leads to different conclusions concerning acceptability."[2616] [Emphasis added.]

It would appear to run counter to the objective of establishing a new and equitable relationship, or a new partnership, between Aboriginal peoples and the Crown, for the federal government to insist that technically lawful dispossessions concerning Aboriginal land rights will not be redressed. In any event, constitutional and legal authority would have to be plainly demonstrated, in addition to the test of "clear and plain intention" in *Sparrow*, before the government can reach any conclusions in regard to a power to extinguish by Parliament.[2617]

[2612] See also R. Mainville, *Visions divergentes sur la compréhension de la Convention de la Baie James et du Nord québécois*, (1993) 23 Recherches amérindiennes au Québec 69 at 76: "...la vision différente qu'on les autochtones et les gouvernements de la Convention de la Baie James et du Nord québécois est elle-même l'une des principales sources de conflits." Unofficial English translation: "...the different vision of the Aboriginal peoples and the governments of the James Bay and Northern Quebec Agreement is itself one of the principal sources of conflict."

[2613] G. Erasmus, "Towards a National Agenda" in M. Cassidy, (ed.), *Aboriginal Self-Determination* (B.C./Montreal: Oolichan Books/Institute for Research on Public Policy, 1991) 171 at 176.

[2614] See also Royal Commission on Aboriginal Peoples, *Treaty-Making in the Spirit of Co-Existence: An Alternative to Extinguishment in Comprehensive Land Claims Agreements* (Ottawa: Minister of Supply and Services, 1995).

[2615] For a discussion of "supersession by law", see also sub-heading 5.6 *supra*.

[2616] Indian and Northern Affairs Canada, *Federal Policy for the Settlement of Native Claims*, note 2378, *supra*, at 6.

[2617] See also discussion under sub-heading 5.6 *supra*.

As this study has described,[2618] it is far from clear that the Crown or Parliament had the capacity to unilaterally extinguish Aboriginal rights at different periods of Canada's history, or alternatively whether in each particular case it was undertaken in a lawful manner.[2619] In this regard, the capacity of the Crown or Parliament is rendered even more doubtful, if one takes into account their respective fiduciary duty to Aboriginal peoples. Moreover, the burden of proving lawful extinguishment rests with the Crown.

In addition, technical capacity to extinguish (if so proved in a given case) does not address such central questions as whether this action led to land dispossession, grave injustice, or a violation of human rights. Consistent with current and emerging international human rights standards,[2620] as well as the recent principles enunciated in *Mabo* v. *State of Queensland*,[2621] extinguishments based on technical grounds that result in injustice and dispossession should not be countenanced.

A case in point is the Mikmaq in the Atlantic provinces. While the history of their relations with the French and the British is complex,[2622] it should be underlined that the pre-confederation treaties that were signed are viewed by the Mikmaq and some commentators to be international treaties.[2623] In any event, these treaties of peace did not include any so-called "land cession" provisions.[2624] Further, it is said that "simple acknowledgement of British sovereignty in the treaties could not be held to extinguish native title, for British sovereignty is assumed in all discussions of the recognition of native rights by English law."[2625] Consequently, it is particularly unjust to suggest that the territorial rights of the Mikmaq are presently extinguished based on supersession by law.

Based on the above, it is the recommendation of this study that the federal government unequivocally renounce and eliminate its policy of denying aboriginal land and resource claims based on "supersession by law". Such an action would be consistent with its fiduciary obligations, as well as with applicable constitutional, human rights and other legal considerations.

[2618] See generally discussion under heading 6 *supra*.

[2619] For analysis as to why supersession by law was not a constitutionally valid means of extinguishing Aboriginal rights, see B. Clark, *Native Liberty, Crown Sovereignty [:] The Existing Aboriginal Right to Self-Government in Canada*, note 2533, *supra*, especially at 149-150, 159-166.

[2620] See, generally, sub-heading 8.2 *supra*.

[2621] *Mabo* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia). For example, Brennan J. provides at 19: "[N]o case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights..." At 95, Deane and Gaudron JJ. add that longstanding legal propositions, if associated with dispossession and injustice, are precluded from acquiring legitimacy.

[2622] See, generally, L.F.S. Upton, *Micmacs and Colonists [:] Indian-White Relations in the Maritimes, 1713-1867* (Vancouver: University of British Columbia Press, 1979); D. Paul, *We Were Not the Savages [:] A Micmac Perspective on the Collision of European and Aboriginal Civilization* (Halifax: Nimbus Publishing Co., 1993).

[2623] S. Grammond, *Les traités entre l'État canadien et les peuples autochtones* (Cowansville, Québec: Les Éditions Yvon Blais, 1994), at 179, where the international nature of the Treaty of 1752 (signed at Halifax) is highlighted; P. Cumming & N. Mickenberg, (eds.), *Native Rights in Canada* (Toronto: Indian-Eskimo Association of Canada, 1972), at 97, where it is indicated that the French reinforced the view of Mikmaq that they were an independent people and not subjects of Britain.

See, generally, J. Henderson, "The Status of Indian Treaties in International Law" in Proceedings of the 1993 Conference of the Canadian Council on International Law, *Aboriginal Rights and International Law* (Ottawa: Canadian Council on International Law, 1992) 126. Cf. *Simon* v. *The Queen*, [1985] 2 S.C.R. 387 (S.C.C.) at 404, where Dickson C.J. indicated: "While it may be helpful in some instances to analogize the principles of international treaty law to Indian treaties, these principles are not determinative."

[2624] See R. Boivin, *Le droit des autochtones sur le territoire québécois et les effets du régime français*, (1995) 55 R. du B. 135 at 160, where it is indicated that the French did not use treaties of peace and alliance with Aboriginal peoples to seek any cession of territorial rights. Boivin adds that the French did not intend to cede any rights but their own to the British under the Treaty of Utrecht (1713), and that this was the view that the French communicated to the Mikmaq.

[2625] P. Cumming & N. Mickenberg, (eds.), *Native Rights in Canada*, note 2623, *supra*, at 98.

Moreover, it would enable a uniform federal policy to be implemented, in regard to the recognition and affirmation of aboriginal rights.

Consistent with the above recommendation, is the following declaration in the British Columbia Task Force Report:

> "Urban areas now cover parts of the traditional territories of some First Nations. *Sometimes referred as 'superseded by law', this must not bar those First Nations from the negotiations*. To do so would be contrary to the spirit and intent of these recommendations [of the Task Force]."[2626] [Emphasis added.]

[2626] ***Report of the British Columbia Claims Task Force***, note 2386, *supra*, at 48.

CONCLUSIONS AND RECOMMENDATIONS

General

1. Extinguishment of the rights of Aboriginal peoples is a subject of growing interest and concern throughout Canada. Virtually all Aboriginal peoples in Canada, whether they be Indian, Inuit or Métis, are or have been affected by the question of extinguishment of their fundamental status or rights. Even those who have not signed historic or "modern" treaties, are still being confronted today by government policies of extinguishment.

2. Historically, extinguishment has been inextricably tied to large-scale dispossessions of Aboriginal lands and resources. Yet, the impacts of extinguishment have also been profoundly felt in regard to issues concerning Aboriginal status. Generally, when Aboriginal status is devalued or denied, there is a corresponding diminution or denial of basic rights.

3. There is a growing contingent of voices - both Aboriginal and non-Aboriginal - that are questioning the legitimacy of extinguishment policies and practices. In addition, the ongoing legacy of extinguishment in terms of the wide-ranging impacts on Aboriginal societies simply cannot be ignored.

4. Aboriginal peoples remain firmly opposed to the very notion of extinguishment of their rights. Regardless of what "legal" theories they are confronted with, or what rationales are put forward to justify the position that their aboriginal rights and titles are or should be eliminated, there continues to be an innate and persistent resistance by Aboriginal peoples themselves to such an alien concept.

5. From the perspective of Aboriginal peoples, their inherent identity with the land and their spirituality, as manifested by their aboriginal title and rights, is not subject to alienation or eradication. Rather, there is a growing determination that no law or agreement could legitimately procure this result.

6. In response to the mounting outcries and objections to the elimination of Aboriginal peoples' fundamental rights, various parliamentary committees or government-appointed task forces have studied the question of extinguishment. They have repeatedly concluded that Canada's extinguishment practices cannot be endorsed and must be reformed.[2627]

7. The formulation of beneficial and practical alternatives to extinguishment is a challenging endeavour, since the extinguishment of aboriginal rights has had significant judicial acceptance.[2628]

[2627] In regard to extinguishment, the findings of the various committees and task forces are described briefly in the Introduction, *supra*, of this study.

[2628] See, for example, majority opinions in *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.).

8. However, it has been judicially concluded in 1992 that "no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights..."[2629] Longstanding legal propositions, if associated with dispossession and injustice, are precluded from acquiring legitimacy.[2630] Moreover, there is a judicial duty to re-examine such propositions regardless of the years of prior acceptance.[2631]

9. Generally, this study concludes that from a constitutional, human rights, legal and equitable viewpoint, there are serious and extensive doubts concerning the validity of past and present extinguishments. These extinguishments are an undesirable relic of colonialism and impede the establishment of positive, durable Crown-Aboriginal relationships in Canada.

10. Government policies and practices of extinguishment should be unequivocally repudiated and abandoned. Moreover, the ongoing legacies and impacts of extinguishment should be effectively redressed.

Double standards concerning extinguishment

11. In the *non-Aboriginal* context, there is no particular doctrine of "extinguishment" in Canada. Nor is there any discernable government policy or practice to extinguish the status or rights of citizens. For the most part, extinguishment of rights conforms to the intentions of the private parties involved in what are simply commercial or personal transactions.

12. However, in relation to Aboriginal peoples, notions of "extinguishment" have developed through Canadian government policies and practices. This has occurred in a historical, legal and political context where Aboriginal peoples have been largely dispossessed of their traditional or historical lands and resources.

13. The application of notions of extinguishment has substantially different and more far-reaching impacts on Aboriginal peoples and their *collective* rights than such notions might have in a traditional property law context addressing non-Aboriginal people's *individual* rights. Yet, the implications of such important differences have never been fairly taken into account by government.

14. Federal land claims policies that *insist* on extinguishment of fundamental land rights of Aboriginal peoples (as a pre-condition to reaching agreements) unfairly target these peoples through policies or actions that are not imposed on non-Aboriginal peoples in Canada. These policies exploit the vulnerable position of Aboriginal peoples and the urgent need to reach agreements concerning their land and resource rights.

[2629] *Mabo et al.* v. *State of Queensland*, (1992) 107 A.L.R. 1 (High Court of Australia), at 19, per Brennan J.

[2630] Id., at 95, per Deane and Gaudron JJ.

[2631] Id., at 82-83, per Deane and Gaudron JJ. Although the court was referring specifically to *terra nullius* and not extinguishment, the general principle enunciated is applicable to a variety of circumstances.

15. Further, this insistence on extinguishment in federal claims policies appears to be in violation of Canada's Constitution and run counter to the notion of free and informed consent.[2632]

16. Aboriginal rights, as collective and individual *human rights*,[2633] are the only human rights in Canada that are targetted for extinguishment. While national or international human rights may in some cases be subjected to certain limits and override, there is no evidence that human rights *per se* are or may be subjected to policies of outright *destruction* or *extinguishment*.[2634]

17. Canadian government extinguishment policies do not seek to "purchase" the aboriginal title to lands and resources of Aboriginal peoples. Instead, federal land claims policies largely take the approach of insisting on cessions of aboriginal title, while at the same time refusing to concede the existence of such title or any rights associated with it.

18. This questionable approach in federal land claims policies is not consistent with what is required by the Royal Proclamation.[2635] Nor would the wholesale purchase of aboriginal lands and resources conform to the intention of the Proclamation, if Aboriginal peoples were left without an adequate land base and vulnerable as a result.

19. In regard to leases concerning Indian reserve lands, excessive, mandatory use of surrenders under the *Indian Act* is difficult to justify, discriminatory, and subject to legal challenge.[2636] No other people in Canada are compelled to confer leases or other interests (less than full alienation of title) through the mechanism of surrender.

20. In view of the experience with surrenders to date, the surrender mechanism under the *Indian Act* is fraught with potential problems and is not in the best interests of the Indian people concerned.[2637] Nor is the use of such a mechanism either appropriate for all purposes or consistent with the federal fiduciary role. It is therefore recommended that Parliament eliminate the discriminatory and harmful practice of obtaining surrenders when leasing Indian land.

Safeguards in the *Royal Proclamation of 1763* in regard to land and extinguishment matters

21. Federal claims policies purport to act in accordance with the Royal Proclamation of 1763. However, the evidence would suggest an opposite conclusion. In particular, "blanket"[2638] extinguishments of aboriginal rights, purportedly carried out as an

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2632 See discussion under note 34 *supra*.

2633 For a discussion of aboriginal rights as human rights, see sub-heading 8.2.1.3 *supra*.

2634 See discussion under sub-heading 8.2.1.5.

2635 The *Royal Proclamation of 1763* is discussed under heading 2 *supra*.

2636 See discussion under sub-heading 1.3 *supra*.

2637 See discussion under sub-heading 1.3 *supra*.

2638 "Blanket" extinguishment refers to the complete elimination or destruction of the rights of an Aboriginal people in or to their lands.

integral part of contemporary federal land claims policies and in many historic treaties, run directly counter to the very purpose of protecting Aboriginal land rights under the Royal Proclamation.[2639]

22. The notion of "extinguishment" of aboriginal rights is said to find its roots in British policy as reflected in the *Royal Proclamation of 1763*. Yet, the term "extinguishment" is not explicitly used in the Proclamation. Moreover, to our knowledge, no other Imperial legislation employed this term.

23. The Royal Proclamation refers to "cessions" or "purchases", but such actions appear to be explicitly circumscribed in an overall context of confirming and safeguarding the rights and interests of Aboriginal peoples. Under the Proclamation, cessions or purchases are not intended to result in land dispossessions that substantially undermine Aboriginal interests or increase the vulnerabilty of the Aboriginal peoples concerned.

24. Cessions or purchases referred to in the Proclamation are to be protected from "great Frauds and Abuses"[2640] by only permitting alienations by Aboriginal peoples to or via the Crown. As an additional safeguard, lands have to be purchased at a public meeting or assembly of the Aboriginal people affected that is to be held for that purpose.

25. Cessions or purchases are not to be forced upon Aboriginal peoples, but are to take place on a consensual basis if the peoples concerned are "inclined to dispose"[2641] of some of their lands. The Proclamation does not require cessions or purchases to take place, in order for colonial or Dominion governments to recognize the land rights of Aboriginal peoples consistent with the Proclamation.

26. The *Royal Proclamation of 1763* continues to have the force of a statute in Canada.[2642] According to this study, the Proclamation is and always has been a constitutional instrument that is a part of the "Constitution of Canada".[2643] This means that, in regard to Aboriginal peoples, governments in Canada have been constitutionally obliged to act in accordance with the Proclamation's terms.

27. By seeking wholesale extinguishment of aboriginal title when addressing Aboriginal land claims and ensuring widespread dispossession of Aboriginal peoples, the government of Canada has failed to conform to the terms of the Royal Proclamation. To date, the Supreme Court of Canada has not pronounced, with any degree of adequacy, upon the status, content and scope of the Royal Proclamation. This has allowed non-Aboriginal governments in Canada to interpret the Proclamation so as to have minimal legal consequences.

[2639] See discussion under heading 2 *supra*.

[2640] See Aboriginal provisions in the Royal Proclamation.

[2641] Id.

[2642] Although some portions of the Royal Proclamation have been effectively replaced by other constitutional instruments, the Aboriginal provisions in the Proclamation continue to be in force in Canada.

[2643] The "Constitution of Canada" is defined under s. 52 of the *Constitution Act, 1982*. For a discussion of the constitutional status of the Royal Proclamation, see sub-heading 2.5 *supra*.

28. If the appropriate judicial rules of interpretation[2644] were applied to the Royal Proclamation, these rules would confirm: i) the intention in the Proclamation to recognize the wide-ranging rights of Aboriginal peoples in the different regions of Canada; ii) the protective nature of the overall regime in the Proclamation applicable to Aboriginal peoples; iii) the fiduciary nature of the Crown's obligations to Aboriginal peoples in Canada; iv) in particular, the limitations on any purchase or cession of Aboriginal lands, so as to ensure that such transactions are in the best interests of the people concerned; and v) the principle of Aboriginal consent underlying any obtention by the Crown of Aboriginal lands and resources.

Significance of the *Rupert's Land and North-Western Territory Order*, 1870 to the question of extinguishment of rights

29. The *Rupert's Land and North-Western Territory Order* provides for the transfer to Canada of the vast territories, known as Rupert's Land and the North-Western Territory. The *Order* was made by the Imperial government on terms and conditions of a constitutional nature, including those contained in two Addresses of the Canadian Parliament in 1867 and 1869.[2645]

30. The *Order*'s terms and conditions include obligations of the Canadian government and Parliament to settle Aboriginal claims "in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines"; to generally "make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer"; and to dispose of Aboriginal claims "in communication with the Imperial Government". In addition, in the carrying out of the *Order*'s terms and conditions by the Canadian Governor in Council, it is stipulated that "the necessary directions" will be given by one of Her Majesty's principal Secretaries of State.

31. In regard to Aboriginal peoples, the constitutional obligations connected with the *Rupert's Land and North-Western Territory Order* continue to be applicable and in effect in Canada. Yet, too often, these important provisions are ignored or underestimated by governments and courts in Canada. This disregard for the rule of law acts to the severe detriment of the Aboriginal peoples concerned.

32. Regardless of whether the *Royal Proclamation of 1763* initially applied to or excluded Rupert's Land and the North-Western Territory,[2646] the constitutional obligations in the *Order* required the Canadian government to adhere to the same equitable principles or standards in the vast northern and western areas of Canada and provide protection to the Aboriginal peoples concerned. In this way, the *Order* served to affirm that, in relation to Aboriginal peoples, a uniform regime of constitutional recognition and protection was

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[2644] Judicial rules of interpretation require that "ambiguities in the interpretation of treaties and *statutes* relating to Indians...be resolved in favour of the Indians..." [Emphasis added.]: *Mitchell* v. *Peguis Indian Band*, [1990] 2 S.C.R. 85, at 98 (per Dickson C.J.), affirming *Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29. In view of the broad constitutional powers included in the royal prerogative at the time of the Royal Proclamation, the Proclamation is judicially considered to have the force of a statute in Canada: see *R.* v. *Lady McMaster*, [1926] Ex. C.R. 68-73. In addition, the doctrine of progressive interpretation, used to interpret constitutional instruments, would also require a broad and liberal construction of the Proclamation.

[2645] See discussion under sub-heading 2.3 *supra*.

[2646] It is a conclusion of this study that significant portions of the Royal Proclamation apply to Rupert's Land: see discussion under sub-headings 2.1 & 2.3 *supra*.

contemplated for all regions of Canada.

Legislated extinguishments and their consequences

33. In relation to the *James Bay and Northern Quebec Agreement* (1975) and the *Inuvialuit Final Agreement* (1984), the Parliament of Canada purported to extinguish the rights of the Aboriginal peoples concerned by legislation that approved these agreements. These legislated extinguishments were unnecessarily carried out, in addition to the surrender provisions included in the two land claims agreements.

34. Legislated extinguishments, if valid, are intended to deny Aboriginal peoples any legal recourse in challenging the validity of the land claims agreements concerned. Therefore, should there be any fundamental or serious defects in obtaining purported surrenders of rights, Aboriginal peoples (whether or not they have signed the land claims agreement) would be denied an effective legal remedy in relation to their rights.

35. In the case of the *James Bay and Northern Quebec Agreement*, a legislated extinguishment was purportedly used to unilaterally extinguish the rights in and to land of Aboriginal third parties both in and outside Quebec.[2647] The extinguishment was effected by legislation, so as to deny these peoples the legal capacity to challenge the Agreement and safeguard their fundamental rights. Such actions run directly counter to the Crown's fiduciary and other obligations to protect Aboriginal peoples under the *Rupert's Land and North-Western Territory Order*, 1870 and the equitable principles in the *Royal Proclamation of 1763*.[2648]

36. Unilateral extinguishment of the rights of Aboriginal third parties constitutes a most serious violation of the collective and individual human rights of the Aboriginal peoples concerned.[2649] In particular, such legislative measures appear to contravene the *Universal Declaration of Human Rights* that provides for the right to an effective legal remedy for violations of fundamental rights.[2650]

37. Any purported extinguishment of rights is a most serious matter for Aboriginal peoples. In particular, those Aboriginal peoples who have been subjected to *legislated* extinguishments of their land rights in the past should have access to appropriate remedies. They should not currently be denied appropriate redress, simply because the land claims agreements that affect them were entered into at an earlier point in time.

[2647] See discussion under sub-headings 1.4 & 7 *supra* and heading 11 *infra*.

[2648] See discussion under sub-headings 1.4 & 7 *supra*.

[2649] Id. Human rights violations arising from unilateral extinguishment would likely include: right to liberty and security of person; right to equality before the law and equal protection under the law, without discrimination; right in full equality to fair and public hearing by an independent and impartial tribunal, in the determination of one's rights and obligations; right to own and enjoy property; right not to be arbitrarily deprived of one's property; right not to be deprived of one's means of subsistence; right to enjoyment of culture.

[2650] See art. 8 of the *Universal Declaration of Human Rights*.

De facto extinguishment through government policies and practices

38. The extinguishment of aboriginal rights is not always pursued by government through legislation or other measures *in law*. In many instances, governments have simply acted in a *de facto* manner to suggest that such rights do not exist and need not be taken into account.

39. A particularly prejudicial practice by non-Aboriginal governments has been the litigation of key issues pertaining to aboriginal rights, without the Aboriginal peoples affected being direct parties to these court cases. It is outrageous that, in the case of Aboriginal peoples, landmark cases have determined their fundamental rights in their absence. This practice by governments has enabled both the status and rights of Aboriginal peoples to be unjustly devalued and diminished.

40. From at least the time of the *St. Catherine's Milling*[2651] case in 1887 to the *Star Chrome Mining*[2652] case in 1921 to the *Smith*[2653] case in 1984, Canadian governments have at times litigated critical aboriginal issues in the absence of any Aboriginal parties. This practice has contributed to a common law jurisprudence on aboriginal rights that may be seriously questioned.[2654]

41. In addition to issues of discrimination, it is not in keeping with the Crown's fiduciary duty to engage in litigation in the absence of interested Aboriginal parties. This situation is further exacerbated when the Crown does not put forward the legal arguments most favourable to the Aboriginal principals concerned. In addition, it is against the rules of natural justice[2655] to effectively deny, through *ex parte* litigation, the right of Aboriginal peoples to be heard.

42. Further, between 1927 and 1951, the Canadian government ensured that it would be the judge in its own cause in matters that related to the aboriginal rights of "Indians". When Aboriginal peoples pressed for the resolution of their land rights, the Canadian Parliament decided to make it a criminal offence for an "Indian" to raise funds or retain a lawyer for the advancement and prosecution of land claims (among other matters).[2656] Deprived of any effective legal recourse over a period of several decades, Aboriginal peoples had little choice but to suffer in many instances what amounted to land dispossession or *de facto* extinguishment of their land rights.

43. In view of this history of repression, discrimination and exclusion, the notion of aboriginal title should be reconsidered by both governments and courts in Canada. To

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[2651] *St. Catherine's Milling and Lumber Co.* v. *The Queen*, (1887) 13 S.C.R. 577 (S.C.C.); (1888) 14 A.C. 46 (P.C.). In the United States, Aboriginal peoples were also not parties to the litigation in such early landmark cases as *Fletcher* v. *Peck*, (1810) 6 Cranch 87, and *Johnson* v. *M'Intosh*, (1823) 21 U.S. (8 Wheat.) 543.

[2652] *A.G. Quebec* v. *A.G. Canada*, [1921] 1 A.C. 401 (P.C.).

[2653] *Smith* v. *The Queen*, (1984) 147 D.L.R. (3d) 237 (S.C.C.).

[2654] For example, there continues to be a failure to unequivocally recognize that aboriginal title includes "real" property rights (not simply "personal" rights), in addition to self-government or jurisdictional dimensions. See discussion under sub-heading 1.5.2.1 *supra*.

[2655] R. Dussault and L. Borgeat, *Administrative Law [:] A Treatise*, 2nd ed. (Toronto: Carswell, 1985), vol. 4, at 245: "The concept [of natural justice] was first afforded legal protection in England by the *Magna Carta*" in 1215.

[2656] See discussion under sub-heading 1.5.2 *supra*.

avoid unjust extinguishments and devaluations of rights, aboriginal rights need to be accorded their full and proper recognition, consistent with the principle of equal rights and self-determination of peoples and other contemporary, positive standards. In this context, any practices contributing to *de facto* extinguishments or devaluations of aboriginal rights should be expressly repudiated.

Government extinguishment policies and the Metis

44. There appears to exist ongoing uncertainty as to whether the term "Indians", as used in constitutional instruments in Canada, includes the Metis. An increasing number of Canadian jurists take the view that the term "Indians" in s. 91(24) of the *Constitution Act, 1867* includes the Metis.[2657] It is the view of this study that such a conclusion is correct not only in the case of s. 91(24), but also in relation to the *Royal Proclamation of 1763*, the *Rupert's Land and North-Western Territory Order*, and the *Natural Resources Transfer Agreements* of 1930.[2658]

45. Government extinguishment policies have been applied to the Metis in ways that are quite different from "Indians" and Inuit. Until 1977[2659], it would appear that the only Canadian legislative provisions expressly contemplating (though not actually legislating) "extinguishment" of "Indian title" were found in the *Manitoba Act, 1870* and the *Dominion Lands Acts* in regard to the Metis.

46. In implementing the "Half-Breed" or Metis provisions in the *Manitoba Act, 1870*, a number of federal and Manitoba acts and orders in council were adopted that are of questionable constitutionality.[2660] The dubious constitutionality of these instruments, or their individual provisions, raises serious questions about the validity of any extinguishment of Metis title to land in the original province of Manitoba.

47. Outside the original province of Manitoba, it would appear that the *Dominion Lands Act* (while useful for other purposes) was not necessary for the specific purpose of empowering the federal government and cabinet to settle the land rights of the Metis.[2661] The legislative and executive powers to protect Aboriginal peoples and settle their land rights in conformity with "equitable principles" were conferred upon the federal government in 1870, through the *Rupert's Land and North-Western Territories Order*. The Canadian government had a constitutional duty to settle the claims of Aboriginal peoples "upon the transference of the territories in question".

[2657] See discussion under sub-heading 3.1 *supra*.

[2658] It is worth noting that s. 35(2) of the *Constitution Act, 1982* defines "aboriginal peoples of Canada" as specifically including the Metis. Therefore, in the context of s. 35 it is not critical that Metis be included in the term "Indians" as used in subsection (2).

[2659] In addition to the surrender provisions in the James Bay and Northern Quebec Agreement, the extinguishment of rights, titles, etc. was explicitly provided in the *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32, s. 3(3).

[2660] See discussion under sub-heading 3.2 *supra*.

[2661] See discussion under sub-heading 3.3 *supra*.

48. In addition, the exemption provision[2662] under the *Dominion Lands Act* in effect required the federal government to settle the land rights of Aboriginal peoples, *prior* to issuing land grants to any persons. However, the exemption provision in favour of all Aboriginal peoples concerned was not applied equally or fairly. Priority was systematically accorded by the federal government to entering into treaties with the Indians over settling the land rights of the Metis. In any event, the exemption provision was not fully respected in relation to both Metis and Indians, since valid surrenders were not obtained from all the Aboriginal peoples concerned prior to issuing land grants to settlers under the Act.

49. Further, by refusing to even begin hearings on Half-Breed claims until treaties with Indians were negotiated and signed, unnecessary delays were incurred. Also, by not settling the co-existing land rights of Metis at the same time as Indians, the Metis were prejudiced generally in terms of land selection. However, in view of the inappropriate scrip regime used by the federal government to deal with Metis land claims, the Metis ended up landless in any event.[2663]

50. With virtually no beneficial results to justify the ongoing implementation of the scrip system, the Canadian government continued to use scrip, over a number of decades, as a basis to purportedly extinguish Metis land rights in both original Manitoba and the vast North-West. By 1923, the Canadian Parliament had amended the *Dominion Lands Act* to substitute cash for land grants. This was no solution to the problems with scrip.

51. In view of the existing constitutional rights and obligations, it cannot be said that the scrip system validly extinguished the "Indian title" of the Metis.[2664] Nor can it be said that the free and informed consent of Metis to the extinguishment of their aboriginal rights was obtained under the scrip regime.[2665]

Contending sovereignties

52. It is often assumed that the history of sovereignty in Canada may be described, in successive periods, in terms of the acquisition of French, then British and finally Canadian sovereignty. The sovereignty of Aboriginal peoples, if recognized at all, is presumed by some observers to be a vanished fragment of our early history.

53. At the time of European exploration and settlement, it is clear that Aboriginal Nations were regarded as independent peoples, or at least treated as such by European nations. This has been recognized by the Supreme Court of Canada, as well as a wide range of legal commentators.[2666]

[2662] See *Dominion Lands Act*, S.C. 1872, c. 23, s. 42: "*None of the provisions of this Act* respecting the settlement of Agricultural lands, or the lease of Timber lands, or the purchase and sale of Mineral lands, *shall be held to apply to territory the Indian title to which shall not at the time have been extinguished.*" [Emphasis added.] In 1883, this provision became a blanket exemption from all provisions of the Act.

[2663] See discussion under sub-heading 3.3.2 *supra*.

[2664] In relation to the use of scrip to satisfy and extinguish Metis claims, see discussion under sub-heading 3.3.2 *supra*.

[2665] See discussion under sub-heading 3.4 *supra*.

[2666] See discussion under sub-heading 4.6 *supra*.

54. Moreover, it is most difficult to dismiss the fact that the sovereignty of Aboriginal peoples persists. Though often repressed or subjected to discriminatory and colonial policies,[2667] Aboriginal sovereignty must still be accounted for both in the Canadian constitutional and international context.

55. The unique history and sovereignty of Aboriginal peoples is being increasingly acknowledged. There is no clear indication that Aboriginal sovereignty has been extinguished or otherwise relinquished. Yet, there continues to exist a lack of understanding in these respects and legal thinking has not kept pace in accommodating and providing answers to such fundamental questions.

56. In the context of sovereignty, it is critical to consider the significance of treaties between Aboriginal peoples and the Crown from the perspective and understanding of the peoples concerned.[2668] At most, Aboriginal peoples viewed treaties as "compacts" to share sovereignty and not to cede it. Clearly, the exercise of their treaty-making capacity by Aboriginal peoples is an indication of their inherent sovereignty and not its relinquishment.

57. It cannot be said that any failure of Great Britain and Canada to treat Aboriginal peoples, as a matter of practice, as inherently self-governing would constitute a loss of Aboriginal sovereignty. In other words, a denial of *de facto* sovereignty is not automatically a loss of *de jure* sovereignty. As the Royal Commission on Aboriginal Peoples has indicated, Aboriginal peoples have not relinquished their right of self-government and this right is constitutionally protected under the *Constitution Act, 1982*.[2669] Moreover, the practice of Great Britain, as reflected in the *Royal Proclamation of 1763*, is in the view of this study, to recognize and protect the liberty and autonomy of Aboriginal peoples in their territories.

58. In assessing notions of British or Canadian sovereignty, it is increasingly being recognized that there exist "*contending sovereignties*" in Canada that include Aboriginal peoples. The notion of contending sovereignties is a necessary and positive dynamic in a federal state. It reflects the natural tensions that exist among the constituent entities of federalism, in order to maintain a balance of powers. Recognition of Aboriginal sovereignty does not signify non-recognition of Canadian sovereignty, but it does reinforce the point that parliamentary sovereignty is a *relative* element in a federal state.

59. Within the Canadian constitutional context, it is not clear that federal and provincial legislatures had the capacity to extinguish aboriginal sovereign status or rights. In this regard, the retention of certain constitutional powers by the British Parliament, the requirements of the *Royal Proclamation of 1763* and other constitutional instruments, the existence of Aboriginal sovereignty and the inherent right to self-government of

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[2667] Since the assimilation of indigenous peoples has been repudiated, discrimination clearly prohibited, and colonialism severely denounced, non-Aboriginal government practices based on these policies can hardly have legitimacy. As a result, these practices cannot be viewed as eliminating in a legal sense the sovereign status of Aboriginal peoples. See discussion under sub-heading 4.6.2 *supra*.

[2668] Treaties must be construed liberally "in the sense in which they would naturally be understood by the Indians": see *Jones* v. *Meehan*, 175 U.S. 1 (1899), affirmed in *Nowegijick* v. *The Queen*, [1983] 1 S.C.R. 29, at 36. See also *Simon* v. *The Queen*, [1985] 2 S.C.R. 387, at 402 (per Dickson C.J.).

[2669] Royal Commission on Aboriginal Peoples, *Partners in Confederation[:] Aboriginal Peoples, Self-Government, and the Constitution*, note 2376, *supra*, at 35-36: "By entrenching Aboriginal and treaty rights in the Constitution, section 35(1) ensured that the right of self-government would henceforth enjoy a substantial degree of immunity from federal and provincial legislation, except where the legislation could be justified under a strict constitutional standard."

Aboriginal peoples, all served to substantially limit the powers of non-Aboriginal governments. As indicated in this study, many of these limitations on the Canadian Parliament or the Crown still exist today.

60. If "contending sovereignties" (federal/provincial/Aboriginal) do exist in Canada,[2670] then the capacity of non-Aboriginal governments to extinguish aboriginal rights based on the principle of parliamentary sovereignty must be revisited. Further, in formulating alternative strategies to extinguishment of aboriginal status and rights, the appropriate recognition of Aboriginal sovereignty should be an important element in the overall conceptual framework.

Use of extinguishment in the Québec secession debate

61. Purported extinguishment and surrender clauses pertaining to the *James Bay and Northern Quebec Agreement* and related legislation are being invoked by some separatist politicians and commentators in Québec as a reason for denying Aboriginal peoples the same right of self-determination they claim for *le peuple Québécois*.[2671] Such arguments have no justification. They are wholly erroneous, are an abuse of the treaty-making process, and demonstrate a lack of respect for the solemn commitments made between Aboriginal peoples and non-Aboriginal governments.

62. The *James Bay and Northern Quebec Agreement* was clearly negotiated in a federalist context, which was agreed to continue indefinitely by all parties. In particular, the government and National Assembly of Quebec gave their explicit consent to this ongoing federal arrangement.

63. Treaties are to be interpreted so as not to bring dishonour to the Crown and "no appearance of sharp dealing should be sanctioned" by the courts.[2672] Presently, it cannot be argued that the purported surrender and extinguishment provisions relating to the *James Bay and Northern Québec Agreement* were intended and understood by the Aboriginal peoples concerned to apply to a secessionist context, even though the Agreement was negotiated and treaty rights subsequently guaranteed[2673] in a clearly federalist framework. Such a distorted interpretation would best be described as "sharp dealing" and would bring dishonour upon the Crown.

64. In the view of the United Nations Working Group on Indigenous Populations as well as a growing number of jurists, Aboriginal peoples have the right of self-determination which must be recognized without discrimination. Arguments based on "surrender and extinguishment" clauses in land claims agreements are not relevant in determining the international right of Aboriginal peoples to self-determination.

[2670] This is one of the principal conclusions of this study.

[2671] See discussion under sub-heading 4.6.3 *supra*. It is important to note that, according to most jurists, Quebecers cannot rely on the right to self-determination in order to claim any right to secede from Canada.

[2672] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1107 per Dickson C.J.; see also *R.* v. *Taylor* and *Williams*, (1981), 34 O.R. (2d) 360 (C.A.); *R.* v. *Batisse*, (1977), 19 O.R. (2d) 145 (Ont. Dist. Ct.); ; *R.* v. *White* and *Bob*, (1965), 52 D.L.R. (2d) 481 (S.C.C.), affirming 52 W.W.R. 193 (per Norris J.A.); *R.* v. *George*, [1966] S.C.R. 267 (Cartwright J. dissenting).

[2673] Treaty rights were subsequently guaranteed in the *Constitution Act, 1982*, s. 35(1).

65. The effects of a denial of exercise of the right to self-determination by Aboriginal peoples in the context of Québec secession would have far-reaching consequences for those directly affected.[2674] Specific issues such as any referendum on accession of Québec to sovereignty and critical boundary questions are likely to have tremendous implications for Aboriginal peoples.

66. In light of the significance of the right of self-determination, particularly in a secession scenario, the resulting discrimination against Aboriginal peoples would likely be far-ranging, severe and ongoing.[2675] The prohibition against racial discrimination is not only a constitutional standard in Canada, but a peremptory international norm. The outlawing of racial discrimination gives rise to obligations incumbent upon all states and these obligations are owed to the international community as a whole.

67. Arguments of extinguished aboriginal rights do not provide Québec separatists or others with any colour of right to deny Aboriginal peoples their fundamental right to self-determination. The self-determination of Québeckers in a secessionist or other context cannot be based on a denial of the same right for Aboriginal peoples. The secession debate in Québec illustrates how extinguishment clauses can be abused. In this way, it provides further reason to eliminate prejudicial policies and practices that purport to extinguish the rights of Aboriginal peoples.

Doctrines or theories of dispossession linked to extinguishment

68. Under English and Canadian law, theories of dispossession evolved based on the "act of state" doctrine[2676] and other questionable rationales such as the "recognition doctrine",[2677] *terra nullius*,[2678] or that indigenous peoples were either too primitive,[2679] aliens, or heathens and infidels.[2680] In many instances, the doctrines or theories on which the diminution or denial of Aboriginal peoples' status and rights were founded were of doubtful validity and are now viewed as anachronistic, discriminatory or otherwise unsupportable.

69. In regard to "act of state", it would appear that this doctrine is inapplicable as a defence to and as a means of denial of the assertion by Aboriginal peoples of their aboriginal rights. At the time of acquisition of British sovereignty in the various regions of what are now Canada, there were no express seizures of Aboriginal lands or territories. Once British sovereignty was established, English law precluded any and all application of the act of state doctrine against British subjects within the British realm.[2681]

[2674] See discussion under sub-heading 4.6.3 *supra*.

[2675] These impacts are briefly described under sub-heading 4.6.3 *supra*.

[2676] See discussion under sub-heading 5.1 *supra*.

[2677] See discussion under sub-heading 5.2 *supra*.

[2678] See discussion under sub-heading 5.3 *supra*.

[2679] See discussion under sub-heading 5.4 *supra*.

[2680] See discussion under sub-heading 5.5 *supra*.

[2681] See discussion under sub-heading 5.1 *supra*.

70. In addition, during the various periods of acquisition of British sovereignty in North America, the relations between Aboriginal nations and the British Crown or its representatives were not such as to suggest that there was, "as a matter of policy"[2682] an intention on the part of the British to dispossess Aboriginal peoples of their status or rights. Should non-Aboriginal governments seek to invoke act of state arguments in this regard, the courts have indicated that strong evidence would be required to prove the existence of actual acts of state, in order to oust the jurisdiction of the courts in such matters.

71. To date, the act of state doctrine has been invoked to deny the sovereignty of Aboriginal peoples under English and Canadian law.[2683] However, acts of state require unambiguous acts. While it is fair to state that the assertion of British sovereignty was unambiguous vis-a-vis France and other European nations, it cannot be concluded that British actions or intentions at that time were in any way similar in regard to the Aboriginal peoples concerned. Rather, it is said that there were "divergent streams of state practice, one inter-European, the other European-Aboriginal".[2684]

72. Moreover, the pre-existing rights of Aboriginal peoples cannot be neatly separated from their jurisdictional aspects. In reality, aboriginal rights embrace both collective and individual rights dimensions and include rights to self-government and self-regulation. What are ordinarily "private" or "public" rights distinctions under English law are profoundly intertwined in the concept of aboriginal rights. In such an intersocietal context, it would be inequitable and circular to rely on doctrines or theories emanating from solely one of the competing legal systems involved.

73. To suggest that the pre-existing rights of Aboriginal peoples survived the assertion of British sovereignty in North America insofar as their property rights are concerned, but not in regard to jurisdictional aspects, would make little sense from an Aboriginal perspective. Nor is there sufficiently strong evidence of such a drastic outcome. As suggested in this study,[2685] there are contending sovereignties of Aboriginal and non-Aboriginal governments that require accommodation and respect within Canada's constitutional framework.

74. In regard to primitivism, this theory of dispossession is no longer accepted by Canadian (or Australian) courts. Yet, judicial attitudes or approaches still prevail in Canada that serve to incorporate notions of primitivism in the analysis of aboriginal rights. Two principal cases that illustrate in varying degrees this continuing tendency are *Hamlet of Baker Lake* v. *Minister of Indian Affairs*[2686] and *Delgamuukw* v. *British Columbia*.[2687] The result of such analyses appears to in effect "freeze" the types of land and resource uses that may be included in the legal interpretation of aboriginal rights.

[2682] See definition of "act of state" under sub-heading 5.1 *supra*.

[2683] See discussion under sub-heading 5.1.1 *supra*.

[2684] B. Slattery, *Aboriginal Sovereignty and Imperial Claims*, (1991) 29 Osgoode Hall L.J. 681 at 689.

[2685] See generally discussion under heading 4 *supra*.

[2686] *Hamlet of Baker Lake* v. *Minister of Indian Affairs*, (1979) 107 D.L.R. (3d) 513 (Fed. Ct. T.D.).

[2687] *Delgamuukw* v. *British Columbia*, [1993] 5 W.W.R. 97 (B.C.C.A.). For a critical view of the "primitivism" focus in *Delgamuukw* by the trial judge at first instance, see R. Ridington, "Fieldwork in Courtroom 33: A Witness to *Delgamuukw*" in F. Cassidy, (ed.), *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville, B.C.: Oolichan Books, 1992) 206.

75. In particular, judicial decisions are unfairly freezing the content of aboriginal rights to include solely those traditional activities exercised prior to the assertion of sovereignty. While traditional land uses may be enjoyed in a contemporary manner, Aboriginal peoples are being told by the courts that their aboriginal rights do not include any land use they may choose at their discretion.[2688]

76. With respect, such judicial approaches are conspicuously Eurocentric and impose standards to determine the content of aboriginal rights that are not applied to the land rights of non-Aboriginal people. The land-related "activities" of Aboriginal peoples at any point in their respective histories simply reflect the needs, priorities and circumstances that existed at such time. Further, if only traditional uses of the land are recognized as being included in the legal concept of aboriginal rights, then it is likely that the concept itself (as defined by the courts) could be unjustly headed for extinction as Aboriginal peoples alter their uses of their territories.

77. In regard to the doctrines of dispossession examined in this study, it generally can be concluded that they show almost total disregard for Aboriginal perspectives and understandings or historical fact. Instead, they depend on one-sided and Eurocentric views that virtually ignore the welfare of Aboriginal peoples and their cultures and societies. Some of these theories do have validity under certain non-Aboriginal circumstances. However, they are inappropriate to apply to or impose on Aboriginal peoples.

78. It is submitted that there is a duty on the part of the courts to reassess the common law, where necessary, so as to repudiate such doctrines in the Aboriginal context. If the rule of law is to be respected, the common law must conform to universal standards of equality and non-discrimination, dignity, and other human rights. Moreover, since these theories cannot justify past dispossessions, they reinforce the view that appropriate measures should be taken, in conjunction with the Aboriginal peoples affected, to ensure adequate restitution or redress for past and ongoing injustices.[2689]

Constitutional or legal capacity to extinguish aboriginal rights

79. There are abundant statements in both jurisprudence and doctrine that refer to the capacity of Parliament or the Crown to extinguish aboriginal rights.[2690] However, too often, statements on the capacity to extinguish aboriginal or treaty rights fail to substantiate on what bases this conclusion was reached. In many other instances, constitutional and other limitations do not appear to be fully taken into account.

80. Extinguishment of aboriginal rights cannot be assumed, nor be deemed to have been effected, on a casual basis. In addition, the onus of proving extinguishment of aboriginal or treaty rights is generally on the party claiming such extinguishment. Therefore, should there be any doubts as to capacity of a "government", "Parliament" or "Crown" to extinguish aboriginal rights in a specific period of Canada's history, it cannot be

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[2688] See discussion under sub-heading 5.4 *supra*.

[2689] In regard to the isssue of restitution, see generally sub-heading 10.4 *infra*.

[2690] See discussion under heading 6 *supra*.

concluded that the criterion of "strict proof"[2691] has been met.[2692]

81. Basic factors or aspects that are not properly taken into account when considering the capacity of Parliament or the Crown to extinguish aboriginal rights include: i) constitutional and legal requirements emanating from the *Royal Proclamation of 1763* and other constitutional instruments; ii) contending sovereignties of Aboriginal peoples; iii) human rights characterizations of aboriginal rights; and iv) requirements of the Crown and Parliament to act in a manner consistent with their constitutional and other legal responsibilities of a fiduciary nature.

82. At different periods of Canada's history, it is clear that the Crown in right of Canada did not have equivalent powers to the Crown in right of the United Kingdom. In addition, the executive did not have the same powers as the legislative branch of government. Consequently, in considering extinguishment questions, it is critical to be clear as to which Crown is being referred to, as well as whether reference is being made to the executive or legislative branch.

83. Generally, the Crown prerogative cannot be validly used to unilaterally extinguish aboriginal title to land. In regard to the pre-Confederation treaties and "numbered" treaties, no extinguishment of rights could have taken place by order-in-council in the absence of consent of the Aboriginal peoples affected. As indicated in this study, it is highly questionable that free and informed consent was actually obtained from Aboriginal peoples in the case of the historic treaties.

84. Prerogative powers must be exercised by the Crown in conformity with the *Canadian Charter of Rights and Freedoms* and other constitutional norms. This would also mean that the exercise of prerogative powers could not derogate from the fiduciary relationship of the Crown that is constitutionally entrenched in s. 35(1) of the *Constitution Act, 1982*, as well as in the *Royal Proclamation*[2693] and other constitutional instruments.[2694]

85. In addition, the Crown cannot extinguish aboriginal title to lands by simply granting such lands to third parties. Since aboriginal rights do not exist merely at the pleasure of the Crown, no such grants are possible. At common law, a Crown grant of land burdened by aboriginal title will not extinguish it, but will take effect subject to the title or else be void.[2695]

86. If there exists any legislative jurisdiction, on the part of non-Aboriginal governments, to address the questions of surrender and extinguishment of aboriginal rights on the lands of Aboriginal peoples, that jurisdiction is exclusively federal under s. 91(24) of the

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[2691] *Simon* v. *The Queen*, [1985] 2 S.C.R. 387 (S.C.C.) at 405-406; *A.G. Quebec* v. *Sioui*, [1990] 1 S.C.R. 1025 (S.C.C.) at 1061.

[2692] Of course, "capacity" is not sufficient in itself to prove extinguishment, since the Supreme Court of Canada has indicated that "clear and plain intention" is also required: *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1099 per Dickson C.J.

[2693] If the Royal Proclamation of 1763 is a constitutional instrument (as this study contends), then the fiduciary relationship of the Crown in regard to Aboriginal peoples would be a constitutional norm reflected in the Proclamation that the Crown was and continues to be bound to observe since 1763.

[2694] An important example is the fiduciary relationship and resulting constitutional obligations under the *Rupert's Land and North-Western Territory Order*, 1870.

[2695] See discussion under sub-heading 6.2.1 *supra*.

Constitution Act, 1867.[2696] This legislative jurisdiction is not unfettered, but is constrained by such constitutional instruments as the *Royal Proclamation of 1763* and the *Rupert's Land and North-Western Territory Order*, 1870.

87. In addition, if full and fair consideration is given to the fact that the sovereignty of Aboriginal peoples continues to exist, then it cannot be assumed that another order of government in Canada (i.e. federal) has the power to unilaterally extinguish the rights and jurisdiction of Aboriginal peoples. In other words, the principle of contending sovereignties must also be a circumscribing or limiting factor in relation to s. 91(24). Such a conclusion would apply not only after 1982 (when s. 35(1) was entrenched in the Constitution), but also since European contact.

88. Aside from constitutional capacity, fiduciary and human rights considerations, it has been indicated by the Supreme Court of Canada that a "clear and plain intention"[2697] by Parliament to extinguish aboriginal rights would have to be evident. However, the Court has not indicated precisely to date what is required under this criterion.

89. In the view of this study, it is hardly possible to show "clear and plain intention" by Parliament, if the legislature never consciously and deliberately considered extinguishing such rights and decided to proceed with such abrogation.[2698] In particular, the objective test of interpreting conflicting words in a statute cannot satisfy the criteria[2699] of the Supreme Court. Conscious legislative intention would be imperative, if Parliament's fiduciary obligations are to have any opportunity of being fulfilled and not bring dishonour[2700] to the Crown.

Expropriation as a means of extinguishment

90. Based on *Sparrow*, exercise of the expropriation power (like other federal powers) would be subject to, and limited by, the Crown's fiduciary obligation in regard to Aboriginal peoples.[2701] To the extent that exercise of the expropriation power was of a regulatory nature *not tantamount to an extinguishment*[2702] of aboriginal rights, the same justification tests would apply. However, use of the expropriation power to unilaterally extinguish aboriginal or treaty rights appears to squarely contradict the spirit and intention of s. 35(1). In addition, other existing constitutional limitations, such as the requirement

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[2696] See discussion under sub-heading 6.2.2.1 *supra*.

[2697] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 at 1099 per Dickson C.J.

[2698] See discussion under sub-heading 6.2.2.4 *supra*.

[2699] In addition to "clear and plain intention", another criterion of the Supreme Court is "strict proof" of extinguishment actually being effected.

[2700] "The honour of the Crown is always involved": see, for example, *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 at 1107 per Dickson C.J. See also B. Ryder, *Aboriginal Rights and Delgamuukw* v. *The Queen*, (1994) 5 Constitutional Forum 43 at 45: "...a stricter understanding of the requirement of 'clear and plain intention' than that adopted by the [British Columbia Court of Appeal in *Delgamuukw*] would be more consistent with the twin goals of upholding the honour of the Crown and promoting a just settlement for Aboriginal Peoples that the Supreme Court has said should guide the interpretation of section 35."

[2701] See discussion under sub-heading 6.2.2.5 *supra*.

[2702] If an expropriation were of a temporary nature (e.g. with a right to reversion of the land) and solely resulted in some form of regulation over the exercise of aboriginal rights, perhaps it could qualify for consideration under the *Sparrow* tests.

of consent in the *Royal Proclamation of 1763*,[2703] would be equally applicable in expropriation matters.

91. In regard to expropriation, the exercise of this power (in the absence of consent by the Aboriginal people affected) appears to be inappropriate in relation to aboriginal and treaty rights.[2704] Expropriation of *collective* rights has far-reaching implications that go well beyond a specific act of expropriation affecting individual rights.

92. Expropriation assumes a certain subordination of the peoples affected, which is contrary to the notion of contending sovereignties involving Aboriginal peoples. It also runs counter to the essential rights of Aboriginal peoples to self-determination, including rights of self-government and consent[2705]. Equally important, aboriginal and treaty rights include not only proprietary but also jurisdictional dimensions that would be destroyed in the event of expropriation.

93. In light of the importance of lands and resources to Aboriginal peoples and their ongoing position of vulnerability, it generally would constitute an act of injustice and dispossession to expropriate unilaterally aboriginal lands and resources. Moreover, the identity of Aboriginal peoples is inextricably linked to their lands and resources. In addition, it is counterproductive to the Crown-Aboriginal relationship to exert unilateral powers of expropriation. Further, it is a harsh instrument that does not foster "sensitivity" and "respect" for the fundamental rights of Aboriginal peoples as the Supreme Court indicated was required in *Sparrow*.[2706]

Extinguishment through constitutional amendment

94. In view of the fact that Aboriginal peoples have participated in First Ministers Conferences on the Constitution between 1983 and 1987 and in the Charlottetown constitutional process in 1992, the question can be posed whether Aboriginal peoples have a right to be directly involved in constitutional amendment processes that affect them. It is possible that at least a "constitutional convention" has been established in regard to both aboriginal participation and consent.[2707] In all of the above-mentioned constitutional processes, existing amending formulas were followed but no amendments were put forward for adoption without first obtaining the participation and consent of the aboriginal peoples concerned.

[2703] See, for example, J. Woodward, *Native Law* (Toronto: Carswell, 1989), at 209: "The Royal Proclamation of 1763, however, does not allow for any method of depriving Indians involuntarily of their title." See also B. Slattery, *Understanding Aboriginal Rights*, (1987), 66 Can. Bar Rev. 727 at 766: "...it can be argued that the Royal Proclamation of 1763 imposed strict constitutional limitations on the power of local Canadian legislatures to expropriate aboriginal land rights."

[2704] See discussion under sub-heading 6.2.2.5 *supra*.

[2705] As indicated in this study, the consensual nature of Aboriginal-Crown relations is constitutionally entrenched through the Royal Proclamation of 1763.

[2706] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1119: "We do not wish to set out an exhaustive list of the factors to be considered in the assessment of justification. Suffice it to say that *recognition and affirmation requires sensitivity to and respect for the rights of aboriginal peoples on behalf of the government, courts and indeed all Canadians.*" [Emphasis added.]

[2707] See discussion under sub-heading 6.2.3 *supra*.

95. However, it may well be that the strongest argument against unilateral extinguishment of aboriginal or treaty rights by Parliament and provincial legislatures lies within s. 35(1). The Supreme Court of Canada has ruled in *Sparrow* that s. 35(1) incorporates a general fiduciary obligation of a constitutional nature,[2708] and such obligation can apply to federal and provincial governments and legislatures according to the circumstances.

96. In order to ensure compliance with their constitutional fiduciary obligations, the governments and legislatures would be subjected by Canadian courts to the principles and justification tests laid down in *Sparrow*. While this does not necessarily guarantee that the courts would require aboriginal consent (as opposed to consultation) to every amendment of any kind affecting s. 35(1), it is highly conceivable that consent would be required in the event of an amendment that purported to extinguish aboriginal or treaty rights.[2709] In the absence of aboriginal consent, it is highly doubtful that governments and legislatures could justify to the courts such a draconian and far-reaching measure.

97. While the above conclusions remain uncertain pending future rulings from the Supreme Court, it can be said that a wholly unilateral action by non-Aboriginal governments and legislatures in Canada would likely not be valid. This would particularly be the case in relation to the extinguishment of aboriginal and treaty rights, through unilateral constitutional amendment.

Capacity of provincial Crown to extinguish aboriginal rights

98. Provincial governments and legislatures have no capacity to extinguish aboriginal rights. This conclusion is not altered by the enactment by Parliament of s. 88 of the *Indian Act*.[2710]

99. The question has arisen whether s. 88 of the *Indian Act* could result, prior to 1982, in an extinguishment of aboriginal rights by provincial legislatures. The Act is said to empower the legislatures of the provinces, under certain circumstances, to apply their laws of general application to Indians.

100. In regard to a provincial power of extinguishment, it is critical to note that s. 88 refers solely to provincial laws of general application in respect of "Indians" and not "lands reserved for the Indians". Therefore, it cannot be concluded that provincial legislatures could have extinguished aboriginal land rights. Also, aside from the likely unconstitutionality of s. 88 at least since 1982,[2711] s. 88 does not indicate a "clear and plain intention"[2712] by Parliament to confer provincial legislatures with a power to extinguish aboriginal rights.

[2708] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 at 1108 per Dickson C.J. This study also concludes that a fiduciary duty of a constitutional nature arises from the terms and conditions of the *Rupert's Land and North-Western Territory Order*, 1870.

[2709] See discussion under sub-heading 6.2.3 *supra*.

[2710] See discussion under sub-heading 6.3 *supra*.

[2711] See discussion in note 1447 *supra*.

[2712] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1099 per Dickson C.J. Moreover, for Parliament to confer provincial legislatures with a power to extinguish aboriginal rights would be inconsistent with its fiduciary obligations to Aboriginal peoples.

101. Furthermore, even prior to 1982, provincial governments could not acquire the capacity to obtain surrenders of Aboriginal land rights through an explicit statutory delegation by Parliament. Such delegations have occurred in the context of boundaries extension legislation in 1912 involving both Québec and Ontario.[2713]

102. In regard to such statutory delegation, grounds for challenging the constitutionality of s. 2(c)[2714] of the *Quebec Boundaries Extension Act, 1912* appear to be numerous.[2715] Such challenges cannot be rebuffed simply by pointing to the fact that any surrenders obtained by the province had to be approved by the Governor in Council.[2716]

Effects of Crown's fiduciary duties on any powers to extinguish

103. A fiduciary relationship has arisen historically between Aboriginal peoples and the Crown. Historical practices to safeguard Aboriginal peoples and their territories were central aspects of the fiduciary relationship and still continue. In particular, these important aspects of the relationship are reflected in the *Royal Proclamation of 1763*, the *Rupert's Land and North-Western Territory Order*, 1870,[2717] the *Indian Act*,[2718] and the *Constitution Act, 1982*[2719].[2720]

104. The fiduciary relationship between Aboriginal peoples and the Crown gives rise to legal and constitutional obligations of a fiduciary nature. Fiduciary obligations are the law's "blunt tool"[2721] for the control of the Crown's discretion in relation to Aboriginal peoples and their fundamental rights.

[2713] In regard to the province of Québec, see *Quebec Boundaries Extension Act, 1912*, S.C. 1912, c. 45, ss. 2(c), (d) & (e); *An Act respecting the extension of the Province of Quebec by the annexation of Ungava*, S.Q. 1912, c. 7. In relation to the province of Ontario, see *Ontario Boundaries Extension Act*, S.C. 1912, c. 40, ss. 2(a), (b), & (c).

[2714] Section 2(c) provides: "That the province of Quebec will recognize the rights of the Indian inhabitants in the territory...to the same extent, and *will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights and has obtained surrender thereof*, and the province shall bear and satisfy all charges and expenditures in connection with or arising out of such surrenders". [Emphasis added.]

[2715] See discussion under sub-heading 6.3.1 *supra*. Note that similar arguments in regard to the constitutionality of statutory delegation could be made concerning the *Ontario Boundaries Extension Act*, S.C. 1912, c. 40, s. 2(a).

[2716] Section 2(d) of the Act provides: "That no such surrender shall be made or obtained except with the *approval of the Governor in Council*". [Emphasis added.]

[2717] In relation to the *Rupert's Land and North-Western Territory Order* and the protection of Aboriginal peoples, see the terms and conditions agreed to by the Parliament and Government of Canada in the joint Addresses of Parliament: *Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada*, Schedule (A), R.S.C. 1985, App. II, No. 9, 8 at 8-9; and *Address*, Schedule (B), R.S.C. 1985, App. II, No. 9, 14 at 16.

[2718] Section 18(1) of the *Indian Act*. However, it must be underlined that this section and the other provisions of the repressive and paternalistic Indian Act are not a fair or just reflection of the historic commitments made to Aboriginal peoples through the Royal Proclamation or the treaty-making process.

[2719] Section 35(1) of the *Constitution Act, 1982*.

[2720] The fiduciary aspects of all of these instruments are discussed under sub-heading 6.4.1 *supra*.

[2721] This expression is used in E. Weinrib, *The Fiduciary Obligation*, (1975) 25 U.T.L.J. 1, at 7, and cited by the Supreme Court of Canada in *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 at 341, and in *K.M.* v. *H.M.*, (1992) 142 N.R. 321 at 382.

105. As indicated by the Supreme Court of Canada in *Sparrow*[2722] in regard to s. 35(1) of the *Constitution Act, 1982*, the honour of the Crown is at stake in dealings with Aboriginal peoples. The special trust relationship and the responsibility of the government vis-a-vis aboriginals must be the "first consideration" in determining whether the *legislation or action* in question can be justified.[2723] This relationship between the government and Aboriginal peoples is described by the Court as "trust-like, rather than adversarial".[2724]

106. The fiduciary relationship and responsibility do not arise only when a "voluntary" surrender of aboriginal lands is involved. The Supreme Court of Canada has explicitly indicated that the Crown's fiduciary duty arises in respect to "any government regulation that infringes or denies aboriginal rights".[2725] In particular, the fiduciary duty would apply in cases of unilateral extinguishment of aboriginal title. Further, the fiduciary obligation applies not only to the *executive* branch of government, but also to the *legislature* concerned.

107. In addition, the government as fiduciary must generally act "for the benefit" of Aboriginal peoples.[2726] As indicated by the Supreme Court, "equity will...supervise the relationship by holding him to the fiduciary's strict standard of conduct."[2727] and "[e]quity will not countenance unconscionable behaviour in a fiduciary, whose duty is that of utmost loyalty to his principal."[2728]

108. Since the recognition and affirmation of aboriginal and treaty rights in s. 35(1) of the *Constitution Act, 1982* gives rise to fiduciary obligations of a constitutional nature, the same conclusion must be reached in regard to the constitutional obligations in favour of Aboriginal peoples pertaining to the *Rupert's Land and North-Western Territory Order*. In the case of the latter instrument, the wording is even more specific and indicative of a fiduciary responsibility on the part of the government and Parliament of Canada than in s. 35(1). As a result, the principles established by the Supreme Court of Canada in *Sparrow* in regard to fiduciary obligations of a constitutional nature, would apply equally to the fiduciary duties incorporated in the *Rupert's Land and North-Western Territory Order*.

109. In relation to Aboriginal peoples, fiduciary principles suggest that both Parliament and provincial legislatures have an obligation to enact laws within their legislative competence which will both protect and foster aboriginal and treaty rights. According to at least one Supreme Court of Canada judge, there appears to be a positive or affirmative duty to legislate "in the interest" of Aboriginal peoples based on treaty obligations.[2729]

[2722] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075 (S.C.C.).

[2723] Id. at 1114.

[2724] Id. at 1108.

[2725] Id. at 1109.

[2726] In *Sparrow*, *supra*, at 1112-1119, the Supreme Court generally indicated that some legislative restrictions on the exercise of aboriginal rights might occur if there exists a valid and compelling legislative objective, the measure is fully justified, and there is a little as infringement as possible with such rights. See also *Guerin* v. *The Queen*, 13 D.L.R. (4th) 321 (S.C.C.) at 339.

[2727] *Guerin* v. *The Queen*, (1984) 13 D.L.R. (4th) 321 at 341.

[2728] Id., at 344.

[2729] *Horseman* v. *The Queen*, [1990] 1 S.C.R. 901 at 913, per Wilson J. dissenting.

110. Even prior to 1982, the Parliament of Canada did not have unfettered authority to adopt laws in violation of treaty obligations. This conclusion is supported by the constitutional and fiduciary requirements in the *Royal Proclamation of 1763*, particularly that Aboriginal peoples "not be molested or disturbed" in the possession of their lands.

111. The same conclusion of constrained legislative authority to contravene treaty rights is also reinforced by the affirmative constitutional and fiduciary duties of the Canadian government under the Imperial *Rupert's Land and North-Western Territory Order*. Under the *Order*, the Canadian government is obliged to "make adequate provision for the protection" of Aboriginal peoples and settle their land rights in conformity with "equitable principles. In this context, it would hardly be protective or equitable for the Canadian government to adopt laws that would violate treaty rights and bring dishonour to the Crown.[2730]

112. In cases of purported surrender and extinguishment,[2731] it is important to determine when fiduciary obligations arise and the nature and scope of these legal duties at all the material times.[2732] *Prior to and at the moment* of a purported surrender, the representatives of the Crown should demonstrate that they conducted themselves as guardian or protector (if not also an advisor) of the Aboriginal peoples concerned.[2733] Clear benefits must have been secured in the short- and long-term to the peoples concerned. *Following* such surrender, the obligations parallel those of a trustee and the Crown should ensure that the obligations owed to Aboriginal peoples under any consensual arrangement are fully implemented.[2734]

113. In enforcing strict standards of conduct by the Crown as a fiduciary, it would appear entirely appropriate for Canadian courts to consider the *international human rights norms* that both exist and are emerging in connection with indigenous peoples. On a number of occasions, Canadian courts have considered the norms in international instruments, both in cases where such instruments have been ratified by Canada and where they have not.

Fiduciary duties of provincial Crowns

114. A fiduciary relationship can arise in a wide range of circumstances and the categories of fiduciary are not closed. Therefore, there exists no reason why the Crown in right of a province would not incur fiduciary obligations if the elements for a fiduciary relationship are present.[2735]

[2730] See also discussion in text accompanying note 1692 *et seq.*

[2731] Note that, as this study points out, there are issues other than fiduciary duties that can affect the validity of a purported surrender or extinguishment of aboriginal rights.

[2732] See discussion under sub-heading 6.4.2 *supra*.

[2733] See *Apsassin* v. *Canada*, [1993] 2 C.N.L.R. 20 (Fed. C.A.), at 66 per Marceau J.A.

[2734] Id. See also Stone J.A. at 44, where a fiduciary relationship is said to exist both prior to and following a surrender of land rights.

[2735] See discussion under sub-heading 6.4.3 *supra*.

115. Provincial fiduciary obligations, however, may in some cases arise from different situations than that of the federal Crown and, therefore, may be of a somewhat different nature. Also, provincial fiduciary obligations may arise prior to, during and subsequent to a purported surrender or extinguishment of aboriginal title. The precise nature of the fiduciary obligations owed by a province will necessarily depend on the circumstances in each case.

116. For example, in relation to the purported surrender and extinguishment of aboriginal title through the *James Bay and Northern Quebec Agreement*, it would appear that the province of Québec took on the position of a fiduciary, when it accepted the annexation of the northern portion of what is now part of the province.[2736] In particular, the Québec government and legislature agreed to the statutory condition that Québec would obtain surrenders of the rights of Indian inhabitants in the territory being annexed.

Natural Resources Transfer Agreements, 1930 - partial constitutional protections not partial extinguishments

117. The *Natural Resources Transfer Agreements*, 1930 raise particular questions as to whether treaty rights received constitutional protection (at least in part) or were they partially extinguished.[2737] The Transfer Agreements were entered into between the federal government and the three prairie provinces. These Agreements were accorded constitutional status by the Imperial Parliament through an amendment to the *Constitution Act* in 1930.

118. In *R.* v. *Horseman*,[2738] the majority opinion of the Supreme Court of Canada recognized that the treaty rights of Indians under Treaty No. 8 included both domestic and commercial aspects. However, in construing a broad treaty right under Treaty No. 8, the majority concludes that the treaty right had been unilaterally reduced by clause 12 of the *Natural Resources Transfer Agreement* of 1930. This study concludes, with respect, that the *Horseman* decision by the Supreme Court was erroneously decided.

119. In reaching its decision, the Court invoked the "merge and consolidation" theory of earlier cases, whereby it is said that the Transfer Agreements of 1930 had the effect of merging and consolidating the treaty rights of Indians in the area and restricting the power of the provinces to regulate the Indians' right to hunt for food. However, there is no historical evidence to demonstrate that the Transfer Agreements were intended to limit the Indians' traditional hunting right to hunt and fish. In this regard, the "merge and consolidation" theory appears to be a judicial fabrication with no proven factual basis.

120. In other words, in the absence of clear and uncontrovertible evidence that the Imperial Parliament[2739] and the governments concerned had the "clear and plain intention" to limit the traditional rights of Aboriginal peoples through constitutional amendment (i.e.

[2736] See discussion under sub-heading 6.4.3 *supra*.

[2737] See discussion under sub-heading 6.6 *supra*.

[2738] *Horseman* v. *The Queen*, [1990] 1 S.C.R. 901.

[2739] For example, there is no evidence that the Canadian government communicated to the Imperial government or Parliament that Canada was seeking to extinguish and replace the treaty rights of Aboriginal peoples in the Prairies. Such explicit communication with the Imperial government was constitutionally required in regard to the Prairie provinces, in view of the terms and conditions of the *Rupert's Land and North-Western Territory Order*, 1870.

the *Constitution Act, 1930*), it cannot be concluded that by providing constitutional protection to certain aspects of Indian treaty rights, other parts were necessarily extinguished. No such interpretive rule exists in relation to Aboriginal peoples or, generally, in regard to constitutional instruments.

121. It can perhaps be said that a uniform policy of constitutionally protected harvesting rights relating to Aboriginal peoples in the Prairie provinces was realized through the 1930 Transfer Agreements. However, this did not mean (nor is there any factual evidence) that other existing aboriginal or treaty rights relating to harvesting were extinguished through any "merge and consolidation" theory. As has been indicated by the Supreme Court, strict proof of the fact of extinguishment would have been necessary.[2740]

122. In the view of this study, the *Natural Resources Transfer Agreements* and the *Constitution Act, 1930* together provide constitutional protection for a portion of the aboriginal and treaty rights of Aboriginal peoples in the Prairie provinces. Prior to 1982, other aspects of their aboriginal and treaty rights may or may not have had constitutional protection (based on other instruments). Any conclusions reached in this regard would depend on the particular facts involved in each case and the interpretation of other applicable constitutional instruments.[2741] In any event, in the absence of "clear and plain intention", these other aspects of aboriginal and treaty rights were not extinguished in 1930.

123. Similarly, it is concluded that the majority of the Supreme Court in *Daniels* v. *White* and *The Queen*,[2742] appears to have seriously erred in construing that para. 13 (Indian rights of harvesting for food) of the 1930 *Manitoba Natural Resources Transfer Agreement* does not limit *federal* legislative powers.[2743] If appropriate judicial rules of interpretation were to be applied to para. 13, it would appear that the prevailing rules would favour upholding the full enjoyment of the rights of Aboriginal peoples recognized in that paragraph. As a result, federal law-making powers would be curtailed by the constitutional rights in favour of "Indians" in para. 13.

124. In addition, it is not clear that para. 13 is inconsistent with s. 6[2744] of the *Migratory Birds Convention Act*[2745]. This latter Act does not provide for an absolute prohibition, but in fact foresees that persons with "lawful excuse" are exempted. In any event, s. 1 of the *Constitution Act, 1930* expressly provides that provisions in the 1930 Transfer Agreement can derogate from "any Act of Parliament of Canada" without exception.

[2740] See, for example, *Simon* v. *The Queen*, [1985] 2 S.C.R. 387 at 405-406 (per Dickson C.J.).

[2741] For example, according to the circumstances, one would have to consider the constitutional implications and effect of the *Royal Proclamation of 1763* and the terms and conditions of the *Rupert's Land and North-Western Territory Order*, 1870.

[2742] *Daniels* v. *White* and *The Queen*, [1968] S.C.R. 517 (S.C.C.).

[2743] See discussion under sub-heading 6.6.1 *supra*.

[2744] Section 6 of the Act provides: "No person, *without lawful excuse*, the proof whereof shall lie on such person, the proof whereof shall lie on such person, shall buy, sell or have in his possession any migratory game bird, migratory insectivorous bird or migratory nongame bird, or the nest or egg of any such bird or any part of any such bird, nest or egg, during the time when the capturing, killing or taking of such bird, nest or egg is prohibited by this Act." [Emphasis added.]

[2745] *Migratory Birds Convention Act*, R.S.C. 1952, c. 179 (now in R.S.C. 1985, c. M-7).

Extinguishment of rights of Aboriginal third parties

125. The extinguishment of the rights of Aboriginal third parties has been claimed in two broad contexts: i) in granting land rights to non-Aboriginal persons; and ii) in land claims agreements with Aboriginal peoples. In both cases, the validity of such alleged extinguishments can be seriously challenged.[2746]

126. In relation to Crown grants of land subject to aboriginal title, it is a fundamental common law rule that the Crown cannot give what it does not have. If grants were made by the Crown to non-Aboriginal persons (e.g. in colonial charters), such grants did not effect any extinguishment of the pre-existing land rights of Aboriginal peoples.

127. In regard to the purported extinguishment of the rights of Aboriginal third parties, a most glaring example is found in connection with the *James Bay and Northern Quebec Agreement* signed in 1975.[2747] Aboriginal peoples, who were not party to this land claims settlement, had their rights purportedly extinguished unilaterally through legislation. In this context, the overlapping claims of Aboriginal third parties were for the most part denied or ignored.[2748]

128. Rather than act in accordance with its constitutional and fiduciary duty towards the Aboriginal peoples affected, the federal government chose to accede to the wishes of the Québec government and seek to unilaterally extinguish their fundamental rights. Moreover, it can be strongly argued that both Canada and Québec had fiduciary and other constitutional obligations toward Aboriginal third parties when these governments sought to purportedly extinguish the rights of the third parties concerned.

129. Through the *James Bay and Northern Quebec Native Claims Settlement Act*,[2749] Parliament sought not only to extinguish the rights of Aboriginal third parties[2750], but also to deprive these peoples of an effective legal remedy.[2751] In neither case, are such provisions likely to survive the type of justification tests required by the Supreme Court of Canada in *Sparrow* v. *The Queen*[2752] that call for minimum interference (if any) with aboriginal rights. In this regard, the enacted provisions appear to run counter to the constitutional obligations in the *Rupert's Land and North-Western Territory Order* that

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[2746] See discussion under sub-heading 7 *supra*.

[2747] *James Bay and Northern Quebec Agreement* (Quebec: Éditeur officiel du Québec, 1976). Agreement between the Government of Québec, Société d'énergie de la Baie James, Société de développement de la Baie James, Commission hydroélectrique de Québec (Hydro-Québec), Grand Council of the Crees (of Québec), Northern Quebec Inuit Association, Government of Canada, signed November 11, 1975.

[2748] The Agreement (s. 2.14) only provided for a commitment by the Québec government to negotiate with those Aboriginal third parties whose rights were to be unilaterally extinguished by federal legislation approving the land claims agreement. At the same time, it was expressly stated that the undertaking to negotiate did not constitute a recognition, by Canada or Québec, of any rights of Aboriginal third parties.

[2749] *James Bay and Northern Quebec Native Claims Settlement Act*, S.C. 1976-77, c. 32.

[2750] Id., s. 3(3).

[2751] Id., s. 3(1). By "declaring valid" the Agreement, Parliament appears to have sought to deny Aboriginal peoples an effective recourse in challenging the validity of the Agreement and safeguarding their fundamental rights: see discussion under sub-heading 1.4 *supra*.

[2752] *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at 1109: "In other words, *federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights.*" [Emphasis added.]

require protection of Aboriginal peoples and the application of equitable principles in satisfying their claims.

130. In addition, in regard to the *James Bay and Northern Quebec Agreement*, there exist other serious grounds for challenging the constitutionality of the legislative provisions that purport to extinguish the rights of Aboriginal third parties, deny them a legal recourse or otherwise diminish their capacity to safeguard their rights.[2753] In some instances, similar grounds may exist for the Aboriginal parties to the Agreement to possibly challenge the purported surrender and extinguishment of their rights.

Extinguishment as a relic of colonialism

131. The extinguishment of aboriginal rights is an integral part of the larger historical process of colonialism. Many other discriminatory or assimilative manifestations of colonialism affecting Aboriginal peoples in Canada have now been eliminated. However, the pervasive notion of extinguishment remains as a relic of colonialism.

132. Presently, there is a general consensus among international lawyers that colonialism, "in all its forms and manifestations" is now contrary to international law. In some instances, colonialism has been characterized in the U.N. General Assembly as a "crime".[2754]

133. Extinguishment not only serves to dispossess Aboriginal peoples of most of their lands and territories, but it also undermines the self-determination of Aboriginal peoples. Since the remedy to colonialism was said by the international community to include external as well as other forms of self-determination,[2755] many states take the position that "colonialism" in international law only refers to those peoples in *territories outside of independent states*. This "Blue Water" or "Salt Water" thesis[2756] has come under severe criticism by jurists as being a misguided attempt to limit the scope of self-determination, unjustifiable, and absurd.

134. It is important to recognize that indigenous peoples in the Americas and elsewhere were colonized both in the traditional "external" sense, as well as internally within independent states. Furthermore, emerging international norms directly applicable to indigenous peoples are explicitly making the link between deprivation of human rights, colonization, and dispossession of lands, territories and resources.

135. Therefore, existing international norms prohibiting colonialism must apply equally to all indigenous peoples, without discrimination. Colonialism is no more acceptable in independent states, such as Canada, than it is in overseas non-self-governing territories. This conclusion is reinforced by the factual and legal links between indigenous peoples and colonialism that are increasingly being recognized both in Canada and internationally.

[2753] For a description of the various grounds for possibly challenging the constitutionality of the purported extinguishment of the rights of Aboriginal third parties, see sub-heading 7.1.1 *supra*.

[2754] See discussion under sub-heading 8.1 *supra*.

[2755] *Declaration on the Granting of Independence to Colonial Countries and Peoples*, (1960), G.A. Res. 1514 (XV), 15 U.N. GAOR, Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960).

[2756] The thesis is described as "Blue Water" or "Salt Water", since it requires a territory to be geographical separate (e.g. overseas possession) from the colonizing state, in order for colonialism to be recognized.

Incompatibility of extinguishment with human rights norms

136. In international human rights instruments, commitments are made by states concerning the universal standards that are to govern the conduct of both governments and people. In some cases, the norms are binding in Canada and in other cases they are not. However, in determining human rights issues, courts in Canada have taken into account standards in international instruments, both in cases where these instruments have been ratified by Canada and where they have not.[2757]

137. In regard to the majority of the extinguishments discussed in this study, it is important to note that they took place *before* Canada assumed the international human rights obligations referred to under this part. These human rights obligations formally began with the *Charter of the United Nations* and continue to develop through to the present. However, decisions by the U.N. Human Rights Committee indicate that what is significant is whether the *effect* of the violation continues into the era of modern human rights.[2758]

138. In considering the wide range of applicable standards, it is vital to keep in mind that the various human rights they entail are most often interrelated and interdependent. This is especially true in the Aboriginal context.

139. For numerous decades, states have ignored many of the world's indigenous peoples in undertaking the international trusteeship[2759] and decolonization processes under U.N. supervision. However, in more recent times, the international community has been taking steps to establish minimum standards that specifically address indigenous peoples' fundamental rights and concerns.

140. International instruments have been adopted or are emerging in various international fora that make express reference to indigenous peoples. These include the *Indigenous and Tribal Peoples Convention, 1989* (No. 169) and the draft *United Nations Declaration on the Rights of Indigenous Peoples*. In addition, explicit reference to indigenous people is provided in the *Rio Declaration on Environment and Development*.[2760]

141. These three instruments are not legally binding in Canadian courts.[2761] However, Canadian courts can still refer to these international norms to guide their interpretation of human rights concerns. This judicial view would be especially useful in relation to indigenous peoples and their collective human rights, since uniform standards are woefully lacking within Canada. Moreover, in all of the international standard-setting processes concerning indigenous peoples (since at least 1982), the Canadian government

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[2757] See discussion under sub-heading 8.2.1 *supra*.

[2758] *Ominayak* v. *Canada*, U.N. Doc. CCPR/C/38/D/167/1984 (Human Rights Committee decision, March 28, 1990). Existing international norms are relevant to the Human Rights Committee's consideration of prior extinguishments of aboriginal title that occurred much earlier in Canada's history, if these extinguishments can be demonstrated to be the source of continuing violations of human rights under the *International Covenant on Civil and Political Rights*.

[2759] The international trusteeship system for "trust territories" is provided for in the *Charter of the United Nations*, art. 75 *et seq.* See also art. 73 of the Charter, where a "sacred trust" is established in regard to "non-self-governing territories".

[2760] *Rio Declaration on Environment and Development*, U.N. Doc. A/Conf. 151/5/Rev. 1, June 13, 1992, reprinted in 31 I.L.M. 874 (1992).

[2761] However, some of the norms contained in these instruments may already be a part of customary international law. See discussion under sub-heading 8.2 *supra*.

has played and continues to play a most direct and active role.[2762]

142. As documented in this study, aboriginal rights are recognized by a wide range of commentators as *collective and individual human rights*.[2763] Yet, what is often absent from analyses or debates on extinguishment is the human rights dimension. A human rights perspective underlines the seriousness of eliminating aboriginal rights through the notion of extinguishment. Moreover, a human rights approach serves to link domestic and international law. This is especially important in the Aboriginal context, since aboriginal rights have more than domestic implications and are being recognized and protected in international instruments.

143. The universal human rights in existing international instruments, as they relate to indigenous peoples, should be flexibly interpreted in a manner compatible with their collective and individual rights. In this way, many of the fundamental economic, social, cultural and political rights that are inherent in the concept of aboriginal rights can find expression (at least in part) in the international regime of universal human rights.

144. Human rights under such major international instruments as the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* are not subject to alienation or other forms of destruction.[2764] Depending on the particular right involved and which international instrument applies, there is the possibility of limiting such rights but only to extent set out in the instrument concerned.

145. Aboriginal rights, like other human rights, may to a certain extent be subject to limitations. For example, limitations arise when Aboriginal peoples agree to share their lands and resources with non-Aboriginal peoples and states. As already discussed, "limitations" of rights are very different, both in fact and in law, from their "extinguishment" or "destruction".

146. It would appear to be discriminatory that aboriginal rights, as collective and individual *human rights*, are the only human rights in Canada that are targetted for extinguishment. The Canadian policy and practice of blanket extinguishments are especially far-reaching and harmful in their effects. Within Canada, human rights may in some cases be subjected to certain *limits* and override, but there is no specific authority to extinguish or otherwise destroy human rights.[2765] Rather, in regard to aboriginal and treaty rights, the Canadian Constitution requires the recognition and affirmation of these fundamental rights.

147. If it is correct to say that extinguishment of aboriginal rights is discriminatory, then federal and provincial governments in Canada cannot agree to make extinguishment the basis of resolving land claims. They cannot validly agree to discriminate on the basis of race and property, without violating customary international law. In this case, the principle of non-discrimination in matters of race is not only a principle of customary

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[2762] See discussion under sub-heading 8.2.1.2 *supra*.

[2763] See discussion under sub-heading 8.2.1.3 *supra*.

[2764] See discussion under sub-heading 8.2.1.4 *supra*.

[2765] See discussion under sub-heading 8.2.1.5 *supra*.

international law but also a peremptory norm.[2766]

148. In regard to international norms on *apartheid*, it is clear that Indian reserves are not discriminatory if they serve as a base for the ongoing development and protection of Indians as distinct peoples and nations.[2767] If no separate political communities were ensured and Aboriginal peoples were simply integrated within the majority population in Canada, their survival as distinct peoples would be jeopardized.

149. However, if the government of Canada seeks to interpret existing treaties as having extinguished the aboriginal land titles of Indians outside their reserves, leaving Indians with no access to an adequate land and resource base for their economic, social and cultural development in other areas of their traditional or historic territories, the government may be opening itself to incriminations of *apartheid* or similar acts of discrimination. Based on a human rights analysis, the government cannot use reserves and purported land cession clauses in treaties (with which the Indian parties have a fundamentally different understanding) to in effect "confine"[2768] Indian peoples to their reserves.[2769]

150. Aboriginal peoples have generally possessed the means of subsistence on their traditional or historic territories (at least when not impacted by colonial settlement). To continue to prevent them, through extinguishment and other policies, from access to an extended land and resource base outside the reserves, would perpetuate their poverty and deterioration as nations. It would deny them their fundamental human rights.[2770]

151. Past and present extinguishment policies and practices in Canada appear to be highly incompatible with a wide range of international and Canadian human rights norms. Yet, to date, purported extinguishments of the fundamental rights of Aboriginal peoples have not been subjected to rigorous and consistent human rights analyses. Such scrutiny is essential and must be carried out in a context that is fully compatible with the collective and individual dimensions of the rights of Aboriginal peoples.

152. International human rights standards of direct relevance to extinguishment questions include those pertaining to: the principle of equality and non-discrimination;[2771] integrity of Aboriginal societies and rights to identity and culture;[2772] self-determination and self-government;[2773] recognition of profound relationship with lands and territories;[2774] importance of a people's own means of subsistence;[2775]

[2766] See discussion under sub-heading 8.2.2 *supra*.

[2767] See discussion under sub-heading 8.2.3 *supra*.

[2768] An essential distinction is being made here between the intention of non-aboriginal governments to "confine" Indians on reserves, as opposed to ensuring a base from which Indians would have ready access to their traditional or historical territories.

[2769] See discussion under sub-heading 8.2.3 *supra*.

[2770] Id.

[2771] See discussion under sub-heading 8.2.2 *supra*.

[2772] See discussion under sub-heading 8.2.4 *supra*.

[2773] See discussion under sub-heading 8.2.5 *supra*.

[2774] See discussion under sub-heading 8.2.6 *supra*.

recognition of land and resource rights;[2776] prohibition against genocide and ethnocide;[2777] right to development;[2778] right to a healthy environment;[2779] recognition of economic and social rights, including essential services;[2780] and right to an effective remedy and restitution[2781].

Considerations relating to the *Canadian Charter of Rights and Freedoms*

153. In regard to the *Canadian Charter of Rights and Freedoms*, section 25 makes clear that the guarantee in the Charter of certain rights and freedoms cannot be interpreted so as to "abrogate or derogate" from any aboriginal, treaty or other rights or freedoms, including rights and freedoms recognized in the *Royal Proclamation of 1763*. Consequently, the Charter guarantees to both *non-Aboriginal* and *Aboriginal* persons cannot be construed so as to abrogate or derogate from the aboriginal and treaty rights of Aboriginal peoples.[2782]

154. It is especially significant that the Charter rights of Aboriginal peoples must be interpreted in a manner consistent with their aboriginal and treaty rights, since these latter rights have important collective and individual rights dimensions.

155. As indicated in this study, aboriginal and treaty rights include collective notions of "liberty" and "security".[2783] Therefore, in regard to Aboriginal people, the guarantee of the rights to *liberty* and *security* in the Canadian Charter[2784] must be interpreted in a manner that is consistent with the collective notions of liberty and security of the people concerned.

156. In view of the profound links of rights of liberty and security to lands and resource matters, it is clear that these Charter norms are most relevant to extinguishment questions affecting Aboriginal peoples. To the extent that extinguishment of aboriginal title significantly affects the security and liberty rights or interests of Aboriginal peoples, it is most difficult to conceive how a Canadian government policy that insisted on extinguishment could be consistent with such norms under the *Canadian Charter of Rights and Freedoms*.

[2775] See discussion under sub-heading 8.2.7 *supra*.

[2776] See discussion under sub-heading 8.2.8 *supra*.

[2777] See discussion under sub-heading 8.2.9 *supra*.

[2778] See discussion under sub-heading 8.2.10 *supra*.

[2779] See discussion under sub-heading 8.2.11 *supra*.

[2780] See discussion under sub-heading 8.2.12 *supra*.

[2781] See discussion under sub-heading 8.2.13 *supra*.

[2782] See discussion under sub-heading 8.3.1 *supra*.

[2783] See discussion under sub-heading 8.3.2 *supra*.

[2784] The rights to liberty and security in the Canadian Charter are included in s. 7.

157. The non-derogation and interpretation clause in s. 25 of the Canadian Charter is not the only reason that would require an interpretation of Charter guarantees for Aboriginal people that may necessarily differ from those for non-Aboriginal people. Different interpretations may well be required, so as to be "consistent with the preservation and multicultural heritage of Canadians."[2785] In addition, the equality guarantees[2786] in the Charter may dictate the need to interpret Charter guarantees differently for Aboriginal peoples, since it is well established that equality cannot always be achieved through identical treatment.[2787]

158. Aboriginal peoples should not in effect be compelled to surrender aboriginal title through land claims agreements, in order for them to gain economic opportunities, reduce regional disparities and receive essential services of reasonable quality. Under the *Constitution Act, 1982*, federal and provincial governments and legislatures are constitutionally committed to promoting equal opportunities, reducing regional disparities, and providing essential services to all people in Canada.[2788] Further, these commitments must be carried out without discrimination.[2789]

Diverse grounds for reconsidering extinguishment

159. As indicated in this study,[2790] there are a number of grounds or rationales for reconsidering the notion and practice of extinguishment, with a view to establishing constructive alternatives. The reasons advanced are extremely diverse and pervasive. They affect virtually all Aboriginal peoples in their present and future development, as well as their ongoing relations with federal and provincial governments.

160. Extinguishment of aboriginal rights imposes the values and perspectives of the dominant culture and legal system, rendering the land tenure systems of Aboriginal peoples increasingly irrelevant. Equally important, in view of the profound relationship Aboriginal peoples have with their lands, resources and environment, their collective and individual identities may also be significantly affected.

161. In addition, extinguishment is antithetic to the recognition and affirmation of Aboriginal rights in s. 35 of the *Constitution Act, 1982*. Moreover, it is inconsistent with constitutional rights and obligations in the *Royal Proclamation of 1763*, the *Rupert's Land and North-Western Territory Order* and other constitutional instruments. As already described, extinguishment also raises a host of fundamental human rights questions. Nor does the fiduciary relationship of the Crown with Aboriginal peoples permit extinguishments to be carried out that are detrimental to the rights and interests of the peoples concerned.

[2785] Section 27 of the Charter.

[2786] The four equality guarantees in s. 15 of the Charter are: equality before the law; equality under the law; right to equal protection; and right to equal benefit under the law.

[2787] See discussion under sub-heading 8.3.3 *supra*.

[2788] *Constitution Act, 1982*, s. 36(1).

[2789] *Canadian Charter of Rights and Freedoms*, s. 15(1).

[2790] For a substantial listing of the grounds for reconsidering extinguishment, see discussion under heading 9 *infra*.

162. For non-Aboriginal governments in Canada to ignore Aboriginal peoples in their opposition to extinguishment is wholly inconsistent with their right to self-determination and their right to exercise control over their own political, economic, social and cultural development. The sovereignty of Aboriginal peoples should not continue to be undermined through policies and practices of extinguishment.

New and equitable approaches

163. Extinguishment is not perceived as an equitable approach on which the future development of Aboriginal societies can be built, nor on which durable relationships between Aboriginal and non-Aboriginal governments can be sustained.[2791] Extinguishment policies and practices do not allow for genuine co-existence of and equality between Aboriginal and non-Aboriginal peoples in Canada.

164. These findings are not only evident among Aboriginal peoples. They are equally consistent with the conclusions of the 1983 Special Committee of the House of Commons, the federally-appointed Task Force to Review Comprehensive Claims Policy, and other entities that have studied extinguishment.[2792]

165. Rather than simply document past and continuing injustices arising from extinguishment, it is also beneficial to focus on new and equitable approaches.

166. The question remains as to how Aboriginal peoples and non-Aboriginal governments can attain mutually satisfactory levels of accommodation. An important first step would appear to include a frank acknowledgement that purported surrenders or extinguishments of past and contemporary eras are fraught with constitutional, human rights, and other legal problems. Moreover, extinguishment never has been, nor is it now, a concept that is beneficial or acceptable to the Aboriginal peoples concerned.

167. Further, for a variety of reasons relating to essential legal questions pertaining to free and informed consent, it cannot be concluded with any reasonable degree of certainty that Aboriginal peoples validly agreed to extinguish all their aboriginal rights in and to land. In particular, in most cases, there does not appear to be convincing evidence of any meeting of the minds or common understanding between Aboriginal and government parties to treaties, in regard to "cessions" that purport to extinguish Aboriginal rights in and to land.[2793]

168. Therefore, a renegotiation of parts or all[2794] of existing treaties would be advantageous and would ultimately be the least costly and most beneficial alternative. This could be accomplished through jointly-established processes for treaty renovation, amendment, implementation, adhesion to existing treaties, or by entering into new treaties to replace, clarify or supplement existing treaty arrangements. The option of what course

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[2791] See generally discussion under heading 10 *supra*.

[2792] See Introduction *supra*.

[2793] See also discussion under sub-heading 10.4.5.1 *supra*.

[2794] While Aboriginal peoples seek to revisit their treaties in various ways, there is little indication that they wish to renegotiate all of the existing provisions.

to follow and which treaty provisions need to be addressed should be determined by the Aboriginal peoples concerned.

169. Government policies in respect to the renegotiation of treaties must be clear in recognizing the inadequacies of past actions. Governments, in conjunction with the Aboriginal peoples concerned, should formulate acceptable and equitable processes for redress in this regard.

170. New policies and practices in Canada must ensure effective recognition of aboriginal title and aboriginal land tenure systems. This approach would be consistent with Canada's Constitution, co-existence and equality of peoples, and national objectives of reconciliation, mutual respect and trust that all parties concerned generally seek to achieve. In addition, such recognition would be compatible with the notion of a Canadian federation made up of sovereign federal, provincial and Aboriginal governments. Equally important is the need to proceed in a manner that is wholly consistent with existing and emerging international norms pertaining to indigenous peoples.

Shortcomings in existing alternatives

171. There are few alternatives to extinguishment that are currently made available by governments or political parties[2795] in Canada to Aboriginal peoples. One is the option included in the federal government's comprehensive claims policy (1986). Another is found in the policy programme of the Parti Québécois (1994).[2796]

172. The 1986 federal claims policy retains the previous policy of purported *extinguishment and grant-back*, but also provides for a second option. This latter option may, in some cases,[2797] allow for existing aboriginal title to continue in specified or reserved areas, while extinguishing aboriginal title in all other areas.

173. Such partial extinguishment, when made available, still includes a number of shortcomings that call for its rejection as a genuine alternative to extinguishment.[2798] In particular, the 1986 federal policy fails to provide a uniform policy for the recognition and affirmation of aboriginal rights. Instead, it merely allows some minimal remaining pockets of aboriginal land rights to possibly continue to exist on an expansive landscape of purportedly extinguished aboriginal title.

174. In the 1994 policy programme of the Parti Québécois, it is indicated that agreements will be concluded without extinguishment of aboriginal rights. However, as this study

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[2795] See also Liberal Party of Canada, *The Aboriginal Peoples of Canada [:] Summary* (Ottawa: Liberal Party of Canada, September 1993) at 12: "In order to be consistent with the Canadian Constitution which now 'recognizes and affirms' Aboriginal and treaty rights, a Liberal government will not require *blanket* extinguishment for claims based on Aboriginal title." [Emphasis added.] However, "partial" extinguishments of aboriginal title can be almost as prejudicial and destructive as "blanket" extinguishments.

[2796] The programme of the Parti Québécois (or any other political party) would not be binding if such party formed a government now or in the future.

[2797] According to the 1986 federal policy, where provincial lands are involved, the province must play a major part in determining the approach to be followed.

[2798] For a discussion of these shortcomings, see sub-heading 10.1.1 *supra*.

indicates, it cannot be concluded that the alternative to extinguishment referred to in the PQ programme would be in any way adequate in terms of recognizing and affirming aboriginal rights. Rather major fundamental reforms are required in regard to the whole PQ programme concerning Aboriginal peoples.[2799]

175. For example, in negotiating future agreements, the starting point appears to be based on the lands *presently* used or occupied by Aboriginal peoples, and not on the full extent of their traditional or historical territories which they have occupied or otherwise used. Unless agreements are reached to the contrary, the PQ's limited recognition for lands currently used or occupied constitutes a policy of *de facto* extinguishment of most of the land rights claimed by Aboriginal peoples concerning their traditional or historical territories.

176. Further, the PQ programme indicates that a commitment was made by the Québec National Assembly in a Resolution, dated March 20, 1985, to conclude agreements guaranteeing the exercise of these matters. However, the 1985 Québec National Assembly Resolution entitled, *Motion for the recognition of aboriginal rights in Québec*, was unilaterally imposed by the PQ government and the National Assembly at that time, against the express objections of Aboriginal peoples in Québec. Therefore, it would hardly seem to serve as a legitimate basis for the PQ's aboriginal policy.[2800]

Proposed alternative to extinguishment

177. The purpose of attaining one or more alternatives to extinguishment should not be considered *in isolation* as an objective in itself. Rather, the primary purpose is to recognize and affirm the aboriginal rights of Aboriginal peoples. According to s. 35(1) of the *Constitution Act, 1982* and other constitutional instruments applicable in Canada since the time of the *Royal Proclamation of 1763*, this is the constitutional obligation that all governments and peoples in Canada must respect.

178. Consequently, the proposed alternative to extinguishment is comprised of two critical dimensions: i) objectives and principles for the overall context of recognition and affirmation of aboriginal rights; and ii) specific elements for a proposed alternative to extinguishment.[2801]

179. Any proposed alternative to extinguishment should take place in a *context* that facilitates and supports the effective exercise of aboriginal rights, as well as the further growth or evolution of Aboriginal land tenure systems. It is not enough to provide for specific alternatives to extinguishment, if the overall legal and political context in Canada is hostile or unaccommodating to the survival and further development of Aboriginal peoples' own rights, perspectives, practices and laws.

[2799] See discussion under sub-heading 10.1.2 *supra*.

[2800] In addition, the National Assembly Resolution, as tabled by the PQ government in 1985, unilaterally removed any reference to the fiduciary relationship between Aboriginal peoples and the federal Crown. Specific reference to the federal fiduciary relationship had been included in earlier draft texts being negotiated by the PQ government and Aboriginal peoples in Québec.

[2801] See discussion under sub-heading 10.2 *supra*.

180. In this regard, principles are elaborated in this study to establish a balanced, secure and just legal and political framework.[2802] These principles include: ensuring the integrity of Aboriginal societies, including an adequate land and resource base; recognition of Aboriginal sovereignty and the inherent nature of Aboriginal rights; respect for the principle of equal rights and self-determination of peoples; continuation of the historical treaty-making process; application of equitable principles of treaty interpretation; respect for the principle of Aboriginal consent; repudiation of the notion of extinguishment as applied to aboriginal rights and status; respect for the relationship of Aboriginal peoples with their lands, resources and environment; and recognition of the right to restitution or redress in connection with their territories.

181. In regard to *specific elements for a proposed alternative*, the objective generally would be to have two broad classifications or categories of land or territory that included aboriginal rights.[2803] The first land category would pertain to exclusive or predominant rights and jurisdiction of Aboriginal peoples; and the second land category would relate to shared rights or jurisdiction[2804] with non-Aboriginal peoples and governments.

182. Depending on the wishes of the Aboriginal peoples concerned, Aboriginal peoples who are involved in negotiating arrangements may choose to either assume jurisdiction for various subject matters in a phased manner, or else negotiate different issues at different stages or periods of time.[2805] In other words, there is no compelling reason why all issues have to be resolved through a single treaty and a single negotiation, if the Aboriginal parties involved choose a different, more gradual pace.

183. Retained aboriginal rights or jurisdiction in shared portions of Aboriginal peoples' traditional or historical territories would, in varying degrees,[2806] include cooperative arrangements concerning such matters as: i) use, management and conservation of lands and resources (both surface and subsurface); ii) control, participation in and benefit from proposed developments; iii) determination of, or participation in, place-naming within such territories; iv) maintenance of spiritual and material relationship with traditional or historical territories, including the lands, resources and environment; v) use and management of archaeological and other cultural property and sites, pertaining to the Aboriginal people or culture concerned.

184. Despite the general regime described above, some exceptions may exist that require specially-tailored solutions. For example, there may be land areas where the interested parties determine that recognition and affirmation of aboriginal title is not possible or appropriate even on a limited and shared basis. In some cases, it may be *mutually agreed* that established cities or towns (in whole or in part) are no longer to be linked to an Aboriginal people's traditional or historical territory. In other instances, such as in the

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[2802] See discussion under sub-heading 10.2.1 *supra*.

[2803] See discussion under sub-heading 10.2.2 *supra*.

[2804] Reference is made here to "rights *or* jurisdiction", because in shared areas Aboriginal peoples may recognize that others have exclusive rights of ownership of lands in significant areas. However, certain jurisdictional aspects of Aboriginal title would still be retained in varying degrees through cooperative arrangements.

[2805] Until Aboriginal peoples actually assume government authority over the different subject matters involved, this first classification may well resemble the second category of land which is best characterized as an area of shared jurisidiction and rights.

[2806] As previously indicated, the nature and extent of recognition of such shared rights or jurisdiction would be determined in each case by the parties through negotiation, taking into account the relevant circumstances.

case of some Metis, the Aboriginal peoples concerned may have been irreversibly dispossessed of their original lands or territories.

185. However, those Aboriginal peoples who have been irreversibly dispossessed, for whatever reason, of their traditional or historical lands need not be left devoid of their aboriginal land rights and jurisdiction. It is suggested by this study that, as a key part of an Aboriginal people's right to restitution, an adequate land and resource base be negotiated by the parties. Unless the Aboriginal people concerned indicate preference for an alternative solution, it should then be expressly agreed through an appropriate treaty that these *replacement lands* constitute lands held according to aboriginal title.[2807]

186. Similarly, where Aboriginal peoples are presently confined to an inadequate land and resource base (e.g. Indian reserve), any additional lands that serve to extend that land and resource base should, if so desired by the Aboriginal people affected, also be expressly agreed through treaty to constitute lands held according to aboriginal title. This would not necessarily mean that the federal *Indian Act* would apply, but would be up to the parties involved to determine what legal regimes were best suited to meet the objectives, priorities and needs of the Aboriginal people concerned.

187. Through such restoration of Aboriginal peoples' rights and titles, the concept of aboriginal rights and aboriginal land tenure systems can have increased opportunities to grow and develop according to each Aboriginal people's own perspectives, values and laws. In addition, appropriate constitutional recognition of aboriginal title in respect to replacement lands (e.g. through treaty rights) would serve to effectively counter the erroneous and prejudicial idea expressed in the Supreme Court of Canada in *Smith* v. *The Queen*[2808] that aboriginal rights, once extinguished, disappear forever.[2809]

188. Specific alternatives to extinguishment should be circumscribed with additional safeguards. The alternative must ensure that an adequate land and resource base is secured and maintained for present and future generations of Aboriginal peoples. Permanent alienations of Aboriginal lands or resources should be viewed as an exception and subject to clear procedural protections. In regard to alienation of any portion of Aboriginal land, consent should be accorded by the people themselves and not by a council, band, chief or organization - unless such entity or person has been clearly mandated by the people in this regard.

189. In addition, *third party rights* should not automatically prevail over those of Aboriginal peoples. Every case should be determined on its merits. Moreover, *supersession by law* should be disavowed as having any validity in terms of eliminating Aboriginal rights in favour of a private third party or a non-Aboriginal government.

190. *Certainty* is not always a positive or desirable element in relation to rights and jurisdictional issues. This is especially true, if it is accomplished in an inequitable manner and primarily at the expense of Aboriginal peoples. If federal-provincial constitutional relationships are best left in a flexible situation and similarly Charter rights, then the same principle should apply to Aboriginal rights and jurisdictions.

[2807] See discussion under sub-heading 10.2.2 *supra*.

[2808] *Smith* v. *The Queen*, (1984) 147 D.L.R. (3d) 237 (S.C.C.).

[2809] See discussion of the *Smith* case under sub-heading 1.5.1 *supra*.

191. Just as the residual rights of federal or provincial governments are not extinguished, an equivalent standard must apply to the *residual rights* of Aboriginal peoples. The lack of residual rights could seriously undermine the capacity of Aboriginal peoples to safeguard and advance their interests in the future, in respect to any key matter not foreseen at the time of the negotiations or which government parties refused to address for whatever reason.

192. In any proposed alternative to extinguishment, the notion of *freezing* the nature and scope of aboriginal rights through land claims treaties should be rejected.[2810] Although some element of certainty can be built into land claims agreements, it must at the same time be recognized that the full range and scope of aboriginal rights have yet to be determined by the courts or otherwise. Therefore, it is unfair for non-Aboriginal governments to continue to seek to truncate or arrest, through such treaties, the natural growth and evolution of aboriginal rights. Such a policy is especially unjust, in light of the repressive history that Aboriginal peoples and their rights have faced in Canada.

193. *Review mechanisms* should be incorporated in treaties that would deal with changing circumstances and needs. In particular, such treaties should explicitly acknowledge the evolving understanding of the judiciary and others of aboriginal rights, and legally entitle Aboriginal peoples to a periodic review of their treaties. A mandatory objective of such reviews would be to reinterpret rights or alter treaty arrangements, so as to fully comply with new human rights, judicial or other identified norms.

194. In the event that agreements cannot be reached on how to resolve specific disputes or conflicts, it would be important for interested parties to have access to *dispute resolution mechanisms or processes*. Such mechanisms might not only serve to enhance the exercise of aboriginal rights under a treaty, but also contribute to attaining certainty, through a jointly agreed upon process.

195. It is generally recognized that parties to a treaty have the *right to terminate the treaty* (even if the treaty is silent on this question), based on recognized grounds. However, in regard to treaties concerning Aboriginal peoples, it would be beneficial if the rules were expressly clarified.[2811] If international rules for treaty termination were to be applied, it would be important to incorporate equitable principles relevant to the Aboriginal context.

196. In regard to the alternative to extinguishment of the rights of Aboriginal peoples (proposed in this study), there are numerous potential benefits that may be derived. Such benefits would accrue to Aboriginal peoples, well as to non-Aboriginal governments and Canadians as a whole.[2812]

[2810] Under federal land claims policy in Canada, any Aboriginal rights retained would in effect be "frozen" according to the meaning they are given in a land claims agreement. See discussion under sub-heading 10.2.2 *supra*.

[2811] By explicitly setting out the grounds for treaty termination in a particular treaty, it could serve to reinforce the equal status of the negotiating parties; instill increased incentive for non-Aboriginal governments to honour the treaty terms; provide a reasonable degree of certainty as to what acts or events would justify treaty termination by one of the parties; and confirm that the aboriginal rights of the Aboriginal people concerned would no longer be affected by the terms of the treaty.

[2812] See discussion under sub-heading 10.3 *supra*.

Failings of the common law

197. The consideration of Aboriginal status and rights by the courts, whether by the Privy Council in Britain or by the courts in Canada and the United States, has had a chequered history.[2813] Common law concepts of Aboriginal rights have for the most part failed to fully take into account the implications of Aboriginal sovereignty, the *Royal Proclamation of 1763* and other constitutional instruments, human rights, and in many instances, the fiduciary responsibility of the Crown.

198. Moreover, the courts have relied on anachronistic and discriminatory doctrines, such as *terra nullius*, that have served to deny Aboriginal peoples their fundamental status and rights. In particular, aboriginal title to territory has been mischaracterized and devalued, with particularly adverse consequences in relation to surrender and extinguishment.[2814]

199. The judicial history concerning the determination of aboriginal title is sufficiently questionable as to add to the many reasons why restitution in regard to aboriginal rights is a necessary and urgent matter.

200. In regard to the nature of aboriginal title in the common law, there is still significant confusion and mischaracterization. This confusion, misunderstanding and lack of consistency in judicial decisions has served to unfairly diminish the fundamental rights of Aboriginal peoples under Canadian law. In particular, the "real property" dimensions of aboriginal title have too often been circumvented by the courts.[2815]

201. Moreover, courts have been too quick to validate purported surrenders or extinguishments of aboriginal title. Beneficial judicial principles exist in Canada both in relation to requiring strict proof of extinguishment of aboriginal title and in regard to the interpretation of treaties and statutes relating to Aboriginal peoples. However, these principles are not always applied with sufficient rigour, in light of the critical importance of aboriginal title to the Aboriginal peoples concerned.

202. While some progress in judicial thinking has occurred, the fairness, Eurocentricity and accuracy of the common law's perspective on aboriginal rights is increasingly being challenged. Aboriginal rights may be "aboriginal" in the sense of having to do with aboriginal people, but it is doubtful that traditional or modern aboriginal perspectives have been equitably or substantially reflected in Canadian common law.[2816] Canadian courts must lift the yoke of "constitutional colonialism under which the Aboriginal peoples have suffered since 1867",[2817] as a result of past judicial interpretations.

[2813] See discussion under sub-heading 10.4 *supra*.

[2814] See, for example, *Smith* v. *The Queen*, (1984) 147 D.L.R. (3d) 237 (S.C.C.).

[2815] See discussion under sub-heading 1.5.2.1 *supra*.

[2816] Inuit Tapirisat of Canada, *Submission of the Inuit Tapirisat of Canada to the Royal Commission on Aboriginal Peoples*, note 2339, *supra*, at 26.

[2817] K. McNeil, *Envisaging Constitutional Space for Aboriginal Governments*, (1993) 19 Queen's L.J. 95 at 119.

Issue of restitution

203. In regard to the matter of restitution, it is to be anticipated that concerns will be expressed that the opening up of the extinguishment question has far-reaching implications that would be most challenging to address. Particular concerns are sometimes raised in relation to existing treaties and Metis land rights.

204. However, any possible redress of extinguishment matters should involve two discrete stages of determination. *The first issue to determine is whether there are serious, fundamental grounds for reexamining and seeking alternatives to extinguishment.* If the grounds for reconsidering extinguishment are deemed to be compelling (based on considerations of law, justice, equity, and human rights), then there is a duty to redress this central matter. *The next step is then how can changes be made that are consistent with order and the rule of law.*[2818]

205. In regard to Aboriginal peoples, the right to restitution of their aboriginal rights requires careful consideration. Restitutionary remedies in Canadian law have not developed to date with the situation of Aboriginal peoples specifically in mind. Consequently, some flexibility will be required in ensuring that Aboriginal peoples have full and equitable access to these important remedies.

206. If restitutionary remedies are to be effectively applied to Aboriginal peoples, statutory limitations to sue and other barriers must be reconsidered in terms of their unsuitability to Aboriginal land and resource matters. It would be inappropriate and unjust to perpetuate the dispossession of Aboriginal peoples of their land and resource rights through limitation statutes or unsuitable judge-made rules.

207. As this study demonstrates,[2819] limitation periods applied to Aboriginal peoples and the equitable doctrines of laches and acquiescence[2820] generally serve to operate as arbitrary instruments of injustice that are wholly insensitive to historical realities and essential cross-cultural differences. What might ordinarily be taken as acquiescence or unreasonable delay is, in an aboriginal context, the result of a complex set of factors beyond the control of the Aboriginal peoples concerned.

208. Further, from a constitutional viewpoint, it is submitted that Canadian courts have a duty to ensure that ordinary statutes of limitation (or certain equitable defences) not be arbitrarily applied, so as in effect to allow constitutional obligations to be circumvented and constitutional rights denied.[2821] Especially in view of the Crown's fiduciary responsibilities, such legislative measures should not be upheld to deny the rights of Aboriginal peoples that are recognized and affirmed in s. 35(1) of the *Constitution Act, 1982*, s. 35(1), or to deny the rights and obligations in the *Royal Proclamation of 1763* and in other constitutional instruments.

[2818] Judicial precedent for such a two-step approach has already been established by the Supreme Court of Canada in relation to other questions of fundmental rights. See *Manitoba Language Rights Reference*, [1985] 1 S.C.R. 721 (S.C.C.). See also discussion under sub-heading 10.4 *supra*.

[2819] See discussion under sub-heading 10.4.2 *supra*.

[2820] Id.

[2821] Id.

Capacity to restore aboriginal rights

209. Restoration of aboriginal land and resource rights is probably in most situations best resolved through negotiations. However, if litigation does occur, restoration of such aboriginal rights requires a remedy that is proprietary (*in rem*) rather than personal (*in personam*).[2822]

210. Generally, the law of restitution provides for both proprietary and personal remedies. It is said that proprietary restitutionary remedies are granted principally, though not exclusively, through the device of the constructive trust.[2823] In determining appropriate and effective remedies for Aboriginal peoples in relation to purported land surrenders and extinguishments, the constructive trust could prove to be of significant use and benefit.

211. Usually, in any given situation concerning the Crown, in order for there to be a constructive trust it must be determined whether the Crown (or in some cases a third party) benefitted from an unjust enrichment. This study suggests that the Crown is in a position to wrongfully gain from purported land surrenders or extinguishments.

212. Further, in the case of the Crown in right of the province, it cannot be concluded that generally it should be exempt from the duty to make restitution to the Aboriginal people affected, in the event of wrongful conduct by the federal Crown. In the context of a constructive trust, the Crown in right of a province, even in the capacity as a third party, does not generally constitute a *bona fide* purchaser for value of lands subject to aboriginal title.[2824]

213. In the 1983 decision by the Supreme Court of Canada in *Smith* v. *The Queen*[2825], it was held that aboriginal rights in property would be deemed to forever disappear upon surrender, even though the Crown in right of Canada violated its fiduciary responsibility in carrying out the land surrender. This far-reaching conclusion, which was reached by the Court without Aboriginal peoples being party to the litigation, is in the view of this study erroneously decided.[2826]

214. If the *Smith* ruling were to retain any validity, it would suggest that Aboriginal peoples would be the only peoples in Canada who could not have proprietary rights or proprietary remedies (based on their own land tenure systems) recognized by the Canadian system of law. This would have far-reaching implications for both Aboriginal peoples and

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[2822] The exercise of personal legal remedies could possibly lead to a settlement that involved *replacement* lands and resources. In such instances, the rights on such lands might not be considered as "aboriginal" *per se* (if the lands were outside of the traditional territory of the people concerned). However, rights on replacement lands could nevertheless be negotiated as treaty rights. It is the view of this study that, in those cases where replacement lands are intended to fulfill the same objectives and purposes as the original aboriginal lands, the rights on replacement lands should still be characterized as "aboriginal".

[2823] P. Maddaugh & J. McCamus, *The Law of Restitution*, note 2391, *supra*, at 37. See generally discussion under sub-heading 10.4.3 *supra*.

[2824] See discussion under sub-heading 10.4.3 *supra*.

[2825] *Smith* v. *The Queen*, (1984) 147 D.L.R. (3d) 237 (S.C.C.).

[2826] The Supreme Court's ruling in the *Smith* case is examined in some detail under sub-heading 1.5.2.1 *supra*. It is possible that the Supreme Court has subsequently changed the view it expressed in *Smith* that aboriginal rights, as personal and not proprietary rights, disappear upon surrender: see *Canadian Pacific Ltd.* v. *Paul*, [1988] 2 S.C.R. 654, at 677.

Canadian society at large. It would mean that the vulnerability of Aboriginal societies would be perpetuated. It would suggest that full and equal opportunities for justice would not be attainable, as compared to non-Aboriginal peoples in Canada. The equality guarantees enshrined in Canada's Constitution and in international human rights instruments would ring hollow. Under such circumstances, confidence in Canada's legal system and the rule of law would be seriously undermined.

215. In general terms, it is clear that restitutionary remedies available to Aboriginal peoples must be flexible and responsive to the stark realities and needs facing the peoples concerned. In numerous situations, restoring parties to their original positions (*restitutio in integrum*) may be neither possible nor desirable. Restitution should not be dependent on whether full restitution is always possible.

216. As described throughout this study, the situations facing Aboriginal peoples are unlike those of other peoples in Canada. In view of the fundamental importance that an adequate land and resource base represents for Aboriginal peoples, it is critical that restitutional remedies not be limited to monetary compensation or damages. In virtually all cases of prior land and resource dispossessions, the Crown has been centrally involved. Consequently, in cases where restitution of traditional lands is no longer possible, legal remedies should be available whereby replacement lands and resources are equitably secured by Aboriginal peoples from the Crown for past wrongdoings.

Restitution of aboriginal rights - the need for a uniform policy

217. In principle, restitution of aboriginal rights should be open to all Aboriginal peoples in Canada who have been wrongfully dispossessed of their lands and resources.

218. Restitution is appropriate, beneficial and long overdue for Aboriginal peoples in a number of different situations. These include Aboriginal third parties whose rights have been purportedly extinguished in connection with the *James Bay and Northern Quebec Agreement*;[2827] Aboriginal peoples who purportedly surrendered their land rights in historic and contemporary treaties;[2828] and Aboriginal peoples subjected to supersession by law.[2829]

219. If a new relationship between Aboriginal peoples and non-Aboriginal governments is to be attained, if genuine reconciliation is to be achieved in Canada, and if healing is to take place in Aboriginal communities - then, a *uniform policy* must be adopted based on recognition and affirmation of aboriginal rights. In this context, government policies of extinguishment must not only be repudiated but previous purported extinguishments be redressed.

220. The questionable policies and practices of extinguishment that have occurred, as well as their ongoing impacts on Aboriginal peoples, call for imaginative and effective measures of restitution or redress. It should be clear, however, that a uniform policy on restitution of aboriginal rights, as well as their recognition and affirmation, does not suggest that identical solutions are required.

[2827] See discussion under sub-headings 7.1 & 10.4.4 *supra*.

[2828] See discussion under sub-heading 10.4.5 *supra*.

[2829] See discussion under sub-headings 5.6 & 10.4.6 *supra*.

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EXTINGUISHMENT OF THE RIGHTS OF ABORIGINAL PEOPLES: PROBLEMS AND ALTERNATIVES

A STUDY PREPARED FOR THE ROYAL COMMISSION ON ABORIGINAL PEOPLES

VOLUME 3

Paul Joffe and Mary Ellen Turpel

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PART II

11. CASE STUDY I: JAMES BAY AND NORTHERN QUEBEC AGREEMENT[2830]

> "When it is modern treaties that are at stake, the Aboriginal party must now, too, be bound by the *informed commitment* that it is now in a position to make. No serious and lasting political compromise or business agreement can be entered into in an atmosphere of distrust and uncertainty."[2831]
>
> Décary J.A., *Eastmain Band et al.* v. *Canada et al.*, 1993

Introduction

In overturning a decision of the Federal Court, Trial Division,[2832] ordering a federal environmental and social impact assessment of the Eastmain hydroelectric project, Décary J.A.[2833] assumed that the James Bay and Northern Québec Agreement (JBNQA) was a "modern" treaty.[2834] The federal Appeal Court judge then distinguished contemporary treaties, such as JBNQA, from the historic treaties, indicating that in the case of JBNQA no similar vulnerability existed among the Aboriginal peoples concerned.[2835] Consequently, Décary J.A. concluded that the Aboriginal parties to the Agreement had been in a position to make an "informed commitment" to the Agreement.

[2830] This Case Study was prepared with input and assistance from Chris Tennant. In particular, Mr. Tennant carried out all interviews for this Study and transcribed the taped interviews. For a list of interviewees for this Case Study, see Annex I *infra*.

[2831] *Eastmain Band et al.* v. *Canada et al.*, [1993] 1 F.C. 501 (Fed. C.A.) at 518-519; (1993) 145 N.R. 270 at 285 (Fed. C.A.), per Décary, J.A.

[2832] Reported 49 F.T.R. 241.

[2833] Robert Décary, Q.C. (as he then was) was counsel for the appellant the Attorney General of Québec in the case of *R.* v. *Sioui*, [1990] 1 S.C.R. 1025.

[2834] *Eastmain Band et al.* v. *Canada et al.*, [1993] 1 F.C. 501 (Fed. C.A.) at 514: "...assum[e] for the purposes of this case that the Agreement is a 'treaty', strictly speaking, on which point I shall express no opinion..."

[2835] Id. at 519: "The principles that ambiguities must be construed in favour of the Aboriginals rests, in the case of the historic treaties, on the unique vulnerability of the Aboriginal parties, who were not educated and were compelled to negotiate with parties who had a superior bargaining position, in languages and with legal concepts which were foreign to them and without adequate representation. [new para.] In this case, there was simply no such vulnerability."

With respect, it is not clear that Décary J.A. could reach a conclusion of non-vulnerability of the Aboriginal peoples in regard to the James Bay and Northern Quebec Agreement. The learned judge offers no real evidence to substantiate that the Aboriginal peoples concerned had the necessary education to comprehend the legal concepts involved and their full implications; that the non-Aboriginal parties to JBNQA did not have a superior bargaining position; or that the language and legal concepts were not foreign to the Crees and Inuit at that time of the negotiations. While it is true that the Aboriginal parties had access to legal counsel, this factor alone cannot adequately compensate for all of the sources of vulnerability that were facing them. For example, as this Case Study describes, access to legal counsel did not alter the fact that non-Aboriginal governments were in a superior bargaining position than the Aboriginal peoples concerned.

This Case Study is concerned with a similar question, not in relation to environmental and social impact assessment, but in regard to the purported surrender or extinguishment[2836] of the rights of Aboriginal peoples in and to land. Can the "commitment" or consent of the Aboriginal peoples be fairly described as "free and informed"? What were the conditions in which the Agreement was negotiated, and how do these conditions relate to the purported surrender or extinguishment of Aboriginal rights in the Agreement and its implementing legislation? In addition, how well were the notions of "surrender" and "extinguishment" understood by the Aboriginal people concerned, at the time the Agreement was negotiated and signed? Were the legal and political implications of these potentially far-reaching notions ever fully explained to the peoples concerned?

In order to shed light on these essential questions, the Case Study describes the perspectives, positions and actions of the parties to the Agreement in the 1970s when the JBNQA was negotiated and signed. This context includes the Crees, the Inuit (including the significant number of Inuit "dissidents", who withdrew their mandate before the Agreement was signed[2837]), and the federal and Québec governments, as well as three development corporations involved in the James Bay hydroelectric project.

At the same time, there is another critical aspect that is described in this Case Study. This pertains to the unilateral extinguishment of the land rights of Aboriginal third parties. In this regard, the James Bay and Northern Quebec Agreement is unique. It is the only "modern" land claims agreement in Canada that seeks to extinguish the rights of third parties without their consent.[2838]

An additional feature of JBNQA is that it was the first land claims agreement in Canada to seek and implement a legislated extinguishment of the rights of Aboriginal peoples in and to land. Not only does the Agreement include provisions for the purported surrender of Aboriginal peoples' land rights, but the Agreement contemplates that the Parliament of Canada would extinguish through legislation the land-related rights of "all Indians and all Inuit in and to the Territory" covered by JBNQA.[2839] As already indicated in the Extinguishment Study,[2840] the legal ramifications of this action are potentially far-reaching and adverse. They affect not only those Aboriginal peoples represented in the JBNQA negotiations as direct parties, but also all other Indians and Inuit with rights in and to the same Territory, regardless of whether these peoples live within or outside the province of Québec.

Further, the James Bay and Northern Québec Agreement represents the first instance in Canada, where the federal Crown permitted a province to take a predominant and leading role in the negotiations and virtually determine the terms of surrender and extinguishment for all the

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[2836] The terms "surrender" and "extinguishment" are often used interchangeably, since the legal effect of a valid surrender can be an extinguishment or elimination of rights. At the same time, it is important to keep in mind that a surrender of rights, based on free and informed consent, may have very different constitutional and legal implications than a legislative extinguishment. Surrenders and legislative extinguishment were both purportedly carried out in connection with the James Bay and Northern Quebec Agreement and related legislation. For a discussion of the particular legal implications of a legislative extinguishment in the context of a land claims agreement, see sub-heading 1.4 *supra*.

[2837] This study readily acknowledges that it is problematic to refer to the Inuit dissidents, who legally withdrew their mandates from the Northern Quebec Inuit Association in connection with the JBNQA negotiations, as a part of the Inuit "Native party" to the Agreement (s. 1.11). At the same time, the Agreement and related legislation forcibly included Inuit in the three dissident communities as "beneficiaries" under the Agreement. Consequently, serious constitutional, human rights and other legal questions arise as to the validity of such unilateral actions on the part of the governments and legislatures concerned. A number of these issues have been raised in an action first instituted by Inuit dissidents in 1981 and recently reactivated: see *Alashua et al.* v. *A.G. Canada et al.*, Québec Superior Court, No. 500-05-018552-818.

[2838] In regard to the constitutionality of unilateral extinguishment of Aboriginal third parties' rights in relation to the James Bay and Northern Quebec Agreement, see discussion under sub-heading 7.1 *supra*. See also discussion under sub-heading 10.4.4 *supra*.

[2839] JBNQA, s. 2.6.

[2840] See discussion under sub-heading 1.4 *supra*.

Aboriginal peoples concerned.[2841] As described in the Extinguishment Study, this raises fundamental questions of a constitutional nature.[2842]

Finally, it is important to point out that the 1975 Agreement has been followed by the signing of a number of related agreements. As Hydro-Québec (one of the parties to JBNQA) has indicated, it has subsequently negotiated eight complementary agreements and six individual agreements with the Crees and Inuit.[2843] These additional arrangements would include other rights and obligations for all parties involved.

However, for the purposes of this Case Study, solely the JBNQA signed in 1975 will be examined. There are a number of reasons for this approach. First, it is solely the initial treaty signed in 1975 and the implementing legislation that include the purported surrender and extinguishment clauses affecting Aboriginal peoples in and outside Québec. Second, the relevant period to determine the conduct of the government and non-Aboriginal parties in relation to questions pertaining surrender and extinguishment is, for the most part, prior to and during the negotiations of the Agreement in 1975.

Third, to a large extent, the JBNQA that was signed in 1975 determined the future bargaining positions of the parties and what type of complemenary or other agreements the Aboriginal peoples were able to negotiate. Fourth, it was the issue of surrender and extinguishment, arising out of the 1975 Agreement, that was the principal issue leading to a serious division among Inuit communities in northern Québec. Fifth, the JBNQA of 1975 has been central both in the shaping of ongoing relations and in the ongoing disputes and litigation among the parties.

The following Case Study is being undertaken, so that important insights and lessons might be learned on the issue of surrender and extinguishment. Moreover, if injustices have occurred, there are compelling reasons for the Crown to redress them in collaboration with those Aboriginal peoples affected.[2844] It is in this spirit and with these basic objectives that the Case Study will now proceed.

11.1 Background to the Agreement

There is an abundance of literature on the technical,[2845] environmental[2846] and

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[2841] See sub-heading 7.1.1 *supra*.

[2842] Id.

[2843] Hydro-Québec, *Memoire à la Commission Royale sur les Peuples Autochtones en Reponse aux Questions Posées par M. David Hawkes à M. Armand Couture* (Montréal: 2 novembre 1993) at 2.

[2844] For a discussion of the issue of restitution, see generally sub-heading 10.4 *supra*. In regard to the anticipated benefits to be derived from new and equitable approaches, see sub-heading 10.3 *supra*.

[2845] Société d'énergie de la Baie James, *The La Grande Rivière Hydroelectric Complex: Phase One Development* (Montréal: SEBJ, 1988). For a technical description of the Complexe La Grande, see "Description Technique - Le Complexe La Grande (1975)" which is reproduced in Schedule 1, c. 8 of the James Bay and Northern Quebec Agreement.

[2846] See, for example, D. Brouard *et al.*, *Summary Report: Evolution of Mercury Levels in Fish of the La Grande Hydroelectric Complex, Québec (1978-1989)* (Montréal: Hydro-Québec, 1990); A. Penn, "Mercury as an Issue in Hydroelectric Development in Southeastern Hudson Bay" in *Proceedings of the Conference on Contaminants in the Marine Environment of Nunavik* (Montreal: March 1991); C. Delisle & M. Bouchard, (eds.), *Managing the Effects of Hydroelectric Development* (Montreal: Symposium of the Canadian Society of Environmental Biologists, 1989); P. Gorrie, "The James Bay Power Project: The environmental cost of reshaping the geography of northern Quebec", in *Canadian Geographic*, February-March 1990, at 21; R. Lalumière, R. LeJeune, & A. Boudreault, *Effects of a Streamflow Reduction on the Caniapiscau and Koksoak Rivers*, Caniapiscau-Koksoak Study Group, James Bay Energy Corporation (Montreal: Gilles Schooner Inc., August 1985).

social[2847] aspects of the James Bay hydroelectric project.[2848] The first phase of the project, known as Le Complexe La Grande, was announced in 1971. It led to the litigation initiated by the James Bay Crees and the northern Quebec Inuit in 1973 and, ultimately, to the signing of the James Bay and Northern Quebec Agreement in November 1975.[2849]

For the purposes of this Case Study, it is not necessary to delve into the technical, environmental and social aspects of the James Bay hydroelectric project.[2850] What is of primary relevance here is the approach taken by the non-Aboriginal governments concerned, so that the rights of Aboriginal peoples affected by the project could be respected and protected. In this regard, there appears to have been no attempt on the part of the federal or provincial governments to consult with the Crees or Inuit in advance of the start of construction of this massive project.[2851] As N. Rouland observes, there was no concern by the Québec government in 1971 for the rights of Indians and Inuit:

> "On ne se préoccupa alors nullement des droits des autochtones, qu'ils fussent Indiens ou Inuit."[2852]

Moreover, Rouland adds that "la cause des autochtones ne trouvait guère d'appui dans une opinion publique québécoise indifférente."[2853]

According to Ambassador Ted Moses, the Crees first heard about the project through radio broadcasts and newspaper articles:

> "...the project was first heard through an announcement on a radio broadcast, that someone, I think Billy Diamond, heard on a short-wave radio while he was out goose hunting... Other people learned it through newspaper articles. The project was not [made] known to the Crees in any official way by the government."[2854]

Chief Billy Diamond, speaking in 1977, confirmed that there was no advance consultation with the Crees about the project, and that the project was announced at a time when many Crees

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[2847] See, for example, R. Salisbury, *A Homeland for the Cree: Regional Development in James Bay 1971 - 1981* (Kingston/Montreal: McGill Queen's University Press, 1989); H. Feit, "Hunting and the Quest for Power: The James Bay Cree and Whitemen in the Twentieth Century" in R. Morrison & C. Wilson, (eds.), *Native Peoples: The Canadian Experience* (Toronto: McClelland & Stewart, 1986) 171.

[2848] For a Quebec government view of the project, see R. Bourassa, *Power From the North* (Scarborough: Prentice-Hall, 1985). For an opposing perspective, see B. Richardson, *Strangers Devour the Land* (Vancouver: Douglas & McIntyre, 1991).

[2849] For a detailed chronology of events between 1971 - 1978, see Annex II *infra*.

[2850] See, for example, J. O'Reilly, "The Role of the Courts in the Evolution of the James Bay Hydroelectric Project" in S. Vincent & G. Bowers, (eds), *Baie James et Nord quebécois: dix ans après/James Bay and Northern Québec: Ten Years After* (Montréal: Recherches amérindiennes au Québec, 1985) 30 at 33: "The hydroelectric power project involved the construction of 4 powerhouses, 4 main dams, 18 spillways and control structures, 80 miles of dikes, the creation of several large reservoirs, and the flooding of an additional 3,407 square miles. The contemplated project entailed gigantic changes to the ecosystem."

See also M. Walsh, "Nature or Power for Québec?", *Los Angeles Times*, May 25, 1991, at A1, where it is said that this massive multi-decade energy project will ultimately generate 26,400 megawatts of electric power, enough energy to power the houses and industry of a city of 13 million people. In the first phase of the project, substantial westerly rivers were diverted to the north, one northbound river was re-routed to the west, and 4,000 square miles of forest were flooded.

[2851] A 1972 Hydro-Quebec publicity film that never mentioned the Cree called the James Bay area, "practically uninhabited and unexplored." L. Lack, "All is not Well in Cree Country", *Whole Earth Review*, March 22, 1988, at 58.

[2852] N. Rouland, *Les Inuit du Nouveau-Quebec et la convention de la Baie James* (Québec: Association Inuksiutiit Katimajiit and Centre d'études nordiques, Université Laval, 1978), at 28. Unofficial English translation: "There was no concern at all in those days for the rights of Aboriginal peoples, be they Indians or Inuit."

[2853] Id. at 32. Unofficial English translation: "the cause of Aboriginal peoples found hardly any support in the indifferent Québec public opinion."

[2854] Interview with Ambassador Ted Moses, July 29, 1993.

were out at their Spring goose hunting grounds. Chief Diamond added that there was no consultation even though "there had been numerous surveyors in the area."[2855]

This was in May of 1971. Once the Crees learned of the project, a series of political and legal events began, which culminated in the signing of the James Bay and Northern Québec Agreement on November 11, 1975. These events are described further in the Case Study, and summarized in the Chronology 1971-1978 in Annex II.

11.2 Extinguishment and Surrender Provisions

The extinguishment and surrender provisions of the James Bay and Northern Québec Agreement must be read in the context provided by the federal implementing statute, the *James Bay and Northern Québec Native Claims Settlement Act*,[2856] and by the *Québec Boundaries Extension Act, 1912*.[2857] The purported surrender clauses are included among the terms of the Agreement itself. The purported legislative extinguishment of rights of all Indians and Inuit in and to the territory (410,000 sq. mi.[2858]) covered by the Agreement is found in the *James Bay and Northern Québec Native Claims Settlement Act*.

As the Extinguishment Study describes, both the *Rupert's Land and North-Western Territory Order*, 1870 and the *Royal Proclamation of 1763* are most relevant to Aboriginal territorial issues in Rupert's Land, which clearly includes northern Québec. However, at the termination of negotiations, the government parties appeared to be primarily concerned with addressing the constitutional obligations provided in the *Québec Boundaries Extension Act, 1912*.[2859]

11.2.1 Relevant provisions of JBNQA

The purported surrender and extinguishment provisions in the James Bay and Northern Québec Agreement itself are as follows. The primary "extinguishment" appears to be in the form of a surrender and grant-back. In section 2.1 of the Agreement it is provided that the Crees and the Inuit surrender all their rights in and to land in the Territory and in Québec:

> "In consideration of the rights and benefits herein set forth in favour of the James Bay Crees and the Inuit of Québec hereby cede, release, surrender and convey all their Native

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[2855] House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development, *Bill C-9, James Bay and Northern Quebec Native Claims Settlement Act*, Issue No. 6, January 25, 1977 [hereinafter "*Minutes of the Standing Committee*"], at 4-5.

[2856] S.C. 1976-77, c. 32.

[2857] *Quebec Boundaries Extension Act, 1912*, S.C. 1912, c. 45. While reference is often made to this federal legislation, it is important to note that parallel legislation was enacted by the Québec legislature at the same time: see *An Act respecting the extension of the Province of Quebec by the annexation of Ungava*, S.Q. 1912, c. 7. Sections 2(c), (d) & (e) of the federal Act are reproduced identically in the Quebec Act.

[2858] Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 5, 1975, No. 174, at B-5934 -B-5935 (J. Ciaccia, head of negotiations of JBNQA for Québec government).

[2859] The obligations in s. 2 of the federal 1912 Act were repealed by the *James Bay and Northern Québec Native Claims Settlement Act*, s. 7.

claims, rights, titles and interests, whatever they may be, in and to land in the Territory and in Québec, and Québec and Canada accept such surrender."[2860]

In section 2.2 of the Agreement, Québec, Canada, the James Bay Energy Corporation, the James Bay Development Corporation and Hydro-Québec, "grant back" or confer certain rights set out in the James Bay and Northern Québec Agreement:

"Québec and Canada, the James Bay Energy Corporation, the James Bay Development Corporation and the Québec Hydro-Electric Commission (Hydro-Québec), to the extent of their respective obligations as set forth herein, hereby give, grant, recognize and provide to the James Bay Crees and the Inuit of Québec the rights, privileges and benefits specified herein, the whole in consideration of the said cession, release, surrender and conveyance mentioned in paragraph 2.1 hereof."

Canada hereby approves of and consents to the Agreement and undertakes, to the extent of its obligations herein, to give, grant, recognize and provide to the James Bay Crees and the Inuit of Québec the rights, privileges and benefits herein.[2861]

The Agreement also provides for the settlement of all outstanding legal proceedings:

"2.4 In consideration of and subject to the rights, benefits and privileges in favour of the James Bay Crees and the Inuit of Québec, the James Bay Crees and the Inuit of Québec consent by these presents to the settlement out of court of all legal proceedings relating to the James Bay project or to the claims, rights, titles and interests in land that they may have. The James Bay Crees and the Inuit of Québec further undertake not to institute any further proceedings relating to the matters contemplated in the said legal proceedings already instituted which are presently before the Supreme Court of Canada in virtue of leave to appeal granted by the Supreme Court of Canada on February 13, 1975."[2862]

In addition, subject to a specified exception, the Agreement provides for the release of Hydro-Québec and the other development corporations from all liability for environmental and social impacts of Le Complexe La Grande (even though full environmental and social impact

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[2860] James Bay and Northern Québec Agreement, November 11, 1975 (as amended). Reprinted in *James Bay and Northern Québec Agreement and Complementary Agreements* (Éditions officiel du Québec, 1991). Hereinafter "James Bay and Northern Québec Agreement", "JBNQA" or "the Agreement". The Inuit of Port Burwell (Killiniq, N.W.T.) similarly surrender all their rights, in section 2.3 of the Agreement: "In consideration of the rights and benefits herein set forth in favour of the Inuit of Port Burwell who are ordinarily resident of Killinek Island, the Inuit of Port Burwell hereby cede, release, surrender and convey all their Native claims, rights, titles and interests, whatever they may be, in and to land in the Territory and in Canada, and Québec and Canada accept such surrender."

[2861] A similar grant-back provision applies to the rights of the Inuit of Port Burwell in s. 2.3:

"...Québec and Canada, the James Bay Energy Corporation, the James Bay Development Corporation and the Québec Hydro-Electric Commission (Hydro-Québec) to the extent of their respective obligations as set forth herein, hereby give, grant, recognize and provide to the Inuit of Port Burwell the rights, privileges and benefits specified herein, the whole in consideration of the said cession, release, surrender and conveyance mentioned in this paragraph."

[2862] The parties also agree to suspend legal proceedings during the "Transitional Period":

"2.9.7 The Parties agree to further suspend during the Transitional Period the legal proceedings relating to the James Bay project or to the claims, rights, titles and interests in land of the James Bay Crees and the Inuit of Québec, including the effects of any judgement, rendered or to be rendered, resulting therefrom, and not to institute any further proceedings relating to such matters, during the Transitional Period, including all matters contemplated by the proceedings in the case of *Kanatewat et al.* vs. the *James Bay Development Corporation et al.* pending before the Supreme Court of Canada and related proceedings pending before the Superior Court of Québec. The Parties further agree not to institute legal proceedings relating to Transitional Measures referred to herein during the Transitional Period."

The "Transitional Period" is defined in section 2.9.1 of the Agreement to be "...the period between the date of execution of the Agreement and either the coming into force of the legislation referred to in paragraph 2.5 or two (2) years from the date of execution of the Agreement, whichever is the earlier..."

assessments were never carried out)[2863]:

> "8.17 In consideration of and subject to the benefits and undertakings in favour of the Native people contemplated by this Agreement and except as otherwise provided for in this Agreement, the said Native people in respect of Le Complexe La Grande (1975), *hereby release* La Société d'énergie de la Baie James and/or Hydro-Québec and/or La Société de développement de la Baie James *of all claims, damages, inconveniences and impacts of whatever nature related to the hunting, fishing and trapping of the Crees and of the Inuit and related activities and to their culture and traditional ways that may be caused by the construction, maintenance and operation of Le Complexe La Grande (1975)*..."[2864] [Emphasis added.]

Also, in regard to future hydroelectric developments,[2865] s. 8.1.3 of the Agreement purports to forbid Crees and Inuit from opposing or preventing such developments based on sociological factors or impacts:

> "...It is agreed that these known projects and any additions and/or substantial modifications to Le Complexe La Grande (1975), if built, shall be considered as future projects subject to the environmental regime only in respect to ecological impacts and that *sociological factors or impacts shall not be grounds for the Crees and/or Inuit to oppose or prevent the said developments*..." [Emphasis added.]

Such provisions show little or no concern[2866] for safeguarding Aboriginal peoples and their distinct societies, as well as the lands and environment on which these peoples depend. Further, to prevent Aboriginal peoples from opposing or preventing proposed developments, regardless of how serious or far-reaching the sociological impacts might prove to be, appears to seriously contravene the human rights of the peoples concerned. In light of the fiduciary and other constitutional obligations of governments under the *Royal Proclamation of 1763*, the *Rupert's Land and North-Western Territory Order*, 1870 and the *Quebec Boundaries Extension Act, 1912*, it is difficult to fathom how such a provision could be included in a land claims treaty that purported to protect the Aboriginal peoples concerned.

The Agreement also contains secondary "extinguishment" provisions which have potentially far-reaching negative implications for the Crees and Inuit, notably in section 2.10 and section 3.2.7. Section 2.10 declares that all lands other than Category 1A lands are and shall remain subject to Québec provincial jurisdiction. However the Section goes on to specify that if a court declares that these lands are subject to federal jurisdiction, then "*any rights given to the Native people with respect to such lands shall cease to exist for all legal purposes.*" Section 2.10 in part provides:

[2863] See, for example, s. 8.1.2 of the Agreement which provides in part: "The parties to the Agreement acknowledge that the Le Complexe La Grande (1975) is already under construction and therefore *shall not be subject to the environmental regime established by the Agreement and further agree not to take any actions whatsoever which would prevent the construction of the said complex.*" [Emphasis added.]

[2864] Section 8.17 continues as follows: "...*except* however that such release shall not apply to the guarantee of La Société d'énergie de la Baie James or its successors or assigns for the same harvest of fish for equal effort to the Native people of Fort Chimo undertaken under the provisions of Sub-Section 8.10 and for the utilization of wildlife resources north of the 55th parallel by the Inuit of Québec insofar as such utilization may be affected by the Caniapiscau diversion."

[2865] Reference is made in s. 8.1.3 of the Agreement to the Great Whale Complex, the N.B.R. Complex (Nottaway, Broadback and Rupert Rivers), and any additions or substantial modifications to Le Complexe La Grande (1975).

[2866] See also ss. 5.5.1 (re Crees) of the Agreement that provide: "...the rights and guarantees given to the Native people by and in accordance with the *Section on Hunting, Fishing and Trapping [s. 24] shall be subject to the right to develop Category III and Category II lands* on the part of Québec, Hydro-Québec, [and the other development corporations party to the JBNQA]...and such other persons as may be lawfully authorized." [Emphasis added.] For a similar provision regarding Inuit, see s. 7.4.1 of the Agreement. It seems discriminatory to suggest that development projects by such non-Aboriginal entities might have some kind of priority over Aboriginal peoples' harvesting activities, regardless of the merits of the projects being proposed at any time in the future. As formulated under the JBNQA, this "right to develop" for non-Aboriginal entities appears to be inconsistent with the human right to development that enures to all peoples, including indigenous peoples: see sub-heading 8.2.10 *supra* of the Extinguishment Study.

"2.10 The Parties hereto recognize and declare that all lands other than Category 1A lands are and shall remain under the exclusive legislative jurisdiction of the Province of Québec.

In the event that a final judgement of a competent court of last resort declares that the whole or any part of Categories II and III lands fall under the legislative jurisdiction of Canada, because of rights granted to the Native people with respect to all or any such lands or because such lands are held to be lands reserved for Indians, *then any rights given to the Native people with respect to such lands shall cease to exist for all legal purposes.*"[2867] [Emphasis added.]

Although s. 2.10 provides that efforts will be taken to "grant anew the same rights that had ceased to exist but with provincial jurisdiction", it is still appalling that the existence and exercise of fundamental rights of Crees and Inuit should be made dependent on the successful realization of Québec jurisdiction in the northern territory.[2868] Not only does this raise human rights considerations, but it is also inconsistent with the fiduciary responsibilities and other constitutional obligations of both governments.

Section 3.2.7 of the Agreement provides that anyone entitled to the benefits of the Agreement will automatically lose the capacity to exercise rights or receive benefits if he or she is absent from the Territory of the Agreement for ten continuous years and is domiciled outside the territory. The capacity to exercise rights or receive benefits only "revives" if the person re-establishes his or her domicile in the Territory:

[2867] The remainder of the text of Section 2.10 reads as follows:

"Québec and Canada undertake that as of the date of the said judgement, both one to the other, as well as individually and collectively, in favour of the Native people to do all things necessary and to introduce such legislation or other measures needed to enable Québec and/or Canada, in their respective jurisdictions, to grant anew the same rights that ceased to exist but with provincial jurisdiction to the said lands.

Nonetheless, in order to avoid hardship to the Native people and notwithstanding the above, the effect of the preceding provisions with respect to the termination of the rights of the Native people shall be suspended for a period of two (2) years following the date of the judgement.

During such period of suspension, Québec and Canada undertake that they will not do anything or permit anything to be done which would prevent the granting or restoration to the Native people of any rights so nullified.

At the expiration of the period of suspension of two (2) years mentioned above, should no measures have been taken which would make possible, under provincial jurisdiction, the restoration of rights to the Native people, Canada and Québec shall continue to endeavour to take the measures necessary which will make possible the restoration under provincial jurisdiction of the said rights over Categories II and III lands.

Should any Category I lands, exclusive of Category 1A lands of the Crees be held by a final judgement of a competent court of the last resort to fall under federal jurisdiction, none of the rights of the Native people in regard to such lands shall be affected. However, Canada and Québec undertake to diligently do all things necessary and to introduce such legislative or other measures required so that such lands and rights of the Native people related to such lands fall under provincial legislative jurisdiction.

The termination of any rights in virtue of this paragraph and the circumstances described herein shall not be deemed to be nor be construed as nullifying in any manner whatsoever any other right or provisions of this Agreement."

In effect, Section 2.10 provides that if the Supreme Court of Canada finds that Category II or Category III lands are under federal jurisdiction for constitutional reasons, then, in addition to the Aboriginal rights which have already been purportedly extinguished by the federal implementing legislation, the Aboriginal parties to the Agreement will also lose the rights that were "granted back" to them under the Agreement in regard to these lands.

The final sentence of Section 2.10 does specify that the rights which will cease to exist or only rights with respect to land: "The termination of any rights in virtue of this paragraph [i.e. Section 2.10] and the circumstances described herein shall not be deemed to be nor be construed as nullifying in any manner whatsoever any other rights of provisions of this Agreement."

[2868] For the Québec government's views on s. 2.10, see Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 5, 1975, No. 174, at B-5952 - B-5954.

> "3.2.7 In the event a person mentioned in paragraphs 3.2.1 to 3.2.6 inclusive of this Sub-Section [i.e. a person entitled to the rights and benefits of the Agreement] is absent from the Territory during ten continuous years and is domiciled outside the Territory, such person *shall not be entitled to exercise his rights or receive benefits under the Agreement*. Upon such person re-establishing his domicile in the Territory, the right of such person to exercise his rights or to receive benefits under the Agreement shall revive." [Emphasis added.]

Section 3.2.7 of the Agreement particularly affects those Crees and Inuit who work actively for their own people, and who leave the Territory (for example to live in Montréal, Québec city, or Ottawa) in order to do so. It is precisely those committed individuals and their family members, who are at greatest risk of disenfranchisement under s. 3.2.7.

This arrangement hardly provides security to the Aboriginal people involved and serves as a possible means for wholesale dispossession of individuals of their basic rights. Also, it potentially sets up different classes of Aboriginal people among both the Crees and Inuit (i.e. those with treaty rights and those without) and, therefore, could be an extremely divisive factor within these societies. Moreover, it is highly questionable for fundamental rights to be arbitrarily dealt with in such a sweeping and draconian manner, especially when human rights are involved. These insensitive measures also appear to be incompatible with the fiduciary duties of the Crown.[2869] In some situations under the JBNQA, it is reasonable to expect that residency requirements would be needed. However, more specific remedies should be implemented than simply disenfranchising Aboriginal people of their basic status and rights.

Except for the out-of-court settlement of the James Bay litigation, all of the above clauses in the Agreement appear to share some common characteristics. The provisions in question include elements of dispossession of fundamental rights, disregard for human rights, reduction of the legal or other remedies available to the Aboriginal peoples concerned, and significant weakening of the position of Crees and Inuit to provide for their future. In addition, these provisions appear highly incompatible in their orientation and purpose with the fiduciary and other constitutional responsibilities of the Crown. In view of these far-ranging implications, the above clauses are strong indicators of a possible pattern of continued domination and coercion or duress. The particular issue of coercion or duress, as well as Crown fiduciary duties, is examined later in this Case Study.

11.2.2 "Extinguishment" and other legislative provisions

Section 2.6 of the Agreement provides that the federal legislation giving effect to the Agreement shall extinguish all native rights "in and to the Territory", and that it shall extinguish all the rights of the Inuit of Port Burwell, without reference to any territory:

> "2.6 The federal legislation approving, giving effect to and declaring valid the Agreement shall extinguish all native claims, rights, title and interests of all Indians and all Inuit in and to the Territory and the native claims, rights, title and interests of the Inuit of Port Burwell, whatever they may be."

The legislative extinguishment is said to be accomplished by section 3(3) of the *James Bay and Northern Québec Native Claims Settlement Act*, which provides that:

[2869] Even if the leadership of the Aboriginal parties may have been in favour of such provisions at the time, this would not signify that the Crown could abdicate its fiduciary responsibilities to the Aboriginal people affected by s. 3.2.7.

> "All native claims, rights, title and interests, whatever they may be, in and to the Territory, of all Indians and all Inuit, wherever they may be, are hereby extinguished, but nothing in this Act prejudices the rights of such persons as Canadian citizens and they shall continue to be entitled to all of the rights and benefits of all other citizens as well as those resulting from the *Indian Act*, where applicable, and from other legislation applicable to them from time to time."[2870]

The parallel provincial enabling statute is *An Act approving the Agreement concerning James Bay and Northern Québec*.[2871] As in the federal enabling legislation, section 2.1 of the provincial Act provides that "The [James Bay and Northern Québec] Agreement is hereby approved, given effect to and declared valid."

The legal consequences of the purported legislative extinguishment clause and the provision "declaring valid" the Agreement are potentially far-reaching. These aspects have already been addressed in the Extinguishment Study and will not be repeated here.[2872]

In order to assess the legitimacy and validity of the purported extinguishment and surrender provisions related to the James Bay and Northern Quebec Agreement and the accompanying legislation, it is important to take account of other relevant instruments (as already accomplished in the Extinguishment Study).

The territory of the James Bay and Northern Québec Agreement was made part of Canada by the *Rupert's Land and North-Western Territory Order* of 1870.[2873] The Order provided that Rupert's Land was to be transferred to the Dominion of Canada from the Hudson's Bay Company. Canada was placed under a constitutional obligation to deal with Indian claims by Clause 14 of the Order, which provided as follows:

> "14. Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian government in communication with the Imperial Government; and the Company shall be relieved of all responsibility in respect of them."[2874]

The Order was made on constitutional terms and conditions that included those contained in the two "Addresses" of the Parliament of Canada. As indicated in the Extinguishment Study,[2875] the Addresses, which are included in the Order as Schedule (A) and Schedule (B) respectively, confirm the Canadian government's positive duty to protect the "Indian tribes" concerned and their interests, and settle their "claims" in conformity with "equitable principles" and in a timely manner:

> "*...upon the transference of the territories in question* to the Canadian government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled *in conformity with the equitable principles which have*

[2870] *James Bay and Northern Québec Native Claims Settlement Act*, S.C. 1976-77, c. 32, s. 3. (3). The Act was amended at the Standing Committee stage, at the insistence of the Inuit, so as not to extinguish the rights of the Inuit of Port Burwell outside the Territory of the Agreement.

[2871] S.Q. 1976, c. 46.

[2872] See discussion under sub-heading 1.4, *supra*, of Extinguishment Study.

[2873] *Rupert's Land and North-Western Territory Order*, June 23, 1870, R.S.C. 1985, App. II, No. 7, confirmed as part of the Constitution of Canada in Item 3 of the Schedule to the *Constitution Act, 1982*.

[2874] Id. For discussion of the constitutional implications of the Order, see Extinguishment Study, sub-heading 2.3, *supra*.

[2875] For an analysis of these terms and conditions, see discussion under sub-heading 2.3 *supra* of the Extinguishment Study.

> *uniformly governed the British Crown in its dealings with the aborigines...*"[2876] [December 1867 Address]
>
> "That *upon the transference of the territories in question* to the Canadian Government *it will be our duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer...*"[2877] [May 1869 Address] [Emphasis added.]

In 1898 and in 1912 respectively, two Acts extended the territory of the Province of Québec northwards into what was to be the Territory covered by the James Bay and Northern Québec Agreement.[2878] These boundaries extension laws were *An Act Respecting the North-Western, Northern, and North-Eastern Boundaries of the Province of Québec*,[2879] and the *Québec Boundaries Extension Act, 1912*.[2880] However, it was the 1912 legislation that added a number of conditions, three of which relate to Aboriginal peoples. Those conditions, governing the obligations of the federal and provincial governments toward the "Indian inhabitants in the territory" are set out in s. 2(c), (d) and (e) of the *Québec Boundaries Extension Act, 1912*:

> "[The territory described] shall, from and after the commencement of this Act, be added to the province of Québec, and shall, from and after the said commencement, form and be part of the said province of Québec upon the following terms and conditions and subject to the following provisions:...
>
> (c) That the *province of Québec will recognize the rights of the Indian inhabitants of the territory* above described to the same extent, and *will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights and obtained surrender thereof*, and the said province shall bear and satisfy all charges and expenditures in connection with or arising out of such surrenders;
>
> (d) That no such surrender shall be made or obtained except with the *approval of the Governor in Council*;
>
> (e) That the *trusteeship of the Indians* in the said territory, and the *management of any lands now or hereafter reserved for their use*, shall remain in the *Government of Canada subject to the control of Parliament*."[2881] [Emphasis added.]

These conditions were removed by s. 7 of the federal enabling statute, the *James Bay and Northern Québec Native Claims Settlement Act*.[2882]

[2876] *Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada*, Schedule (A), R.S.C. 1985, App. II, No. 9, 8 at 8-9.

[2877] *Address*, Schedule (B), R.S.C. 1985, App. II, No. 9, 14 at 16.

[2878] For maps illustrating the approximate extent of these boundaries extensions, see R. Mainville, *Visions divergentes sur la compréhension de la Convention de La Baie James et du Nord québécois*, (1993) 23 Recherches amérindiennes au Québec 69 at 70.

[2879] S.C. 1898, c.3. Québec consented to the federal statute in *An Act Respecting the Delimitation of the North-Western, Northern and North-Eastern Boundaries of the Province of Québec*, S.Q. 1898, c. 6.

[2880] *Québec Boundaries Extension Act, 1912*, S.C. 1912, c. 45.

[2881] Id., s. 2. The constitutionality of ss. 2(*c*) and (*d*) has been seriously questioned by legal commentators. For analysis, see section 6.3, *supra*.

[2882] S.C. 1976-77, c. 32.

11.3 Perspectives on Extinguishment and Surrender

The purported extinguishment and surrender provisions of the Agreement were an issue of major importance at the time that the James Bay and Northern Quebec Agreement (JBNQA) was negotiated and signed. As will be described below, there are very different perspectives among the Aboriginal and government parties as to what the surrender and extinguishment clauses entail.

If one accepts the government view that JBNQA involves an extinguishment of *all* rights of the Crees and Inuit in and to the Territory covered by JBNQA, except for those rights "granted back" to them, then it can be argued that an extensive dispossession of Cree and Inuit land and resource rights[2883] has been effected by the Québec and federal governments through the land claims agreement and related legislation.[2884] As P. Cumming explains:

> "*The James Bay land claims settlement of November 1975 allows the Inuit and Cree Indians in the area to retain the ownership of about 1.3% of the traditionally used lands which are ceded and surrendered.*[2885] The other major element of the settlement is the transfer, over several years, of $225 million to the 10,000 native people. Discounting for inflation, the *per capita* present value of a share in these monies could be as little as $7,000."[2886] [Emphasis added.]

Cumming adds:

> "This land/money formula is not unlike the historical land cession treaties in southern Canada. *Indeed, the comparative value of southern reserve lands retained, and annuities received*, through a land cession treaty (say, for example, in 1873, when Treaty No. 3 was signed in northwestern Ontario...) *would be greater than those under the present James Bay 'treaty'*."[2887] [Emphasis added.]

Even more fundamental is the position of Ligue des droits et libertés. This major human rights organization in Québec condemns the process leading to the James Bay and Northern Quebec Agreement and especially the notion of extinguishment:

> "...la [Ligue des droits et libertés] dénonce alors le processus ayant conduit à l'entente de la Convention de la Baie James et du Nord Québécois, et son contenu, *particulièrement l'extinction des droits aborigènes*, territoriaux ou autres, prévue dans

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[2883] At the same time, it is important to point out that the ensuing discussion is generally in terms of Aboriginal land ownership. However, the Aboriginal parties retain harvesting rights over the whole of their traditional territories.

[2884] See, for example, N. Rouland, *Les Inuit du Nouveau-Québec et la Convention de la Baie James* (Québec: Association Inuksiutiit & Centre d'études nordiques de l'Université Laval, 1978), at 168, where it is said that the Québec government did not make any major concession to the Aboriginal peoples, and that the right of exclusive ownership of the Inuit is only affirmed on 1% of the territory.

[2885] P. Cumming, "Canada's North and Native Rights" in B. Morse (ed.), *Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada* (Ottawa: Carleton, 1989), 695 at 743, n. 92. Cumming bases his calculations on the following figures: "The Agreement provided the following allocations:

Crees: Category I - 2,158 square miles
Category II - 25, 130 square miles (hunting, fishing and trapping rights)

Inuit: Category I - 3,250 square miles
Category II - 35,000 square miles (hunting, fishing and trapping rights)...

The land settlement covers a total area of some 410,000 square miles (the areas added to the province of Quebec in 1898 and 1912)...Thus, some 10,000 people will own (collectively) 5,408 square miles." [Note: Inuit traditional territory alone is said to be 250,000 square miles. 3,250/250,000 also equals 1.3%.]

[2886] Id. at 721.

[2887] Id. at 721, 723.

l'entente."[2888]

In reviewing the question of extinguishment in the context of the Agreement, the discussion begins with some general issues which the question raises. We then go on to discuss the perspectives on extinguishment of the various parties who were signatories to, or were affected by, the Agreement.

11.3.1 Some key issues raised by the extinguishment question

It is important to deal briefly first with three key issues relating to extinguishment: the effect on relations between Aboriginal groups; constitutional and other matters connected to the *Quebec Boundaries Extension Act, 1912*; and the apparent lack of any reasonable level of understanding of the extinguishment issue by many of the Aboriginal people affected at the time of the Agreement.

In regard to the first issue identified, one of the significant impacts of the extinguishment provisions relating to the Agreement has been their adverse effect on relations between Aboriginal peoples, as well as on relations within Aboriginal communities. For example, Jacques Kurtness[2889] notes that the extinguishment of Montagnais rights in land which the Naskapis then received has caused difficulties between them: "The Nakapis received lands that belonged to the Montagnais, and it makes their relationship with [the] Montagnais quite difficult... They resent it..."[2890]

Disagreements over the extinguishment clause also split Aboriginal communities and families. To quote Harry Tulugak: "Not only were the Inuit communities split, families were split over this issue."[2891] Johnny Uitangak is still blunter: "The Agreement caused a major rift amongst the Inuit, it pitted father against son, brother against brother, mother against daughter, sister against sister, and cousin against cousin..."[2892] Among the Inuit in northern Québec, deep concerns over extinguishment resulted in a new dissident movement, Inuit Tungavingat Nunami (ITN),[2893] which still persists to a significant degree today.

The issue of extinguishment has also led to deep rifts and ongoing conflicts with non-Aboriginal governments. In the case of the James Bay Crees, there has been major litigation against the federal and Québec governments for a number of years on issues that fundamentally

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[2888] Ligue des droits et libertés, *La Ligue des droits et libertés et le dossier autochtone: une lecture de persévérance*, (Mémoire présenté devant la Commission royale sur les peuples autochtones), November 17, 1993, at 11. Unofficial English translation: "...the [Ligue des droits et libertés] denounces therefore the process that led to the James Bay and Northern Quebec Agreement, and its content, *especially the extinguishment of aboriginal rights*, territorial or others, contemplated in the Agreement." [Emphasis added.]

[2889] All persons interviewed for this Case Study are listed and described in Annex I *infra*.

[2890] Interview with Jacques Kurtness, July 28, 1993.

[2891] Interview with Harry Tulugak, September 16, 1993.

[2892] Johnny Uitangak, "Hot Shot Johnny, In Search of Self-Government" (n.d.), at 16. This sentiment is echoed by the Commission des droits de la personne du Québec, which noted that: "the maintenance of the [extinguishment] clause during the James Bay and Northern Québec Agreement negotiations was a source of deep disagreement among Native organizations. The provision was a divisive force among the Inuit in particular, one group of whom still refuse to abide by the Agreement." Letter from Jacques Lachapelle, the President of the Commission des droits de la personne du Québec, dated June 17, 1986, to Raymond Savoie, Minister responsible for Mines and Native Affairs (on file with the authors).

[2893] See N. Rouland, *Les Inuit du Nouveau-Québec et la Convention de la Baie James* (Québec: Association Inuksiutiit & Centre d'études nordiques de l'Université Laval, 1978) at 173, where the opposition of the dissident Inuit movement is described. Note in more recent times, ITN has also been referred to as Inugatigiit Tungavingat Nunamini.

relate to extinguishment.[2894]

A second general issue arising with respect to extinguishment is the meaning of s. 2(c) of the *Québec Boundaries Extension Act, 1912*.[2895] Section 2(c) of the Act imposes an obligation on the province of Québec to "recognize the rights of the Indian inhabitants of the territory":

> "[The territory described] shall, from and after the commencement of this Act, be added to the province of Québec, and shall, from and after the said commencement, form and be part of the said province of Québec upon the following terms and conditions and subject to the following provisions:—
>
> ...(c) That the province of Québec will recognize the rights of the Indian inhabitants of the territory above described to the same extent, and will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights and obtained surrender thereof, and the said province shall bear and satisfy all charges and expenditures in connection with or arising out of such surrenders..."[2896]

As already indicated, after the James Bay and Northern Québec Agreement was signed, ss. 2(c), (d) and (e) of the 1912 Act were repealed by s. 7 of the *James Bay and Northern Québec Native Claims Settlement Act*.[2897] A number of third parties have argued that Québec's obligation under s. 2(c) of the *Québec Boundaries Extension Act, 1912* to "recognize the rights of the Indian inhabitants of the territory" was fulfilled, if at all, only toward the Crees and the Inuit. For example, Aurelian Gill, President of the Conseil Atikamekw-Montagnais[2898] argued in testimony before the Standing Committee on Indian Affairs and Northern Development in 1977 that:

> "*The Province of Québec, after accepting in an act passed in 1912 the conditions imposed by the federal government, had therefore to recognize our rights in the territory and to obtain its transfer before it could develop them*, in order to complete its title on this territory. However, the Province of Québec has just recently obtained the transfer of the rights of two groups, that is the Cree Indians and the Inuit, when it signed with the latter, the 'James Bay and Northern Québec Agreement'...
>
> The obligation assumed by Québec under the 1912 act is therefore fulfilled only in part since *the Government of Québec has not obtained the transfer of the rights of other Indians or Inuit in the territory aimed at by the 1912 Act, namely the Montagnais and Attikamekw Indians.*
>
> *The federal government cannot therefore accept, as indicated in Section 7 of Bill C-9, to revoke the obligation* that it has delegated to the Government of Québec and that the latter has fulfilled only partially."[2899] [Emphasis added.]

[2894] See, for example, *Grand Chief Matthew Coon Come et al. v. La Commission Hydro-Électrique de Québec (Hydro-Québec)*, No. 500-05-004330-906, Québec Superior Court.

[2895] S.C. 1912, c. 45.

[2896] Id., s. 2(c).

[2897] *James Bay and Northern Québec Native Claims Settlement Act*, S.C. 1976-77, c. 32, s. 7.

[2898] The Council is currently referred to as "Conseil des Atikamekw et des Montagnais".

[2899] A. Gill, President of Conseil Atikamekw-Montagnais, in House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development, *Bill C-9, James Bay and Northern Quebec Native Claims Settlement Act*, Issue No. 19, March 1, 1977, at 10. At 45, the same sentiment is echoed by Andrew Delisle, President of the Confederation of Indians of Québec, in response to a question by Standing Committee Member Brisco:

> "Mr. Brisco: ...You are also...unhappy with that [i.e. with the repeal of subs. 2(c), (d) and (e) of the Québec Boundaries Extension Act]?

Similarly, the Labrador Inuit Association indicated to a Committee of the National Assembly in 1983 that the Québec government had never fulfilled its obligations under the 1912 Act to the Labrador Inuit:

> "The Québec Boundaries Extension Act of 1912 imposed a similar obligation [i.e. to deal with native claims] on the Province of Québec. However, when Québec passed the legislation approving the James Bay Agreement in 1976, it had not fulfilled its obligations with regard to us."[2900]

A further basic problem was that any notion of extinguishment was ill-understood at the time by many of the Aboriginal people affected and, therefore, most difficult to obtain their free and informed consent. It was difficult for the people who were affected by the Agreement to understand what it was that they were giving up. Ambassador of the James Bay Cree Nation, Ted Moses, puts the problem succinctly for the Cree situation:

> "[I]n the Cree language to try and explain extinguishment, it's something that's difficult to say, and to explain the position of the government, what it is that they're extinguishing, it's something like in fairyland. You're saying something, but it's...it's like to say, well you're putting out a fire, but the fire's not there, there's never a fire."[2901]

Ambassador Moses goes on to say that documents were signed to say that extinguishment had been explained to the Crees, but that "there was no elaborate way of explaining extinguishment in Cree..."[2902]

A distinct exception was the dissident Inuit. Through extensive discussions, they had a clear idea of what they thought the implications of the extinguishment clause were. This was the central reason why Inuit in three communities became dissident; Inuit in non-dissident communities emphasized the benefits under the Agreement, Inuit in dissident communities looked to the extinguishment clause.[2903] For the dissident Inuit, the notion of extinguishment had a clear meaning:

> "Extinguishment meant...you kiss what ownership you had to the land goodbye forever in and to the land, whatever these rights may have been".[2904]

The problem of explaining the purported extinguishment and surrender under the JBNQA was further compounded by the fact that there appeared to be no common understanding of what

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> Mr. Delisle: Yes, we are. I think as presented by our brothers, the Montagnais people, the act referred to Indian people and not to any specific group and it was in our mind that the Québec Boundaries Extension Act and anything it had said implied all Indian people."

[2900] Labrador Inuit Association, *Brief to the Assemblée nationale, Québec commission permanente de la présidence du conseil et de la constitution* (LIA, November 23, 1983) at intro-9.

[2901] Interview with Ambassador Ted Moses, July 29, 1993. In an interview with Georges Filotas, July 2, 1993, Filotas makes the same point:

> "In this situation in which we find ourselves today, the government insists on this thing which is called extinguishment of Aboriginal rights, whatever they may be. You can explain that pretty clearly. But to convey to the person whom you're asking to agree to that, what is it this animal called Aboriginal rights, and what is this process, what historical role has it played in the past of this country called Canada, and would it mean for the future, what could it be for the future, if there wasn't extinguishment, it takes a hell of a lot of explaining, and you need yourself to be able to understand a lot of things, and it means that you should have a lot of abilities as a communicator to explain these things to people who have no clue that such an animal could exist."

[2902] Interview with Ambassador Ted Moses, July 29, 1993. Some sense of the translation problem is apparent from the National Film Board film, *Our Land is Our Life*, note 2929, *infra*.

[2903] Interview with Harry Tulugak, September 16, 1993.

[2904] Interview with Harry Tulugak, September 16, 1993.

was intended or what its meaning was - among representatives of both the non-Aboriginal governments and Aboriginal peoples. Even ten years after the Agreement was signed, confusion over what precisely had been done in regard to extinguishment and surrender, and by whom, continued to prevail. For example, Rem Westland, then Director, Quebec Claims Secretariat, Department of Indian Affairs and Northern Development, Ottawa, indicates:

> "...it gets us into very legal and continually debated terminology that's been the subject of considerable exchange at the constitutional level, about what is at issue when one talks about extinguishment. *I can say, not as a lawyer but as one who is working on the implementation of the Agreement, that there's nothing, from what I can tell, that has been extinguished.*"[2905] [Emphasis added.]

James O'Reilly, general legal counsel, James Bay Crees, states:

> "...as far as I'm concerned, *what was extinguished was the exclusive - and I underline exclusive - use of the territories by the native people. That was extinguished, that's all.* That does not mean that there's not a use that is still possible that does continue by the native people, and that has not given carte blanche."[2906] [Emphasis added.]

William Grodinsky, legal counsel for the Crees, adds that, when JBNQA was negotiated in 1975, Aboriginal sovereignty and rights of self-determination were not given up:

> "At that point native people were not negotiating something which, firstly, had not been recognized; secondly, had not been put into appropriate terminology so that it could be negotiated; and thirdly, was always considered as being inherent and not subject to negotiation in any case!"[2907]

Éric Gourdeau, then Director of SAGMAI[2908], the Quebec government department whose principal responsibilities included the implementation of the James Bay and Northern Quebec Agreement, takes the view that the Agreement does not have the legal effect of extinguishing any rights but that the federal legislation approving JBNQA did:

> "Je pense que les droits ont été éteints, mais non par la Convention. Ils ont été éteints par une législation fédérale qui a été passé pour faire suite à la Convention. *Celle-ci annonçait que les droits allaient être éteints, mais ce n'est pas la Convention elle-même qui les a légalement éteints.* C'est une législation fédérale qui a été passée par la Chambre des communes en 1977, je crois, et qui, outre les droits des bénéficiares de la Convention, a éteint les droits des tiers sur le territoire couvert par la Convention."[2909] [Emphasis added.]

If there existed such different understandings of what the surrender and extinguishment clauses under the Agreement purported to do, then what exactly was understood and agreed to by the parties? If, as stated by E. Gourdeau, the Director of SAGMAI for the Québec

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[2905] S. Vincent & G. Bowers, (eds), *Baie James et Nord quebécois: dix ans après/James Bay and Northern Québec: Ten Years After* (Montréal: Recherches amérindiennes au Québec, 1985), at 153.

[2906] Ibid.

[2907] W. Grodinsky, "Quebec Cree claims: a constitutional timebomb" in *Canadian Speeches: Issues of the day*, August/September 1992, vol. 6, Issue 5, 2 at 4-5.

[2908] SAGMAI refers to Secrétariat des activités gouvernementales en milieu amérindien et inuit.

[2909] S. Vincent & G. Bowers, (eds), *Baie James et Nord quebécois: dix ans après/James Bay and Northern Québec: Ten Years After* (Montréal: Recherches amérindiennes au Québec, 1985), at 152: "I think the rights were extinguished, but not by the Agreement. They were extinguished by a federal legislation which had been passed to follow the Agreement. *The latter announced that the rights were going to be extinguished, but it is not the Agreement itself that legally extinguished them.* It is a federal legislation which had been adopted by the House of Commons in 1977, I believe, and which, beside the rights of the beneficiaries of the Agreement, had extinguished the rights of third parties in the territory covered by the Agreement." [Unofficial translation, emphasis added.]

government, the surrender clauses in JBNQA were not intended to have any legal effect of extinguishing the rights of Crees and Inuit, then what was supposed to be the meaning of these provisions? Was there a common understanding among the signatories? What precisely was explained to the principals or peoples they represented?

It is important to underline here that "free and informed consent" is often difficult and complex to obtain in a cross-cultural context where highly different understandings and perspectives may generally exist. Moreover, in relation of Aboriginal peoples, such important factors as inequality of bargaining power, feelings of awe or intimidation[2910] in regard to White authorities, or fear of the consequences, can mean that no genuine consent on a particular issue was in fact obtained. In regard to Aboriginal people/Crown negotiations, these factors are a reality, whether or not legal counsel is available to the Aboriginal people concerned.[2911]

The difficulty in obtaining genuine consent in an Aboriginal/non-Aboriginal context has been recently highlighted by the Royal Commission on Aboriginal Peoples. In regard to the issue of Inuit consent to the High Arctic relocation carried out in the 1950s, the Royal Commission states:

> "*The question of consent is...difficult and complex. The presumption of relative equality of knowledge and bargaining position*, which underlies commonly accepted non-Inuit attitiudes to the obtaining and giving of consent, *does not fit the facts of the relations between Inuit and non-Inuit at the time of the relocation.*"[2912] [Emphasis added.]

In concluding that there was no free and informed consent by Inuit to the relocation, the Royal Commission highlighted the need for "special instructions" in such a cross-cultural context in order to obtain genuine consent:

> "...the [federal government] Department gave the RCMP *no special instructions* about how to approach the Inuit or how to secure their consent, notwithstanding the *well-known difficulty of obtaining genuine consent from the Inuit.*"[2913] [Emphasis added.]

The findings of the Royal Commission on Aboriginal Peoples and the principles on "consent" that the Commission underlines appear to be relevant to the Crees and Inuit in the context of JBNQA. At the time of the negotiations of the Agreement, both Aboriginal parties had had little or no previous dealings with the federal and Québec governments on such far-reaching matters as the land claims negotiations entailed.[2914]

[2910] See, for example, H. Brody, "Illira: Meeting with the White Man", *Canadian Association in Support of Native Peoples*, Bulletin 18.1, 1977, where the author describes the relationship between Inuit and non-Inuit as *illira* (Inuktitut): "...a kind of fear, a blend of awe and intimidation, the feeling you have about a person whose behaviour you can neither control nor predict, but who is perhaps going to be dangerous." Quoted in Royal Commission on Aboriginal Peoples, *The High Arctic Relocation [:] A Report on the 1953-55 Relocation* (Ottawa: Minister of Supply and Services, 1994) at 13.

[2911] Legal counsel can help to mitigate a situation facing Aboriginal peoples. However, access to legal counsel cannot alter the fact that the there continues to exist a great disparity in bargaining position between Aboriginal peoples and the Crown. Moreover, in most situations, Aboriginal peoples find themselves in acutely vulnerable positions and subject to Crown discretion.

[2912] Royal Commission on Aboriginal Peoples, *The High Arctic Relocation [:] A Report on the 1953-55 Relocation* (Ottawa: Minister of Supply and Services, 1994) at 13.

[2913] Id. at 141.

[2914] See Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 6, 1975, No. 176, at B-6045 & B-6046, where a representative of the dissident Inuit (G. Filotas) indicates that traditional Inuit decision-making had never been confronted with such global decisions and the problems they are currently facing with governments.

11.3.2 Aboriginal perspectives and positions on extinguishment

Keeping in mind the apparent misunderstandings and confusion surrounding the extinguishment and surrender questions, it is important for this Case Study to present the perspectives on extinguishment (and surrender) of the parties that were directly involved in the negotiation of the James Bay and Northern Québec Agreement. These parties include the Crees, the Inuit (as represented by Northern Quebec Inuit Association (NQIA) and, subsequently, Makivik), the Indians of Québec Association, Canada, and Québec. We also discuss here the position of the dissident Inuit, who chose *not* to be involved in the negotiations of the James Bay and Northern Québec Agreement.

11.3.2.1 James Bay Crees in Québec

The James Bay Crees in Québec were most immediately and directly affected by the James Bay hydroelectric development project. Prior to considering Cree responses to extinguishment matters, it is important to first have some appreciation of the climate of insecurity and fear that arose in Cree communities with news of a massive hydroelectric project to be imposed by non-Aboriginal governments.

The impending development had a tremendous negative impact on the Cree communities. According to Robbie Matthew, the threat of development had a particularly profound effect on the Cree elders. Here is how R. Matthew put it:

> "We had a lot of elders [at] that time. But when they saw this thing was going through, they just passed away one by one...They didn't want to have nothing to do with what's going on...When the project came around, the elders started to talk, but they wouldn't listen. Nobody wanted to listen to them. So this is, it was, a sad story to me, a sad situation, that we had to let our elders down...When they were told that there would be a big construction, a big dam, and they were going to flood the river, and they left, that's how we lost our elders."[2915]

In other cases, the threat of development caused entire communities to flee. In 1977, Chief Diamond said this of the community of Nemimscau:

> "As a result of the surveyors in the area and as a result of the many rumours that were going around about the possibility of developing the southern part of the project, the Nottaway, Broadback and Rupert Rivers, the community of Nemimscau fled its village. That community has now been abandoned since 1970."[2916]

The threat of development was so devastating because the development was in direct conflict with the Cree relationship to the land. To quote Ambassador of the Cree Nation, Ted Moses, one of the negotiators of JBNQA:

> "*[The development] ran into direct conflict with the Cree philosophy of respect for the land*, use for the land, and preserving the fruits of the land, and ensure that future generations also can benefit from the same...*The Cree found it inconceivable for someone*

[2915] Interview with Robbie Matthew, July 29, 1993.

[2916] Chief Billy Diamond, January 25, 1977, *Minutes of the Standing Committee*, No. 6, at 5.

> *to say, 'I'm building, that's it, whether [you] like it or not, and you have no rights.'"*[2917] [Emphasis added.]

A further threat identified by the Crees relates to the establishment of a huge James Bay Municipality[2918] in Cree traditional territory, in 1971, through the adoption by Québec's National Assembly of the *James Bay Region Development Act*.[2919] As Chief Billy Diamond describes:

> "Prior to the James Bay negotiations, a huge James Bay Municipality was created on our land... *This was a massive, unilateral land-theft that included the power to exclude anyone for 'security reasons'. Quebec did not have the constitutional*[2920] *or any other right to rob us of our land in this way.* The James Bay Development Corporation was established to deal with the 'development' of this municipality, OUR TERRITORY."[2921] [Emphasis added, capitals in original.]

With the traditional way of life of the Crees severely threatened, it was left for a new generation to carry on as best they could. It was this younger generation that took the lead in negotiating the Agreement for the Crees: "We carried on. It was our turn now, for renewal...it was going to be a new way of life that was there, that wasn't going to be the same."[2922]

[2917] Interview with Ambassador Ted Moses, July 29, 1993. The point is echoed by Roderick Pachano in an interview, July 29, 1993:

> "And the way the people think, everything that's been provided, creation, the earth, everything that's been created, the Creator gave that to us. So *it was inconceivable for the people at that time, when the government said, well I'm going to go and do this, on your land, or there, and I don't need your permission*, because we have a responsibility to the land, to preserve the land, and to make sure that it's passed on at least the way it was handed to us, or better, so it was inconceivable to the older people, especially the older people, that someone could come along, and say, out of the blue, say I can do anything that I want on that. So they said, well he doesn't have that right, the Creator didn't give him that right, that he has no right to do it." [Emphasis added.]

[2918] See R. Dussault and L. Borgeat, *Administrative Law [:] A Treatise*, 2nd ed. (Toronto: Carswell, 1985), vol. 1, at 213, where it is said that "[the James Bay Municipality's] powers are exercised by a Council consisting of the same persons as those in the James Bay Development Corporation" and that the Municipality is "[t]ruly a regional municipality, due both to its size and the predominant role played by the Crown Corporation and its subsidiaries".

[2919] *James Bay Region Development Act* (Bill 50), R.S.Q., c. D-8. The Société de développement de la Baie James (James Bay Development Corporation) is incorporated under s. 21 of the Act. In *Société de développement de la Baie James* v. *Chief Robert Kanatewat*, [1975] C.A. 166, at 176-177, the Québec Court of Appeal refused to rule on the constitutionality of the 1971 Act (Bill 50), since the court was considering a request for an interlocutory injunction and felt that, at this stage, it should presume the constitutionality of the Act in question.

Section 43 of the Act provided: "This act shall in no way affect rights of the Indian communities living in the Territory." However, the powers conferred on the James Bay Development Corporation and Hydro-Québec under the Act are very extensive in terms of promoting the development and exploitation of the Territory. These powers, combined with the appropriation of the whole Territory for the purposes of establishing a kind of regional municipality, in effect rendered s. 43 with very little meaning. Solely Indian reserves created under the federal *Indian Act* and pre-existing municipalities were exempted from the boundaries of the new James Bay municipality. Consequently, it is strongly arguable that the Act was in violation of Québec's obligations under the *Quebec Boundaries Extension Act, 1912* and was also inconsistent with the constitutional duty of protection owed by the Canadian government pursuant to the terms and conditions attached to the *Rupert's Land and North-Western Territory Order*, 1870.

[2920] In regard to the unconstitutionality of provincial laws on unceded territory that is possessed or occupied by Aboriginal peoples, see R. Boivin, *Le droit des autochtones sur le territoire québécois et les effets du régime français*, (1995) 55 R. du B. 135 at 169. The author concludes that lands that are "reserved for the Indians" by virtue of the Royal Proclamation can only be legislated by the federal government in accordance with s. 91(24) of the *Constitution Act, 1867*.

[2921] Grand Council of the Crees, *Presentation to the Royal Commission on Aboriginal Peoples*, Montreal, May 28, 1993, at 17.

[2922] Interview with Ambassador Ted Moses, July 29, 1993. In an interview on July 27, 1993, Roderick Pachano makes the same point:

> "*People just gave up...or did not wish to live. [They] did not wish to see what was going to happen.* For people like us, our decision was...to accept that, so that we could stop the progression...to stop it there, so that we could put things on hold, and then gradually come back.... So that when people become more enlightened and...see things from the Cree perspective, and other perspectives, not such a myopic view of what it is that they want, then we

The initial objective of the Crees was not the recognition of their aboriginal rights: it was simply to stop the James Bay project.[2923] However, the recognition of Cree rights and halting the hydroelectric project were soon perceived to be interrelated objectives. Accordingly, in May of 1972, the Crees initiated court action in the Superior Court of Québec, seeking a permanent injunction to stop the James Bay project.[2924] An enormous amount of time and resources went into making the case for the injunction. According to Chief Billy Diamond:

> "*We...realized...that the only way that we could prove to the courts that we have rights in the territory would be to bring all our people down and let them testify for their people and on their behalf.* The court action took 71 days of hearings and over 315 pieces of exhibits were filed, over 10,000 pages of testimony were given, 46 native witnesses testified before the court, and a total of 167 witnesses were heard."[2925] [Emphasis added.]

The Crees tried to maintain as much control over the process as possible. The threat of development itself galvanised a sense of a common Cree identity, and helped the Crees to work together to retain control over the process.[2926] Negotiations were initially carried out on behalf of the Crees by the Indians of Québec Association, but by April of 1974, the Crees felt that their interests as Crees were not being sufficiently served by the Indians of Québec Association.[2927] The Grand Council of the Crees (of Québec) was officially formed in August of 1974, giving the Crees the "official structure" to enter the negotiations as a Cree organization.[2928]

At the time that an Agreement in Principle was negotiated and signed in 1974, the Cree leadership did their best to see that the Cree people remained informed of the progress of the negotiations. For example, Chief Diamond describes the consultations which occurred over the Agreement in Principle:

"We bussed the people of Waswanipi to Mistassini and had a joint meeting between the

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would be there to continue another day." [Emphasis added.]

2923 Interview with Ambassador Ted Moses, July 29, 1993.

2924 See *Chief Max "One-Onti" Gros-Louis* v. *Societé de développement de la Baie James*, [1974] R.P. 38 (Québec S.C.) per Malouf J.; reversed on appeal in *Societé de développement de la Baie James* v. *Chief Robert Kanatewat*, [1975] C.A. 166.

2925 Chief Billy Diamond, January 25, 1977, *Minutes of the Standing Committee*, No. 6 at 6.

2926 Grand Council of the Crees, *Presentation to the Royal Commission on Aboriginal Peoples*, Montreal, May 28, 1993, at 5 (Grand Chief Matthew Coon Come): "The news of the project was like a thunderbolt and it also brought all of our communities together. The common threat of destruction brought us closer together as a People."

2927 Chief Billy Diamond, January 25, 1994, *Minutes of the Standing Committee*, No. 6, at 8:

> "We were not satisfied with the work that was being done by the Indians of Québec Association. We felt that the issue in the James Bay territory was Cree rights, was the Cree way of life; that the animals were not being discussed, the land was not being discussed. We felt that the other Indians in Québec were trying to use the James Bay project to get a global settlement for all of Québec, and the Cree chiefs decided that this was unfair to our people, and that our people would be the ones to suffer.
>
> So in April, 1974, we took the mandate away from the Inuit of Québec Association and decided to negotiate. We decided that the Crees should negotiate for Crees. We decided to negotiate on the things that our people wanted, the land, hunting, fishing and trapping, and modifications to the project."

2928 Interview with Ambassador Ted Moses, July 29, 1993:

> "The Indians of Québec association had a different objective in the negotiations. They wanted to settle the whole Indian rights question in Québec, they saw this as an opportunity...[T]here was a big dispute, there was a disagreement, we were accused by the leaders of the association of not being committed to the whole Indian cause... [T]hen in August of 1974, the Grand Council [of the Crees] was officially formed, and we had all the legal documents, letters patent, incorporation, and that's when we had an official structure to begin as a Cree organisation.

> Mistassini and Waswanipi councils and band members. Over 800 people attended the meeting. The entire gymnasium was packed and there were not enough chairs to go around. People were standing up on the walls for the duration of the five or six hour meeting...The same thing occurred in Fort George and Great Whale. People were interested. They knew what they were deciding. They knew that their future was at stake."[2929]

The Cree leadership were opposed to the extinguishment of their rights, but also came to the realization that surrender and extinguishment clauses were not negotiable issues for Canada and Québec. In the words of Chief Billy Diamond: "*The principles of extinguishment and surrender were not negotiable issues, they were the words that government insisted upon having on the document in order to get to a table.*"[2930] [Emphasis in original.]

At the same time, the Cree negotiators did not understand the Agreement as effecting a surrender of all their rights in the territory. In the words of Ambassador Ted Moses: "It was clear that we were not surrendering all of the rights, that we were only surrendering certain rights, so therefore if such a thing as extinguishment was in practice a reality then...only certain rights were being extinguished. Not all of the rights in the territory."[2931]

In December 1975, the Cree leadership sought ratification of the Agreement in the Cree communities:

> "...*during the period of December 1 to December 22, 1975*, the Crees went to ratify the Agreement. We went back to our communities with witnesses from Québec and Canada and we followed the criteria that was established by the Minister in getting that ratification. Once again there were band meetings, and our people were shocked. They were very frustrated. They were wondering why we were coming back again to ask them the same question we had asked them four months or three months prior to that.[2932] They sat there and listened to the sections being translated and they ratified the Agreement by signing the power of attorney. *Nine hundred and twenty-two Crees signed in favour of the Agreement and one against.*"[2933] [Emphasis added.]

[2929] Chief Billy Diamond, January 25, 1977, *Minutes of the Standing Committee*, No. 6, at 9-10. Some of the ambience of the meeting in Mistassini is captured in the National Film Board of Canada film, *Our Land is Our Life*, directed by Boyce Richardson and Tony Ianzelo, National Film Board of Canada (1974), which includes footage from the meeting.

[2930] Grand Council of the Crees, *Presentation to the Royal Commission on Aboriginal Peoples*, Montreal, May 28, 1993, at 19.

[2931] Interview with Ambassador Ted Moses, July 29, 1993. The point is corroborated by Peter Hutchins: "I don't think the people understood [the Agreement] as saying: we are surrendering all our rights to the land, we are no longer owners of the land in the Aboriginal sense...we're squatters." Interview with Peter Hutchins, August 20, 1993.

[2932] Clearly, in order to have a valid ratification, the people had to be considering the latest text (not a draft of three or four months earlier).

[2933] Chief Billy Diamond, January 25, 1977, *Minutes of the Standing Committee*, No. 6, at 12. However, only 24% of the eligible voters voted. At the time of the vote, section 39 of the *Indian Act*, R.S.C. 1970, c. I-6, provided as follows (now R.S.C. 1985, c. I-5, s. 39), and, in particular, gave the Minister of Indian Affairs the discretion to call for another meeting and vote, if a majority of a band did not vote in any referendum that considers an absolute surrender of land:

> "39. (1) An absolute surrender or designation is void unless
>
> (a) it is made to Her Majesty;
> (b) *it is assented to by a majority of the electors of the band*
>
> (i) at a general meeting of the band called by the council of the band,
> (ii) at a special meeting of the band called by the Minister for the purpose of considering a proposed absolute surrender or designation, or
> (iii) by a referendum as provided in the regulations; and
>
> (c) it is accepted by the Governor in Council.
>
> (2) *Where a majority of a band did not vote at a meeting or referendum called pursuant to subsection (1), the*

In contrast to the Inuit ratification vote, the Crees did not hold a secret ballot: "Mr. O'Reilly [legal counsel] said the Cree did not hold a secret ballot vote 'because even before the Nov. 11 signing we had the approval of 75 per cent of the adult Cree population.'"[2934] It is not clear, from the information obtained for the purposes of this Case Study, that the Cree ratification process was an adequate one. In particular, there seems to be a significant discrepancy between the time requested by the Inuit to explain the Agreement[2935] and the time needed by the Crees.

What is clear is that the Cree leadership felt that the primary issue was to avoid great suffering among the people and the Agreement was the best that could have been negotiated under the circumstances. The alternative to the Agreement was considered as no alternative at all:

> "*I think our people would have suffered greatly [had there been development without the Agreement]. I think they would have had the same conditions imposed on them as in the past* when progress came to a town, without consulting or without making an agreement with the native people. *I think my people would have lived in poverty and I think my people would have just disintegrated as our own people.* Their pride would not have been regained and they would not have any respect for themselves..."[2936] [Emphasis added.]

In 1990, Chief Diamond emphasized again that the Crees were given no choice but to attempt to negotiate a settlement:

> "Our feeling was that no one can buy a way of life and culture with money. We were ready to proceed in court, but we saw the need to limit the damages, seek remedial works, and have certain fundamental rights recognized. We decided to attempt to negotiate a settlement. *We really had no other choice.*"[2937] [Emphasis added.]

To conclude, the James Bay Crees faced tremendous pressures and believed that there were real and imminent threats to their way of life. Not only was the massive James Bay hydroelectric project about to flood a significant portion of their traditional lands, but a huge James Bay Municipality was established by the Québec National Assembly to administer and develop what the Crees knew was their traditional territory. Under the circumstances, the Crees felt that they had "no choice" but to attempt to negotiate an agreement.

Under the circumstances, the Cree leadership likely did the best that they could to see that the Cree people were informed of the implications of the Agreement. In view of the pressures

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Minister may, if the proposed absolute surrender or designation was assented to by a majority of the electors who did vote, call another meeting by giving thirty days notice thereof or another referendum as provided in the regulations.

(3) Where a meeting is called pursuant to subsection (2) and the proposed absolute surrender or designation is assented to at the meeting or referendum by a majority of the electors voting, the surrender or designation shall be deemed, for the purposes of this section, to have been assented to by a majority of the electors of the band.

(4) The Minister may, at the request of the council of the band or whenever he considers it advisable, order that a vote at any meeting under this section be held by secret ballot.

(5) Every meeting under this section shall be held in the presence of the superintendent or some other officer of the Department designated by the Minister." [Emphasis added.]

[2934] H. Gendron, "Inuit vote delay rejected" in the *Montreal Star*, February 20, 1976.

[2935] See sub-heading 11.3.2.3 *infra*, where the Northern Quebec Inuit Association requested a total of two months to explain the Agreement to the people (using three separate teams to visit Inuit communities), in addition to the time required to prepare written materials in Inuktitut to summarize principal aspects of JBNQA.

[2936] Chief Billy Diamond, January 26, 1977, *Minutes of the Standing Committee*, No. 7, at 8.

[2937] B. Diamond, "Villages of the Dammed" in *Arctic Circle*, November/December 1990, 24 at 27.

and opposition they faced, it is not surprising that the Cree leadership took pride in the Agreement that they had negotiated and approached the JBNQA with a renewed sense of hope for the future.[2938]

11.3.2.2 Inuit in and outside Québec

The James Bay development project also affected the Inuit. Although the major works for the La Grande project are in Cree territory, the drainage basins for the project extend into Inuit territory. Many of the impacts of the project have accordingly been felt in Inuit territory.[2939]

Any discussion of the Inuit perspective on extinguishment must distinguish the perspective of the dissident Inuit (located in the northern Inuit communities of Povungnituk, Ivujivik, and Salluit), from that of the Inuit represented by the Northern Québec Inuit Association and later by Makivik.

All of the Inuit were opposed to extinguishment. For example, in 1982, Makivik formally indicated to the federal government that extinguishment is "abhorrent to native peoples and inherently unacceptable to them."[2940] Further, in 1985, Makivik made clear to the federal Task Force to Review Comprehensive Claims that: "The restoration of extinguished aboriginal title is essential..".[2941]

However, at the time of the land claims negotiations, extinguishment was more of an issue for the dissidents than for N.Q.I.A.[2942] Extinguishment was on the table not because the Inuit wanted it, but because it was one of the conditions which the federal government had

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[2938] Chief Billy Diamond, January 25, 1977, *Minutes of the Standing Committee*, No. 6, at 13-14: "For the first time a tribe of Indians has been able to go to government and to negotiate with the government...The terms and conditions were approved by the Crees and they were consulted in the process of negotiations. The people were decision-makers for their future, and they were able to decide because they knew what they were deciding...We believe in the Agreement. We want the Agreement to be put into force now."

[2939] Interview with Sam Silverstone (legal counsel), August 18, 1993.

[2940] See Indian and Northern Affairs Canada, *James Bay and Northern Québec Agreement Implementation Review* (Ottawa: Minister of Indian Affairs, February 1982), at 101.

[2941] Makivik Corporation, *Submission from Makivik Corporation to the Task Force to Review Comprehensive Claims* (Makivik, October 1985), at 41.

[2942] It is also worth noting the situation faced by the Inuit of Port Burwell, who were involved in the JBNQA negotiations and also spoke out against the extinguishment of their rights. In the case of the Port Burwell Inuit, the federal government had sought to extinguish the rights of the Port Burwell Inuit not only within the Territory in Québec, but also elsewhere in Canada. Apparently, the federal government had planned to extinguish Inuit rights first, and then later finish the negotiations that had begun on the offshore. To date, the offshore negotiations have never been completed. The notion of extinguishing rights first and negotiating later was vehemently opposed by the Inuit of Port Burwell. To quote Norman Snowball, President, Community Council of Port Burwell:

> "...what is in the agreement with regard to Killinik (Port Burwell) surrendering their rights in all of Canada is completely unacceptable without proper compensation. There has been no proper compensation for the surrender of Port Burwell Inuit rights in Canada and it is certain to us that the government has given us a blank cheque, has given us a run-around without proper compensation for these surrenders."

Norman Snowball, February 8, 1977, *Minutes of the Standing Committee*, No. 10, at 17. As a result of the strong protest of Port Burwell Inuit and N.Q.I.A. representatives, the Honourable Warren Allmand, Minister of Indian Affairs and Northern Development, subsequently announced that, "...Clause 3(3) will be amended so that the Inuit of Port Burwell will have no rights extinguished outside the James Bay territory..." *Minutes of the Standing Committee*, No. 21:4. Section 3(3) of the *James Bay and Northern Québec Native Claims Settlement Act*, S.C. 1976-77, c. 32, contains no special reference to the rights of the Inuit of Port Burwell.

imposed on the negotiations: "[Extinguishment] was the [federal] policy, and to the extent that you took loans for negotiating, and your comprehensive claim was accepted for negotiation, you entered into the process. That was one of the conditions."[2943]

In the 1977 Parliamentary hearings on Bill C-9, a number of other Inuit groups spoke out strongly against the extinguishment clause.[2944] The Director of the Land Claims Project for the Inuit Tapirisat of Canada, John Amagoalik, testified before the Committee that not only did the proposed extinguishment have the effect of dividing the Inuit against themselves,[2945] it also struck at the heart of the Inuit relationship with the land:

> "It is essential for the Committee to realize the far-reaching consequences of this action, both legally and within our culture. This is a very difficult time for the Inuit...We have watched our culture change drastically in a very short time, in the last 100 years or so -- and it is a short time. We have seen values which we held very close change and disappear within one generation. The very meaning of what it is to be an Inuk has been altered by outside forces and step by step the government of Canada has removed one piece of our identity after another. *Now the government and the large corporations want to take the very soul of our culture: they want our land.*
>
> *The Inuit are Inuit because of our relationship with the land.* That relationship is based on hunting, trapping and fishing. To deny these rights is to break our relationship with our land and we cannot really allow this to happen any more."[2946] [Emphasis added.]

Amagoalik went on to characterize the unilateral extinguishment of the rights of the Inuit without their consent as being "nothing less than an attempt at cultural genocide."[2947]

Further, in 1979, the Inuit Tapirisat of Canada adopted a resolution which opposed extinguishment and emphasized the human rights aspects. The resolution provides in part:

> "WHEREAS perpetuation of federal and provincial government policy of surrender and extinguishment, as conceived and implemented by governments, serves to *unnecessarily deprive the Native peoples of unique and intrinsic cultural and human rights and ultimately results in a form of assimilation* with the mainstream of Canadian society in a manner detrimental to Native peoples...
>
> THEREFORE BE IT RESOLVED:
>
> THAT the *Inuit do not accept the position, as presently conceived by the federal and provincial governments, calling for surrender and extinguishment of aboriginal rights as*

[2943] Interview with Sam Silverstone, August 18, 1993.

[2944] See also H. Gendron, "Native claims are far from frivolous" in the *Montreal Star*, March 20, 1976, at B5: "This approach [i.e. federal claims policy of extinguishment in JBNQA] has been completely rejected by the N.W.T. Inuit and Indians. They are not prepared to relinquish their interest in the land but are prepared to share it with southerners, provided they retain ultimate control over the land."

[2945] See John Amagoalik, February 23, 1977, *Minutes of the Standing Committee*, No. 17 at 5:

> "Legislation of this nature also creates problems among the Inuit. *It serves to divide our people. It distinguishes the people of Northern Québec from the people outside Québec in a way which they would not do themselves.* Our people have continually expressed a desire to share the lands. This type of government action creates artificial boundaries between Inuit. *It undermines our natural ability to live together.*" [Emphasis added.]

[2946] John Amagoalik, February 23, 1977, *Minutes of the Standing Committee*, No. 17, at 5.

[2947] John Amagoalik, February 23, 1977, *Minutes of the Standing Committee*, No. 17, at 5. See the discussion of the right to protection from cultural genocide or ethnocide under sub-heading 8.2.9, *supra*, of this Extinguishment Study.

an essential condition to settlement of aboriginal claims."[2948] [Emphasis added.]

11.3.2.3 Dissident Inuit in Québec

The dissident Inuit, represented by Inuit Tungavingat Nunami (I.T.N.), were unequivocally opposed to the notion of extinguishment and surrender of Inuit rights. In order to better understand what transpired during the land claims negotiations that led to the formation of a dissident movement among Inuit in northern Québec, it is worth recounting briefly some of I.T.N.'s concerns.

In February of 1974, at the start of negotiations, the government of Québec asked for evidence of the Northern Québec Inuit Association's mandate to act on behalf of the Inuit of Northern Québec. A "power of attorney" form was drawn up, and at the time of the signing of the Agreement in Principle, in November 1974, the Northern Québec Inuit Association held powers of attorney from 1,229 of a possible total of approximately 1,900 Inuit adults.[2949] The language of the power of attorney was broad. Each person who signed the document constituted the Northern Québec Inuit Association as his or her attorney:

> "To discuss, negotiate and agree or refuse to agree upon the surrender of some or all of our rights in the territory described hereunder, or any part of it, on such terms and conditions as it, in its sole discretion may see fit, and for such consideration as it may decide, and to settle, compromise, or transact the judicial proceedings already taken, or which may be taken...on such terms and conditions as it may see fit."[2950]

[2948] Inuit Tapirisat of Canada, *Significance of Maintaining the Concept of Aboriginal Rights*, Resolution #2, Igloolik, N.W.T., September 3-7, 1979, submitted by Inuit Committee on National Issues to the Meeting of the Steering Committee of the Continuing Committee of Ministers on the Constitution and the Native Presidents, Ottawa, Dec. 3, 1979, Doc. 830-77/011.

[2949] Letter from the Northern Québec Inuit Association to the Standing Committee on Indian Affairs and Northern Development, dated February 7, 1977. Reprinted as Appendix "IAND-4", *Minutes of the Standing Committee*, No. 10A, 5-7, at 6.

[2950] The full text of the power of attorney reads as follows:

> "We, the undersigned, hereby nominate and constitute Charlie W. Watt, or anyone whom he should delegate, as our Attorney to institute, continue and participate in any judicial or other proceedings as may be necessary to protect our rights over the territory described hereunder, or in part thereof.
>
> And we hereby constitute and appoint The Northern Québec Inuit Association as our Attorney,
>
> To discuss, negotiate and agree or refuse to agree upon the surrender of some or all of our rights in the territory described hereunder, or any part of it, on such terms and conditions as it, in its sole discretion may see fit, and for such consideration as it may decide, and to settle, compromise, or transact the judicial proceedings already taken, or which may be taken, in the name of some of us, and including the case of Robert Kanatewat et al. vs. James Bay Development Corporation et al., on such terms and conditions as it may see fit.
>
> And we hereby empower our said attorneys to execute such documents and agreements as may be necessary to give effect to the above.
>
> And we hereby describe the territory over which we claim rights as being the following:
>
> That certain land area made up of land situated within the boundaries of the Province of Québec north of the 55th parallel plus certain land situated within the Northwest Territories (plus the surrounding land).
>
> Signed..."

Reproduced as Appendix "IAND-13", *Minutes of the Standing Committee*, No. 15A at 1.

The dissident Inuit challenge all aspects of the power of attorney. They challenge the process through which the power of attorney was obtained, as well as the authority of the Northern Québec Inuit Association to act on their behalf once the power of attorney had been revoked.

According to the dissident Inuit, the power of attorney was not translated into Inuktituut. Eliyassie Sallualuk, President of the Community Council of Povungnituk, testified before the Standing Committee on Aboriginal Affairs and Northern Development in 1977 that the power of attorney was "written only in English and the meaning...was never explained to those who had to sign them."[2951]

Furthermore, according to Mr. Sallualuk, the power of attorney was explained only as something which was required in order to help the Crees stop the James Bay Hydro-electric project. The Inuit who signed the documents had no idea of the extent of the powers they were giving to the Northern Québec Inuit Association:

> "I would like to continue my remarks on how the Inuit Association of Northern Québec [sic] got its mandate that gave it the authority to negotiate and sign the principal agreement...
>
> During the month of March, 1974, workers, people working for the association, visited our village to get this mandate.
>
> The people that visited us told us: 'As you know, the James Bay Indians have a problem. Dams will be built on the rivers in their territory. We come here to get help, things that we could use to help these Indians.'
>
> We were told at the time that the Indians had given their representatives the mandate to represent them before the Courts. Cannot you, the Eskimos, do the same thing?
>
> After explaining that, the people representing the association had to *sign proxy forms written only in English and the meaning of which was never explained to those who had to sign them.*
>
> Furthermore, they were told that even if they signed them, this mandate could perhaps be worthless. *It was only an assurance in case the Indians going to court would need any help.*
>
> Since it was presented to them in this way, they had no objection. They simply wanted to help those who had to or wanted to appear in court. This is why they signed.
>
> *However, had they known the extent to which they were remitting their powers into the hands of other persons, they would never have done so.* One never gives away one's power to somebody else; this is simply not done."[2952] [Emphasis added.]

Although the Agreement in Principle was signed on November 15, 1974, it is alleged that the Inuit in the communities in the North only received a copy of the Agreement in December, 1974, after the text of the Agreement had been published in *Le Devoir*, and then translated by

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[2951] Eliyassie Sallualuk, February 17, 1977, *Minutes of the Standing Committee*, No. 15 at 7. The account is corroborated by Yves Michaud: "The power of attorney was not translated into Inuktituut." Interview with Yves Michaud, July 7, 1993.

[2952] Eliyassie Sallualuk, February 17, 1977, *Minutes of the Standing Committee*, No. 15, at 7. Sallualuk's comments were translated from Inuktituut into French, and from French into English. Again, Johnny Uitangak makes the same point: "[The signatories of the powers of attorney] assumed that their signatures were going to be used for the sole purpose of stopping the James Bay project and after a year passed without news of any kind, out came an Agreement-in-Principle, which was going to be the basis of a one year negotiation process.... Apparently, the signatures of the Inuit had been used to enter into negotiations with both levels of governments and other interested parties pertaining to their land, without their knowledge or consent." Uitangak, note 2892, *supra*, at 14.

Father Steinmann into Inuktituut.[2953] It was only through this unofficial translation that the Inuit learned what had happened: "Only by reading this translation did they find out why and how there had been negotiations and what the results of these negotiations were."[2954]

In September, 1975, before the James Bay and Northern Québec Agreement was signed, members of the communities of Povungnituk, Ivujivik and Salluit formally revoked their powers of attorney.[2955] After the revocation, Northern Québec Inuit Association claimed no longer to be acting on behalf of those Inuit who had revoked their powers of attorney. In a letter to the Standing Committee on Indian Affairs, the Northern Québec Inuit Association stated that:

> "*The [Northern Québec Inuit] Association has never purported to act on behalf of those Inuit who revoked their powers of attorney before the Final Agreement was signed*...With respect to individual dissidents who remain opposed to the Agreement, the Association has negotiated that such persons shall be counted among the Inuit of Québec and, as such, shall be eligible for all the benefits of the Agreement. It is ultimately for such persons to decide on an individual basis whether or not they wish to avail themselves of the benefits negotiated on their behalf."[2956] [Emphasis added.]

The dissident Inuit brought two motions to court to try to stop the Agreement. First, on October 31, 1975, the dissident Inuit unsuccessfully sought a temporary injunction to stop the signing of the Agreement.[2957] Second, in *Alashua et al.* v. *A.G. Canada et al.*,[2958] the dissident Inuit are seeking[2959] to have the James Bay and Northern Québec Agreement declared illegal, null and void in part because the Northern Québec Inuit Association had no

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[2953] Eliyassie Sallualuk, February 17, 1977, *Minutes of the Standing Committee*, No. 15 at 7; interview with Georges Filotas, July 2, 1993.

[2954] Eliyassie Sallualuk, February 17, 1977, *Minutes of the Standing Committee*, No. 15 at 7. According to Georges Filotas, people at the meeting were told that the power of attorney was "a mandate to use in case they needed to discuss things with the government." Interview with Georges Filotas, February 7, 1993.

[2955] See Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 6, 1975, No. 176, at B-6057, where Z. Nungak of the Northern Quebec Inuit Association confirms: "...339 adults at one time or other indicated their opposition to the signature [of the Agreement] and withdrew their powers of attorney in total." Also, at B-6059, C. Melançon, legal counsel for the dissident Inuit indicates that he has in hand the withdrawals of mandates from over 300 adults.

[2956] Letter from the Northern Québec Inuit Association to the Standing Committee on Indian Affairs and Northern Development, dated February 7, 1977. Reprinted as Appendix "IAND-4", *Minutes of the Standing Committee*, No. 10A at 7.

While it may be true that individual dissidents were entitled to choose whether or not to participate in the benefits of the Agreement, as the Agreement and its enabling legislation have been interpreted, *the dissident Inuit had no such choice with respect to the surrender and extinguishment of their rights*.

[2957] *Simiuni Sivuarapik et al.* v. *Northern Québec Inuit Association*, F.C.T.D. No. T-3820-75, per Addy J. (October 31, 1975). The action was dismissed on the grounds that it was premature, as the Agreement had not yet been signed. However, for a different judicial view, see *Benoanie* v. *Canada (Minister of Indian and Northern Affairs)*, [1993] 2 C.N.L.R. 97 at 106, where Rouleau J. makes an opposite ruling:

> "It appears to me in the present case, that *this action is not going to be heard and resolved before ratification takes place*...I am also of the view that there is considerable momentum in favour of ratification by the Inuit. Accordingly, *I am not prepared to dismiss the plaintiffs' motion [for interlocutory injunction] on the grounds that it is premature*, and I therefore must consider their prayer for relief on its merits." [Emphasis added.]

[2958] *Alashua et al.* v. *A.G. Canada et al.*, Québec Superior Court, No. 500-05-018552-818.

[2959] Georges Filotas explained the failure to institute a second legal action earlier than 1981 as follows:

> "Unfortunately because of...weariness, because of fatigue...it never went to court between the period when the Agreement was signed and the various legislations passed...[People were] worn out by the process..."
>
> Interview with Georges Filotas, July 2, 1993.

mandate from the plaintiffs to sign the Agreement.[2960]

The perspective of the dissidents is succinctly expressed by Georges Filotas:

> "[The dissidents] thought the land was theirs. It was not theirs to give away. NQIA, Charlie Watt [the president of NQIA] had no business signing away their forefathers rights, their children's rights, their descendants rights. This was just something that you don't give away, no matter in exchange for what. It is as simple as that. They thought it was a ridiculous idea."[2961]

The dissidents were also opposed to the Agreement on the grounds that the benefits which the Agreement promised were "citizens' rights": benefits to which all citizens of Canada were entitled. Why should the Inuit extinguish their rights in exchange for rights to which they were already entitled?

> "In the Agreement you will find all kinds of public services...schools, health services, policing, all that. *People would say: we will have it anyway, because we are citizens of Canada. Why should it be put into the Agreement?* People were really, really thinking of those points, that no more citizens rights were put into an agreement that had to have extinguishment of Aboriginal rights at the beginning. That was one argument repeated very often during the meeting."[2962] [Emphasis added.]

[2960] The statement of claim reads in part:

> "12. ...ladite Convention est plus particulièrement illégale, nulle et non avenue et inopérante quant aux demandeurs et aux territoires des villages de Povunnituk, Ivujivik et Saglouc pour les raisons...suivantes:
> a) La Northern Québec Inuit Association n'a jamais été mandatée par les demandeurs qui constituent, entre autres, la quasi-totalité des adultes des deux sexes des villages de Povungnituk et Ivujivik;
> b) Tout prétendu droit ou mandat de représenter les demandeurs ou leurs villages fut révoqué par écrit le ou vers le 29 septembre 1975, c'est-à-dire bien avant la signature de ladite Convention, et cette révocation fut communiquée non seulement à ladite association, mais également et par écrit aux autorités fédérales et provinciales compétentes;
> c) Les demandeurs refusèrent également de ratifier et de légitimer la Convention a posteriori, plus particulièrement au cours du simulacre de référendum organisé par ladite association en février 1976 et qui fut boycotté par la population des trois villages concernés, à telle enseigne qu'à Povungnituk seulement 10 personnes éligibles sur 236 se présentèrent pour voter, à Ivujivik, 7 sur 84 at à Saglouc, 54 sur 181;
> d) En fait, les demandeurs n'ont jamais consenti à la Convention, ni avant, ni après sa signature, et n'ont jamais cessé de s'y opposer..."
>
> Declaration Re-Amendée, *Alashua et al.* v. *A.G. Canada et al.*, Québec Superior Court, District de Montréal, No. 500-05-18552-818 (December, 1981), at 4-5.
>
> Unofficial English translation:
>
> "...more particularly, the said Agreement is illegal, null, without effect and inoperative with respect to the Plaintiffs and to the territories within which the villages of Povungnituk, Ivujivik and Sugluk are contained for the following...reasons:
> a) The Northern Québec Inuit Association was never mandated by Plaintiffs who constitute, among others, practically the totality of the adults of both sexes of the villages of Povungnituk and Ivujivik;
> b) All alleged right or mandate to represent Plaintiffs or their villages was revoked in writing on or about September 29, 1975, that is to say well before the signature of the said Agreement, this revocation was communicated not only to the said association but also in writing to the competent federal and provincial authorities;
> c) Plaintiffs also refused the ratification and the legalization of the Agreement *a posteriori* more particularly during the supposed referendum organized by the said association in February 1976 which was boycotted by the population of the three villages concerned, to such a point that at Povungnituk only 10 persons eligible of 236 voted, in Ivujivik, 7 of 84 and in Sugluk 54 of 81;
> d) In fact, Plaintiffs never agreed to the Agreement, neither before nor after its signature and have never ceased to oppose same...

The plaintiffs also allege that the Agreement is *ultra vires*, null and without effect, for constitutional reasons, and because the Northern Québec Inuit Association did not have the power under its federal letters patent to surrender Aboriginal rights. Id.

[2961] Interview with Georges Filotas, July 2, 1993.

[2962] Interview with Yves Michaud, July 2, 1993.

The dissident Inuit position with respect to "citizens' rights" is in effect confirmed[2963] by John Ciaccia, the Special Representative of Premier Bourassa:

> "The inhabitants of Quebec's North, like everybody else, have to have schools. They have to be able to depend on health services. They have to have the security of justice and a system of law enforcement. This Agreement responds to these needs, and provides the structures through which they can be met...
>
> *These are all steps that would have to be taken, these are all services that would have to be provided and developed anyway, regardless of whether or not there was a James Bay project.* What the Government of Québec is doing here is taking the opportunity to extend its administrations, its laws, its services, its governmental structures throughout the entirety of Québec...."[2964] [Emphasis added.]

Access to full and proper information was a problem that continually arose for the dissident Inuit. For example, no copy of the draft JBNQA was provided to them prior to their appearance in November 1975 before the Québec National Assembly Standing Committee that was considering the Agreement and hearing some testimony just days before the Agreement was signed.[2965] When the dissident Inuit requested time to digest the draft JBNQA and reappear before the Standing Committee, that request was refused.[2966]

At that time, the dissident Inuit were considered by the Québec government, as compared to the 6,500 Crees, as "un petit groupe dans un petit groupe".[2967] Surprisingly, the Special Representative of the Québec government, J. Ciaccia, appears to treat the dissident Inuit before the Standing Committee as if they were a single group with the Crees, with no independent right to take their own positions and make their own choices:[2968]

> "On oublie ici qu'il y a 6,500 Cris qui sont en faveur de cette entente et on essaie de changer le débat ici parce que *quelque dissidents* sont contre ce projet d'entente.

[2963] See also Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 5, 1975, No. 174, at B-5937, where Ciaccia indicates that the Agreement offers the Crees and Inuit services and rights of administration which all other citizens in Québec enjoy.

[2964] Unofficial English translation of the opening remarks made by Mr. John Ciaccia, member of the National Assembly for Mount Royal and special representative of Premier Robert Bourassa in the James Bay negotiation, on November 5, 1975 at the opening of the standing Parliamentary Committee of the National Assembly of Québec on Natural Resources and Lands and Forests, convened to examine the Agreement with the James Bay Crees and Inuit of Québec, prior to its signature, as printed in James Bay and Northern Québec Agreement and Complementary Agreements (Québec: Éditeur officiel du Québec, 1991), p. XIII, at pp. XV-XVI.

[2965] Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 6, 1975, No. 176, at B-6039 (G. Filotas) & B-6062 (C. Melançon, legal counsel for Inuit dissidents).

[2966] Id. at B-6064 & B-6067 (J. Ciaccia).

[2967] Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 5, 1975, No. 174, at B-5945 (Ciaccia): "a little group within a little group" [Unofficial English translation.]

[2968] See also H. Gendron, "Inuit vote delay rejected" in the *Montreal Star*, February 20, 1976:

> "...Natural Resources Minister Jean Cournoyer said *Quebec was not interested in signing separate agreements with the Cree and Inuit* because the province was seeking to fulfill once and for all its obligations deriving from the 1912 Quebec Boundaries Extension Act...
>
> Mr. Cournoyer, in the interview, said that *the province wanted a free hand to develop its northern resources and that the James Bay final agreement would have to extinguish the rights and claims of all native peoples in the territory.*" [Emphasis added.]

Il ne faudrait pas nous laisser embarquer dans une telle voie."[2969] [Emphasis added.]

Although the Québec government characterized the dissenting voices in Povungnituk, Ivujivik and Salluit (Sugluk) as "a few dissidents", Joe Clark, then Leader of the Opposition in the House of Commons, considered the dissident Inuit as most significant in terms of federal responsibility:

> "[The dissident Inuit] are are concerned about the effect of this legislation [Bill C-9] upon their future. The government might say, 'What matter are they? There are only 1,200 people in these communities, out of a total community of 4,000.' However, I say...that *when this parliament and this government begins to count as inconsequential 1,200 native people, we have betrayed the responsibilities that we legislators have in a free society.*"[2970] [Emphasis added.]

After the James Bay and Northern Québec Agreement was signed on November 11, 1975, a ratification of the Agreement took place among all eligible Inuit voters.[2971] The referendum was carried out in January, February and March of 1976. Of 1,968 Inuit who were eligible to vote, 1,308 (66.5%) cast a ballot. Of the 1,308 ballots, 1,253 (95.8%) were in favour of the Agreement, 45 (3.4%) were opposed, and 10 ballots (0.8%) were spoiled. However, there were few votes cast in the dissident communities. In Povungnituk, of 236 eligible voters, there were 10 votes cast (4.2% of eligible voters), with 6 in favour and 4 opposed. On Ivujivik, of 84 eligible voters, there were 7 votes cast (8.3% of eligible voters), with 7 in favour and none opposed. Finally, in Sugluk (Salluit), of 180 eligible voters, there were 54 votes cast (30% of eligible voters), with 53 in favour and 1 opposed.[2972]

The Northern Québec Inuit Association described the Inuit ratification process in the following terms to the Standing Committee on Indian Affairs and Northern Development in 1977:

> "[I]n the months of January, February, and part of March, the native parties undertook to have the Agreement ratified. This was a fairly costly process, at least on our part. I know the figures are between $120,000 and $130,000 and involved a number of staff members of the association. It involved a number of aircraft. *We had to visit our communities. We had to explain the Agreement. This whole process took about four weeks*; it also took approximately five or six weeks to prepare a lot of the documentation for these trips."[2973] [Emphasis added.]

[2969] Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 6, 1975, No. 176, at B-6064. Unofficial English translation: "We forget here that there are 6,500 Crees who are in favour of this agreement and we are trying to change the debate here because *a few dissidents* are against this draft agreement. [new para.] We should not let ourselves embark down such a path." [Emphasis added.]

[2970] House of Commons, *Debates*, December 14, 1976 (Opposition Leader, Joe Clark), at 2000.

[2971] Section 2.16 of the Agreement refers to this as a process of "consultation and confirmation":

> "2.16 The Agreement shall, within four months of the date of execution, and in a manner satisfactory to Canada, be submitted to the Inuit and the Crees for purposes of consultation and confirmation. The Transitional Measures provided for herein and the provisions of Sub Sections 25.5 and 25.6 shall take effect only from the time of such confirmation but retroactive to the date of the execution of the Agreement."

[2972] Letter from Project North to the Honourable Judd Buchanan, March 5, 1976, reprinted as appendix "IAND-3", *Minutes of the Standing Committee*, No. 10A, at 3. The voting results are also tabulated in N. Rouland, *Les Inuit du Nouveau-Québec et la Convention de la Baie James* (Québec: Association Inuksiutiit & Centre d'études nordiques de l'Université Laval, 1978) at 135.

[2973] Sam Silverstone, February 2, 1977, *Minutes of the Standing Committee*, No. 11 at 22. According to Peter Ainalik of Ivujivik, the NQIA ratification process was financed by the federal government, and was a "mockery of democracy":

> "...Peter Ainalik of Ivujivik said the referendum was a mockery of democracy. He said the NQIA, was financed by the government and was able to travel extensively and to put its position to the people. The opposing group [i.e. the dissident Inuit] had only a little money raised from individuals."

From the perspective of the dissident Inuit, the ratification process was inadequate. If adequate information was lacking, as said by the dissidents, then N. Rouland concludes that the ratification process that was carried out lack all meaning:

> "*...nous pensons que si la description faite par les dissidents des campagnes d'information préalables au référendum est exacte, ce référendum et ses résultats ne possèdent plus aucune signification*: il n'exprime plus une légitimité et un consensus, mais constitue uniquement un alibi. Cela pour une simple raison: *il ne peut y avoir démocratie sans information.*"[2974] [Emphasis added.]

Joe Clark, then Leader of the Opposition, also expressed concerns in the House of Commons in regard to the ratification process:

> "*Another area of concern is that the ratification vote was rushed through.* The agreement was translated into the native tongue only at the last minute, and only under pressure. Then *the translation document was circulated in conditions under which it was difficult to ensure adequate information or real consensus.* The document was circulated in abbreviated form."[2975] [Emphasis added.]

According to I.T.N. representatives, the Northern Québec Inuit Association had prepared an "abridged version" of only those chapters of the James Bay and Northern Québec Agreement that concerned the Inuit. Moreover, there have been allegations that the Northern Québec Inuit Association did not even reach all the communities in order to explain properly the Agreement before the votes were held.[2976] As Peter Ainalik of Ivujivik told the Standing Committee in 1977, the affirmative vote in the ratification process and the process itself lacked credibility:

> "We often say we live in a democratic country. What does it mean?
>
> Does the word 'democracy' only imply the right to vote freely? But that right to vote loses its meaning if people cannot get information beforehand, in order to make the right decision.
>
> *The freedom of voting has no meaning at all if there is no freedom of information. If the people have no free access to information from many sources, enabling them to make a considered decision and the right way, if they do not have that opportunity, the freedom of vote has no meaning.*"[2977] [Emphasis added.]
>
> P. Ainalik adds:
>
> "*In the case of the referendum, the inhabitants of Northern Quebec did not get to see the text of the agreement nor did they have a copy of it on hand.* The consultation procedures started only ten days before the referendum...Ten days before voting day, they went around various posts. When they arrived in each village, they held general meetings

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"Quebec Inuit fight land agreement" *Montreal Star*, February 18, 1977.

[2974] N. Rouland, *Les Inuit du Nouveau-Québec et la Convention de la Baie James* (Québec: Association Inuksiutiit & Centre d'études nordiques de l'Université Laval, 1978) at 142. Unofficial English translation: "*...we think that if the description given by the dissidents of the information campaign preceding the referendum is accurate, this referendum and its results do not possess any meaning*: it does not express any more a legitimacy or consensus, but solely constitutes an alibi. This is for a simple reason: *one cannot have democracy there without information.*" [Emphasis added.] For a similar conclusion, see S. Grammond, *Les traités entre l'État canadien et les peuples autochtones* (Cowansville, Québec: Les Éditions Yvon Blais, 1994), at 108-109.

[2975] House of Commons, *Debates*, December 14, 1976 (Opposition Leader, Joe Clark), at 2001.

[2976] Interview with Georges Filotas, July 2, 1993.

[2977] House of Commons, Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development, *Bill C-9, James Bay and Northern Quebec Native Claims Settlement Act*, Issue No. 15, February 17, 1977, at 14. [Official English translation (from French translation from Inuktitut.)]

where they read a translated summary of the agreement."[2978] [Emphasis added.]

Regardless of whether or not the allegations of the dissident Inuit are wholly accurate, one critical point seems clear. The N.Q.I.A. did not consider that four weeks to explain the James Bay and Northern Québec Agreement was sufficient to effectively explain its terms and implications to the people in the communities. As reported in the *Montreal Star* at that time:

> "The Northern Quebec Inuit Association (NQIA) has made a *formal request to the federal government to delay the ratification vote on the James Bay final agreement*, which was to begin this week among the 14 Inuit communities in northern Quebec...
>
> An NQIA negotiator here [in Great Whale River, Québec] said the association would probably be asking for a *delay of at least one month*."[2979] [Emphasis added.]

If N.Q.I.A., who was carrying out the consultation and ratification process with the people, was of the firm view that the initial period of four weeks had proved inadequate and "at least one month" more would be required, then the federal government should have authorized this delay, so that the northern Quebec Inuit in the communities could make free and informed decisions. Moreover, I.T.N. had also asked the federal government to delay the vote to enable its representatives to complete the tour of the 14 communities.[2980] Without proper understanding of the Agreement, it could hardly be argued that the ratification process was valid or that Inuit had given the JBNQA their free and informed consent.

Yet, the federal government refused to grant the N.Q.I.A. any additional time to explain the Agreement to their people. As H. Gendron reports:

> "Federal Indian Affairs Minister Judd Buchanan yesterday *rejected an appeal* from the Northern Quebec Inuit Association (NQIA), which asked that he extend the deadline for the ratification vote of the James Bay final agreement by one month, to April 11...
>
> *Federal government representatives had denied the one-month extension at a meeting in Montreal Wednesday, but [a senior NQIA negotiator] had been instructed by NQIA president Charlie Watt to appeal the decision directly to Mr. Buchanan.*"[2981]

Apparently, the reason for the refusal to allow Inuit another month was because "no extension can be granted without the consent of all the parties to the final agreement".[2982] Initially, the N.Q.I.A had asked for a six-month ratification period, but were forced[2983] to settle for four months.[2984] Such a position by the federal or Québec[2985] government does not seem consistent with that of a fiduciary and would appear to contribute to a pattern of duress.

[2978] Id. at 15.

[2979] H. Gendron, "Inuit request delay of James Bay vote" in the *Montreal Star*, February 17, 1976.

[2980] Id.

[2981] H. Gendron, "Inuit vote delay rejected" in the *Montreal Star*, February 20, 1976.

[2982] Id.

[2983] Federal Minister Judd Buchanan only agreed to the Inuit request for a ratification process at the "eleventh hour" prior to the deadline for the JBNQA negotiations. See H. Gendron, "Inuit vote delay rejected" in the *Montreal Star*, February 20, 1976, where it is reported "...it became clear that the NQIA would not sign the agreement that night [Nov. 11, 1975] without a ratification clause and that two years of negotiation would collapse."

[2984] Id. The overall four-month period includes preparation of appropriate materials (English and Inuktitut) for the consultation and ratification process, setting up teams of N.Q.I.A. representatives to travel to Inuit communities on the three northern coasts in Québec, orgainizing all the logistics for travel and public meetings. In view of the various steps involved, the actual time to inform and consult the people was reduced to approximately four weeks.

[2985] That the Québec government was opposed to any ratification whatsoever by the Inuit in their northern communities is confirmed in H. Gendron, "Inuit accept agreement" in the *Montreal Star*, March 6, 1976, A1 at A2.

The dissidents remain bitter about the James Bay and Northern Québec Agreement. Until a few years ago, the dissident communities refused to accept any of the benefits which were available under the Agreement to Inuit communities; the negative effects were particularly experienced in education and in the hunter support programs.[2986] According to Johnny Uitangak, "you can't see the benefits of the Agreement...it's as if there has been no agreement at all."[2987] Harry Tulugak identifies the long-term effects of the extinguishment on the dissident communities as a lack of pride, a deterioration of social conditions, and a lack of attention to the needs of local people.[2988] Nonetheless, some dissidents remain steadfast in their opposition to extinguishment. To quote Harry Tulugak:

> "*For me, considering this question of extinguishment has not changed one bit the value of that word and the impact it has on the people that understood it* to me that it's finished, it's gone, it's 'goodbye' forever. *That impact is still there, even stronger: time has not changed my perception of extinguishment...I am opposed to it as much, if not more, than at the time, towards the extinguishment clause.* I'm going to fight it. I'm glad that this is being brought up, because the dissident movement was the force behind having this extinguishment clause brought out into the open and discussed."[2989] [Emphasis added.]

For others, opposition to the Agreement has decreased with time. This may be especially true in Salluit (Sugluk).[2990]

The position taken by the dissident Inuit in opposition to the Agreement, and the withdrawal of their mandates from the NQIA, raises a number of important issues, which have not been satisfactorily addressed. First, can the dissident Inuit be said to be "parties" to the James Bay and Northern Québec Agreement when they legally revoked their mandate? If they are not parties to the Agreement, then what is the status of the extinguishment and surrender provisions with respect to them? Second, did N.Q.I.A have a mandate to surrender the rights and titles in and to land of all Inuit in Québec?

Third, were the purpose and potential effects of the NQIA mandate accurately and adequately explained to the Inuit signatories? There is at least some evidence to indicate that they were not.

Fourth, was the Agreement adequately explained during the ratification process? The fact that N.Q.I.A. was of the view during the ratification process that substantially more time (i.e. an additional four weeks) was necessary in order for people in the communities to understand the basic terms of the Agreement is a most important factor. The fact that the federal government refused to allow N.Q.I.A. this additional time to explain the Agreement to the people would suggest that the ratification process lacked validity in the final analysis. Further, the lack of cooperation of the federal and Québec governments to enable the dissident Inuit to make their views known to Inuit in the 14 communities during the ratification process served to further undermine the democratic process, by restricting access to important information. This was especially true in regard to the issue of extinguishment. All of these factors are a strong indication that the approval of JBNQA by a substantial majority of Inuit in northern Québec

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[2986] Interview with Harry Tulugak, September 16, 1993.

[2987] Interview with Johnny Uitangak, September 16, 1993.

[2988] Interview with Harry Tulugak, September 16, 1993.

[2989] Interview with Harry Tulugak, September 16, 1993.

[2990] See, of example, testimony of Paul Alaku, February 8, 1977, *Minutes of the Standing Committee*, No. 10 at 12:

> "...the people of Sugluk are not unanimous in their support of the agreement. As mentioned during our earlier appearance, some people belong to an organisation known as ITN. The previous dissatisfaction with the agreement in the community of Sugluk has decreased recently. The conflicts and internal fighting that had gone on previously in the community have greatly decreased. Understanding of each other's views has increased, squabbling and internal fighting has decreased."

lacked legitimacy and was less than informed from any reasonable legal standard.

11.3.2.4 Confederation of Indians of Quebec

The Confederation of Indians of Quebec was the successor to the Indians of Quebec Association. The Indians of Quebec Association negotiated on behalf of the Crees until March, 1974, when the Crees revoked their mandate, seven months before the Agreement in Principle was signed. In testifying before the Standing Committee on Indian Affairs and Northern Development, Andrew Delisle, the president of the Confederation and a past-president of the Indians of Québec Association, testified that the Indians of Québec Association and the Confederation of Indians of Québec were consistently opposed to extinguishment:

> "We disagree with the principle of the Agreement, the principle of extinguishment, and we still maintain that position. As far as people we represent are concerned, I do not think any amount of money would convince us to extinguish our rights."[2991]

At the time of the Agreement, the Indians of Quebec Association (I.Q.A.) had clearly indicated to the Québec government that the Indian peoples that they represented were willing to negotiate agreement based on the recognition of their rights and not based on cession or extinguishment:

> "Nous avons été mandatés par les Indiens du Québec pour *entamer des négotiations pour la reconnaissance et l'identification de nos droits et non leur cession ou leur extinction.* Nous sommes prêts à négocier cette reconnaissance et cette identification basées sur ces principes, premièrement, la participation au développement, deuxièmement, le partage des bénéfices des ressources, troisièmement, la compensation pour la perte des droits et la pert de l'usage des terres et enfin, quatriémement, une reconnaissance explicite du titre 'Indien' sur toute la terre du Québec."[2992] [Emphasis added.]

11.3.3 Government[2993] perspectives and positions on extinguishment

11.3.3.1 Federal government of Canada

The official federal land claims policy at the time of the negotiations of the James Bay and Northern Quebec Agreement was the 1973 policy, which provided:

> "The Government is now ready to negotiate with authorized representatives of...native peoples on the basis that where their traditional interest in the lands concerned can be

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[2991] Andrew Delisle, March 1, 1977, *Minutes of the Standing Committee*, No. 19 at 30.

[2992] Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 6, 1975, No. 176, at B-6070 (quoted by J.-Y. Morin). Unofficial English translation: "We have been mandated *to open negotiations for the recognition and the identification of our rights and not their cession or their extinguishment.* We are ready to negotiate this recognition and this identification based on these principles, first, participation in development, second, sharing of benefits from resources, third, compensation for the loss of rights and the loss of use of lands, and finally, fourth, an explicit recognition of "Indian" title on all lands of Québec." [Emphasis added.]

[2993] Crown corporations, such as Hydro-Québec, are also included under this sub-heading.

established, an agreed form of compensation or benefit will be provided to native peoples *in return for their interest*".[2994] [Emphasis added.]

From the perspective of the Aboriginal parties to the Agreement, the position of the federal government was made clear: extinguishment was a necessary condition for any agreement. The Cree chief negotiator put it as follows:

> "Insofar as the extinguishment clause was concerned... [T]here was no way of getting around it. It was in at the insistence of the government of Canada. They said, look...if you want us to approve this agreement, there must be an extinguishment clause. *Rights must be surrendered by the Crees, otherwise without such a clause we will not sign an agreement...It's a fundamental condition, it's a policy.*"[2995] [Emphasis added.]

For purposes of this Case Study, it has been difficult to interview federal representatives speaking on behalf of the government. However, Marc Lafrenière, who was a federal negotiator for the Agreement, agreed to be interviewed in a personal capacity. According to M. Lafrenière, the federal government's primary objective was the settlement of native claims in northern Québec. From the federal perspective, the claims of the Indians in northern Ontario had been settled by treaty; the settlement of claims required by the *Rupert's Land Order*,[2996] and the *Québec Boundaries Extension Act, 1912*[2997] had not yet been achieved. The Federal negotiators were convinced that Québec had yet to fulfil the conditions of the Act. The parallel between the situation of the Crees living in the Treaty 9 area in Ontario and the Crees living in Québec was very much in the minds of the government negotiators.[2998]

With respect to the blanket extinguishment, in testimony given to the Standing Committee on Indian Affairs and Northern Development in 1976, Warren Allmand, the Minister of Indian Affairs and Northern Development, said that the term "extinguishment" was used in the Agreement in part for historical reasons, and in part to achieve finality: "The reason that term was used was that it has been used in the past in certain treaties in the West. It was used in the Alaskan settlement, and what it really means is that for these particular matters this is a final settlement."[2999] The extinguishment was understood by the federal government as an exchange: the Cree and Inuit gave up ill-defined rights and received definite rights; the extinguishment was not intended to touch other rights:

> "What has happened here is that by the Agreement, in place of very vague, undefined rights, the Cree and Inuit got very defined rights -- rights that are defined clearly. They have those under the Agreement whereas their rights before were not defined. It is an exchange. They are extinguishing certain undefined rights for very defined rights but this extinguishment does not touch many other things."[3000]

[2994] Indian and Northern Affairs Canada, *Statement Made by the Honourable Jean Chretien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People* (Ottawa: Indian Affairs and Northern Development, August 8, 1973) at 4.

[2995] Interview with Ambassador Ted Moses, July 29, 1993. Andrew Delisle, President of the Confederation of Indians of Québec, and past-president of the Indians of Québec Association, put it as follows: "Our interpretation [of the government position] is, 'You do not have rights, but we are going to extinguish them anyway and we will settle later.'" Andrew Delisle, March 1, 1977, *Minutes of the Standing Committee*, No. 19 at 28.

[2996] *Rupert's Land and North-Western Territory Order*, June 23, 1870, R.S.C. 1985, App. II, No. 7, confirmed as part of the Constitution of Canada in Item 3 of the Schedule to the *Constitution Act, 1982*.

[2997] S.C. 1912, c. 45. See ss. 2(c), (d) & (e) of the Act, quoted at the beginning of the Case Study.

[2998] Interview with Marc Lafrenière, September 28, 1993.

[2999] The Honourable Warren Allmand, December 16, 1976, *Minutes of the Standing Committee*, No. 5, at 6.

[3000] The Honourable Warren Allmand, December 16, 1976, *Minutes of the Standing Committee*, No. 5 at 6. The Minister had a relatively limited view of what rights might not be extinguished: "[The use of the term "extinguishment"] does not mean that other things are extinguished. For example, we are not talking about extinguishment of Indian identity or Indian culture or rights that they enjoy under the Indian Act. We have put that into the proposed James Bay Act to make

According to Marc Lafrenière, the federal government was looking at a minimum for a surrender through the negotiations. The objective was to settle the claim, with clarity and certainty; a surrender was seen as the minimum means for achieving that objective.[3001] It would appear that the Québec government was pushing hard for an extinguishment, and that a legislated extinguishment also fulfilled the federal government's certainty objectives.[3002]

According to Lafrenière, the federal government also felt that it had taken an appropriately active role in the negotiations. Specifically, the federal government assisted the Crees and the Inuit financially in pursuing their case, took an active role in the negotiations, and contributed to the settlement. While the word "fiduciary" was not being used at the time of the negotiations in 1974-75, the federal government did feel that it had an obligation to protect the interests of the Crees and the Inuit.[3003]

Marc Lafrenière indicates that, in the negotiations leading up to the James Bay and Northern Québec Agreement, the federal negotiators pushed very strongly for the insertion of a clause in the Agreement that would commit the government of Québec to negotiate politically with Aboriginal non-signatories with interests in the territory. The result was section 2.14 of the Agreement. The federal negotiators felt themselves in a bind, as they knew that Québec would probably refuse to sign an agreement which did not contain an extinguishment clause. Accordingly, if the federal negotiators argued too strongly for the rights of third parties, they would not be upholding their responsibility to the Crees and the Inuit, who wanted an agreement. With the inclusion of s. 2.14, the federal negotiators were satisfied that third party rights had been dealt with appropriately. [3004]

However, this view by M. Lafrenière is not shared by Aboriginal third parties affected by s. 2.14.[3005] Moreover, it is incompatible with the federal government's responsibilities as a fiduciary to argue that the rights of some Aboriginal peoples must be unilaterally extinguished because other Aboriginal peoples wished to enter into an agreement in regard to the same territory.

According to Marc Lafrenière, the federal government was also concerned that the James Bay and Northern Québec Agreement be properly explained to the Crees and the Inuit who would be bound by it: "it was of great concern to us that the Agreement had to be explained

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that absolutely clear." Id.

Later in his testimony (at 14-15), in response to a question from a member of the Standing Committee, the Minister specified that it was only rights with respect to land that were being extinguished:

> "Mr. Smith (Churchill): But the words "extinguishment of claims" is for land then?
>
> Mr. Allmand: That is what I tried to make clear."

[3001] Interview with Marc Lafrenière, September 28, 1993.

[3002] Interview with Marc Lafrenière, September 28, 1993. Mr. Lafrenière was not privy to the legal discussions in which these specific questions were raised, but he did say that it was clearly important to the Québec government that there be certainty, "and they no doubt were insisting on extinguishment." Id.

[3003] Interview with Marc Lafrenière, September 28, 1993.

[3004] Interview with Marc Lafrenière, September 28, 1993.

[3005] See, for example, R. Pratt, "Third Party Native Rights and the James Bay and Northern Québec Agreement" in S. Vincent & G. Bowers, (eds), *Baie James et Nord québécois: dix ans après/James Bay and Northern Québec: Ten Years After* (Montréal: Recherches amérindiennes au Québec, 1985) 65, at 68, where he interprets section 2.14 of the Agreement as a moral obligation on the part of Québec to negotiate:

> "Quebec's pledge under subsection 2.14 of the Agreement to negotiate the settlement of third party native claims in the Territory is an obligation which is, in my view, not legally enforceable. It must remain a commitment of a moral and political nature rather than a legal obligation. However, this commitment is of the highest order because it was made in consideration of the repeal, without compensation, of a statutory undertaking of Québec to recognize and settle Indian claims in a large portion of the Territory."

fairly and objectively to the communities; we took responsibility there."[3006] In the end, the federal government was satisfied with the ratification of the Agreement by the Crees and the Inuit.[3007] While the federal negotiators were disturbed by the rejection of the Agreement by the dissident Inuit (Inuit Tungavingat Nunami), they were satisfied that there was sufficient support for the Agreement amongst the Inuit: "We felt that there was enough support in the community as a whole; we saw it as a collective agreement."[3008]

In the end, the federal negotiators felt that the Agreement was the best that could have been achieved. Marc Lafrenière recently stated that the Agreement involved difficult decisions for all concerned on the Aboriginal side:

> "Ten years after that we organised a special event for all those who participated in the negotiations — Crees, Inuit and Naskapi — and I will always remember, we had a dinner, and those who participated in the negotiations on the native side spoke up. *You really had the feeling that the decisions were very difficult for them, but they had to make a decision. That's what we did, for the best and the worst.*"[3009] [Emphasis added.]

The deep federal concern expressed by Lafrenière that "the Agreement had to be explained fairly and objectively to the communities" does not appear to correspond to the events that transpired at that time. As already mentioned, the federal and Québec[3010] governments did not agree to even allow Cree and Inuit communitities to ratify the Agreement, until it became clear at the eleventh hour of the negotiations that N.Q.I.A. would not sign the JBNQA. Moreover, the federal government refused to allow N.Q.I.A. more time to explain the Agreement to the people in the communities when N.Q.I.A. argued that it was necessary.

Since the James Bay and Northern Québec Agreement was signed, the federal government has not always seen the Agreement as the basis for a continuing relationship between itself and the Aboriginal parties. In subsequent negotiations with the Crees and the Inuit, the federal government has sought to buy out the Agreement and to "complete" its obligations under the Agreement.

In an October 22, 1986 letter from Mr. Andrew Croll, the chief federal negotiator for the James Bay and Northern Québec Agreement, to Mr. Richard Van Loon, Assistant Deputy Minister for Self-Government, Indian and Northern Affairs Canada, Mr. Croll describes the purpose of the negotiations as being to end Canada's obligations under the Agreement:

> "*Goal*
>
> To get a *written agreement*, approved by Cabinet, the Grand Council of the Crees of Québec, the Makivik Corporation, and the Naskapi Band on:
> - the current *status of completion* of the JBNQA
> - the specific *initial* and *ongoing* requirements to complete *ALL* undertakings of the Canadian Government as agreed to in the JBNQA and related agreements.
>
> *Purpose*
>
> The purpose of the negotiations is to *discharge Canada's* financial and other *obligations* under the JBNQA and related agreements so that the native parties to the JBNQA and

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[3006] Interview with Marc Lafrenière, September 28, 1993.

[3007] According to Lafrenière, it was essential that the Cree and Inuit communities agree to the entire agreement, including the extinguishment clause. Interview with Marc Lafrenière, September 28, 1993. But see discussion, *supra*, of the problems with the ratification process in the Cree and Inuit communities.

[3008] Interview with Marc Lafrenière, September 28, 1993.

[3009] Interview with Marc Lafrenière, September 28, 1993.

[3010] H. Gendron, "Inuit accept agreement" in the *Montreal Star*, March 6, 1976, A1 at A2.

> related agreements will be capable of complete *self-government*."[3011] [Emphasis added.]

In a reply to Croll, dated November 12, 1986 (i.e. three weeks later), Richard Van Loon confirms that the goal of the federal government is to buy out the Agreement, at least with respect to the Crees:

> "[T]he problem...is that Cabinet/TB [i.e. Treasury Board] does not give that kind of approval unless they know what they will get for it (i.e. a "sign-off")...
>
> *Sorry* but that is how things are and this is why we need a good negotiator. If we knew the Cabinet bottom line I could just use a PM-4 [i.e. a senior administrator] to draw up a proposal and give it to the signatories on a take-it-or-leave-it basis. Instead, in the real and fuzzy world of Ottawa, you will have to talk to the GCCQ [i.e. the Grand Council of the Crees (of Québec)] enough to figure out what *their* real bottom line is before we go to Cabinet. If they don't have one (i.e. if they prefer an open-ended arrangement) or if it is way off the realistic $200M level then we simply don't have negotiations. *This is bad for them too since we will then have to just continue the current funding levels.*"[3012] [Emphasis added.]

Federal attempts to "buy out" the Agreement can be argued to be inconsistent with the constitutional nature of the federal Crown-Aboriginal relationship. The federal "buy-out" strategy appears to exploit the notion of "self-government" and the fact that "current funding levels" are less than adequate to meet Cree needs. Such attempts are also arguably inconsistent with the fiduciary obligation of the federal government toward Aboriginal peoples.[3013] Attempts to "buy out" the Agreement are in addition inconsistent with the intentions indicated in the *James Bay and Northern Québec Native Claims Settlement Act*.[3014] The preamble to the *Act* confirms a continuing responsibility between the government and Parliament of Canada and the Crees and Inuit:

> "[T]he Government of Canada and the Government of Québec have assumed certain obligations under the Agreement in favour of the said Crees and Inuit.
>
> AND WHEREAS the Agreement provides, *inter alia*, for the grant to or setting aside for Crees and Inuit of certain lands in the Territory... the establishment in the Territory of regional and local governments to ensure the full and active participation of the Crees in the administration of the Territory...*the creation and continuance of institutions and programs to promote the economic and social development of the Crees and Inuit and to encourage their full participation in society...*
>
> AND WHEREAS *Parliament and the Government of Canada recognize and affirm a special responsibility for the said Crees and Inuit...*"[3015] [Emphasis added.]

11.3.3.2 Québec government

[3011] Letter from Andrew Croll to Richard Van Loon, Assistant Deputy Minister, Self Government, dated October 22, 1986, "Appendix to Letter to R. Van Loon of October 22, 1986," at 1.

[3012] Memorandum to A. Croll, November 12, 1986, from Richard Van Loon, Assistant Deputy Minister, Self-Government, Indian and Northern Affairs Canada.

[3013] See discussion under sub-heading section 6.4 *supra*.

[3014] S.C. 1977, c. 32.

[3015] Id., preamble.

The Québec government insisted on the extinguishment of *all* aboriginal rights in the Territory, including the rights of non-signatory third parties. In an interview reported in the *Montreal Star* in 1976, Natural Resources Minister Jean Cournoyer confirmed the importance of extinguishing the rights of Aboriginal peoples in the following terms:

> "Mr. Cournoyer, in the interview, said that *the province wanted a free hand to develop its northern resources and that the James Bay final agreement would have to extinguish the rights and claims of all native peoples in the territory.*"[3016] [Emphasis added.]

J. Ciaccia, Special Representative of Premier Bourassa, expressed the Quebec government position on extinguishment as follows:

> "Mais en plus des dissidents, il y a 6,000,000 de Québécois...6,000,000 qui ont aussi des droits dans le territoire. Ce ne sont pas seulement les Indiens et les Inuit qui ont des droits dans ce territoire. *Ces 6,000,000 ont le droit d'avoir des titres clairs à ce territoire. La loi de 1912, on a le droit de compléter et de donner un titre clair au Québec...*
>
> *"La seule façon dont nous pouvons le faire, c'est avec la clause 2.6"*[3017] [Emphasis added.]

The above explanation by Ciaccia seriously distorts the constitutional situation that existed at that time. The *Rupert's Land and North-Western Territory Order*, 1870 required the government of Canada and Parliament to protect the Aboriginal peoples concerned and required the application of equitable principles in satisfying their claims. Six million Quebecers did not have a "right" to have a clear title to the Territory covered by the JBNQA. The 1912 Act, referred to by Ciaccia, required Québec to recognize the rights of the Aboriginal inhabitants in the territory and to obtain a surrender on a consensual basis. Neither actions of duress nor unilateral extinguishment were countenanced in any way by any of the applicable constitutional instruments.

Under the 1912 Act or any other legislation, there existed no "right" to complete and give clear title to Québec through a blanket extinguishment clause. Nor was it accurate to state that the "only" way that Québec could obtain clear title was to secure federal legislation to extinguish the rights of all Indians and all Inuit in and to the Territory. To inform the Québec National Assembly Standing Committee otherwise was to grossly mislead the Committee and to disregard the fiduciary responsibilities of the Québec government.

The position of the Québec government on the extinguishment issue is summarized as follows by the Commission des droits de la personne du Québec:

> *"[T]he Québec government played a major role in inserting and maintaining the third party rights extinguishment clause in the federal bill* [i.e. s. 3(3) of the federal enabling legislation]. This issue was debated thoroughly while Bill C-9 was being studied, precisely because of the many protests it raised. These protests prompted the federal government to say it was prepared to review the provision. *It informed the Québec authorities of its intention, but the latter refused to review this condition of the agreement, which they deemed essential.*

[3016] H. Gendron, "Inuit vote delay rejected" in the *Montreal Star*, February 20, 1976.

[3017] Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 7, 1975, No. 177, at B-6072. Unofficial English translation: "But in addition to the dissidents, there are 6,000,000 Quebeckers who also have rights in the territory. It is not only the Indians and Inuit who have rights in this territory. *These 6,000,000 have the right to have clear titles to this territory. The Act of 1912, we have a right to complete it and to give clear title to Québec*...[new para.] *The only way that we can do it, it's with clause 2.6.*" [Emphasis added.]

> *In summary, Québec played a decisive and dominant part in the overall affair*, and took action with direct and far-reaching implications for the territorial rights of the aboriginal peoples, the signatories and non-signatories of the agreement."[3018] [Emphasis added.]

In addition, it was clear to all the participants in the negotiations that a blanket extinguishment was essential to the government of Québec. To quote James O'Reilly:

> "...if the question of extinguishment is changed, Québec will not agree. If [section] 2.6 is deleted from the [James Bay and Northern Québec] agreement, or the concomitant section of Bill C-9, there is no agreement with the Government of Québec and this James Bay and Northern Québec agreement will never come into force."[3019]

The policy that uncertain aboriginal rights should be exchanged for precise and limited rights has been rejected by the Commission des droits de la personne du Québec, which stated in 1993:

> "Notre Commission...a dénoncé cette politique de l'extinction des droits sur un territoire visé contre la reconnaissance de nouveaux droits précis et limités. Nous croyons toujours que cette pratique est contraire au principle de l'égalité dans les négociations."[3020]

Based on the above, it is clear that, while it was federal legislation that purported to extinguish the rights of all Indians and all Inuit in and to the Territory, it was the Québec government that insisted that such blanket extinguishment be carried out. All parties in the negotiations appear to have been aware that such a position was being taken by the Québec government.[3021] This extinguishment policy has been consistently criticized by the Commission des droits de la personne du Québec since 1978. Yet, despite the human rights implications raised by the Commission, there does not appear to be any real change in approach emanating from the Québec government.

11.3.3.3 Hydro-Québec and other development corporations

It is also relevant to consider the perspective of Hydro-Québec and the two other development corporations, Société d'énergie de la Baie James (SEBJ) and Société de développement de la Baie James (SDBJ). These Crown Corporations took a leading role in the JBNQA negotiations and were able to influence the positions taken by the government of Québec.[3022]

It was said at the time by Jean Cournoyer, then Québec Minister of Natural Resources,

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[3018] Commission des droits de la personne du Québec, *The Rights of Aboriginal Peoples [:] We must respect the rights of Native Peoples and deal with them accordingly* (Québec: January 1978) (Document 1), at 9-10.

[3019] James O'Reilly, January 25, 1977, *Minutes of the Standing Committee*, No. 6 at 21.

[3020] See Commission des droits de la personne du Québec, *Mémoire de la Commission des droits de la personne présenté à la Commission royale sur les peuples autochtones* (Montréal: novembre 1993) at 26. Unofficial English translation: "Our Commission...has denounced this policy of the extinguishment of rights in a given territory in exchange for the recognition of new precise and limited rights. We still believe that this practice is contrary to the principle of equality in the negotiations."

[3021] Under the following sub-heading, it is made clear that the Québec government policy of insisting on extinguishment is well-known to the development corporations who were distinct parties to the JBNQA negotiations and Agreement.

[3022] See, for example, N. Rouland, *Les Inuit du Nouveau-Québec et la Convention de la Baie James* (Québec: Association Inuksiutiit & Centre d'études nordiques de l'Université Laval, 1978) at 120, where the author indicates that difficulties arose in regard to Category II land selections (exclusive harvesting rights), due largely to the influence of Hydro-Québec, who wished to exercise its powers without any hindrance in certain regions of the Territory.

that Hydro-Québec was "un état dans L'Etat"[3023] and that the Crown corporation was "plus puissant que le gouvernement [du Québec]".[3024] N. Rouland describes the power of Hydro-Québec in the early 1970s in northern Québec as virtually a sovereign authority.[3025] Apparently, in order to limit Hydro-Québec's control over the northern territory, Premier Robert Bourassa created through legislation the Société de développement de la Baie James and its subsidiary, Société d'énergie de la Baie James.[3026] However, Hydro-Québec maintained majority participation in SEBJ, and the latter was said to be in effect more a subsidiary of Hydro than of SDBJ.[3027]

In addition, B. McKenna describes the awesome power of Hydro-Québec and its implications for the Aboriginal peoples concerned:

> "By the time of James Bay, its power was unchallenged. Hydro-Québec decided which rivers would be dammed. *Hydro-Québec decided which lands the native people would get, which minerals they would never get, and even which ways native health, education and social services would evolve.* Hydro-Québec rules the 250,000 square miles of the James Bay territory with greater clout than even the old masters - the Hudson's Bay Company. *No one may enter the region without an invitation from Hydro and a security check by the Hydro police.* Much to the chagrin of Bell Canada, Hydro runs its own telephone company and its own fleet of aircraft. Mother, the church, it is Hydro."[3028] [Emphasis added.]

It is said that Hydro-Québec and the other corporations entered the negotiations because of the threat posed by the interlocutory injunction to the hydroelectric development: "la CBJNQ a été négociée pour lever l'hypothèque pesant sur la réalisation du complexe La Grande, dont les travaux avaient fait l'objet d'une ordonnance d'injonction interlocutaire de l'honorable juge Malouf."[3029] Yet, it is important to highlight that it is highly irregular to have three development corporations of the provincial Crown participate as independent parties for all aspects of a land claims negotiations. The status and role accorded to these powerful corporations in the negotiations can be seen to have increased the unequal bargaining position of the Aboriginal parties and served to exert significantly more pressure on them.[3030] In this way, the full inclusion of the development corporations by the Québec and federal governments contributed to the overall pattern of duress.

While the JBNQA negotiations included modifications to the James Bay hydroelectric project which directly involved these corporations, this did not mean that they should be a full party in determining other key issues in the Agreement (e.g. Cree/Inuit land regimes, environmental regime, administration of territory, harvesting regime, etc.). However, the Québec government saw the northern part of the province principally in terms of its economic development potential which called for inclusion of Québec's most important Crown

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[3023] Unofficial English translation: "a state within the state".

[3024] Unofficial English translation: "more powerful than the government [of Québec]". Cited in N. Rouland, *Les Inuit du Nouveau-Quebec et la convention de la Baie James*, note 2829, *supra*, at 39.

[3025] Id.

[3026] Id. at 40.

[3027] Id.

[3028] B. McKenna, "The Power and Glory of James Bay" in *Weekend*, March 19, 1977, Ottawa, at 4-5. Cited in N. Rouland, *Les Inuit du Nouveau-Quebec et la convention de la Baie James*, note 2829, *supra*, at 39.

[3029] Hydro-Québec, *Memoire à la Commission Royale sur les Peuples Autochtones en Reponse aux Questions Posées par M. David Hawkes à M. Armand Couture* (Montréal: 2 novembre 1993). Unofficial English translation: "The JBNQA had been negotiated in order to lift the heavy mortgage on the realization of the La Grande Complex, the construction of which having been the subject of an interlocutory injunction by Judge Malouf." During the JBNQA negotiations, as well as at the time the Agreement was signed, Mr. Couture represented the James Bay Energy Corporation.

[3030] See discussion under sub-heading 11.5.4 *infra* for Aboriginal views on this point.

Corporations:

> "Ces possibilités, ce sont celles d'un développement économique sans précédent dont pourra bénéficier la entière population du Québec pourvu que l'on sache saisir l'occasion qui s'offre afin de le planifier et de réaliser de façon rationnelle en tenant compte de la dimension humaine.
>
> *Pour cette raison, les parties concernées par cette convention comprennant trois des plus importantes sociétés d'État...qui sont à l'origine d'une ère nouvelle et d'un développement territorial sans précédent*, et cela grâce à leur expérience et aux décisions que ces sociétés et leurs dirigeants ont constamment prises dans l'intérêt de tous les Québécois."[3031] [Emphasis added.]

In relation to the extinguishment issue, the President of Hydro-Québec, Armand Couture, has confirmed in a 1993 brief to the Royal Commission on Aboriginal Peoples that extinguishment of Aboriginal peoples' rights continues to be the policy of both the Crown corporation and the Québec government:

> "*L'extinction du titre indien ou des revendications autochtones par l'échange de ceux-ci contre des garanties, droits et privilèges spécifiques continue d'être à la base de la philosophie d'Hydro-Québec dans ses relations avec les autochtones, d'accord en cela avec la politique du gouvernement québécois*...Cet échange nous apparaît essentiel pour que le développement de projets dans le territoire ne soit pas entaché par la survie de droits dont la nature et l'étendue ne sont pas connues."[3032] [Emphasis added.]

It would appear that Hydro-Québec has subsequently attempted to obtain extinguishments from the Crees of their rights under the James Bay and Northern Québec Agreement, just as the federal government has tried to buy out the entire Agreement. Chief Billy Diamond describes this Hydro-Québec strategy as the "two per cent solution":

> "...Hydro-Québec, acting as almost a government on its own, goes after our own bands for individual agreements based on the famous two per cent solution. Two per cent of the capital cost of the project in order to get the Crees to give up more territory, lose more of a birthright and push on with the Hydro-Québec dream."[3033]

Approaches by Québec's development corporations that favour extinguishment of the rights of Aboriginal peoples are, however, in direct contradiction to the approaches recommended by the Commission des droits de la personne du Québec. In regard to the period when JBNQA was negotiated, the Commission highlights the human rights considerations and describes the extinguishment policies as "unacceptable":

[3031] Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 5, 1975, No. 174, at B-5934 - B-5935 (J. Ciaccia). Unofficial English translation: "These possibilities, they are those of an economic development without precedent which could benefit the whole population of Québec provided we know how to seize the occasion which offers itself in order to plan and realize it in a rational manner taking into account the human dimension. [new para.] *For this reason, the parties concerned in this Agreement include three of the most important Crown Corporations...who are at the origin of a new era and of a territorial development without precedence*, and that thanks to their experience and to the decisions that these corporations and their directors have constantly taken in the interest of all Quebeckers." [Emphasis added.]

[3032] Hydro-Québec, *Memoire à la Commission Royale sur les Peuples Autochtones en Reponse aux Questions Posées par M. David Hawkes à M. Armand Couture* (Montréal: 2 novembre 1993). Unofficial English translation: "The extinguishment of Indian title or of Aboriginal claims through the exchange of these for specific guarantees, rights and privileges continues to be the basis of the philosophy of Hydro-Québec in its relations with Aboriginal peoples, in agreement on this with the policy of the government of Québec...This exchange appears to us to be essential in order that the development of projects in the territory not be tainted by the survival of rights the nature and scope of which is unknown."

[3033] Grand Council of the Crees, *Presentation to the Royal Commission on Aboriginal Peoples*, Montreal, May 28, 1993, at 26-27 (Chief Billy Diamond).

> "...en regard de la politique énergétique du Québec, la Commission estimait que *savoir concilier le développement des ressources naturelles et le respect des droits territoriaux des Autochtones est un enjeu majeur quant au progrès dans la lutte pour le respect des droits humains.*
>
> Poser comme principe préalable obligatoire à toute négotiation l'extinction des droits territoriaux des Autochtones, comme c'était la procédure traditionnelle au Canada, était *inacceptable pour la Commission.*"[3034] [Emphasis added.]

11.4 Unilateral Extinguishment of the Rights of Aboriginal Third Parties

A central question related to the extinguishment of Aboriginal rights in the James Bay and Northern Québec Agreement is that of the rights of Aboriginal third parties. The legislation which implemented the James Bay and Northern Québec Agreement extinguished *all* native claims, rights, and titles of all Indians and all Inuit in and to the area covered by the Agreement, whether or not such Indians or Inuit were signatories to the Agreement.

As already indicated, section 3(3) of the *James Bay and Northern Québec Native Claims Settlement Act*[3035] provides:

> "*All native claims, rights, title and interests, whatever they may be, in and to the Territory, of all Indians and all Inuit, wherever they may be, are hereby extinguished*, but nothing in this Act prejudices the rights of such persons as Canadian citizens and they shall continue to be entitled to all of the rights and benefits of all other citizens as well as those resulting from the *Indian Act*, where applicable, and from other legislation applicable to them from time to time." [Emphasis added.]

Can the unilateral extinguishment of the rights of Aboriginal third parties in the Territory be justified? What position does it leave those Aboriginal third parties whose rights are purportedly extinguished? Fundamental constitutional and other legal issues pertaining to the extinguishment of rights of these third parties are already covered in the main text of the Extinguishment Study,[3036] so they will not be repeated in this Case Study.

The difficulty Aboriginal third parties face in regard to their claims in and to land within the Territory covered by JBNQA is that their rights were unilaterally extinguished and were instead given an undertaking by Québec to negotiate these claims. This undertaking to negotiate is set out in s. 2.14 of the Agreement as follows:

> "*Québec undertakes to negotiate with other Indians or Inuit* who are not entitled to participate in the compensation and benefits of the present Agreement, in respect to any claims which such Indians or Inuit may have with respect to the Territory.

[3034] Commission des droits de la personne du Québec, *Mémoire de la Commission des droits de la personne présenté à la Commission royale sur les peuples autochtones* (Montréal: novembre 1993) at 14. Unofficial English translation: "...in regard to the energy policy of Québec, the Commission assessed that *how to reconcile the development of natural resources and respect for the territorial rights of Aboriginal peoples is a major stake concerning progress in the struggle for respect of human rights.* [new para.] To put as an obligatory preliminary principle in all negotiations the extinguishment of the territorial rights of Aboriginal peoples, as this was the traditional procedure in Canada, was *inacceptable to the Commission.*" [Emphasis added.]

[3035] *James Bay and Northern Québec Native Claims Settlement Act*, S.C. 1976-77, c. 32.

[3036] See discussion under heading 7 and sub-heading 10.4.4 *supra* of the Extinguishment Study.

> Notwithstanding the undertakings of the preceding sub-paragraph, *nothing in the present paragraph shall be deemed to constitute a recognition, by Canada or Québec, in any manner whatsoever, of any rights of such Indians or Inuit.*
>
> Nothing in this paragraph shall affect the obligations, if any, that Canada may have with respect to claims of such Native persons with respect to the Territory. *This paragraph shall not be enacted into law.*" [Emphasis added.]

This clause is sorely inadequate for a number of reasons. First, s. 2.14 cannot possibly replace the rights purportedly extinguished unilaterally by Parliament. Second, an undertaking to negotiate claims does not mean that there is any obligation to reach a satisfactory agreement.[3037] Third, s. 2.14 makes clear that the provision is not to be enacted into law. Fourth, the dissident Inuit would not be covered by s. 2.14, since they are viewed as being "entitled to participate in the compensation and benefits" of JBNQA.

In addition, Québec is the only party explicitly required under s. 2.14 of the Agreement to negotiate with Aboriginal third parties. Yet, the consent of *all* parties to the JBNQA is required in order to recognize or confer rights in the Territory to Aboriginal third parties. Section 4 of the *James Bay and Northern Québec Native Claims Settlement Act* provides in part that:

> "4. (1) ...the Governor in Council may, by order, approve, give effect to and declare valid...
>
> (b) any agreement to which the Government of Canada is a party with the Naskapi Indians of Schefferville, Québec, or with any other Indians or Inuit or groups thereof, concerning the native claims, rights, title and interests that such Indians, Inuit or groups thereof may have had in and to the Territory prior to the coming into force of this Act.
>
> (2) *No order shall be made under paragraph (1)(b) in respect of any agreement under that paragraph that expressly or by implication amends or modifies the Agreement unless the procedure set forth in subsection 2.15 of the Agreement has been followed.*"[3038] [Emphasis added.]

Section 2.15 of the Agreement provides in part as follows: "The Agreement may be, from time to time, amended or modified in the manner provided in the Agreement, or in the absence of such provision, *with the consent of all the Parties...*" [Emphasis added.] The consequences for Aboriginal third parties are potentially most significant:

> "[B]ecause it is necessary in many instances to amend the Agreement to confer rights in the Territory on native third parties, the consent of Canada, the James Bay Crees, and

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[3037] Commission des droits de la personne du Québec, *The Rights of Aboriginal Peoples [:] We must respect the rights of Native Peoples and deal with them accordingly* (Québec: January 1978) (Document 1), Appendix: "The Extinguishment of Third Party Rights in the James Bay and Northern Québec Agreement", at 20: "The words 'Québec undertakes' involves a real commitment, but only for the purposes stated thereafter, namely 'to negotiate'. [new para.] There is no commitment to negotiate to the satisfaction of the aboriginal peoples concerned. A commitment to negotiate does not include any contractual legal obligation, and thus has no legal value, unless it is accompanied by a sanction, a penalty clause, for instance."

[3038] This provision was described as follows by the Honourable Warren Allmand, Minister of Indian Affairs and Northern Development:

> "The next [proposed] amendment is an amendment requested and agreed to by all the parties; that if the government makes an agreement with a third party pursuant to Clause 4 and pursuant to Section 2.14 of the Agreement, that such an agreement will require the consent of the contracting parties if their rights are affected in any way. In other words, if we were to make an agreement with a third party and we were to affect the lands or the compensation or anything else, we would also have to get the agreement of the contracting party. We agreed to that, and so did the Government of Québec, and all the other contracting parties agreed."
>
> The Honourable Warren Allmand, March 8, 1977, *Minutes of the Standing Committee*, No. 21 at 5.

> the Inuit of Québec is often required...*Thus, while Québec is the only party legally obligated to negotiate with third party natives under subsection 2.14, should Canada or any of the native beneficiaries under the Agreement or the Northeastern Québec Agreement refuse to participate in any future negotiations with third party native claimants, the negotiations could prove to be meaningless.*"[3039] [Emphasis added.]

With the above context in mind, the Case Study reviews under the following sub-headings the responses of the federal and Québec governments, the Commission des droits de la personne du Québec, the Cree and Inuit parties, and Aboriginal third parties to the Agreement. In addition, the alternatives to extinguishment of Aboriginal third party rights that were proposed at that time will be briefly discussed.

11.4.1 Federal position on Aboriginal third parties

With respect to the third parties who were affected by the Agreement, according to Marc Lafrenière, the federal government was particularly aware of the claim of the Montagnais, as this was a claim that was raised while the Agreement was being negotiated. However, the federal negotiating team was convinced that in negotiating with the Crees and the Inuit, they were negotiating with all the parties who had a primary interest in the area covered by the Agreement. The federal negotiating team assessed the "balance of inconvenience" and decided that to wait until every claimant was satisfied was to run a serious risk of penalizing the Crees and the Inuit, who held the primary interests.[3040] The federal policy was to settle the claims of the Crees and the Inuit, and then make accommodations with other groups in the future.[3041]

It should be said, however, that there exists no such test as "balance of convenience" - whereby the federal Crown acting in its fiduciary capacity to all Aboriginal peoples can choose which Aboriginal peoples' fundamental rights will be extinguished, so that other Aboriginal peoples might enter into a land claims agreement. The federal Crown's responsibility to Aboriginal peoples is to act in the best interests of all Aboriginal peoples and not sacrifice some peoples' basic rights to secure an agreement. Moreover, as already discussed in the Extinguishment Study,[3042] such action is contrary to the constitutional terms and conditions attached to the *Rupert's Land and North-Western Territory Order*.

In testimony before the Standing Committee on Indian Affairs and Northern Development, the Associate Deputy Minister of the Department of Indian Affairs and Northern Development, P. M. Ollivier, described the uncertain legal status of Aboriginal third-party claims, even in regard to compensation, as follows:

> "...it has been suggested to me that it would be possible for the third parties, whose rights have been extinguished, if they are unable to come to an agreement with Québec, to sue for compensation...on the basis that their rights have been extinguished. *They cannot sue by way of injunction to have their rights respected. But the rights having been extinguished, possibly, they could claim compensation.*
> *Now there is nothing in the Agreement about compensation and, as I say, I have not*

[3039] R.A. Pratt, "Third Party Native Rights and the James Bay and Northern Québec Agreement" in S. Vincent & G. Bowers, (eds), *Baie James et Nord québécois: dix ans après/James Bay and Northern Québec: Ten Years After* (Montréal: Recherches amérindiennes au Québec, 1985) 65 at 66.

[3040] Interview with Marc Lafrenière, September 28, 1993.

[3041] Interview with Marc Lafrenière, September 28, 1993.

[3042] See heading 7 *supra*.

> *examined the possible outcome of such a recourse*, but I would not dismiss it out of hand."[3043] [Emphasis added.]

Upon questioning, Mr. Ollivier and Mr. Allmand further clarified the obligation of Québec with respect to these third parties:

> "Mr. Holmes: How comfortable would legal counsel be, if they were in the position of a third party who may or may not have third [party] rights, when you are confronted with a bill that extensively extinguishes the rights of third parties or non-signatories to the agreement? What leverage do you have as a third party to negotiate when your rights are extinguished before you start?
>
> Mr. Ollivier: Well, I would say that *all that this third party can do would be to rely on the good faith of the Québec government that undertook to negotiate, presumably in good faith, with anybody who has a claim. And that is all the person can do.*
>
> Mr. Holmes: A moral obligation but not a legal obligation.
>
> Mr. Allmand: Oh no, *there is a legal obligation to negotiate but no legal obligation to settle. There would not be any obligation to settle, in any case... You cannot impose a legal obligation on somebody to settle something. They can oblige themselves to negotiate but how can you oblige people to settle?*[3044] [Emphasis added.]

According to Marc Lafrenière, from the federal perspective, the Montagnais of Schefferville had a minimal interest in the land "from time immemorial", as they did not originate in Schefferville; the Algonquin territory was to the south of the area covered by the James Bay and Northern Québec Agreement, and the Algonquins were not very negatively affected by the Agreement.[3045] In fact, the Montagnais claim is currently in the process of being negotiated.[3046]

It is said that, in view of the position of Québec, it was not a viable alternative to seek a surrender of rights by the Crees and the Inuit, without extinguishing the rights of other Aboriginal peoples in and to the territory. Given the substantial investment that the province was making in the James Bay project, and in the Agreement, the province of Québec had to be assured that there could be no further injunction after the Agreement was signed.[3047] In the words of the Honourable Warren Allmand, Minister of Indian Affairs and Northern Development:

> "Québec had an obligation under the Act of 1912 to settle with the native people of that territory -- that was the subject matter of the Act of 1912 -- and my understanding is that in making that settlement, which they feel they are doing in the James Bay Agreement and the legislation pursuant to it, they want all claims to be extinguished and they do not want people coming back in ten or fifteen years with other claims...I do not think they would have agreed to the Agreement if there were still the possibility of claims coming along in five, ten or fifteen years."[3048]

[3043] P. M. Ollivier, March 8, 1977, *Minutes of the Standing Committee*, No. 21, at 39.

[3044] P.M. Ollivier and the Honourable Warren Allmand, March 8, 1977, *Minutes of the Standing Committee*, No. 21 at 34.

[3045] Interview with Marc Lafrenière, September 28, 1993.

[3046] Interview with Jacques Kurtness, July 28, 1993. Interview with Marc Lafrenière, September 28, 1993. It has taken some time for the negotiations to get under way: today, 19 years later, the negotiations are still not completed.

[3047] Interview with Marc Lafrenière, September 28, 1993.

[3048] Honourable Warren Allmand, March 8, 1977, *Minutes of the Standing Committee*, No. 21 at 33.

In the end, in the opinion of Marc Lafrenière, the federal negotiators were convinced that they were negotiating with the appropriate parties. To quote Mr. Lafrenière:

> "In retrospect, we had at that time a deep conviction that we were dealing with the right people, who had a mandate from their people, and it was really up to them. If they accepted the terms negotiated, for us it was fine. I guess if a significant majority of the Inuit had been opposed, it would have been totally different. We knew that we had an extremely high majority of the Crees, who were really affected by the project, pressing the government to go ahead. *We had the main player, in terms of providing the benefits, wanting to have absolute certainty*. And there was a general feeling that the deal was not bad, and it was seen like this by the natives concerned."[3049] [Emphasis added.]

The federal position with respect to third parties must be understood in the context of later statements by the federal government with respect to "overlapping claims". In its 1981 policy statement, *In All Fairness [:] A Native Claims Policy*, the federal government stated that no land should be granted where there are overlapping claims, until the competing claims have been resolved:

> "Even where jurisdictions are not at issue, *some lands are used by more than one native group*. Where this sort of overlapping exists and where there appears to be no ready agreement among the different users, *some appropriate and timely means must be found to resolve the differences. Until this is done, no land in these areas will be granted.*
>
> Again, the motive for approaching land selection in this way is to protect the rights of Canadians, native and non-native alike, who might be affected by the settlement. Furthermore, *it is designed to encourage native people to participate actively in the fair and equitable negotiations that surround these decisions.*"[3050] [Emphasis added.]

Based on the above, it is clear that the federal government had not adequately reflected on its position on the rights of Aboriginal third parties, in the context of JBNQA. Little regard was in effect given to its constitutional obligations under the *Rupert's Land and North-Western Territory Order*, 1870. Also, Canada's fiduciary responsibility to all Aboriginal peoples (not simply Crees and Inuit) was not carefully considered. In addition, the federal government acquiesced to Québec's demand for unilateral extinguishment of the rights of all Aboriginal third parties, without knowing exactly what was the legal effect of Québec's undertaking to negotiate (s. 2.14). Whatever the federal government did know indicated that the third parties affected were being placed in a very tenuous and vulnerable position. Finally, the fact that the federal government altered its position on "overlapping claims" in 1981 would suggest that the government came to realize that its previous position was, and would continue to be, prejudicial to Aboriginal third parties to any land claims agreement.

11.4.2 Québec position on Aboriginal third parties

Section 2.14 of the Agreement, which imposes on obligation on Québec to negotiate with

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[3049] Interview with Marc Lafrenière, September 28, 1993. Note that Mr. Lafrenière cannot be including the dissenting Inuit, who viewed the deal as clearly harmful and unacceptable.

[3050] Indian and Northern Affairs Canada, *In All Fairness [:] A Native Claims Policy* (Ottawa: Indian Affairs and Northern Development, 1981), at 23. There was no policy with respect to overlapping claims in the Federal claims policy of 1973: see Indian and Northern Affairs Canada, *Statement Made by the Honourable Jean Chretien, Minister of Indian Affairs and Northern Development on Claims of Indian and Inuit People* (Ottawa: Indian Affairs and Northern Development, August 8, 1973).

third parties, was included at the insistence of the federal government.[3051] According to he Honourable Warren Allmand, Minister of Indian Affairs and Northern Development, Québec refused to allow the obligation to negotiate set out in s. 2.14 to be enacted into law.[3052] Québec also refused to consider an extinguishment clause limited in effect to the rights of the contracting parties to the Agreement:

> "[T]here had been a suggestion that Article 2.14 be incorporated in the law and the Agreement be amended so as not to extinguish [the rights of non-signatories to the Agreement]. I spoke to Mr. Berubé [Québec Minister of Natural Resources and of Lands and Forests] and told him that we were ready to accept an amendment to put Article 2.14 in the law, to have it incorporated in the statute. But after deliberation, they felt that they could not agree to that.
>
> I am just repeating what they said to you...their argument went along these lines. They feel that Article 2.14 is in the Agreement, that they have signed the Agreement, that they are bound in law by the Agreement, and that, consequently, they are bound to negotiate third-party rights under Article 2.14, and they feel there is no need of putting it in the statute."
>
> So that is where it remains. You might say he repeated his commitment to bargain or negotiate, the Québec government, with any third party who feel they have rights in the territory, and we stand by that commitment as well.[3053]

In order to better understand the Québec government position on extinguishment of Aboriginal third party rights, it is useful to examine the testimony of the government's representatives before the Québec National Assembly Standing Committee in 1975, just prior to the signature of JBNQA.

It would appear that the Québec government did not consider that the extinguishment of Aboriginal third party rights in and to the Territory was that serious a matter. As J. Ciaccia points out:

> "Je veux seulement clarifier, spécifiquement, que les droits que nous éteignons sont *seulement* les droits dans le territoire."[3054] [Emphasis added.]

Further, Ciaccia characterized the claims and legal procedures of Aboriginal third parties as "blackmail":

> "L'Association des Indiens, même d'après le jugement Malouf, *n'a pas d'intérêt dans le territoire*. L'Association des Indiens a été invitée à négocier. L'Association des Indiens

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[3051] Interview with Marc Lafrenière, September 28, 1993.

[3052] This is reflected in the text of Section 2.14, which includes the sentence that "[t]his paragraph shall not be enacted into law." This sentence was included in s. 2.14 at the insistence of Québec:

> "I can tell you how it [i.e. this sentence] got into the Agreement...These words found their way into one of the first drafts of this Agreement at a time when it was considered that possibly the Agreement would become a statute. The position of the Québec representatives was that they were quite satisfied to assume a contractual obligation but they did not want to cause it to become a statutory obligation."
>
> Mr. Ollivier, March 8, 1977, *Minutes of the Standing Committee*, No. 21 at 32.

[3053] Honourable Warren Allmand, March 8, 1977, *Minutes of the Standing Committee*, No. 21 at 6.

[3054] Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 7, 1975, No. 177, at B-6071 - B-6072. Unofficial English translation: "I want only to clarify, specifically, that the rights that we are extinguishing are *only* those rights in the territory." [Emphasis added.] The use of the term "only" is somewhat surprising, since the Territory being referred to covers 410,000 square miles.

a refusé de négocier[3055] et, à la dernière minute, *elle a essayé de faire du chantage en allant devant la cour*, leur requête a été rejetée."[3056] [Emphasis added.]

Earlier in the discussions, J.-Y. Morin had indicated that the effect of such actions by the government appeared to be "extremely draconian".[3057] In view of Morin's repeated questioning on the issue of unilateral extinguishment of Aboriginal third party rights, Ciaccia finally asked Morin if he was representing the interests of Québec or not:

"M. Ciaccia: ...Est-ce que vous représentez le Québéc ici ou si vous ne le representez pas...

M. Morin: ...nous représentons les intérêts de tous les Québécois y compris les Indiens."[3058]

Finally, the Québec government indicated that it is going to "insist" that rights be extinguished if the Agreement is signed;[3059] and that to hear the views of the Aboriginal third parties whose rights were to be extinguished would "put the province in an impossible position".[3060] Consequently, the goverment voted to defeat the motion to hear the views of Aboriginal third parties on the issue of extinguishment.[3061]

It is important to note that, although the rights of *Aboriginal* third parties were to be extinguished at the insistence of the Québec government, the government took an entirely different approach in respect to the rights of *non-Aboriginal* people. In regard to hunting and fishing by non-Aboriginal people, the Quebec government confirmed:

"A la suite de pleusieurs rencontres avec les maires et quelques conseillers de différentes municipalités, Matagami, Chibougamau, Chapais, Lebel-sur-le-Quévillon, nous avons eu des rencontres avec les fonctionnaires des différentes ministères et ces personnes, *nous*

[3055] It is not that the Indians of Quebec Association refused to negotiate, but they refused to negotiate on the basis of extinguishment rather than recognition of their fundamental rights. See Andrew Delisle, President of the Confederation of Indians of Quebec, March 1, 1977, *Minutes of the Standing Committee*, No. 19, at 44:

> "[T]he basic principle that the Indian people have, the third parties in this case, and the basic principle that the government has are not the same...We want to negotiate on a basis of nonextinguishment. The government wants to negotiate on the basis of extinguishment. Therefore, there is no submission [of claims].
>
> Just in passing, for your information, we feel it is not to our benefit...to present a claim when we know that the government's intention is to extinguish our rights...When we first got together and approached the government, our definite intention was not to extinguish our rights. But, when we presented certain positions to the government or when the government got its hands on certain positions, it used this to say that we wanted this in exchange for the extinguishment of our rights. And we were not prepared to take that chance at this time."

[3056] Id. at B-6073. Unofficial English translation: "The Indians of Quebec Association, even after the Malouf judgement, *has no interest in the territory*. The Indians of Quebec Association has been invited to negotiate. The Indians of Quebec Association has refused to negotiate and, *at the last minute, it tried to do some blackmail in going before the court*, their motion has been rejected." [Emphasis added.] For additional references to "blackmail" by dissident Aboriginal groups, see B-6072 and B-6073.

[3057] Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 6, 1975, No. 176, at B-6069. The original French text reads: "L'effet...me paraît extrêmement draconien."

[3058] Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 7, 1975, No. 177, at B-6073. Unofficial English translation: "M. Ciacca: ...Are you representing the interests of Québec here or if are you not representing it... [new para.] M. Morin: ...we represent the interests of all Quebeckers, including the Indians."

[3059] Id. at B-6074 (J. Ciaccia).

[3060] Id. at B-6075 (J. Ciaccia).

[3061] Id.

avons pris en considération leurs inquiétudes, leurs préoccupations. Nous avons amendé la sélection des terres des Cris de la Baie James afin que les endroits que ces gens voulaient protéger pour eux-mêmes, parce qu'ils faisaient de la chasse et la pêche dans ces endroits, soient exclus des territoires de catégorie II."[3062] [Emphasis added.]

In addition, in regard to lands and waters in general for non-Aboriginal people:

"Nous avons persuadé les autochtones de réduire leurs demandes, d'exclure certaines parcelles de territoires et de lacs pour satisfaire aux demandes des non-autochtones dans le territoire."[3063]

Further, in relation to mining claims of non-Aboriginal third parties:

"...les parties ont convenu que les claims [miniers] seront respectés...*Les droits des tiers seront entièrement protegés.*"[3064] [Emphasis added.]

It is clear that some accommodation is often necessary for the rights of non-Aboriginal third parties. However, the issue here is that while the Québec government made efforts to safeguard the rights and interests of non-Aboriginal people, there was no corresponding treatment for Aboriginal third parties. Such a double standard is especially discriminatory, since the Québec government itself had generally acknowledged, during the proceedings of the National Assembly Standing Committee, the importance of the relationship of Aboriginal peoples with their lands.[3065]

11.4.3 Position of the Commission des droits de la personne du Québec

Since the 1970s, the Commission des droits de la personne du Québec has consistently criticized the unilateral extinguishment of Aboriginal third party rights.[3066] Since the views

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[3062] Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 11, 1975, No. 178, at B-6100 - B-6101 (J. Ciaccia). Unofficial English translation: "Following several meetings with the mayors and some counsellors of different municipalities, Matagami, Chibougamau, Chapais, Lebel-sur-le-Quévillon, we have had meetings with the civil servants of different ministeries and these persons, *we have taken into consideration their worries, concerns. We have changed, we have amended the land selections of the James Bay Crees so that the locations that these people wanted to protect for themselves, because they engage in hunting and fishing in these areas, be excluded from the territories of Category II.*" [Emphasis added.]

[3063] Id. at 6102 (J. Ciaccia). Unofficial English translation: "We have persuaded the Aboriginal peoples to reduce their requests, to exclude certain parcels of territories and of lakes to satisfy the requests of non-Aboriginal people in the territory."

[3064] Id. at 6112 (J. Ciaccia). Unofficial English translation: "...the parties have agreed that the [mining] claims will be respected...*The rights of third parties will be entirely protected.*" [Emphasis added.]

[3065] Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 5, 1975, No. 174, at B-5936 (needs and interests of Aboriginal peoples are closely tied to their lands) and B-5938 (real and authentic relationship with their lands) (J. Ciaccia).

[3066] Commission des droits de la personne du Québec, *The Rights of Aboriginal Peoples [:] We must respect the rights of Native Peoples and deal with them accordingly* (Québec: January 1978) (Document 1), at 21-23; P. Lepage, *Droits autochtones et droits de la personne: Quelques perspectives d'avenir*, (Québec: Commission des droits de la personne du Québec, mai 1987), at 12, 45; M. Rochon & P. Lepage, *Oka-Kanehsatake - Été 1990 [:] Le choc collectif* (Québec: Commission des droits de la personne du Québec, 1991) at 85-86; Commission des droits de la personne du Québec, *Mémoire de la Commission des droits de la personne présenté à la Commission royale sur les peuples autochtones* (Montréal: novembre 1993), at 15, 26. See also Letter from Jacques Lachapelle, the President of the Commission des droits de la personne du Québec, dated June 17, 1986, to Raymond Savoie, Minister responsible for Mines and Native Affairs, where

of the Commission are also included in other parts of this Case Study, the discussion under this sub-heading will be brief.

The Commission has concluded that the extinguishment of third party rights is in breach of three sections of the *Québec Charter of Human Rights and Freedoms*.[3067] These provisions are sections 6, 23 and 24, as follows:

> "6. Every person has a right to the peaceful enjoyment and free disposition of his property, except to the extent provided by law.
>
> 23. Every person has a right to a full and equal, public and fair hearing by an independent and impartial tribunal, for the determination of his rights and obligations or of the merits of any charge brought against him.
>
> 24. No one may be deprived of his liberty or of his rights except on grounds provided by law and in accordance with the prescribed procedure."[3068]

In regard to these fundamental precepts, the Commission adds:

> "The above sections essentially affirm rights recognized internationally,[3069] which form the very basis of a democratic system. In English law, for example, one must go back to the Magna Carta for the origin of the principles stated in these sections."[3070]

The Commission has therefore advocated for a complete re-evaluation of Crown-Aboriginal relations, indicating that extinguishment is unacceptable as a precondition to negotiations:

> "Poser comme principle préalable obligatoire à toute négotiation l'extinction des droits territoriaux des Autochtones, comme c'était la procédure traditionnelle au Canada, était inacceptable pour la Commission. Il lui paraissait nécessaire de réviser entièrement les relations avec les Autochtones, au Québec comme dans le reste du Canada, par le respect des droits des uns et des autres et par la négociation pour concilier ces droits."[3071]

11.4.4 Positions of Cree and Inuit parties to the Agreement

The Crees and the Inuit were put in an extremely difficult position with respect to the

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it is said that: "...the Commission deplored the unilateral suppression [i.e. extinguishment] of the rights of non-signatory third parties", on the grounds that such extinguishment was a violation of human rights. (On file with the author.)

[3067] R.S.Q., c. C-12.

[3068] Commission des droits de la personne du Québec, *The Rights of Aboriginal Peoples [:] We must respect the rights of Native Peoples and deal with them accordingly* (Québec: January 1978) (Document 1), Appendix: "The Extinguishment of Third Party Rights in the James Bay and Northern Québec Agreement", at 21-23.

[3069] *Universal Declaration of Human Rights*, arts. 10 & 17.

[3070] Id. at 22.

[3071] Commission des droits de la personne du Québec, *Mémoire de la Commission des droits de la personne présenté à la Commission royale sur les peuples autochtones* (Montréal: novembre 1993), at 14. Unofficial English translation:

> "To make the extinction of the territorial rights of Aboriginal peoples a necessary precondition to all negotiations, which was the traditional procedure in Canada, was unacceptable to the Commission. It appeared necessary to the Commission to revise completely the relationship with Aboriginal peoples, in Québec and in the rest of Canada, by respecting the rights of all, and by negotiations to reconcile these rights."

rights of Aboriginal third parties. In the negotiations, in view of the pressures they were facing, they had to first and foremost seek to safeguard their own rights and interests.[3072]

The Inuit in northern Québec took the position that the extinguishment of the rights of third parties was not properly their concern. Charlie Watt, President of the Northern Québec Inuit Association, made it clear in his presentation to the Standing Committee on Indian Affairs and Northern Development that the extinguishment of Aboriginal rights was something that only the federal government was capable of doing:

> " [W]e have never been completely satisfied with...the extinguishment of our rights, and we ourselves do not have any authority to extinguish rights of other groups.
>
> The federal government is the only body that has the authority to cause surrender. The surrender and extinguishment of rights is not something that we dispense. We do not have that authority. It is the federal government that has the job of extinguishing rights."[3073]

For the Cree negotiators, it was a matter of urgency that an agreement be reached since their people were the ones most directly affected by Le Complexe La Grande. The lawyer for the Crees suggested that involving every group with a claim may have been difficult:

> "There is no question that it is preferable that everybody and anybody who has any interest whatsoever in that full geographic area should be party to the Agreement...But that would have involved perhaps 20 or 25 groups."[3074]

However, it is not clear who were the twenty or twenty-five groups being referred to as having claims in the Territory. Moreover, it is solely the areas with "overlapping claims" that would be affected by third parties and not the entire Territory covered by the Agreement. In regard to the different areas with overlapping claims, a much smaller number of Aboriginal peoples in each particular case would have overlapping claims. In any event, difficulties with the number of claimants would not provide a justifiable rationale for extinguishing some Aboriginal peoples' fundamental rights.

A much more positive example in addressing the rights of Aboriginal third parties is found in the Nunavut land claims agreement pertaining to Inuit in the eastern Arctic.[3075] The following principle is included in this agreement, in regard to identifying Inuit Owned Lands subject to overlapping claims:

> "...identification in areas of overlapping use and occupation with other aboriginal peoples may not be finalized until issues relating to such overlap are resolved..."[3076]

In addition, rather than purport to extinguish the rights of Aboriginal third parties, the Nunavut land claims agreement safeguards these peoples' rights, interests and claims.[3077]

[3072] As a fiduciary, it was the responsibility of the federal government to safeguard the rights and interests of Aboriginal third parties. In view of Québec assuming a lead role in obtaining surrenders and extinguishments from Aboriginal peoples, a fiduciary responsibility also arose in regard to Québec. See discussion under sub-headings 6.4.3 & 7.1 *supra*.

[3073] Charlie Watt, February 3, 1977, *Minutes of the Standing Committee*, No. 9 at 15.

[3074] James O'Reilly, January 25, 1977, *Minutes of the Standing Committee*, No. 6 at 22.

[3075] *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada* (Ottawa: Indian and Northern Affairs Canada, 1993). Signed on May 25, 1993.

[3076] Id., s. 18.1.1 (e).

[3077] Section 40.1.1 provides: "Nothing in the Agreement shall be construed to affect, recognize or provide any rights under Section 35 of the *Constitution Act, 1982*, for any aboriginal peoples other than Inuit."

A further concern in relation to Aboriginal third parties pertains to the undertaking by Québec to negotiate set out in s. 2.14 of the Agreement. It is said that s. 2.14 has the effect of *devaluing* the rights of the Crees and the Inuit under the Agreement, because, unless future land claims agreements under s. 2.14 take the form only of monetary compensation from Québec, such agreements are likely to affect the rights of the Crees and the Inuit. To quote Sam Silverstone:

> "You settle, and years later the government has signed an undertaking like in 2.14 to continue negotiating, and they say, yes, you have rights in this same area that we settled with the Inuit, they happen to overlap, so we're just going to grant you those rights, and suddenly we're sharing — their rights to the territory are confirmed along with ours, and we're sharing it. In other words, it's a form of devaluation...[I]t may not sound important, but when you used to have rights to all the outfitting camps in an area, and now you have to share it with 2 or 3 or 4 other groups, and they have rights equivalent to yours, I consider that a devaluation of your rights."[3078]

The above concern may not be entirely a valid one, since any modifications to JBNQA would require the consent of the Aboriginal party to the Agreement that is being affected.[3079] However, there could still be pressures of a political nature for the Cree and Inuit parties to in fact make significant concessions. At the same time, rights of Aboriginal third parties merit full respect and protection.

11.4.5 Positions of Aboriginal third parties to JBNQA

Non-signatories to the James Bay and Northern Québec Agreement with claims within the area covered by the Agreement include the Atikemekw, Montagnais (Innu), Naskapis, Algonquins, Mo Cree Bec[3080] (now in Ontario), Labrador Inuit, Labrador Innu, and Inuit (Belcher Islands, N.W.T.).[3081]. An agreement was reached with the Naskapis in Québec in

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S. 40.1.2: "For greater certainty,...nothing in the Agreement, or in any legislation ratifying or implementing its terms, shall:

(a) constitute a cession, release, surrender or other qualification or limitation of any aboriginal or treaty rights under the *Constitution Act, 1982* for any aboriginal peoples other than Inuit; or

(b) be interpreted as to abrogate or derogate from or otherwise conflict or be inconsistent with, any aboriginal or treaty rights under the *Constitution Act, 1982* for any aboriginal peoples other than Inuit."

S. 40.1.3: "Nothing in the Agreement shall limit the negotiation of agreements between Inuit and any other aboriginal peoples respecting overlapping interests or claims, except that the provisions of such agreements shall not be binding on Government or any person other than Inuit and those aboriginal peoples without the consent of Government."

[3078] Interview with Sam Silverstone, August 18, 1993.

[3079] See discussion under sub-heading 11.4 *supra*, where reference to s. 2.15 of the Agreement is made concerning amendments to JBNQA.

[3080] Interview with Randy Kapashesit, Chief, Mo Cree Bec First Nation, August 30, 1993.

[3081] That Atikamekw, Montagnais and Algonquins are Aboriginal third parties (among others) with claims in the territory is acknowledged in Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 6, 1975, No. 176, at B-6069 (J.-Y. Morin, Leader of the Opposition) and Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 7, 1975, No. 177, at B-6071 (J.-Y. Morin). Similarly, in regard to the Naskapis in Québec, Innu (Labrador), and Inuit (Belcher Islands, N.W.T.), see Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 11, 1975, No. 178,

January of 1978 (the Northeastern Québec Agreement),[3082] by means of which the Naskapis were effectively incorporated into the framework of the James Bay and Northern Québec Agreement.

One effect common to all the Aboriginal third parties is that the legislated extinguishment of all rights within the area covered by the Agreement severely impairs the bargaining position of all groups with claims in and to that Territory. This point was expressed by the representatives of a number of Aboriginal peoples in testimony before the Standing Committee on Indian Affairs and Northern Development in 1977. Harry Daniels, President of the Native Council of Canada, expressed the point as follows:

> "Mr. Chairman...the extinguishment of all rights, as is stated in the [James Bay and Northern Québec] agreement, *forever damages our bargaining power in the future*, whether or not it is written in the Agreement that [Québec] will negotiate."[3083] [Emphasis added.]

Carl Larivière, President of the Laurentian Alliance of Métis and Non-Status Indians made the same point:

> "We are not ready to [negotiate] at this point in time, but then, if the third part[ies] do have rights within this territory, and if these are extinguished within this Bill C-9, then what bargaining power do the Métis and the Non-Status Indians have when it is time to negotiate [the] settlement of their claim, if they have any..."[3084]

In August of 1982, representatives of the Algonquins, the Atikamekw, the Montagnais, the dissident Inuit, and the Labrador Inuit met at Lac Simon, Québec, and adopted a resolution re-affirming their opposition to the Agreement. The first resolution of the meeting reads as follows:

> "*Proposition no. 1*
>
> Attendu que nous voulons protéger et faire reconaître nos droits aborigènes.

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at B-6089 (J. Ciaccia).

[3082] *Northeastern Québec Agreement*, January 31, 1978. Given effect to by federal Order in Council of 23 February 1978, P.C. 1978-502. See also *An Act approving the Northeastern Québec Agreement*, S.Q. 1978, c. 98.

[3083] Mr. Harry Daniels, February 24, 1977, *Minutes of the Standing Committee*, No. 18 at 26.

[3084] Carl Larivière, February 24, 1977, *Minutes of the Standing Committee*, No. 18 at 13. The comments of P. Burnet, Legal Counsel to the National Indian Brotherhood, are also apposite:

> "I understand it has been brought up in this committee before, that paragraph 2[.]14 of the agreement itself would possibly be adequate protection for the rights of the third parties who are not signatories to this agreement, in that, by that paragraph, the government of Québec has undertaken to negotiate with these third parties on the subject of compensation and benefits to be given to them in exchange for the extinguishment of any rights that they may have. I can only submit on behalf of the Brotherhood that paragraph 2[.]14 cannot in any way be looked upon as a satisfactory guarantee to the third parties that these benefits or compensations would be forthcoming.
>
> In the first place the rights are extinguished before the negotiations take place, and, under any theory of negotiation, to call a discussion a negotiation, I would respectfully suggest, would imply that each party has something that the other wants, and there is a balance of power through which an acceptable or equitable agreement will be made. Well, in this case, one side already has already had the total amount of everything the other side is looking for taken away from them."
>
> P. Burnet, March 15, 1977, *Minutes of the Standing Committee*, No. 14 at 11. Similarly, Randy Kapashesit, Chief of the MoCreebec First Nation in Moose Factory, Ontario, argues that the James Bay and Northern Québec Agreement has prejudiced the standing of his people in many ways, and that it has placed their political and legal standing in limbo. The problem has been that the James Bay and Northern Québec Agreement is specific to Québec. The Cree-Naskapi Act has been replacing the Indian Act. As a result some MoCreebec have lost their status as Indian Act Indians, and yet do not benefit from the Cree-Naskapi Act because they do not live in Québec. Interview with Randy Kapashesit, August 30, 1993.

Attendu que ces droits sont lésés par la Convention de la Baie James et du Nord québécois.

Qu'il soit résolu par cette assemblée, réunissant les nations algonquine, attikamek, montagnaise, les Inuit de Labrador at les Inuit dissidents de la Convention de la Baie James et du Nord québécois, que ses participants mettent sure pied un comité de coordination dont le mandat est de spécifier notre opposition à la Convention de la Baie James et du Nord québécois comme modèle de règlement des revendications autochtones."[3085]

Additional responses to the purported extinguishment of the rights of Aboriginal third parties are described under the following sub-headings.

11.4.5.1 Naskapis in Québec[3086]

As mentioned above, the Naskapis in Schefferville, Québec signed the Northeastern Québec Agreement in January of 1978. At the time of the James Bay and Northern Québec Agreement negotiations, the Naskapi numbered approximately 400 registered Indians, living on a reserve in Schefferville, Québec.[3087] The Naskapi first learned that their rights would be extinguished in the area of the James Bay and Northern Québec Agreement only after the Agreement in Principle was signed in November, 1974. The Naskapi initially contracted the Northern Québec Inuit Association to negotiate for them, but by October 1975, one month before the James Bay and Northern Québec Agreement was signed the Naskapi were dissatisfied with the conduct of the negotiations on their behalf by the Northern Québec Inuit Association, and they introduced their own negotiating team.[3088]

At the time of the hearings held by the Standing Committee on Indian Affairs and Northern Development in 1976 and 1977, representatives of the Naskapi complained that passage of Bill C-9, with the accompanying extinguishment of their rights in the Territory, would impair their negotiating position.[3089] The Naskapi negotiating position was further complicated by having to negotiate with the Crees and the Inuit, who had been allocated Naskapi hunting

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[3085] Reprinted in J.-R. Proulx, *Front commun des non-signataires de la C.B.J.*, (1982) 12 Recherches amérindiennes au Québec 310. Unofficial English translation:

"Proposition No. 1

Whereas we wish to protect and to have recognized our aboriginal rights.

Whereas these rights have been infringed by the James Bay and Northern Québec Agreement.

That it is resolved by this assembly, reuniting the Algonquin, Atikamekw, and Montagnais nations, the Inuit of Labrador and the dissident Inuit of the James Bay and Northern Québec Agreement, that these participants establish a coordinating committee whose mandate is to *state our opposition to the James Bay and Northern Québec Agreement as a model for the settlement of aboriginal claims.*" [Emphasis added.]

[3086] We were unable to obtain comments from John Mameamskum, Director General of the Naskapi Band in Québec.

[3087] Brief from the Naskapi Indians of Schefferville to the Standing Committee on Indian Affairs and Northern Development, February 19, 1977, reprinted as Appendix "IAND-16," *Minutes of the Standing Committee*, No. 16A at 2.

[3088] Id. The details are substantially confirmed by the Honourable Warren Allmand, December 16, 1976, *Minutes of the Standing Committee*, No. 5 at 6.

[3089] John Mameamskum, February 22, 1977, *Minutes of the Standing Committee*, No. 16 at 5: "The Naskapi would really like Bill C-9 to be held off until the Naskapi have an agreement, because we think if Bill C-9 is passed before the Naskapi get an agreement our negotiating position would not be all that good."

territory under the James Bay and Northern Québec Agreement.[3090]

It is important to note that the Naskapis were not satisfied with the undertaking to negotiate set out in s. 2.14 of the Agreement. Instead, the Naskapis demanded, and were given, written commitments by all parties to the Agreement, before the federal enabling legislation was given Royal Assent on July 14, 1977. The Naskapis threatened to reactivate their injunction proceedings against the James Bay power project if they did not receive such commitments.[3091] Consequently, *the Northeastern Québec Agreement cannot be seen as the product of the undertaking to negotiate set out in Section 2.14 of the Agreement.*[3092]

11.4.5.2 Labrador Inuit

The Labrador Inuit Association represents approximately 3,000 Inuit, living in the Labrador communities of Nain, Hopedale, Makkovik, Postville, Rigolet, Happy Valley, and Northwest River.[3093] While the Labrador Inuit live in communities in Labrador, they have always hunted in Québec. To quote C. Brice-Bennett, Director, Land Use and Occupancy Survey, Labrador Inuit Association, speaking before the Standing Committee on Indian Affairs and Northern Development in 1977: "as many hunters as there are in Labrador at some point in their life, whether in the past or now, have gone over into Québec. If we talk of a population in the Northern communities of 2,000, then perhaps there might be 400 hunters of that total, 400

[3090] R. Pratt, legal counsel for the Naskapis, described the problem as follows:

> "One of the main problems facing the Naskapi when they entered the negotiations once the James Bay Agreement had been signed was that they not only had to negotiate with Canada and Québec but they had to negotiate with the Crees and the Inuit, to whom Québec and Canada had allotted the Naskapi hunting territory. They were forced to negotiate with the Crees and Inuit because the Crees and the Inuit had the Naskapi hunting ground on paper in the James Bay Agreement. This involved a terrible waste of time for the Naskapis because the Crees and the Inuit were naturally reluctant to withdraw from territory they had gained under the James Bay Agreement, but it was absolutely necessary because under the James Bay Agreement exclusive hunting, fishing and trapping rights were granted to the Crees and the Inuit."

R. Pratt, February 22, 1977, *Minutes of the Standing Committee*, No. 16 at 12. The Naskapi negotiating team also decided not to negotiate for the Naskapis (Innu) of Davis Inlet, because including a group not resident in Québec would complicate negotiations too much: "Québec more or less firmly indicated to us that if we were going to be negotiating on behalf of a group of natives who were not resident in Québec, it would make the matter just too complex for them to handle at this time." Id., 16 at 18.

[3091] R. Pratt, legal counsel for the Naskapis, summarizes their situation as follows:

> "The Naskapis were not satisfied with the mere undertaking of Québec to negotiate, as set out in subsection 2.14 of the Agreement, because they felt that their negotiating position would be completely undermined once Bill C-9 had been adopted and their native rights extinguished in the Territory. The Naskapis demanded written commitments from all parties with reference to the particulars of the final Naskapi agreement to be concluded, and demanded these commitments prior to the adoption of Bill C-9. The Naskapis threatened to intervene in the Supreme Court to reactivate the injunction proceedings against the James Bay power project unless they obtained such commitments. On 21 April 1977 the government of Québec made a written commitment to the Naskapis, outlining the particulars of a final agreement to be signed with the Naskapies on the subjects of eligibility, land regime, compensation, and other matters. Canada, the James Bay Crees, and the Inuit of Québec made parallel separate written commitments to the Naskapis shortly afterwards. On the basis of these commitments, the Naskapis withdrew their objections to the passage of Bill C-9, which was given royal assent on 14 July 1977."

R. Pratt, "Third Party Native Rights and the James Bay and Northern Québec Agreement" in S. Vincent & G. Bowers, (eds), *Baie James et Nord quebécois: dix ans après/James Bay and Northern Québec: Ten Years After* (Montréal: Recherches amérindiennes au Québec, 1985) 65, at 67-68.

[3092] Id., at 68.

[3093] The figures are from 1983. Opening Statement for the Québec Parliamentary Committee Hearings by Frances Williams, President, Labrador Inuit Association, *Brief to the Assemblée nationale, Québec commission permanente de la présidence du conseil et de la constitution* (LIA, November 23, 1983).

adult male hunters now."[3094] Paulus Maggo, of Nain, gave eloquent testimony before the Committee of his people's need to use land within Québec:

> "Our fathers hunted on Québec land because the animals cannot stay in one place for long. Sometimes they were in Labrador and sometimes in Québec. That is why we do not think of the land being separated. The only thing we know is that animals move around. The animals are the same ones going back and forth to Labrador and Québec. That is why we always use the land to hunt on. Same with Québec, we want to continue to use it as we did before."[3095]

According to G. Lester, legal counsel for the Labrador Inuit Association, the effect of the purported blanket extinguishment in connection with the James Bay and Northern Québec Agreement was to reduce the bargaining position of the Labrador Inuit Association in land claims negotiations.[3096] In 1983, Enoch Obed spoke powerfully of the effect of the legislated extinguishment on the Labrador Inuit:

> "*The blow delivered against the Labrador Inuit [by the blanket extinguishment of Aboriginal rights in the James Bay and Northern Québec Agreement] denied us our historical, legal, cultural and economic roots, without our ever having given our consent, received any compensation or been allowed any recourse in accordance with due process of law*...To the Labrador Inuit it is urgent that uncertainty surrounding our rights to our land and resources be resolved. The realization of our culture and economy, the protection of our language, the practice of our customs and traditions, the promotion of individual and community developments are, for us, matters of utmost urgency. All of these aspects of our daily life are subject to the insidious attacks of gradual governmental and industrial incursions into our land and community and their expropriation of our resource rights."[3097] [Emphasis added.]

The Labrador Inuit have argued that the extinguishment of their rights by the Agreement was illegal. Specifically, the Labrador Inuit have argued that the Agreement is in violation of basic principles of contract law:

> "According to basic principles of the law of contract and the Québec Civil Code, the Agreement would not have deprived anyone of his legal rights unless that party *agreed*. Accordingly, the James Bay Agreement would normally not have the effect of depriving Labrador Inuit and other native groups of their aboriginal rights in the area in question...
>
> *The James Bay Agreement represents a radical departure from standard notions of contract law, because it purports to abolish the rights of third parties in the area, without those groups ever having been party to the agreement*. Furthermore, it does so without any *quid pro quo*. To put matters simply, the apparent effect of the Agreement on the interests of the Labrador Inuit (and other such groups) is *to unilaterally expropriate them*

[3094] C. Brice-Bennett, February 10, 1977, *Minutes of the Standing Committee*, No. 12 at 6.

[3095] Brief by Paulus Maggo to the Standing Committee on Indian Affairs and Northern Development, February 10, 1977, reprinted in Appendix "IAND-5", *Minutes of the Standing Committee*, No. 12A at 1. Jerry Sillit, Chief Elder of Nain, made the same point: "people always go over the Québec border when hunting even to this day. Therefore, we of Labrador wish to be allowed to hunt over the border into Québec and be able still to follow the traditions of hunting as in the past." Brief by Jerry Sillit, id. at 1.

[3096] G. Lester, February 10, 1977, *Minutes of the Standing Committee*, No. 12 at 8: "...the federal government has made a commitment, has made a promise, and it is taking away the only bargaining counter the Labrador Inuit have in securing a land-claim settlement consistent with their own aspirations and their own self identity."

[3097] Enoch Obed, for the Land Claims Division of the Labrador Inuit Association, Labrador Inuit Association Brief to the Commission Parlementaire de la Presidence du Conseil et de la Constitution (November, 1983), 1-B-5.

without either compensation or any legal process for the losing party."[3098] [Emphasis added.]

11.4.5.3 Atikamekw and Montagnais (Innu) in Québec

In 1977, the Conseil des Attikamekw-Montagnais represented approximately 30 per cent of the Indian population of Québec, or 9,085 persons registered as Indians under the *Indian Act*.[3099] In 1977, Aurelian Gill, President of the Conseil Attikamekw-Montagnais, described the interests of the Montagnais in the claim area as "extensive":

> "[Y]ou have heard [witnesses] represent[ing] Obedjiwan, Pointe-Bleu, Obedjiwan Attikamekw, Pointe-Bleu Montagnais, Bersimis, Sept-Îles, Mingan and Schefferville...We believe that we have roughly marked off the territories frequented by the Montagnais and the Attikameks. We would estimate that this territory frequented by the Attikameks and Montagnais represents about 30 per cent, at the least, and at times even more than that, of the total territory [covered by the James Bay and Northern Québec Agreement]."[3100]

In 1980, the "Conseil Attikamek Montagnais" brought a claim against the Canadian Government before the Fourth Russell Tribunal on the Rights of the Indians of the Americas. The Tribunal noted that the Canadian Parliament had unilaterally extinguished the land rights of the Attikamekw, and concluded that:

> "1. The actions of the Canadian government violate the rights of the Attikameks and Montagnais to retain their land, which is protected by:
>
> - art. 17 of the Universal Declaration of Human Rights.
> - art. 21 of the American Convention on Human Rights.
>
> 2. These actions also violate:
>
> The Indians right to control their natural resources and economic development, which are protected by:
>
> - art. 1 of the International Convention on Economic, Social and Cultural Rights
> - paragraph II of the Declaration on the Granting of Independence to Colonial Countries and Peoples
> - General Assembly Resolution 1803, concerning Permanent Sovereignty over Natural Resources."[3101]

In 1978, the general assembly of the Conseil des Atikamekw et des Montaignais (CAM) mandated CAM to negotiate their land claims with the federal and provincial governments. It has been a continuing principle of CAM that no agreement will be signed which involved the

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[3098] Labrador Inuit Association, *Brief to the Assemblée nationale, Québec commission permanente de la présidence du conseil et de la constitution* (LIA, November 23, 1983), at 9-4 to 9-5.

[3099] Aurelian Gill, March 1, 1977, *Minutes of the Standing Committee*, No. 19 at 26-27, 42.

[3100] Aurelian Gill, March 1, 1977, *Minutes of the Standing Committee*, No. 19 at 25-26.

[3101] *Report of the Fourth Russell Tribunal on The Rights of the Indians of the Americas* (Rotterdam: November 1980).

extinguishment of rights in the area of the claim.[3102] In 1993, the Attikamekw-Montagnais claim was still in the process of negotiation. The Attikamekw and the Montagnais remained opposed to any settlement involving the extinguishment of their rights.[3103]

11.4.5.4 Naskapi Montagnais Innu Association (Labrador)[3104]

The Naskapi Montagnais Innu Association in Labrador was founded in February, 1976. In 1977, the Association represented some 236 Naskapi Indians based at Davis Inlet, Labrador, and some 550 Naskapi and Montagnais Indians based at Northwest River, Labrador.[3105] The members of the Association have traditionally hunted over the Québec-Labrador Peninsula, including in the Territory of the James Bay and Northern Québec Agreement.[3106] The governments of Canada and Québec made no attempt to consult with the Naskapi Montagnais Innu Association in regard to the James Bay and Northern Québec Agreement negotiations. According to H. Anthony Williamson, land claims director, Northwest River, of the Naskapi Montagnais Innu Association:

> "*[T]o my knowledge there was never any consultation between the federal government and the settlement in Labrador concerning the James Bay project.* The James Bay negotiations and the legislation arising out of it came to the attention of the Montagnais Naskapi only by way of the Schefferville Indians, not by way of the federal government."[3107] [Emphasis added.]

11.4.5.5 Métis and non-status Indians

The James Bay and Northern Québec Agreement also affected the rights of non-status Indians, in that it purported to extinguish all aboriginal rights within the territory covered by the Agreement. The problem was succinctly expressed by Harry Daniels, the President of the Native Council of Canada, in his testimony before the Standing Committee on Indian Affairs and Northern Development:

> "The bill will eliminate all Native rights for all Native people for all time in the area covered by the Agreement. Thousands of Native families who are neither Indian nor Inuit, who are not under the umbrella of a special federal department but who also live on these lands and whose traditional livelihood is equally threatened, have no safeguards under the proposed agreement. They will receive no compensation. They will not sit on proposed new school boards. They will have no special hunting, trapping, and fishing

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[3102] R. Dupuis, *Historique de la Négociation sur les Revendications Territoriales du Conseil des Atikamekw et des Montaignais (1978-1992)*, (1993) 23 Recherches amérindiennes au Québec 35 at 39-40.

[3103] Interview with Jacques Kurtness, July 28, 1993.

[3104] We were unable to obtain comments from Daniel Ashini of the Innu Nation.

[3105] Brief of the Naskapi Montagnais Innu Association of Labrador to the Standing Committee on Indian Affairs and Northern Development, February 10, 1977, reprinted as Appendix "IAND-8," *Minutes of the Standing Committee*, No. 13A at 1.

[3106] Id., at 2.

[3107] H. Anthony Williamson, February 10, 1977, *Minutes of the Standing Committee*, No. 13 at 11.

rights. They will not share in local government decisions. They will forever be denied a voice in future developments which none of us can now foresee."[3108]

During the James Bay and Northern Québec Agreement negotiations, the federal government did not consult with, or provide funding to, Métis and non-Status Indian organizations, including the Native Council of Canada,[3109] and the Laurentian Alliance of Métis and Non-Status Indians.[3110]

11.4.6 Alternatives to extinguishment of Aboriginal third party rights

There were alternatives to a blanket extinguishment of Aboriginal rights, including the extinguishment of the rights of non-signatories to the Agreement. Several of the affected or potentially affected third-parties proposed amendments to Bill C-9 that would have protected third-party rights. These proposed amendments would have limited the effects of the purported extinguishment to signatories to the Agreement.

For example, the Labrador Inuit Association proposed the addition of a new paragraph to Clause 3(3) of Bill C-9 to the effect that: "nothing in the Agreement or in this section shall be construed as abrogating the native claims, rights, title and interests, whatever they may be, in and to the Territory of all the Indians and Inuit, wherever they may be, who are not signatories to the Agreement."[3111] The Native Council of Canada proposed a delay to

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[3108] Harry Daniels, February 24, 1977, *Minutes of the Standing Committee*, No. 18 at 4-5.

[3109] Harry Daniels, February 24, 1977, *Minutes of the Standing Committee*, No. 18 at 4:

> "The Federal Department of Indian Affairs and Northern Affairs made funds and other resources available to the registered Indian and Inuit people affected by the passage of this bill, without ever having been properly represented in the consultation process leading to the James Bay Agreement.
>
> The Métis and Non-Status Indian people I represent, who are every bit as vitally affected, received no such financial and resource support, nor were we ever consulted or allowed the common courtesy of being involved in any stage of the negotiations."

[3110] Carl Larivière, President, Laurentian Alliance of Métis and Non-Status Indians, February 24, 1977, *Minutes of the Standing Committee*:

> "Mr. Neil: At any time, during the negotiations that were taking place, or subsequent to the Agreement, did any members of the Department of Indian Affairs and Northern Development or any government officials, contact you, or any members of your group, with respect to your use of these lands?
>
> Mr. Larivière: No. None whatsoever."

Id., at 16. The Laurentian Alliance of Métis and Non-Status Indians represented Cree, Algonquin and Montagnais non-Status Indians, of whom only the Cree non-Status Indians were included in the James Bay and Northern Québec Agreement:

> "We have had a meeting with the Crees, the negotiators and their legal counsel at that time. When our non-status members in Fort George and Mistassini, who are Cree, were included, we told ourselves: "It is an agreement with the Crees." Really, we did believe that it was an agreement for the Crees. When we found out it was about the rights for the whole territory then...we really had to change our views. Because then it affects the rights of all the other members: the Algonquins, the Montagnais."
>
> Id., at 18.

[3111] Brief of the Labrador Inuit Association to the Standing Committee on Indian Affairs and Northern Development, reprinted as Appendix "IAND-7," February 10, 1977, *Minutes of the Standing Committee*, No. 12A at 16-17. Similar proposals were made by the Naskapi Montagnais Innu Association: "The amendment that has been discussed, but without specific wording proposed, is to the effect that no extinguishment of rights should occur except in relation to signatories to

reassess the terms of the Agreement "to ensure that the rights of the Métis and Non-Status Indian people in the area are protected by the Agreement; and further, that Bill C-9 enshrines these safeguards."[3112]

Andrew Delisle, President of the Confederation of Indians of Québec suggested that the real alternative was for there to be no extinguishment at all:

> "*I believe there is an alternative. I do not believe today there is any question of extinguishment.* I raised the point of theoretically rejecting the idea that there are Aboriginal rights, and yet, accepting that you can extinguish these rights, I cannot see the relationship. So I go back to the question that *today there can be accommodation without the extinguishment of these rights and allow for interpretation as progress changes things*, but especially making sure that all the people in the area whether they are directly affected, as the Montagnais are, or indirectly affected, as we are in the south, guaranteeing that there is going to be reasonable preservation of our desires and reasonable resources to allow for this preservation."[3113] [Emphasis added.]

No alternative to extinguishment, even for Aboriginal third parties, was adopted by the Parliament of Canada. In the face of the Québec government's insistence on a blanket extinguishment clause, the constitutional obligations of the government and Parliament of Canada were ultimately ignored on this fundamental matter. In contrast, it is worth noting that an alternative to extinguishing the rights of Aboriginal third parties is found in the Nunavut land claims agreement pertaining to Inuit in the eastern Arctic.[3114]

11.5 Coercion or Duress

> "...the way to start is for the white majority to *reject the double standard, to stop treating native people as though we can take their land for trinkets or treat their lives as pawns.*
>
> In Bill C-9 we have an agreement that arose out of a *process that is simply unacceptable to a civilized country.* It is not acceptable...that the government of Canada should be allowed to get away with abandoning people for whom it is responsible under

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the Agreement." Douglas Sanders, Legal Counsel for the Naskapi Montagnais Innu Association, February 10, 1977, *Minutes of the Standing Committee*, No. 12 at 24.

Also, the National Indian Brotherhood proposed the addition of a new clause to Bill C-9: "Nothing in this Act or in the agreement shall be deemed or construed so as to affect the native or Indian claims[,] rights, titles, and [interest] of any Indians or Inuit unless they are an express party to such an agreement and have given their written consent to such agreement." Noel Starblanket, President, National Indian Brotherhood, February 15, 1977, *Minutes of the Standing Committee*, No. 14 at 5.

[3112] Harry Daniels, President, Native Council of Canada, February 24, 1977, *Minutes of the Standing Committee*, No. 18 at 5.

[3113] Andrew Delisle, President, Confederation of Indians of Québec, March 1, 1977, *Minutes of the Standing Committee*, No. 19 at 31.

[3114] *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada* (Ottawa: Indian and Northern Affairs Canada, 1993). Signed on May 25, 1993. The relevant provisions to safeguard Aboriginal third party rights are reproduced at note 3077, *supra*.

law."[3115]

Joe Clark, Leader of the Opposition, House of Commons, 1976

In contrast to the above quotation, this Case Study began with a quotation from the judgment in *Eastmain*,[3116] in which Décary J.A. likened the James Bay and Northern Québec Agreement to a business transaction and spoke of the "informed commitment" of the Aboriginal parties to the Agreement.[3117] However, as indicated in this section, Décary J.A.'s characterization under the circumstances that prevailed is, with respect, unfounded. A critical element that Decary J.A. fails to consider is the context of the JBNQA negotiations that included numerous indications of coercion or duress.

It appears that the Aboriginal parties to the Agreement had a genuine and overwhelming fear[3118] that significant portions of their traditional territory were being taken from them by the Québec government and flooded for purposes of hydroelectric development without their consent. They believed that their lands and waters would be despoiled and polluted and the way of life of their people seriously jeopardized. These threats to their traditional territory were substantiated both by the representations of government and by the beginning of massive construction of the James Bay project without Aboriginal approval.

B. Diamond, Grand Chief of the Grand Council of the Crees at the time the Agreement was negotiated, confirms the pressure of the ongoing construction and the perceived threat that the federal Parliament would unilaterally extinguish Cree aboriginal rights at the insistence of the Quebec government:

> "...as the work on the project progressed, our chances of obtaining essential changes to the project decreased. Significantly, despite its financial assistance, the federal government had refused to support our position in court and was urging us in no uncertain terms to negotiate. *We feared that if we did not negotiate, even if we should win in the courts, Parliament would respond to political pressures from the Quebec government and would eventually pass a law extinguishing our aboriginal rights.*"[3119] [Emphasis added.]

[3115] House of Commons, *Debates*, December 14, 1976 (Opposition Leader, Joe Clark), at 2002.

[3116] *Eastmain Band et al.* v. *Canada et al.*, [1993] 1 F.C. 501 (Fed. C.A.) at 518-519; (1993) 145 N.R. 270 at 285 (Fed. C.A.), per Décary, J.A.

[3117] See quote accompanying note 2831, *supra*.

[3118] In regard to fear or threats as a ground for recission of contract under Québec civil law, see J.-L. Beaudoin, *Les Obligations*, 3ème éd. (Cowansville, Québec: Les Éditions Yvon Blais, 1989) at 138-141. See also *Québec Civil Code* (Montreal: Wilson & Lafleur Ltée, 1994), arts. 1402-1404. Art. 1402 provides: "Fear of serious injury to the person or property of one of the parties vitiates consent given by that party where the fear is induced by violence or threats exerted or made known to the other party. [new para.] Apprehended injury may also relate to another person or his property and is appraised according to the circumstances."; and art. 1403: "Fear induced by the abusive exercise of a right or power or by the threat of such exercise vitiates consent."

Prior to 1994, see *Québec Civil Code of Lower Canada* (Montreal: Wilson & Lafleur Ltée, 1993), arts. 994-1000. In particular, see art. 994: "Violence or fear is a cause of nullity, whether practised or produced by the party for whose benefit the contract is made or any other party"; and art. 995: "The fear whether produced by violence or otherwise must be a reasonable and present fear of serious injury. The age, sex, *character and condition of the party are to be taken into consideration.*" [Emphasis added.] See also art. 998: "If the violence be only a legal constraint, or the fear only of a party doing that which he has a right to do, it is not a ground of nullity; but it is, if the forms of law be used or threatened for an unjust and illegal cause to extort a consent."

[3119] B. Diamond, "Aboriginal Rights: The James Bay Experience" in M. Boldt and J.A. Long, *The Quest for Justice [:] Aboriginal Peoples and Aboriginal Rights* (Toronto: Univ. of Toronto Press, 1985) at 265 at 279.

As will be further described, the Aboriginal parties to JBNQA were in effect coerced and pressured into signing it. They had *no choice*,[3120] other than in a purely formal sense, but to sign it. In the words of the Right Honourable Joe Clark (then leader of the Opposition):

> "...it was clear from the outset, certainly to them, that *if they did not come to an agreement...a settlement would be imposed on them*...The native people of the James Bay region were negotiating under the gun of a deadline to which they had to adhere. If they did not adhere, they and their people would suffer serious consequences...
>
> *...they were forced to negotiate under the gun of extraordinary conditions, conditions to which people of a different kind of background would probably not have been subjected.*"[3121] [Emphasis added.]

Similarly, P. Cumming has concluded that the Crees and Inuit in Québec had no choice but to accept the JBNQA:

> "*The James Bay settlement is simply a forced purchase, an 'offer that could not be refused'* in the sense that no other offer would be made. Construction on the hydroelectric project went on throughout the negotiations. All provincial parties supported the hydroelectric scheme, the largest development project in Canada's history...*The federal government was not prepared, and indeed was politically unable, to exert any pressure upon the Quebec government. It was the provincial government that negotiated this settlement.*"[3122] [Emphasis added.]

In November 1993, the Grand Council of the Crees recounted to the Royal Commission on Aboriginal Peoples the numerous ways in which there had been "conditions of pressure and duress under which this agreement was negotiated"[3123]:

> "a) construction of the La Grande mega-project was continuing without interruption. Our rights to our lands and waters and way of life - were being taken from us **while we negotiated**;
>
> b) by the time we could reach the Supreme Court of Canada in the *Kanatewat* case **the construction would be completed** or the **balance of convenience would be against us**;
>
> c) the Federal Government was **threatening to cut off funds** we depended upon to defend our rights;
>
> d) all governments were using false and illegitimate arguments to debate us, including that **we had no aboriginal rights or title**. We were told we were squatters. The Agreement was thus negotiated under conditions of **fundamental error**, if governments truly believed what they told us, or under conditions of **fraud** if they did not;
>
> e) the **social position of our people was desperate**, and programs upon which we depended were being cut and frozen, including while negotiations were underway;

[3120] Under Canadian common law, "no reasonable choice" or lack of a "feasible, practical alternative" is an indicator of duress: see generally G.H.L. Fridman, *Restitution*, 2nd ed. (Toronto: Carswell, 1992) at 111-128. In regard to "contrainte légale" (legal duress), see J.-L. Beaudoin, *Les Obligations*, 3ème éd. (Cowansville, Québec: Les Éditions Yvon Blais, 1989) at 141-142.

[3121] House of Commons, *Debates*, December 14, 1976, at 1999 (Joe Clark).

[3122] P. Cumming, "Canada's North and Native Rights" in B. Morse (ed.), *Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada* (Ottawa: Carleton, 1989), 695 at 723.

[3123] Grand Council of the Crees (of Quebec), *Presentation to the Royal Commission on Aboriginal Peoples*, Montreal, November 18, 1993, at 8.

f) the governments stated that certain **fundamental matters were non-negotiable**, including the issues of surrender and extinguishment;

g) we were forced to accept structures, **institutions and principles that did not reflect Cree law**, culture or belief but rather those of the dominant societies. This was in contravention of our fundamental right of self-determination including the right to determine our own institutions, and our social, economic and cultural rights;

i) we were obliged to **negotiate against the might of three development corporations and two governments**; and

j) the federal government **failed to assert its fiduciary obligation to protect our rights and interests**. Instead, in this first 'modern' land negotiation, the federal Crown maintained a morally and legally bankrupt position of 'alert neutrality'."[3124] [Emphasis in original.]

Further, Deputy Grand Chief Romeo Saganash has summarized:

"The James Bay and Northern Quebec Agreement, including its purported surrenders and extinguishments, was imposed upon the Cree people under unconscionable conditions of duress."[3125]

Any finding of significant coercion or duress would have far-reaching implications as to the legitimacy of the Agreement - at least in regard to surrender and extinguishment issues and other specific provisions that may have arisen as a result of duress. For this reason, it is important to examine more closely the conduct of the non-Aboriginal government parties and the impacts that the government positions and actions had on the Aboriginal parties' responses, as well as any specific allegations of duress.[3126]

11.5.1 Failure to recognize existing rights and obligations

Any discussion of coercion or duress in the context of the James Bay and Northern Québec Agreement must begin with the failure of the federal and provincial governments, and by the provincial Crown corporations, to recognize that there were any Aboriginal rights in the territory of the Agreement. The refusal of the two governments to recognize the rights of the Aboriginal peoples and to satisfy their claims recurred repeatedly, despite specific constitutional obligations to the contrary.[3127]

This failure was recently recognized by the Supreme Court of Canada:

[3124] Ibid.

[3125] Grand Council of the Crees, *Presentation to the Royal Commission on Aboriginal Peoples*, Montreal, May 28, 1993, at 41.

[3126] See, for example, G.H.L. Fridman, *Restitution*, 2nd ed. (Toronto: Carswell, 1992) at 112: "Compulsion is an integral aspect of duress...Compulsion necessarily includes and imports anything which obliges someone to agree to another's disposition or demand because *the application of his mind and his will is so overborne by some other party's conduct or statements that the one compelled has no alternative...*" [Emphasis added.]

[3127] See, for example, the terms and conditions pertaining to the *Rupert's Land and North-Western Territory Order*, 1870, discussed under sub-heading 2.3 *supra*. See also sub-heading 6.3.1, where the constitutional obligations under the *Quebec Boundaries Extension Act, 1912* are also discussed.

> "...the James Bay development by Québec Hydro was originally initiated without regard to the rights of the Indians who lived there, even though these were expressly protected by a constitutional instrument; see the *Québec Boundaries Extension Act, 1912*, S.C. 1912, c. 45."[3128]

Both the federal and provincial governments refused to recognize the existence of aboriginal rights. In testifying before the Standing Committee on Indian Affairs and Northern Development, the Minister for Indian Affairs and Northern Development, the Honourable Warren Allmand stated the federal position clearly:

> "The department [of Indian Affairs and Northern Development] has done a lot of research on this, by the way, and we have yet to be shown that there are any real rights in that area...With respect to hunting, fishing and trapping, that continues by virtue of a specific section, but other rights in addition to fishing, hunting and trapping, we are really interested in knowing what they might be. *So when you talk about extinguishing rights, what are these rights?*"[3129] [Emphasis added.]

Yet, in 1910 in a meeting of the Committee of the Privy Council, the federal Minister responsible for Indian Affairs recognized that even the northern territory annexed to the province of Québec in 1898 was subject to existing "Indian title" which remained to be "purchased":

> "The Minister submits that the Act 61 Vic. Cap 3, 'An Act respecting the northwestern, northern and north-eastern boundaries of the Province of Quebec', *does not convey any lands to the Province of Québec, as free from the burden of the Indian title, which yet remains to be purchased before the lands are available to the Province as a source of revenue.*"[3130] [Emphasis added.]

It was only years after the JBNQA was signed and approved by Parliament that the government of Canada was willing to recognize publicly that it had "constitutional obligations respecting the Territory and its native inhabitants":

> "The Agreement enabled Québec to proceed with a multi-billion dollar hydro development scheme which will have long lasting economic benefits. *Canada's main purpose for participating in the negotiations was to fulfill its constitutional obligations respecting the Territory and its native inhabitants.*"[3131] [Emphasis added.]

Québec also refused to recognize the existence of any aboriginal rights in the territory. This was the position that they maintained during the James Bay litigation[3132] and throughout the JBNQA negotiations with respect to the Crees and Inuit. To quote Ambassador Ted Moses, who was the Cree chief negotiator for the James Bay and Northern Québec Agreement:

> *"[I]n 1972, when [Québec] announced the project, their position was that there were no rights, no Indian rights, in Québec.* Notwithstanding what the Dorion report said, and what 1912 said, and what the 1898 Boundaries Extension Act [said], and what...the Royal

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[3128] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 at 1103-1104.

[3129] The Honourable Warren Allmand, March 8, 1977, *Minutes of the Standing Committee*, No. 21 at 34-35.

[3130] Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 2nd May 1910 (on file with the authors). Unlike the *Quebec Boundaries Extension Act, 1912*, the 1898 boundaries extension legislation did not make any reference to the rights of Aboriginal peoples or the obligations of the province of Québec in this regard. However, the federal Minister in 1910 had still recognized that Aboriginal peoples had rights in and to the territory concerned.

[3131] Indian and Northern Affairs Canada, *James Bay and Northern Québec Agreement Implementation Review* (Ottawa: Minister of Indian Affairs, February 1982) at 7.

[3132] See *Gros-Louis* v. *Société de développement de la Baie James*, [1974] R.P. 38; *Société de développement de la Baie James* v. *Kanatewat*, [1975] C.A. 166.

> Proclamation, stipulated...*The position of Québec was that the Indians, the Crees, didn't have any rights. That we were simply squatters, and that they tolerated us as squatters.*"[3133] [Emphasis added.]

In 1977, testifying before the Standing Committee on Indian Affairs and Northern Development, Chief Billy Diamond said the same thing: "Before our court proceedings and in particular to the previous negotiations about our interests in the area, the government of Québec did not even recognize our rights. They told us that our interests in the area were just privileges that could be taken away without our consent..."[3134]

In refusing to recognize the existence of any rights, the Québec government was ignoring the *Rupert's Land and North-Western Territory Order*, 1870 and the equitable principles in the *Royal Proclamation of 1763*. Prior to negotiating a draft Agreement in November 1975, Québec was also refusing to acknowledge the conclusion of the Dorion Commission that the *Québec Boundaries Extension Act, 1912* imposed an obligation on the province to recognize Indian title in the territory added to Québec and to satisfy Aboriginal claims through consensual agreement.[3135]

It was only when a draft Agreement had been substantially negotiated and was to be signed within a few days time that the Québec government suddenly reversed its position, in terms of recognizing both the pre-existing rights of the Crees and Inuit and the constitutional obligations of Québec as a government. As J. Ciaccia pointed out to the Québec National Assembly Standing Committee in November 1975, the Crees and Inuit had territorial rights since time immemorial:

> "Les territoires compris dans la convention couvrent presque quelque 410,000 milles carrés, soit plus que toute la province d'Ontario...
>
> *...ces territoires constituent aussi, depuis des temps immémoriaux, le domaine de groupements cris et inuit disseminés sur toute sa superficie ou presque toute*, vivant de la chasse, de la pêche et du trappage."[3136] [Emphasis added.]

In regard to Québec's obligations to Aboriginal peoples under the *Quebec Boundaries Extension Act, 1912*, Ciaccia also stated:

> "[La Convention] nous permet de remplir nos obligations à l'égard des populations qui

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[3133] Interview with Ambassador Ted Moses, July 29, 1993. Again according to Ambassador Moses, the Cree themselves had a clear conception of their rights as still intact:

> "Our land hadn't been taken away, or we hadn't lost it in battle. We never sold it either. So our position was clear that our rights were still intact, and we felt that Québec, that both governments, had an obligation, to seek our consent, prior to commencing any project.... We had been exercising our rights. Including trapping beaver, nobody bothered us, no projects, threatened that way of life. We were masters in our land."

[3134] Chief Billy Diamond, January 26, 1977, *Minutes of the Standing Committee*, No. 7 at 14.

[3135] *Rapport de la Commission d'Étude sur l'intégrité du territoire du Québec* (Québec: Éditeur Officiel, 1971), vol. 4.1 (Dorion Report) at 391. Cited in P. Cumming & N. Mickenberg, (eds.), *Native Rights in Canada* (Toronto: Indian-Eskimo Association of Canada, 1972) at 90. See also J. O'Reilly, "The Role of the Courts in the Evolution of the James Bay Hydroelectric Project" in S. Vincent & G. Bowers, (eds), *Baie James et Nord quebécois: dix ans après/James Bay and Northern Québec: Ten Years After* (Montréal: Recherches amérindiennes au Québec, 1985) 30 at 32, where it is said by the Crees' legal counsel that the Québec government was ignoring the Dorion Report in terms of recognizing Indian rights and maintaining that "Indians and Inuit in Northern Québec had no land rights whatsoever."

[3136] Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 5, 1975, No. 174, at B-5935 (J. Ciaccia, Special Representative of Premier Robert Bourassa). Unofficial English translation: "The territories included in the Agreement cover almost some 410,000 square miles, being more than all of the province of Ontario...[new para.]...*these lands constitute also, since time immemorial, the domain of Cree and Inuit groups spread over all its area or almost all*, living from hunting, fishing and trapping." [Emphasis added.]

habitent nos régions du Nord..."[3137]

Further, at the time of the adoption of the provincial legislation approving the Agreement, the Honourable J. Cournoyer, Quebec Minister of Natural Resources stated before the National Assembly that the Crees and Inuit definitely had territorial rights:

> "Dans le territoire visé, les principales personnes qui, *c'est sûr, avaient des droits ladessus*, c'étaient les Cris...et les Inuit..."[3138] [Emphasis added.]

In addition, Minister Cournoyer acknowledged that Québec had been negligent in not carrying out its obligations under the *Quebec Boundaries Extension Act, 1912*:

> "...dans ce qu'on appelle la loi de 1912, ou la loi de l'extention du territoire québécois, nous dit que nous devons faire un certain nombre du gestes que nous avons négligé, comme gouvernement, de poser depuis 1912 et que nous avons dû poser, suivant notre bon jugement, à partir de 1970 ou 1971."[3139]

Based on the above, it is clear that the failure by the federal and Québec governments to recognize the rights of Aboriginal peoples in and to the Territory covered by JBNQA and the related constitutional obligations owed by both governments was not based on an honest belief that such rights and obligations did not exist. Rather, it appears to have been a position intentionally taken by both governments to enhance their own positions, both in regard to the James Bay litigation and the land claims negotiations that ensued.

Such actions were incompatible with the respective fiduciary and other constitutional obligations of both governments. Moreover, the positions taken by the two governments served to misrepresent the legal positions of the Crees and Inuit.[3140] This in turn generated undue pressure on the Aboriginal parties in the JBNQA negotiations to "agree" to the terms put forward by the Québec and federal governments. In view of these government positions, the Aboriginal parties concerned were led to believe that they had no practical choice or reasonable alternative but to accede to the government positions in the negotiations. This was especially true in regard to matters pertaining to surrender and extinguishment.

[3137] Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 5, 1975, No. 174, at B-5934. Unofficial English translation: "[The Agreement] allows us to fulfill our obligations in regard to the populations who inhabit our regions of the North...". At B-5935, Ciaccia specifically quotes the *Rapport de la Commission d'études sur l'intégrité du territoire du Québec* (Québec: Éditeur Officiel, 1971), vol. 4.1, at 392 (Dorion Report) as concluding and recommending that Québec take measures without delay to honour the obligations contracted towards Indians under the boundaries extension acts of 1912. In regard to Québec's obligations under the 1912 Act, see also Assemblée nationale, *Journal des Débats, Commissions parlementaires*, Commission permanente des richesses naturelles et des terres et forêts, Entente concernant les Cris et les Inuit de la Baie James, 3rd Sess., 30th Legisl., November 7, 1975, No. 177, at B-6073 (J. Ciaccia).

[3138] Assemblée nationale, *Journal des Débats*, 4th Sess., 30th Legisl., vol. 17, No. 29, June 21, 1976, at 1597. Unofficial English translation: "In the territory contemplated, the principal persons who, *it is certain, had rights there*, were the Crees...and the Inuit..." [Emphasis added.]

[3139] Id. Unofficial English translation: "...in that which we call the Act of 1912, or the Act extending the Québec territory, we say that we must make a number of gestures that we neglected, as a government, to do since 1912 and which we had to do, according to our good judgment, since 1970 or 1971."

See also the *ex post facto* statement of J. Ciaccia in the "Philosophy of the Agreement" in the James Bay and Northern Quebec Agreement, at xx: "The Québec government has taken the position in these negotiations that it wanted to do all that was necessary to protect the traditional culture and economy of the native peoples, *while at the same time fulfilling its obligations under the Act of 1912*." [Emphasis added.]

[3140] Apparently, these types of misrepresentations have characterized the treaty process since the early 1800s. See B. Clark, *Native Liberty, Crown Sovereignty [:] The Existing Aboriginal Right to Self-Government in Canada* (Montreal: McGill-Queen's University Press, 1990) at 202: "The treaties since the early 1800s were made by colonials. *To drive hard bargains the colonials led the natives to believe that they did not already have any strictly legal rights. The natives were induced to enter these treaties in order to acquire some legal rights, at least to small portions of the Indian territory, which small portions would be called their reserves.*" [Emphasis added.]

11.5.2 Severe limitations in litigation alternative

In 1971, the absence of political recognition of Aboriginal rights by the Québec and federal goverments gave the Cree and the Inuit no choice but to turn to the courts. As J. O'Reilly, legal counsel for the Crees, explains:

> "...prior to the James Bay case the Québec government did not recognize that the Indians and Inuit of Northern Québec had any legal rights whatsoever in the territory. On its side, the federal government was unwilling to force the Québec government to recognize such rights, especially in the context of the James Bay project. The courts were thus the only option available to the native people in their attempt to preserve their way of life, or at least salvage a substantial part of it."[3141]

However, the degree to which the courts recognized Aboriginal rights was vastly different in the early 1970s than it is today. The judgment of the Supreme Court of Canada in *Calder*,[3142] which marks to some degree a milestone in terms of modern judicial recognition of aboriginal rights, was rendered in January, 1973. Yet, the *Calder* decision was not totally clear in its recognition of aboriginal rights. Sam Silverstone, a lawyer and negotiator for the Inuit, described the legal situation at the time of the negotiations as follows:

> "[T]he courts had said...whatever rights you have they're of an ephemeral nature in any case. So there was no support, there was no *Sparrow* case, there was no *Sioui* case. And most important of all, there was no section 25 and section 35 and section 52 of the *Constitution Act, 1982*."[3143]

The perception of the courts as a place not receptive to Aboriginal interests was widely shared. Initially, the Crees and the Inuit went to court because they felt they had no other choice, given the attitude of the federal and provincial governments. To quote Chief Josie Sam-Atkinson, of the Fort George Band: "We knew it was a great risk to fight in the court but we had little choice. Our rights were not recognized by the Province of Québec and/or the developers."[3144] One Cree negotiator described the laws as incompatible with Cree values: "None of the Cree values were incorporated into any of these laws."[3145] Yet, when Mr. Justice Malouf of Québec's Superior Court rendered his decision in favour of the Cree and Inuit parties,[3146] it was clear that the strategy to litigate in 1971 was an effective one - at least at the beginning.

[3141] J. O'Reilly, "The Role of the Courts in the Evolution of the James Bay Hydroelectric Project" in S. Vincent & G. Bowers, (eds), *Baie James et Nord quebécois: dix ans après/James Bay and Northern Québec: Ten Years After* (Montréal: Recherches amérindiennes au Québec, 1985) 30 at 30.

[3142] *Calder* v. *A.G. British Columbia*, [1973] S.C.R. 313 (S.C.C.).

[3143] Interview with Sam Silverstone, August 18, 1993.

[3144] Chief Josie Sam-Atkinson, January 27, 1977, *Minutes of the Standing Committee*, No. 8 at 14. The sentiment was shared by Chief Peter Gull of the Waswanipi Band:

> "Then came the court case, the bringing of witnesses to Montreal to testify; further information meetings in the communities of the Waswanipis, and the difficulties of explaining the court proceedings into the Cree language. *One can only imagine the fears and worries in the hearts of the Waswanipi Crees. What would be the decision of the courts, and whether the Crees would have their rights recognized or whether they would end up with nothing.*"
>
> Chief Peter Gull, January 27, 1977, *Minutes of the Standing Committee*, No. 8 at 6.

[3145] Interview with Roderick Pachano, July 29, 1993.

[3146] *Chef Max "One-Onti" Gros-Louis* v. *Societé de développement de la Baie James*, [1974] R.P. 38 (Québec S.C.) per Malouf J.

However, the Crees and Inuit subsequently discovered that seeking recourse in the courts had severe limitations during the mid-1970s. The suspicion on the part of the Crees and Inuit of the degree to which their rights would be recognized by the courts was borne out in practice. While the motion for an interlocutory injunction to stop the James Bay project was successful in Québec Superior Court, the injunction was almost immediately suspended by the Québec Court of Appeal;[3147] and the Supreme Court of Canada, in a three-to-two decision, refused leave to appeal since it did not wish to substitute its judgment on such issues for that of the Court of Appeal.[3148] This meant that construction of the James Bay project could continue unchecked, rendering the likelihood of stopping the project increasingly improbable as time passed.

The November 22, 1973 decision of the Québec Court of Appeal that allowed construction of the James Bay project to proceed pending further judicial hearing of the issues concerned has been strongly criticized by Québec constitutional and other professors and lawyers as "having given the impression that [the Appeal Court] was more sensitive to the political arguments of a government than the legal arguments of a minority." [Unofficial translation][3149] In light of these events in the courts whereby construction of the project could resume, N. Rouland concludes that any final judgment by the Supreme Court of Canada would have been rendered ineffective:

> "On peut donc penser que la continuation des travaux de la Baie James - qui est la conséquence de la décision de la Cour d'Appel - a bien pour *effet de rendre le jugement final inefficace...*"[3150] [Emphasis added.]

Similarly, Joe Clark, described to the House of Commons in 1976 how the lack of an effective response from the courts and a "political decision" had "forced" the Aboriginal peoples to negotiate JBNQA, in order to counter the effects of the James Bay project that had also been "forced" upon them:

> "As all of us know, the Cree people of the James Bay region won an injunction in November, 1973, in a court in Québec. That injunction was suspended weeks later by the Court of Appeals of that province, and the Supreme Court of Canada refused the Council of the Cree leave to appeal in the Supreme Court in December, 1973. *As a consequence of that...the native people were forced to negotiate the manner of their response to the James Bay project which had been forced upon them by a political decision of the*

[3147] The Superior Court decision, granting an interlocutory injunction, was rendered by Malouf J. on November 15, 1973; and the same injunction was suspended by the Québec Court of Appeal on November 22, 1973, until judgment of the Court in the appeal or until the Court otherwise ordered. See J. O'Reilly, "The Role of the Courts in the Evolution of the James Bay Hydroelectric Project" in S. Vincent & G. Bowers, (eds), *Baie James et Nord quebécois: dix ans après/James Bay and Northern Québec: Ten Years After* (Montréal: Recherches amérindiennes au Québec, 1985) 30 at 35. See also B. Richardson, *People of Terra Nullius [:] Betrayal and Rebirth in Aboriginal Canada* (Vancouver: Douglas & McIntyre, 1993) at 312: "Malouf's judgment was overturned within a week, the justice system reasserted its customary discriminatory attitude towards aboriginal people."

[3148] [1975] 1 S.C.R. 48 (S.C.C.).

[3149] H. Brun, D. Ferland, H. Reid, "La Cour d'Appel, les Indiens et la Justice" in *Le Devoir*, 21 décembre 1974. Original French version states that the Court of Appeal: "...[a] donné l'impression qu'elle était plus sensible aux arguments politiques d'un gouvernement qu'aux arguments juridiques d'une minorité". Cited in N. Rouland, *Les Inuit du Nouveau-Québec et la Convention de la Baie James* (Québec: Association Inuksiutiit & Centre d'études nordiques de l'Université Laval, 1978) at 33, where the author appears to share the opinion that the Court of Appeal based its decision on political as well as legal considerations. Cree legal counsel has called the November 22 judgment of the Court of Appeal "one of the blackest days in Québec's legal history": see J. O'Reilly, "The Role of the Courts in the Evolution of the James Bay Hydroelectric Project" in S. Vincent & G. Bowers, (eds), *Baie James et Nord quebécois: dix ans après/James Bay and Northern Québec: Ten Years After* (Montréal: Recherches amérindiennes au Québec, 1985) 30 at 36.

[3150] N. Rouland, *Les Inuit du Nouveau-Québec et la Convention de la Baie James* (Québec: Association Inuksiutiit & Centre d'études nordiques de l'Université Laval, 1978) at 35. Unoffical English translation: "One may thus think that the continuation of the work on James Bay - which is the consequence of the decision of the Court of Appeal - has well the *effect of rendering the final judgment ineffective...*" [Emphasis added.]

government of Quebec."[3151] [Emphasis added.]

Against this background, it is not surprising that the Crees and the Inuit chose to negotiate and agree to JBNQA. The Québec Court of Appeal, by issuing what a number of jurists and other commentators view as politically-motivated judgments, in effect left the Aboriginal parties with no practical alternative.[3152]

11.5.3 Illegitimate appropriation of Cree traditional territory

From the Cree and Inuit perspective, the unilateral taking of their traditional lands for the vast James Bay Municipality and for the massive hydroelectric project was perceived as doing violence[3153] to their lands. By restricting access to their own territory, bulldozing the forests and clearing the land, sending in unprecedented numbers of workers from the south, diverting rivers important to the Crees and Inuit, and building huge dams - this violence was perceived by the Aboriginal peoples concerned as an assault on their own societies and cultures, in light of their intimate relationship with their lands.[3154] Equally disturbing, the duress and threats were not hypothetical but were being carried out before their very eyes.

As Grand Chief Matthew Coon Come describes:

> "The Government and the utility [Hydro-Québec] would have nothing to do with us. *We had no rights. The project had more rights than we had. There were thousands of workers invading our territory* with bulldozers, roads, multi-ton trucks, police, security and they were setting up temporary towns that were bigger than all our villages."[3155]

[3151] House of Commons, *Debates*, December 14, 1976 (Opposition Leader, Joe Clark), at 1999.

[3152] Furthermore, the lawyers for the Crees advised their clients that even if they were ultimately successful in the courts, it would most probably be open to Parliament to expropriate whatever rights the courts might decide existed. James O'Reilly, the lawyer for the Crees, testified before the Standing Committee on Indian Affairs and Northern Development that it was in his opinion, in the early 1970s, "a very, very risky business to go in and to stake the whole future of the people and all their rights in and to the land on a judgment of Supreme Court of Canada, which at best could say that there is a right of use, but it could be taken away at any time by expropriation by Parliament": James O'Reilly, January 26, 1977, *Minutes of the Standing Committee*, No. 7 at 18. Peter Hutchins, another lawyer for the Crees, elaborates on this point as follows:

> "Can Parliament undo whatever the courts say?...You have to look at the political context. I don't think back in 1974-75 [that] there would have been people streaming into the streets, had Parliament extinguished Cree rights. Certainly not in Québec...The Crees were on their own...[A]s lawyers, with the state of the law at that time, we had to tell the client...whether we agreed with it or not, there were certainly authorities saying that Parliament could ultimately extinguish their rights."
>
> Interview with Peter Hutchins, August 20, 1993.

[3153] It is worth noting that, in regard to grounds for nullifying contractual agreements, a legal concept of "violence" existed under Québec civil law at the time of the creation of the James Bay Municipality and construction of the James Bay hydroelectric project. See *Québec Civil Code of Lower Canada* (Montreal: Wilson & Lafleur Ltée, 1993), arts. 994-1000. In particular, see art. 994: "Violence or fear is a cause of nullity, whether practised or produced by the party for whose benefit the contract is made or any other party"; and art. 995: "The fear whether produced by violence or otherwise must be a reasonable and present fear of serious injury. The age, sex, *character and condition of the party are to be taken into consideration.*" [Emphasis added.]

[3154] See, generally, testimony of Cree and Inuit witnesses in *Chef Max "One-Onti" Gros-Louis* v. *Societé de développement de la Baie James*, [1974] R.P. 38 (Québec S.C.) per Malouf J.; see also B. Richardson, *Strangers Devour the Land* (Vancouver: Douglas & McIntyre, 1991). See also Grand Chief Matthew Coon Come, Grand Council of the Crees, *Presentation to the Royal Commission on Aboriginal Peoples*, Montreal, May 28, 1993, at 50:

> "We have lived here for a very long time, not just centuries, but millenia; and we hold the land to be very close to our people. *We are part of the land, and we do not want to see it harmed in any way.*" [Emphasis added.]

[3155] Grand Council of the Crees, *Presentation to the Royal Commission on Aboriginal Peoples*, Montreal, May 28, 1993, at 6.

[Emphasis added.]

According to Chief Billy Diamond, both prior to and during the JBNQA negotiations, his people were being determinedly dispossessed of their traditional territory through strategies that would render any favourable decision from the Supreme Court of Canada "hypothetical":

> "What [the Québec government and Hydro-Québec] did was simple. *They bulldozed, they dammed, they built, they constructed, they moved in as many people into the Territory as possible and they did everything in their power in order to try to dispossess us and take by force what they might or might not win through the courts...*In the end, the Quebec Court of Appeal obliged them, and any Supreme Court of Canada decision would have been hypothetical...
>
> Were they acting illegally? The Supreme Court of Canada in the *Sparrow* case over 18 years later said they were[3156]..."[3157] [Emphasis added.]

As already discussed in the Extinguishment Study, the *Rupert's Land and North-Western Territory Order*, the *Royal Proclamation of 1763*, and even the *Quebec Boundaries Extension Act, 1912* all required the Crown in right of Quebec and Canada to recognize the territorial rights of Aboriginal peoples and imposed fiduciary and other obligations on the governments concerned. In the view of this Case Study, these constitutional provisions did not permit the Québec government to act in the unilateral manner it did in appropriating Cree and Inuit traditional territory.[3158]

By effectively seizing significant portions of Aboriginal territory for construction purposes and also for creation of a huge regional municipality, the Québec government went beyond mere threats and actually violated the rights and collective security of both Crees and Inuit.[3159] It is said that the unlawful "threat" of seizure of property constitutes duress that is analagous to duress of the person.[3160] In the case of the Crees and Inuit in northern Québec, the actual taking of property for the purposes described, with little regard for existing constitutional rights and obligations or for the importance of these lands to the Aboriginal peoples concerned, clearly demonstrates a form of coercion that seems unjustifiable and highly insensitive under the circumstances.

While it may be argued that the Québec government did not have a clear idea of the precise nature of Cree and Inuit rights, the government was aware that such rights existed and

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[3156] *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 at 1103-1104: "...the James Bay development by Québec Hydro was originally initiated without regard to the rights of the Indians who lived there, even though these were expressly protected by a constitutional instrument; see the *Québec Boundaries Extension Act, 1912*, S.C. 1912, c. 45."

[3157] Grand Council of the Crees, *Presentation to the Royal Commission on Aboriginal Peoples*, Montreal, May 28, 1993, at 18.

[3158] In this regard, see also *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 (S.C.C.) at 1103-1104; and Indian and Northern Affairs Canada, *James Bay and Northern Québec Agreement Implementation Review* (Ottawa: Minister of Indian Affairs, February 1982) at 7: "Under the terms of the *Quebec Boundaries Extension Act* (1912, 2 George V. C45), the Government of Quebec was given primary responsibility for settling the question of aboriginal title in its new northern territories. *Quebec took no action to fulfill this responsibility until it was forced to begin negotiations as a result of the 1973 legal proceedings launched by the Crees and Inuit.*" [Emphasis added.]

[3159] It should be pointed out here that the areas of initial construction affected the Crees much more than it did the Inuit on the Hudson Bay coast. In addition, the James Bay Municipality was established for the most part in Cree (not Inuit) traditional territory.

[3160] See, for example, G.H.L. Fridman, *Restitution*, 2nd ed. (Toronto: Carswell, 1992) at 122-123, where duress of property is illlustrated with an example involving money obtained following an unlawful threat of seizure of property: "...money obtained by the unlawful threat of seizure of goods was recoverable. Such duress was analogous to duress in the strict sense of duress to the person. Indeed, there was no need for any protest in a formal sense prior to payment being made. The question of protest only went to the issue whether there was evidence to establish the payer's intention, i.e., whether his act in paying was or was not voluntary. This was laid down in the leading case of *Maskell* v. *Horner*[, [1915] 3 K.B. 106]."

that it had undertaken a constitutional obligation in 1912 to recognize such rights. By taking the above unilateral actions described above, the Québec government chose to ignore even the 1971 Dorion Report[3161] which had recommended that the government settle, through negotiated agreement, the rights of the Aboriginal inhabitants in the northern regions in the province.

11.5.4 Role of development corporations in JBNQA negotiations

Throughout the negotiations of the James Bay and Northern Agreement, the Aboriginal parties were required to deal with not only the federal and Québec governments, but also three of Québec's Crown corporations - Hydro-Québec and the two other development corporations, Société d'énergie de la Baie James[3162] and Société de développement de la Baie James.[3163] Each of the three corporations had been given a major role in regard to the realization of the James Bay hydroelectric project. Each of these entities were made full and independent parties to all of the JBNQA negotiations, signing the land claims treaty as independent parties.

In fairness to the Québec government and the three development corporations, it should be pointed out that the latter entities had a role to play in that a court case was pending that directly involved them. Moreover, any modifications to the James Bay hydroelectric project would concern them directly. Consequently, to the extent that technical modifications were to be made to the project, it would make sense that the Crown corporations be directly included in such negotiations.[3164]

At the same time, the existing interests of the Crown corporations did not mean that they should be full and independent parties to all aspects of the land claims negotiations. This appears to be a marked departure from the practice up to that time in Canada and, therefore, merits closer evaluation.

In examining the appropriateness or validity of including the three development corporations as full and independent parties, it is useful to consider again the constitutional obligations assumed by the Québec government in s. 2(c) of the *Quebec Boundaries Extension Act, 1912*:

> "That the province of Québec will recognize the rights of the Indian inhabitants of the territory above described to the same extent, and will obtain surrenders of such rights *in the same manner, as the Government of Canada has heretofore recognized such rights and obtained surrender thereof...*" [Emphasis added.]

[3161] *Rapport de la Commission d'Étude sur l'intégrité du territoire du Québec* (Québec: Éditeur Officiel, 1971), vol. 4.1 (Dorion Report) at 391.

[3162] Known in English as "James Bay Energy Corporation".

[3163] Known in English as "James Bay Development Corporation".

[3164] The Crees acknowledge that there was a role for the Crown corporations, in regard to technical modifications to the James Bay hydroelectric project. See Grand Council of the Crees (of Quebec), *Submission: Status and Rights of the James Bay Crees in the Context of Quebec's Secession from Canada* (Submission to the U.N. Commission on Human Rights, February 1992) (on file with authors) at 101:

> "The three development corporations, were each considered as separate negotiating parties and they coordinated strategies with the Quebec government against the aboriginal parties. Generally, the harsh positions taken by Quebec were set by the development corporations. *These corporate entities could have had input in negotiating technical modifications to the James Bay hydro project, but they were fully involved in all aspects of the land claims negotiation. As a result, rights and protections in regard to our northern environment, lands, resources and development were severely affected.*" [Emphasis added.]

In other words, Québec undertook to recognize the rights of the Aboriginal peoples concerned and obtain surrenders of such rights "*in the same manner*" as the government of Canada had done at that time. However, the Canadian government had never included development corporations as full and independent parties in treaty negotiations, so the Québec government would not have been constitutionally authorized to do so. Nor could it be said that the Québec government was validly authorized by the federal government to make the development corporations independent parties to the land claims negotiations, since the executive government cannot derogate from legislative enactments (especially those with constitutional status).

While there may have been instances when treaties were negotiated by persons other than the Crown, in those cases the persons were said to have held themselves out as representing the Crown.[3165] In the case of the JBNQA, it cannot be said that the three development corporations were "representing" the Crown in right of Québec or in right of Canada, since the Québec and federal governments were in the negotiations as parties acting on their own behalf.

In addition, as independent parties to the negotiations, the corporations were free to take a position that differed from the two governments. This in effect meant that, despite existing constitutional obligations, the federal and Québec Crowns had partially re-defined their respective roles, so as to now require the consent of the three Crown corporations before making arrangements with the Crees and Inuit on lands, environment, regional and local government issues, education, harvesting, among other matters.

At this point, it is important to emphasize that the government of Canada had assumed constitutional obligations pursuant to the *Rupert's Land and North-Western Territory Order* to "make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer" of Rupert's Land to Canada. Subsequently, through an act of doubtful constitutionality,[3166] the Parliament of Canada delegated Québec to obtain surrenders of the rights of "Indian inhabitants" in the territory covered by the 1912 boundaries extension legislation. Finally, in regard to the JBNQA negotiations, the federal and Québec governments in effect diminished their respective roles by including three development corporations as full and independent parties. In view of the constitutional obligations in the *Rupert's Land and North-Western Territory Order*, such actions can hardly be said to be protective of the Crees and Inuit in the context of satisfying their territorial claims.

The action of including the corporations as independent parties was especially prejudicial to the Aboriginal peoples, since the three Crown corporations involved had extensive interests that conflicted directly with those of the Crees and Inuit in the Territory. Even without the direct involvement of the development corporations, there were vastly greater financial, technical and human resources available to the two governments than to the Aboriginal parties to the negotiations. In particular, the federal and Québec governments could each call on the expertise and resources of their entire government bureaucracy.[3167]

In the early 1970s, the Crees and Inuit had had little experience with these kinds of complex negotiations. According to Peter Hutchins, this "was an absolutely new situation for the Crees — you were dealing with a population that was still majority unilingual Cree, and were very dependent on the information brought by their negotiators [and] advisers through

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[3165] See, for example, *R. v. White and Bob*, (1964) 50 D.L.R. (2d) 613 (B.C.C.A.), aff'd [1965] S.C.R. vi, 52 D.L.R. (2d) 481, where agreements between Indian tribes and the Hudson's Bay Company were said to constitute "treaties" (within the meaning of s. 88 of the *Indian Act*).

[3166] See sub-heading 7.1.1 *supra* of the Extinguishment Study.

[3167] In the case of the province of Québec, the government was also free to consult with the three Crown corporations - Hydro-Québec, the James Bay Energy Corporation and the James Bay Development Corporation - and take into account their positions and interests. However, this did not mean that the development corporations were entitled to be independent parties to all aspects of the JBNQA treaty negotiations.

translation..."[3168] In this regard, the situation among Inuit was similar to say the least.

Consequently, by including these proponents of hydroelectric development as independent parties, the bargaining positions of the Crees and Inuit were seriously undermined and their vulnerability unnecessarily enhanced.

According to Sam Silverstone, the Crown corporations played a pivotal role in the JBNQA negotiations: "Québec allowed Hydro-Québec to play a major role in the negotiations. *Hydro-Québec directed those negotiations. Nothing was agreed to by the Québec party without Hydro-Québec's consent.*"[3169] [Emphasis added.] Aboriginal peoples have questioned the prominent role played by the Crown corporations in the JBQNA negotiations, whose clear mandate was the exploitation and development of natural resources. To quote John Amagoalik, of the Inuit Taparisat of Canada:

> "*[The Agreement] was made under pressure from Hydro-Québec and those developers*, and as far as we are concerned, those developers, Hydro-Québec and those other groups, really had no right in being part of the negotiations. The agreement should have been between the Inuit people and the Government, of Canada and perhaps the provincial government, but as far as we are concerned, Hydro-Québec, James Bay Development Corporation and all those different private interests had no right in taking part in the agreement."[3170] [Emphasis added.]

11.5.5 Denial of Cree and Inuit resource rights

The James Bay and Northern Québec Agreement does not expressly recognize in favour of the Crees and Inuit any mineral and subsurface rights (other than substances such as soapstone or gravel for local purposes). By way of contrast, the Inuit land claims agreement[3171] in the eastern Arctic (Northwest Territories) expressly provides for Inuit Owned Lands with mineral rights.[3172] In this regard, it is said that Inuit have recognized ownership of 136,000 square miles of land and that approximately 14,000 square miles includes mineral, oil and gas rights.[3173] Further, to date, it appears that every other comprehensive claims agreement in Canada has explicitly recognized some mineral or other sub-surface rights of the Aboriginal peoples concerned.

As D. Sanders has highlighted to the 1989 U.N. Seminar on racism, the denial of indigenous peoples' rights to lands and resources can only be supported by reliance on racist or colonial doctrines:

"Modern international law must be taken to recognize the right of ownership and control

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[3168] Interview with Peter Hutchins, August 20, 1993.

[3169] Interview with Sam Silverstone, August 18, 1993.

[3170] John Amagoalik, February 23, 1977, *Minutes of the Standing Committee*, No. 17 at 9.

[3171] *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada* (Ottawa: Indian and Northern Affairs Canada, 1993). Signed on May 25, 1993.

[3172] Id., at s. 19.2.1 (a): "fee simple including the mines and minerals that may be found to exist within, upon or under such lands".

[3173] See "The Nunavut Agreement: Inuit Determine Their Future Now!" in *Arctic Circle*, January/February 1992, at 30. The Nunavut land claims agreement specifies the Inuit land quantums in the various regions of the Arctic in Schedules 19-2 - 19.7 In addition, provision is made in Schedule 40-2 for certain lands jointly owned by Inuit of Nunavut and Inuit of northern Quebec.

> of lands and resources by indigenous peoples. This is a proper concern of international law...*A denial of indigenous rights to lands and resources can only be supported by invoking doctrines of racism and colonialism*. Ideas of 'discovery' and 'terra nullius' can not be considered legally valid."[3174] [Emphasis added.]

The James Bay Crees are currently asserting in litigation that they possess mineral and sub-surface rights throughout their traditional territory.[3175] However, in regard to Category I lands,[3176] the Agreement presumes that Quebec "remains the owner of the mineral and sub-surface rights"[3177], except in cases where grants to others have been already made. At the same time, the Agreement specifies that "no minerals or other sub-surface rights can be obtained, extracted, mined...from or with respect to all Category I lands without the consent of the particular community with rights over such lands..."[3178]

According to the Grand Council of the Crees, the Aboriginal parties in the JBNQA negotiations were denied the right to select their own traditional lands for harvesting purposes,[3179] if the lands selected had any known mineral potential:[3180]

> "During the negotiation of the *JBNQA*, the Quebec government unjustly imposed specific criteria for land selection that excluded all Cree and Inuit traditional lands with mineral potential. This denied the Crees 'the inherent right...to enjoy and utilize fully and freely their natural wealth and resources'.[3181] It constituted a major violation of the aboriginal right to economic self-determination. It still serves to perpetuate our dependency. No land claims agreement in Canada has prohibited aboriginal peoples from selecting lands with resource potential."[3182]

11.5.6 Government threats regarding funding and services

It is alleged that the federal government used the threat of withdrawing funding and diminishing services that it provided to the Aboriginal peoples, in order to pressure them to negotiate. Chief Billy Diamond makes a clear link between government threats to cut funding

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[3174]. See conclusions in D. Sanders, "Indigenous Participation in National Economic Life", Background paper, United Nations Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations Between Indigenous Peoples and States, Geneva, January 16-20, 1989, at 14 (para. 22). The Sanders paper is reproduced in the *Report on the United Nations Seminar on the effects of racism and racial discrimination on the social and economic relations between indigenous peoples and States, Geneva, Switzerland, 16-20 January 1989*, E/CN.4/1989/22, 8 February 1989, para. 22, at 51.

[3175] *Grand Chief Matthew Coon Come et al.* v. *La Commission Hydro-Électrique de Québec (Hydro-Québec)*, No. 500-05-004330-906, Québec Superior Court.

[3176] "Category I lands" refer to lands generally owned by Crees or Inuit under the JBNQA.

[3177] JBNQA, s. 5.1.10 a) (Cree land regime); s. 7.1.7 a) (Inuit land regime).

[3178] JBNQA, s. 5.1.10 a). For a similar provision in regard to Inuit, see s. 7.1.7 a).

[3179] Reference is being made here to Category II lands, which are lands selected under JBNQA by the Aboriginal peoples concerned, where they are recognized to have exclusive hunting, fishing and trapping rights.

[3180] See N. Rouland, *Les Inuit du Nouveau-Québec et la Convention de la Baie James* (Québec: Association Inuksiutiit & Centre d'études nordiques de l'Université Laval, 1978) at 122, where this policy of Québec is described and criticized.

[3181] *International Covenant on Civil and Political Rights*, article 47.

[3182] Grand Council of the Crees (of Quebec), *Submission: Status and Rights of the James Bay Crees in the Context of Quebec's Secession from Canada*, note 3164, *supra*, at 100.

and flood Cree lands and the resulting impact of leaving the Crees with no alternative but to negotiate according to government terms:

> "*Continuous threats of cuts in funding, the threat of being left with flooded lands and no benefits, and the toll this whole process was taking on our People left us no choice.* Our choice basically was to enter into negotiations with government or be erased from this land or wait until the decision of the Supreme Court of Canada to confirm our Rights. By the time the decision came, our Rights would basically have been to continue our activities in dammed, flooded and polluted lands!"[3183] [Emphasis added.]

According to Ambassador Ted Moses, the federal government threatened to call back loans it had already made to the Crees:

> "We got *more* pressure from the federal government, saying, you've got to negotiate, we'll give you a loan...*If you don't negotiate, you won't get this loan, and you won't get any more money, and we'll call back the money that we gave you to fight the case* [i.e. the motion for an injunction to stop the project]. We were under that kind of pressure."[3184] [Emphasis added.]

In regard to the land claims negotiations, Sam Silverstone expresses the acute vulnerability of the Aboriginal parties vis-a-vis government as follows:

> "[The negotiations were] a process in which the power of each negotiating party [was] disproportionate. Government had vast resources. They can print money, they can change laws, making black into white, white into black, they can do whatever they want basically. If they need resources, they can draw on any department at the taxpayer's expense. *The native parties on the other hand, have a very limited budget, they're operating on the basis of federal loans, which have a condition attached that they can't use those moneys for litigation should negotiations break off...*"[3185] [Emphasis added.]

Just days before the scheduled date of termination of JBNQA negotiations, a letter was sent by the federal Assistant Deputy Minister of Indian and Northern Affairs to C. Watt, President of the Northern Quebec Inuit Association.[3186] Like the Grand Council of the Crees, N.Q.I.A. was virtually totally dependent on government financing in order to cover its operating costs - especially the millions of dollars of ongoing costs for land claims negotiations. Yet, the letter from the Assistant Deputy Minister makes clear that continuation of interim financing by his Department would be "conditional upon signing of the Final Agreement by the N.Q.I.A.":

> "The purpose of this letter is to confirm the details of the interim financing of the N.Q.I.A. by this Department...
>
> We are prepared, and have the concurrence of the Minister, immediately to seek Treasury Board authority for interim financing of the N.Q.I.A...Two possibilities were discussed...
>
> *These proposals are conditional upon signing of the Final Agreement by the N.Q.I.A., but is not intended in any way to influence the subsequent consideration of the Agreement by the Inuit of northern Quebec.*"[3187] [Emphasis added.]

[3183] Grand Council of the Crees, *Presentation to the Royal Commission on Aboriginal Peoples*, Montreal, May 28, 1993, at 18-19.

[3184] Interview with Ambassador Ted Moses, July 29, 1993.

[3185] Interview with Sam Silverstone, August 18, 1993.

[3186] Letter, dated November 7, 1975, from P.B. Lesaux, Assistant Deputy Minister (Indian and Eskimo Affairs) to Charles Watt, President, Northern Quebec Inuit Association (on file with the authors).

[3187] Id.

According to Grand Chief Matthew Coon Come, the federal and Québec government also pressured the Crees to negotiate by veiled threats to reduce basic services. These services were benefits to which the Crees were already entitled:

> "*[T]he James Bay and Northern Québec Agreement...was negotiated in the shadow of various threats including that Québec and Canada would minimize or perhaps withdraw services* at a time when the impacts to the Cree way of life by the hydroelectric development would compromise our ability to survive as a people...These benefits were things we were entitled to without being required [to] exchange, as governments now claim we did, our fundamental rights."[3188] [Emphasis added.]

Aside from the issue of threats to withdraw or reduce funding and services, there appeared to exist another type of pressure or duress. At the time of the negotiations, Inuit and Cree communities were in dire need of essential services. Basically, what seemed to be clear from the negotiations was that there would only be a significant beneficial change in the delivery of government services to Cree and Inuit communities, if the Aboriginal parties signed the Agreement that surrendered or extinguished their rights.

Confirmation of the purported services-for-title approach is found to a large degree in the federal government's own 1982 Report on the *James Bay and Northern Québec Agreement Implementation Review*:[3189]

> "It is clear, from discussions with people involved in the negotiation of the Agreement, that the general tone and spirit of the negotiations engendered high expectations about the changes and improvements that the Agreement would bring for the Crees and Inuit...*The native people had been repeatedly promised that, as soon as the uncertainty as to the title of the land was resolved, the people could expect a rapid improvement in conditions.*"[3190] [Emphasis added.]

In 1985, Makivik Corporation (successor of N.Q.I.A. under the JBNQA) denounced this government position of requiring exchanges of Aboriginal peoples' territorial rights for basic services:

> "It is unthinkable that any group of Canadians should have to buy into the public services which citizens expect — e.g., schooling for their children in their own language, community services, etc. In fact, it becomes all the more scandalous when the price that is paid constitutes of a people's ancestral lands."[3191]

It would be difficult for this Case Study to ascertain to what degree there may have been threats to cut or reduce funding and services. However, the evidence does show that there were at least some highly inappropriate attempts to use funding as a motivation to the Aboriginal parties to negotiate and enter into the JBNQA.

For example, it is fundamental that governments should not in any way suggest that ongoing funding may be cut off in regard to land claims unless the Aboriginal party signs an impending land claims agreement. Such actions constitute a form of duress and cannot be justified. In addition, governments should not have exploited the vulnerable position of Cree and Inuit people in the communities and imply in any way that improved essential services, that are available to Canadians in general, would only be forthcoming if they "agreed" to extinguish their

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[3188] Grand Chief Matthew Coon Come, Grand Council of the Crees, *Presentation to the Royal Commission on Aboriginal Peoples*, Montreal, May 28, 1993, at 7.

[3189] Indian and Northern Affairs Canada, *James Bay and Northern Québec Agreement Implementation Review* (Ottawa: Minister of Indian Affairs, February 1982).

[3190] Id. at 31.

[3191] Makivik Corporation, *Submission from Makivik Corporation to the Task Force to Review Comprehensive Claims Policy* (Makivik, October 1985) at 26.

territorial rights. This approach by the two governments was incompatible with the Aboriginal peoples' human rights[3192] and with the Crown's fiduciary and other constitutional obligations.

That it was known to be wrong for the two governments to demand a surrender of land title in exchange for improvement of community services is in effect confirmed by J. Ciaccia, Special Representative to Premier Bourassa. In a preface to the official published copy of the JBNQA, Ciaccia subsequently pointed out that the services that were agreed to in JBNQA "would have to be provided and developed anyway" and that the main objective of the Québec government had been "to affirm the integrity of our territory":

> ""The inhabitants of Québec's North, *like everybody else*, have to have schools. They have to be able to depend on health services. They have to have the security of justice and a system of law enforcement. The Agreement responds to those needs, and provides the structures through which they can be met. There will be local school boards, police units, fire brigades, municipal courts, public utilities, roads, and sanitation services...
>
> *These are all steps that would have to be taken, these are all services that would have to be provided and developed anyway, regardless of whether or not there was a James Bay project. What the Government of Québec is doing here is...in short, to affirm the integity of our territory.*"[3193] [Emphasis added.]

11.5.7 Threat of unmitigated environmental and social impacts

There were also the pressures from the ongoing construction of the James Bay hydroelectric project, particularly for the Crees and their elders. The pressure of the ongoing development was most strongly felt in individual Cree communities. Chief Josie Sam-Atkinson of the Fort George Band described the likely effects on his community to the Standing Committee on Indian Affairs and Northern Development:

> "Energy [Corporation of Québec], and other developers[] did not ask permission to come on our land. They used the Village of Fort George when they wanted to. Sooner or later what has happened to other Indian villages would happen to Fort George. We would have had a very bad social disruption and we would have lost our Indian pride and identity. Our younger generations would have been even more seriously affected."[3194]

Philip Awashish, one of the Cree negotiators, described the intense fear generated among his people:

> "When the decision to build the James Bay hydroelectric project was announced, *we reacted with shock and fear...*
>
> ...We...feared that the James Bay project would put *an end to our way of life* based on close attachments to the earth and wildlife resources. We feared that the project would *destroy the land* which has provided for our needs and survival for many thousands of

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[3192] See discussion under sub-heading 8.2.12 *supra* of the Extinguishment Study.

[3193] *James Bay and Northern Québec Agreement* at xv-xvi.

[3194] Chief Josie Sam-Atkinson, January 27, 1977, *Minutes of the Standing Committee*, No. 8 at 15.

years."[3195] [Emphasis added.]

It would appear that the fear and pressure felt in the Cree communities was exacerbated by the lack of a sensitive response from the federal and Québec governments. In this regard, Awashish adds:

> "The Cree chiefs decided to defend our culture and way of life against the James Bay project, which represented a ferocious onslaught on our traditions...*The federal government refused to intervene on our behalf* and took a position of 'alert neutrality'...
>
> *The government of Québec refused to negotiate, stating that the plans for the hydroelectric project were not negotiable and that Indian people had no special rights...*"[3196] [Emphasis added.]

In light of these overwhelming concerns and the reactions of government, the Crees felt that the project was inevitable, and that they had "no choice but to negotiate and sign" the Agreement in an attempt to mitigate its effects. According to Grand Chief Matthew Coon Come:

> "In our view, we had no choice but to negotiate and sign. The project as negotiated was inevitable, and *our leaders would have been remiss if they had [not] acted to at least reduce the project to one third of its size and to try to mitigate some impacts...*
>
> We negotiated the James Bay and Northern Québec Agreement because we did not have a choice."[3197] [Emphasis added.]

A further concern is the requirement in the Agreement that Crees and Inuit not be allowed to oppose or prevent, on sociological grounds, certain specified future hydroelectric developments.[3198] This issue has already been briefly described in this Case Study, so it will not be repeated here.[3199] However, it is worth noting the comments of Joe Clark in the House of Commons at that time:

> "Quebec Hydro indicated that it would agree only if the Inuit people who were affected would accept *conditions which denied in advance their right to invoke social impact factors of proposed*[3200] *future hydroelectric projects...*It was, in my judgement, an unreasonable imposition to place upon the native peoples of that place at that time. But *it was another of the conditions into which they were forced to enter in those negotiations.*"[3201] [Emphasis added.]

The prohibition of the Crees to oppose or prevent certain specified hydro projects, on the basis of social factors or impacts, is a draconian measure according to any standard. This government position most likely also served to reinforce the belief among the Aboriginal parties that, in the absence of an "agreement", the anticipated environmental and social impacts would not be diminished.

[3195] P. Awashish, "The Stakes for the Cree of Québec" in S. Vincent & G. Bowers, (eds), *Baie James et Nord québécois: dix ans après/James Bay and Northern Québec: Ten Years After* (Montréal: Recherches amérindiennes au Québec, 1985) 42 at 42-43.

[3196] Id., at 43.

[3197] Grand Council of the Crees, *Presentation to the Royal Commission on Aboriginal Peoples*, Montreal, May 28, 1993, at 8.

[3198] JBNQA, s. 8.1.3.

[3199] See sub-heading 11.2.1 *supra*.

[3200] According to JBNQA, s. 8.1.3, the proposed future projects were the Great Whale Complex and the N.B.R. Complex (Nottaway, Broadback and Rupert).

[3201] House of Commons, *Debates*, December 14, 1976 (Opposition Leader, Joe Clark), at 1999.

The James Bay and Northern Québec Agreement negotiations also took place under tremendous time pressures and constraints, driven by the pace of the James Bay development and the Aboriginal fear of far-ranging adverse environmental and social impacts, which they were led to believe[3202] would likely occur unmitigated. The Cree and Inuit leadership in the negotiations also saw a need to come to a rapid agreement, since they perceived their bargaining position decreasing as time passed and the project was increasingly built. Harry Tulugak described representatives of the Northern Québec Inuit Association skidooing out to Inuit hunters to persuade them to sign on to the Agreement. According to Tulugak, the message was:

> "*We're going to miss the boat here*, sign on the dotted line -- don't worry about extinguishment."[3203] [Emphasis added.]

The time pressures under which the Agreement was negotiated[3204] are particularly apparent, when the JBNQA process is compared to that of the Nunavut land claims process in the Northwest Territories, which took between 15 and 20 years to negotiate.[3205] A similarly lengthy time period was required to negotiate the land claims agreements in the Yukon.[3206]

11.5.8 Refusal to allow Inuit to carry out an adequate ratification process

As already discussed,[3207] there are a number of factors that indicate that the approval of JBNQA by the Inuit through the ratification process was far from adequate and constituted yet other examples of undue pressure or duress.

First, the Inuit were not accorded the six-month time period that they requested to carry out the ratification process. It was only at the "eleventh hour" before the scheduled termination of negotiations that the federal Minister of Indian Affairs acceded to the request of N.Q.I.A. However, the governments limited the time allotted for the ratification process to a total of four months.

Second, the N.Q.I.A., who was primarily involved in carrying out the ratification process, was not permitted to take an extra month to explain the key aspects of the Agreement to Inuit in the 14 northern communities. If the N.Q.I.A. was of the informed view that the people required more time to understand key aspects of the Agreement, the federal and Québec governments should not have denied the people this critical opportunity. In the absence of adequate time to understand the Agreement, it cannot be concluded that the Inuit in the communities gave their free and informed consent.

[3202] It would be fair to conclude here that the unwillingness of the Québec government to alter the project's plans and the refusal of the federal government to intervene on behalf of the Crees would reasonably lead to the belief that the impacts would be unmitigated.

[3203] Interview with Harry Tulugak, September 16, 1993.

[3204] The JBNQA was negotiated within approximately one year from the time of the Agreement-in-principle and within a two-year period in total.

[3205] *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada* (Ottawa: Indian and Northern Affairs Canada, 1993). Signed on May 25, 1993.

[3206] See *Umbrella Final Agreement [:] Council for Yukon Indians* (Ottawa: Minister of Supply and Services, 1993). Agreement between the Council of Yukon Indians, Government of Canada, and Government of the Yukon, signed May 29, 1993, and the individual agreements negotiated with individual Yukon First Nations in conformance with to this umbrella agreement.

[3207] See sub-heading 11.3.2.3 *supra*.

Third, the dissident Inuit had also requested the governments for additional time to explain their views of the Agreement to people in the various Inuit communities. They, too, were denied this important opportunity.

Fourth, the Inuit were not permitted to determine the level of popular vote to approve the JBNQA, despite its far-reaching implications for present and future generations of Inuit. As reported in the *Montreal Star* in March 1976:

> "The NQIA had also asked that a 66 per cent favorable vote be the minimum for ratification of the agreement but the federal government set 50 per cent-plus-one as the limit."[3208]

It is generally known that, under companies legislation in Canada, shareholders of commercial corporations are accorded the right to have votes of 2/3 or 3/4 majority for certain important matters. Why then should Aboriginal peoples be refused the right to opt for a majority vote beyond 50%-plus-one, in regard to matters that have far-reaching implications for their present and future?

N. Rouland comments on the imposed level of a simple majority vote as follows and why no government could take the risk of a higher level of popular approval among Inuit:

> "*...il aurait été normal que, pour une décision de cette importance, on ne se contentât pas de 50% des suffrages + 1 voix*, mais qu'on exigeât un chiffre voison de 70% de suffrages favorables pour que l'Entente fût adoptée...*Mais il est vrai qu'aucun gouvernement ne pouvait prendre ce risque: on savait en effet avant le scrutin que les seuls dissidents regroupaient environ un tiers de la population...*"[3209] [Emphasis added.]

11.5.9 State of necessity

In this Case Study, it is clear that the Cree and Inuit parties to the Agreement were in a "state of necessity" in that they were in dire need of essential community services and were living in poor and underprivileged conditions. These conditions of necessity made it even more important for governments not to exert any forms of pressure, coercion or duress as has been already described above.

J.-L. Beaudoin indicates that, under the Civil Code of Québec, a "state of necessity"[3210] should not be exploited by a contracting party to secure an unwarranted advantage:

> "...dans certains cas, *la volonté du contractant peut avoir été déterminée par la violence des événements eux-mêmes (état de nécessité)*. On ne saurait parler à cet égard de violence au sens traditionnel...*[S]i le cocontractant utilise cet état de nécessité pour obtenir un avantage indu*...on comprend que le juge, pour *sanctionner la mauvaise foi*

[3208] H. Gendron, "Inuit accept agreement" in the *Montreal Star*, March 6, 1976, A1 at A2.

[3209] N. Rouland, *Les Inuit du Nouveau-Québec et la Convention de la Baie James* (Québec: Association Inuksiutiit & Centre d'études nordiques de l'Université Laval, 1978) at 140. Unofficial English translation: "*...it would be normal that, for a decision of this importance, one would not be satisfied with 50% of the votes + 1 vote*, but that one would require a number in the neighbourhood of 70% of the votes in favour in order that the Agreement be adopted...*But it is true that no government could take this chance: one knew in effect before the vote that the dissidents alone would bring together around a third of the population...*" [Emphasis added.]

[3210] See also J.-L. Beaudoin, *L'état de nécessité dans les contrats*, (1963) 13 Thémis 170.

> *et l'immoralité d'une telle conduite*, puisse octroyer une demande en réduction des obligations ou des dommages-intérêts selon les cas..."[3211] [Emphasis added.]

In the case of the Aboriginal peoples involved in the JBNQA negotiations, taking advantage of a state of necessity would be more consequential than generally would be the case under civil (or common) law. Since the federal and Québec governments respectively had fiduciary obligations of a constitutional nature, the standards required of these governments would be significantly enhanced in the present context.

In summary, it should be indicated that some of the above actions or positions taken by government could, if viewed in isolation, perhaps be characterized as simply tough negotiating positions or strategies. However, in assessing the conduct of the federal and Québec governments in the overall context, it would be most difficult to avoid the conclusion that the Aboriginal parties to JBNQA were repeatedly subjected to inappropriate, unlawful coercion or duress. These actions were incompatible with the fiduciary obligations of both governments and substantially affected the fundamental terms of the "agreement" reached by all parties concerned.

As Joe Clark, then Leader of the Opposition, concludes:

> "...it is highly likely that the agreement that we are dealing with today would be very different if the native people involved had had adequate resources and were not forced to meet deadlines of the sort imposed upon them under the threat of imposition of conditions. *It is also clear...that if they had received the support of the federal government to which they were entitled, instead of this cop-out policy of alert neutrality, we would today have been dealing with an agreement very different from this one, an agreement which would have been much more in the interests of the native people involved.*"[3212] [Emphasis added.]

Similarly, it was reported in *L'Avenir* in Sept-Iles:

> "...il est indéniable que tant le gouvernement que les autorités fédérales *se sont livrées à de très fortes pressions, pas tres éloignées de la manipulation*, pour arracher cette entente..."[3213] [Emphasis added.]

Although this portion of the Case Study has examined the coercion or duress faced by the Aboriginal parties, it should also be remembered that there were other coercive aspects to the JBNQA process. In particular, reference is being made here to the unilateral extinguishment of the rights of Aboriginal third parties that was purportedly carried out by the two governments concerned.[3214]

Such coercion was further compounded by the fact that the Québec National Assembly Standing Committee that was considering the draft Agreement just prior to its signing was not

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[3211] J.-L. Beaudoin, *Les Obligations*, 3ème éd. (Cowansville, Québec: Les Éditions Yvon Blais, 1989) at 137. Unofficial English translation: "*...in certain cases, the will of the contractant can have been determined by the violence of events themselves (state of necessity)*. One could not speak in this regard of violence in the traditional sense...*[I]f the co-contractant uses this state of necessity to obtain an unwarranted advantage*...it is understood that the judge, to *sanction the bad faith or immorality of such conduct*, could grant a request for reduction of obligations or for damages according to the circumstances..." [Emphasis added.]

[3212] House of Commons, *Debates*, December 14, 1976 (Opposition Leader, Joe Clark), at 2002.

[3213] *L'Avenir*, Sept-Iles, March 6, 1976. Unofficial English translation: "...it is undeniable that the provincial government as well as the federal authorities *indulged in very strong pressures, not far from manipulation*, to extract this agreement..." [Emphasis added.] Cited in N. Rouland, *Les Inuit du Nouveau-Québec et la Convention de la Baie James* (Québec: Association Inuksiutiit & Centre d'études nordiques de l'Université Laval, 1978) at 139, n. 33.

[3214] See, generally, sub-heading 11.4 *supra*.

prepared to hear the views of these third parties affected - even on the single issue of extinguishment of their fundamental rights. Nor did the Standing Committee allow the dissident Inuit to have time to study the contents of the draft Agreement (November 1975), in order that they might reappear before the Committee to present their views and concerns.[3215]

11.6 Fiduciary Responsibilities of the Federal and Québec Governments

In the case of the James Bay and Northern Québec Agreement, the trust responsibility of the federal government and of Québec was reinforced by the terms and conditions attached to the *Rupert's Land and North-Western Territory Order*[3216] and the combined operation of s. 2(d) and (e) of the *Québec Boundaries Extension Act, 1912*. The two latter sections read as follows:

> "[The territory described] shall, from and after the commencement of this Act, be added to the province of Québec, and shall, from and after the said commencement, form and be part of the said province of Québec upon the following terms and conditions and subject to the following provisions:...
>
> ...(d) That no such surrender shall be made or obtained except with the approval of the Governor in Council;
>
> (e) That *the trusteeship of the Indians in the said territory, and the management of any lands now or hereafter reserved for their use, shall remain in the Government of Canada* subject to the control of Parliament."[3217] [Emphasis added.]

From the perspective of the Aboriginal parties to the Agreement (the Crees and the Inuit), the federal government did not discharge its trust responsibility towards them. In 1977, Charlie Watt, President of the Northern Québec Inuit Association, speaking before the Standing Committee on Indian Affairs and Northern Development, described the federal involvement in the negotiations as follows:

> "*The federal government during our negotiations pretty well put itself aside every time the native people [had] difficulties*, not only related to land selection but also related to other areas that we have problems with. And this has been the case.
>
> A number of times we have met with the federal government representatives including the Minister of Indian Affairs, Warren Allmand, indicating to him that we do have problems and that *it is his responsibility as trustee to act on behalf of the Inuit people to encourage the Québec government to negotiate in good faith. This has not happened.*"[3218] [Emphasis added.]

In 1993, Sam Silverstone described the federal role during the negotiations in the following terms:

[3215] In addition, s. 6.1.1 of JBNQA allows the Québec government to designate Category I lands from areas withdrawn from selection, in the event that any dissenting community does not select such lands within a two-year period. For a similar provision in regard to Category II lands, see s. 6.2.2.

[3216] See sub-heading 6.4.1 *supra* of the Extinguishment Study.

[3217] *Québec Boundaries Extension Act, 1912*, S.C. 1912, c. 45, s. 2.

[3218] Charlie Watt, February 2, 1977, *Minutes of the Standing Committee*, No. 10 at 29.

> "*[T]he federal government did not play its role as trustee.* It really did not play the role. And one day, the history of this will be written, and it will be shown that *they were passive, and they allowed Québec to bring in Hydro-Québec, and they allowed the native parties to be put under a tremendous, tremendous amount of pressure.*[3219]

The Crees describe a similar pattern of federal inaction. Chief Billy Diamond described the federal policy of "alert neutrality" as follows: "[T]he Federal Government, our supposed fiduciary, adopted a position of 'alert neutrality' which really meant that they wanted us to settle this thing to get out of the political embarrassment it was causing..."[3220] Peter Hutchins, who has acted as a lawyer for the Crees, was blunter still:

> "They were asleep...I sat on a number of committees, and *I don't remember federal assistance or support...They were there to be the extinguisher (or so they thought).*"[3221] [Emphasis added.]

Deputy Grand Chief Romeo Saganash highlights some of the ways that both the federal and Québec governments imposed "unconscionable conditions of duress"[3222] and, therefore, abdicated their fiduciary duties:

> "The Governments of Canada and Quebec...refused to suspend construction of the massive James Bay Project pending negotiations or determination of our rights.
>
> The Governments of Canada and Quebec deliberately misinformed us as to our aboriginal status and rights.
>
> The Governments of Canada and Quebec exploited our vulnerability by making promises of social benefits including health care and education conditional on an 'exchange' for fundamental rights...
>
> The Governments of Canada and Quebec insisted on a provision that Governments hoped would prevent the Crees from opposing future mega-projects on sociological grounds. It is hard to imagine a provision in the history of relations between Aboriginal peoples and the Crown that brings more dishonour to the Crown."[3223]

Joe Clark, then Leader of the Opposition in the Parliament of Canada, condemned the federal policy of "alert neutrality" and the abdication of federal fiduciary responsibility as follows:

> "There can be no doubt about the responsibility of the government of Canada for the people who were involved in the James Bay region. *However, instead of exercising that responsibility to a people who were imperilled, the federal government abandoned its solemn legal trust and adopted, instead, a policy which they called alert neutrality.* Alert neutrality is hardly an adequate way for this or any government to carry out fundamental responsibilities to people in a field where progress will be made only if there is active trust and active co-operation instead of alert neutrality.
>
> *...we intend to protest to the extent of our ability the irresponsible way in which the government of Canada abandoned its responsibility to the native people of the James Bay*

[3219] Interview with Sam Silverstone, August 18, 1993.

[3220] Chief Billy Diamond, presentation to the Royal Commission on Aboriginal Peoples, May 28, 1993.

[3221] Interview with Peter Hutchins, August 20, 1993

[3222] Grand Council of the Crees, *Presentation to the Royal Commission on Aboriginal Peoples*, Montreal, May 28, 1993, at 41.

[3223] Id.

region."[3224] [Emphasis added.]

From the perspective of the federal government, to have taken a leading role in the negotiations would have amounted to a "conflict of interest": the negotiations were in part negotiations with the federal government. According to Warren Allmand, the Minister of Indian Affairs and Northern Development, the federal government could not "validly negotiate on behalf of the Crees with ourselves."[3225] Minister Allmand also argued that to have taken the lead in the negotiations would have been paternalistic.[3226]

Marc Lafrenière, who was a negotiator of the James Bay and Northern Québec Agreement for the federal government, admitted that the federal government did not take the lead in the negotiations. Lafrenière argued that the lead was evidently and rightly in the hands of the province of Québec, where it belonged, given that the province had to provide most of the compensation. The federal government took the lead in areas of its own responsibility (such as the *Cree-Naskapi (of Québec) Act*[3227]), but most of the areas covered by the Agreement were under provincial jurisdiction (such as hunting, fishing and land rights).[3228]

It is important to note that *the federal government could have fulfilled its fiduciary obligations without taking the leading role in the negotiations away from the aboriginal parties.* Specifically, the federal government should have conducted the negotiations in keeping strictly with the terms and conditions attached to the *Rupert's Land and North-Western Territory Order.* Two provisions are relevant here. The first is that Indian claims will be settled in accordance with equitable principles:

> "[U]pon the transference of the territories in question to the Canadian government, the claims of the Indian tribes to compensation for lands required for the purposes of settlement will be considered and settled *in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines...*"[3229] [Emphasis added.]

The second provision makes clear that it is the responsibility of the Canadian government to make adequate provision for the protection of the interests of those Indian tribes involved in the transfer:

> "upon transference of the territories in question to the Canadian Government it will be our *duty to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer...*"[3230] [Emphasis added.]

The fiduciary obligations of the federal and Québec governments may have been somewhat different, having arisen from different situations. However, it is clear that both

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[3224] House of Commons, *Debates*, December 14, 1976 (Opposition Leader, Joe Clark), at 2000.

[3225] The Honourable Warren Allmand, December 16, 1977, *Minutes of the Standing Committee*, No. 5 at 5: "Furthermore, there is the whole question of conflict of interest. If we had taken the lead in the negotiations some of the negotiations were with ourselves, with the federal government. Could we validly negotiate on behalf of the Cree with ourselves? I think that would have been open to severe criticism."

[3226] Id., at 5: "There were...several allegations that the federal government had abrogated its trustee responsibility in allowing the Indian and Inuit people to negotiate this settlement themselves. Mr. Chairman, the attitude we took, and that the Cree took, was that if you do not believe in paternalism you let the Indian people negotiate their own settlement. That is what they wanted to do. They wanted to take the lead; they wanted certain support from us but they wanted to take the lead."

[3227] *Cree-Naskapi (of Québec) Act*, S.C. 1984, c. 18.

[3228] Interview with Marc Lafrenière, September 28, 1993.

[3229] *Rupert's Land and North-Western Territory Order*, Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada, Schedule (A), R.S.C. 1985, App. II, No. 9, 8 at 8-9.

[3230] *Rupert's Land and North-Western Territory Order*, Schedule (B), R.S.C. 1985, App. II, No. 9, 8 at 8-9.

governments had fiduciary responsibilities to all of the Aboriginal peoples concerned (including Aboriginal third parties to JBNQA).

Based on events and circumstances described in this Case Study, neither the federal nor Québec government could validly argue that inherent conflicts of interest prevented them from taking a more principled role. Their respective fiduciary roles were set out in constitutional instruments. Therefore, these governments' own interests had to be defined in a manner compatible with their constitutional responsibilities to all Aboriginal peoples concerned.

In this context, it is clear that conduct by the Canadian government and Parliament that in any way failed to "make adequate protection of the Indian tribes whose interests and well-being are involved in the transfer" of the northern lands to Canada would be inconsistent with the *Rupert's Land and North-Western Territory Order*. While it does not appear to be constitutional to have delegated a duty to Québec to obtain surrenders from the Aboriginal peoples affected, the fact that the Québec government and National Assembly accepted the terms of the *Quebec Boundaries Extension Act, 1912* signifies that Québec also accepted to act as a fiduciary towards Aboriginal peoples.

Federal and Québec government actions that failed to meet the requisite standards of a fiduciary include all of the forms of coercion or duress that are described in this Case Study; the unilateral extinguishment of rights of Aboriginal third parties that was purportedly carried out; and the treatment of the dissident Inuit who vehemently opposed the notion of surrender and extinguishment of their rights.

Equally important, it would be difficult to conclude that the "blanket" surrender and extinguishment of the rights of the Crees and Inuit were equitably or validly secured by the two governments. Blanket extinguishment did not appear to be in the interests of the Aboriginal peoples and is inconsistent with the equitable principles called for in the *Rupert's Land and North-Western Territory Order* and the *Royal Proclamation of 1763*.

The fact that blanket surrender and extinguishment of territorial rights was imposed on the Aboriginal parties as a pre-condition to any agreement only reinforces the draconian nature of the actions taken. In this regard, the desperate and vulnerable situation of the Crees and Inuit were exploited in an unjustifiable and, arguably, unconstitutional manner.

Since the Parliament of Canada has purported to extinguish the rights in and to the Territory of all Indians and Inuit, and has also "declared valid"[3231] the JBNQA, it could be argued that any duress or other illegalities that may have occurred are now deprived of a remedy. While the principle of parliamentary supremacy might prevail under certain situations, such a conclusion does not appear to be the case in relation to the JBNQA.

In the view of this Case Study, it is reasonable to conclude that there are serious grounds for constitutional challenges pertaining to the James Bay and Northern Quebec Agreement. If the actions of Parliament are determined to be contrary to the constitutional terms and conditions of the *Rupert's Land and North-Western Territory Order*, or if these actions cannot be justified based on Parliament's fiduciary obligations, then the purported legislative extinguishment of rights and declaring valid the JBNQA would not retain their validity. Furthermore, human rights considerations[3232] would only reinforce this conclusion of this Case Study.

[3231] See discussion under sub-heading 1.4 *supra* of the Extinguishment Study.

[3232] For a discussion of the relevant human rights aspects, see generally sub-heading 8.2 *supra*.

Conclusions and Recommendations

If the James Bay and Northern Québec Agreement is a modern treaty, then the process of modern treaty-making in relation to Aboriginal peoples requires some fundamental changes. The events and negotiations leading up to the Agreement are characterized by coercion, duress, disregard for the rights of Aboriginal third parties, and the abdication of the federal and provincial trust responsibilities. If there are circumstances under which Aboriginal peoples can freely consent to surrender or extinguish their fundamental rights, such circumstances manifestly did not prevail in the events surrounding the negotiation and signature of the James Bay and Northern Québec Agreement.

The conditions under which the James Bay and Northern Québec Agreement was negotiated and signed were such that the Aboriginal parties effectively had no choice but to sign the Agreement. It is thus not surprising that there was a general feeling among the Aboriginal parties to the Agreement at the time that, considering the pressures under which the Agreement was negotiated and ultimately signed, the Agreement provided the Aboriginal parties with a measure of hope. Chief Peter Gull's statement to the Standing Committee on Indian Affairs and Northern Development in 1977 expresses this feeling of hope for the future:

> "...one can see what the Waswanipi Band has gained from the Agreement and what it will gain in the future. *Here was a...band that, like other bands in Canada, [had] nothing, but with the signing of the Agreement it may change*, and we have started to develop a community of our own which we can be proud of."[3233] [Emphasis added.]

Similarly, Charlie Watt, President of the N.Q.I.A., spoke of trying to make the best of the Agreement, since he and other Inuit leaders signed it and wish to make it work:

> "The Northern Quebec Inuit Association has a responsibility to protect the agreement and to make sure that the agreement is properly legislated.
>
> *We feel it is our obligation, since we have signed the agreement, to make the agreement work*, to make it workable for the benefit of our people, keeping in mind that although the agreement was not fully satisfactory to us, we are willing to live with it and we are prepared to do our part to make sure that the contents of the agreement and the spirit of the agreement are carried out."[3234] [Emphasis added.]

It is clear that Cree and Inuit leaders have made numerous other optimistic statements concerning the Agreement over a number of years, since the signing of the JBNQA. However, this does not change the events of the negotiations or the policies and practices that they and other Aboriginal peoples were subjected to in the process and subsequently. Both the "hopes and dreams" of the peoples affected and the sordid use of the extinguishment provisions are described by a Cree representative in the following statement to the Royal Commission on Aboriginal Peoples in May 1993:

> "When the Agreement was signed, the Crees hoped that it would serve as the basis of an honourable relationship. Our leaders put the process of negotiations behind them. *Their speeches show how the Crees invested their hopes and dreams for a better future in the spirit and intent of the Agreement* - the protection and strengthening of the Cree way of life.
>
> We now understand that the James Bay and Northern Quebec Agreement serves more to deny us our aboriginal and fundamental human rights than to facilitate their exercise. It is increasingly invoked to deny us our aspirations and our rightful place in a Canadian federation. *The purported surrenders and extinguishments of the Agreement are now being asserted against the Crees to imply extinguishment of fundamental rights that were*

[3233] Chief Peter Gull, January 27, 1977, *Minutes of the Standing Committee*, No. 8 at 8.

[3234] Charlie Watt, President, N.Q.I.A., February 3, 1977, *Minutes of the Standing Committee*, No. 9 at 10.

never part of the negotiations."[3235] [Emphasis added.]

While it is important to record the optimism that Cree and Inuit leaders felt at the time of the approval of the Agreement, this Case Study readily acknowledges that there were numerous dissenting voices during the same period. Moreover, it is clear that the concept of extinguishment is not acceptable to any of the Aboriginal peoples affected. For example, Makivik Corporation[3236] has formally indicated that extinguishment is "abhorrent to native peoples and inherently unacceptable to them"[3237] and that "[t]he restoration of extinguished aboriginal title is essential..".[3238] The Grand Council of the Crees refers to federal extinguishment policy as "fundamentally racist, unacceptable...illegal" and "an anachronistic antique from the days of colonialism".[3239]

In order to achieve positive, durable relationships between Aboriginal and non-Aboriginal peoples that are of benefit to all parties concerned, it is strongly recommended that the notion of extinguishment be repudiated and abandoned. In particular, corrective measures should be initiated by both the federal government and Québec, in regard to all those Aboriginal peoples who were affected by purported extinguishments in connection with the James Bay and Northern Quebec Agreement.

Serious injustices have occurred to the Crees and Inuit, who were given no choice during the negotiations and were in many ways coerced into "agreeing" to such notions as "surrender" and "extinguishment". In this context, the voices and positions of the dissident Inuit should be given full consideration. Further, it was duplicitous and inconsistent with the conduct required of a fiduciary for the federal and Québec governments to deny, both prior to and during the JBNQA negotiations, that the Aboriginal peoples concerned had legal rights to their traditional lands and resources or that non-Aboriginal governments had important constitutional obligations in this respect.

Equally important, there is no justification for the unilateral and callous treatment of the rights of Aboriginal third parties. It is a matter of honour and respect for human rights that the Crown in right of Canada and of Québec take appropriate measures, in conjunction with the Aboriginal third parties affected, to ensure the full recognition of their rights in and to land. Also, as this Case Study indicates, it was discriminatory for the federal and Québec governments to provide safeguards for the rights and interests of non-Aboriginal third parties and, at the same time, insist that the land rights of Aboriginal third parties be extinguished without their consent and despite their protests.

Efforts to find acceptable alternatives[3240] for all these situations should be initiated as soon as possible - with a renewed spirit of cooperation and determination. Such an approach could help forge a path towards additional fundamental reforms that are clearly required in relation to JBNQA, in order to conform with existing and emerging international and national standards. In addition, Aboriginal third parties would then be more in a position to negotiate cooperative arrangements with non-Aboriginal governments based on equality of peoples, co-existence and mutual respect.

[3235] Deputy Grand Chief Romeo Saganash, Grand Council of the Crees, *Presentation to the Royal Commission on Aboriginal Peoples*, Montreal, May 28, 1993, at 41.

[3236] Makivik is the successor to N.Q.I.A. as the Inuit "Native party" under JBNQA.

[3237] See Indian and Northern Affairs Canada, *James Bay and Northern Québec Agreement Implementation Review* (Ottawa: Minister of Indian Affairs, February 1982), at 101

[3238] Makivik Corporation, *Submission from Makivik Corporation to the Task Force to Review Comprehensive Claims* (Makivik, October 1985), at 41.

[3239] Grand Council of the Crees, *Presentation to the Royal Commission on Aboriginal Peoples*, Montreal, May 28, 1993, at 20.

[3240] For discussion of a proposed alternative to extinguishment, see sub-heading 10.2 *supra* of the Extinguishment Study.

Annex I: Interviewees for JBNQA Case Study

The James Bay and Northern Québec Agreement Case Study included interviews with many people who were either involved in the JBNQA negotiations, or who were in a position to comment on the subsequent effects of the Agreement. The authors of this Report would like to thank all of these people for their contributions to the JBNQA Case Study. We list here the people who were interviewed, their role in the JBNQA process, and the capacity in which they spoke.

Armand Couture: Mr. Couture is président et chef de l'Exploitation, Hydro-Québec.

Georges Filotas and *Yves Michaud*: Mr. Filotas and Mr. Michaud have been involved with the Inuit dissident movement (Inuit Tungavingat Nunami) from its beginnings. They work for the Fédération des Coopératives du Nouveau Québec.

Peter Hutchins: Mr. Hutchins is currently a partner at the law firm of Hutchins, Soroka & Dionne. Mr. Hutchins was involved in the JBNQA negotiations, as a lawyer acting for the Crees, from the beginning of the process. He spoke in his personal capacity.

Randy Kapashesit: Mr. Kapashesit is Chief of the MoCreebec First Nation in Moose Factory, Ontario.

Jacques Kurtness: Mr. Kurtness is currently chief negotiator for the Conseil des Atikamekw et des Montagnais. In 1972, Mr. Kurtness was working for the Association of Québec Indians.

Marc Lafrenière: At the time of the interview, Mr. Lafrenière was Assistant Secretary for Aboriginal Affairs in the Privy Council Office. Mr. Lafrenière was an assistant negotiator on the federal negotiating team during the negotiation of the James Bay Agreement. He spoke in his personal capacity. Specifically, his statements were not made on behalf of the Department of Indian Affairs, nor on behalf of the Government of Canada.

Jean-Maurice Matchewan: Chief Matchewan is Chief of the Barrière Lake Algonkins, in Québec.

Robbie Matthew: Mr. Matthew is currently a member of the Cree Council of Elders. Mr. Matthew was a member of the Council of the Community of Chisasibi at the time of the JBNQA negotiations.

Michael McGoldrick: Mr. McGoldrick works for Senator Charlie Watt and for Makivik Corporation.

Ted Moses: Ambassador Moses is currently Ambassador of the James Bay Cree Nation to the United Nations. Ambassador Moses was the chief negotiator for the Crees during the JBNQA negotiating process.

Roderick Pachano: Mr. Pachano was one of the assistant negotiators for the Crees during the JBNQA negotiating process.

Sam Silverstone: Mr. Silverstone was a lawyer and negotiator for the Northern Québec Inuit Association. He spoke in his personal capacity.

Harry Tulugak and *Johnny Uitangak*: Mr. Tulugak and Mr. Uitangak were involved in the Inuit dissident movement (Inuit Tungavingat Nunami) in Povungnituk at the time of the JBNQA negotiations and subsequently.

The following people declined to be interviewed, or did not answer repeated requests[3241] for an interview: John Ciaccia, then Special Representative for Québec Premier Robert Bourassa; Chief Billy Diamond, then Grand Chief of the Grand Council of the Crees and Cree signatory to JBNQA; John Mameamskum, then Chief Negotiator for the Naskapis in Québec; Zebedee Nungak, then executive member of the Northern Quebec Inuit Association (NQIA) and Inuit signatory of JBNQA; James O'Reilly, then general legal counsel for the Grand Council of the Crees; John Tait, then Assistant Deputy Minister (Indian and Northern Affairs, Canada); Charlie Watt, then President of NQIA and Inuit signatory of JBNQA.

[3241] In all cases, repeated attempts for an interview were made by Chris Tennant. As many of the individuals concerned were not able to be reached directly, requests were sometimes made to other persons who work for these individuals and are in close contact with them.

Annex II: Chronology 1971 - 1978[3242]

1971

Apr. 30	Premier Bourassa announces the James Bay Hydro-electric project.
May 12	A lawyer for the Crees sends a letter to the Minister of Indian and Northern Affairs, asking that the question of Aboriginal land rights be settled before the project goes ahead.
July	A federal-provincial study group on the environmental impact of the project is formed, headed by André Marsan.
July	Crees hold first meeting at Mistassini to discuss the project.
Jul. 14	The Assemblée nationale of Québec adopts Bill 50[3243] creating the James Bay Development Corporation.
Dec. 20	The James Bay Energy Corporation, a subsidiary of Hydro-Québec, is incorporated.

1972

Jan. 20	The Québec minister for natural resources rejects the demand of the Indians of Québec Association for 5 billion dollars in compensation for the loss of hunting territories in the James Bay region as the basis for negotiations.
Feb. 2	The federal-provincial study group on the environmental impact of the project releases its report. The report finds a risk of a substantial impact on Aboriginal peoples.
Apr. 21	The Crees meet in Fort George. Chief Billy Diamond proposes to take judicial action to stop the project, and the Indians of Québec Association is given the mandate to begin the court action.
May 5	The Crees and the Inuit accuse the provincial government of bad faith in the conduct of negotiations, and commence an action against the Attorney-General of Québec, the James Bay Development Corporation, and Hydro-Québec.
May 8	The Minister of Indian and Northern Affairs announces that the federal government is providing funds to assist the court action, and for research.
May 25	Premier Bourassa meets with the Minister for Indian and Northern Affairs to discuss the effects of the James Bay project on Aboriginal people.
Oct. 23	The provincial government announces that there will be no modifications to the project, as the Crees have demanded.
Oct. 25	The Cree and Inuit leadership meet with Premier Bourassa.
Oct. 26	The Indians of Québec Association announces that it will seek an injunction from the Québec Superior Court to stop work on the James Bay project.
Dec. 7	The Crees and the Inuit file for an interlocutory injunction to stop the project.
Dec. 8	Judge Malouf of the Québec Superior Court agrees to hear the case.
Dec. 12	Hearings in the case begin. The hearings are to last 78 days, including 167 witnesses, among whom nearly 100 are Cree and Inuit hunters.

[3242] This chronology relies substantially on J.-G. Deschênes & S. Vincent, "La Convention dans la longue marche des autochtones canadiens vers leur autonomie [-] Eléments de chronologie 1967 - 1987" in S. Vincent & G. Bowers, (eds), *Baie James et Nord québécois: dix ans après/James Bay and Northern Québec: Ten Years After* (Montréal: Recherches amérindiennes au Québec, 1985), at 215-238; and N. Rouland, *Les Inuit du Nouveau-Quebec et la convention de la Baie James* (Québec: Association Inuksiutiit Katimajiit and Centre d'études nordiques, Université Laval, 1978), at 210-213.

[3243] *James Bay Region Development Act* (Bill 50), R.S.Q., c. D-8.

1973

January	Judgment rendered by the Supreme Court of Canada in *Calder*.
May 24	Hearings end on the motion for an interlocutory injunction.
Nov. 15	Judge Malouf grants the interlocutory injunction.
Nov. 19	Premier Bourassa announces his decision to negotiate an agreement with the Crees, the Inuit and the Indians of Québec Association. John Ciaccia will be the negotiator for the province.
Nov. 22	The Québec Court of Appeal suspends the Malouf judgment on the basis of the "balance of convenience".
Dec. 10	The Cree chiefs, meeting in Val d'Or, give the Indians of Québec Association the mandate to carry out negotiations.
Dec. 21	A motion by the Crees for leave to appeal the suspension of the Malouf judgment to the Supreme Court of Canada is denied.

1974

Jan. 1	The Crees and the Inuit seek permission from the Court of Appeal to continue the original case for a permanent injunction.
Feb. 3	Judge Crête refuses to proceed with the claim for a permanent injunction until the Court of Appeal has rendered a final decision in the Malouf case.
February	Negotiations begin.
March	The Indians of Québec Association carries out consultations in all the affected communities about the negotiations.
March	The Northern Québec Inuit Association travels to all the Inuit communities to obtain signatures to a document giving the Northern Québec Inuit Association a mandate to negotiate for the Inuit.
April	The Cree chiefs meet in Fort George. Dissatisfied with the Indians of Québec Association's conduct of the negotiations, they withdraw their mandate from the Association. A Cree negotiating team is formed.
Sep. 5	The Grand Council of the Crees (of Québec) is created.
Oct. 10	Final negotiating positions are exchanged between the Crees and the Province of Québec.
October	The Cree leadership consults with the Cree communities.
Nov. 15	The Agreement in Principle is signed. The Indians of Québec Association denounces the Agreement in a press conference.
Nov. 21	The Québec Court of Appeal reverses the Malouf decision.

1975

Feb. 13	The Supreme Court of Canada grants leave to appeal from the Court of Appeal's reversal of the Malouf decision. The Crees and the Inuit agree to proceed with negotiations and not to appeal the decision of the Court of Appeal.
August	A general assembly of the Crees decides to proceed with the negotiations; the Grand Council of the Crees (of Québec) is given the mandate to conduct the negotiations.
Sep. 29	The communities of Povungnituk, Ivujivik and Salluit withdraw their mandates given to the Northern Québec Inuit Association. The Inuit dissident movement (Inuit Tungavingat Nunami) is born.
Oct. 10	Inuit Tungavingat Nunami and the Indians of Québec Association seek an injunction in Québec Superior Court to stop the imminent James Bay and Northern Québec Agreement.
Oct. 15	The members of the Cree band councils arrive in Montréal for the final stage of negotiations.
Nov. 10	The Superior Court refuses the motion by Inuit Tungavingat Nunami and the Indians of Québec Association for an interlocutory injunction to stop the signature of the James Bay and Northern Québec Agreement.

Nov. 11	The James Bay and Northern Québec Agreement is signed.
Dec. 15	The Cree leadership takes the Agreement to the Cree communities for ratification. With 24% participation, the Agreement is ratified by 922 votes to 1.

1976

February	The Agreement is ratified by the Inuit. With 66.5% participation, 95.8% of voters vote in favour of the Agreement. Only 15% of the dissidents participate in the vote.

1977

Feb. 2	The Inuit Tungavingat Nunami asks the Québec Minister of Natural Resources to re-open the James Bay question. The Minister refuses.
Apr. 21	The Government of Québec agrees in writing to negotiate with the Naskapi. The Government of Canada, the Grand Council of the Crees (of Québec) and the Northern Québec Inuit Association also agree to negotiate.
Oct. 31	Entry into force of the *James Bay and Northern Québec Native Claims Settlement Act*,[3244] and *An Act approving the Agreement concerning James Bay and Northern Québec*,[3245] the enabling legislation for the James Bay and Northern Québec Agreement.

1978

Jan. 12	The Northeastern Québec Agreement is signed with the Naskapis.
Jan. 31	Complementary Agreement No. 1 to the James Bay and Northern Québec Agreement is signed to make possible the Northeastern Québec Agreement.

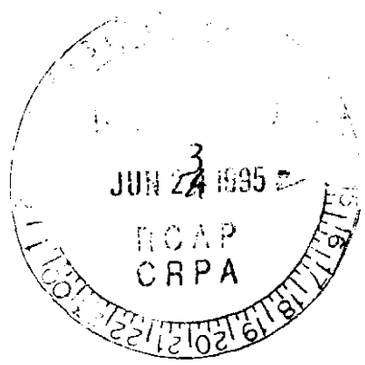
[3244] S.C. 1976-77, c. 32.

[3245] S.Q. 1976, c. 46.

EXTINGUISHMENT OF THE RIGHTS OF ABORIGINAL PEOPLES: PROBLEMS AND ALTERNATIVES

A STUDY PREPARED FOR THE ROYAL COMMISSION ON ABORIGINAL PEOPLES

VOLUME 1



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