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# Aboriginal Rights in Canada and the United States

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# ABORIGINAL RIGHTS IN CANADA AND THE UNITED STATES

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> They made us many promises, more than I can remember, but they never kept but one: they promised to take our land, and they took it.
>
> Anonymous Indian.[1]

## I INTRODUCTION

The controversy following the Canadian government's issuance of The White Paper on Indian Affairs,[2] combined with the universally rising consciousness and militancy amongst oppressed people,[3] has once again focused attention upon the seemingly eternal and unabating plight of native peoples in North America.[4]

In Canada, much of the rhetoric has concerned itself with the interpretation and practical viability of aboriginal rights.[5] "Aboriginal rights"[6] refers to those property rights which inure to native people (Indians and Eskimos) by virtue of their occupation upon certain lands from time immemorial. The recognition and enforcement of such rights have been matters of hot dispute and protracted litigation both in Canada and the United States.[7] While it

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[1] Newsweek, February 1, 1971 at 69, *rev'g* D. Brown, *Bury My Heart at Wounded Knee* (New York: Holt, Rinehart and Winston, 1970).

[2] Department of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy* (1969).

[3] The most spectacular example of Indian militancy has been the occupation of Alcatraz in California. Perusal of the monthly publication Akwesasne Notes (Rooseveltown, New York) which consists of reprinted news stories about native peoples in North and South America, will reveal that Alcatraz is but one of many similarly assertive acts.

[4] Several notable books have recently been published in Canada and the United States which concern themselves with the so-called "Indian-problem". *See, e.g.,* Indian-Eskimo Assoc. of Canada, *Native Rights in Canada* (Toronto: 1970); H. Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: M. G. Hurtig Ltd., 1969); *Our Brothers Keeper: The Indian in White America,* E. Cahn (ed.), (Washington D.C.: New Community Press, 1969); V. Deloria, Jr., *Custer Died For Your Sins* (London: Collier-Macmillan Ltd., 1969).

[5] Compare remarks of Prime Minister Trudeau at an August 8, 1969 speech in Vancouver, British Columbia, reprinted in *Native Rights in Canada, supra* note 4, at Appendix 8, with views of H. Cardinal, *supra* note 4 at 29;

[6] Throughout this article, the term "aboriginal rights" is used interchangeably with the terms "original Indian title", "Indian title" and "aboriginal title".

[7] *See, e.g., Calder* v. *Attorney-General of British Columbia* (1971), 13 D.L.R. (3d) 64, (1970), 74 W.W.R. 481 (B.C.C.A.); *United States* v. *Alcea Band of Tillamooks* (1946), 329 U.S. 40. Unlike Canada, the United States has made the political decision to compensate for the loss of aboriginal rights in appropriate cases. The enabling legislation is the Indian Claims Comm'n Act, 25 U.S.C. §70 (1964). See *Otoe and Missouria Tribe of Indians* v. *United States,* 131 F. Supp. 265 (Ct. Cl. 1955), cert. denied, (1955), 350 U.S. 848.

may be too much to hope that Canadian courts will order compensation for the infringement of aboriginal title without a legislative direction to that effect,[8] judicial cognizance of aboriginal title, a considered study of its qualities, and a frank recognition that government has failed to live up to its legal and moral obligations, *is* a real possibility and would undoubtedly hasten a political solution of this unhappy problem.[9] It is thus suggested that while a favorable outcome for native claims may ultimately be determined by the legislature, aggressive litigation should by no means be foreclosed as a method of attaining recognition of aboriginal rights. Only a most insensitive political leadership could refuse to rectify grievances in the face of judicial declarations that such grievances are just and outstanding.

It is assumed that the issue of aboriginal rights will be increasingly litigated in Canada.[10] While much of the aboriginal land question in Canada has been peacefully settled through treaties with the Indians, few if any treaties have been concluded in British Columbia, Quebec, the Yukon and much of the Northwest Territories.[11] Whatever land rights native people have in these latter areas will depend upon the treatment accorded the theory of aboriginal rights in the courts and legislatures. A study of the jurisprudence surrounding the question of native rights therefore seems both timely and appropriate. Moreover, unlike other areas of Canadian law which have developed quite independently of American influence, the peculiarities of the law of aboriginal rights will undoubtedly cause a certain reference to American case law in the future. There are several reasons for this. The histories of Canada and the United States are substantially entwined during the period in which the doctrine of aboriginal rights was being developed.[12] Further, the pattern of dealing with native peoples has, in many respects, been quite similar in both countries.[13] Most important, the Canadian and American jurisprudence of aboriginal rights has developed along the same lines, and Canadian courts have frequently referred to American decisions

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[8] Such was the development of the law in the United States. See *Tee-Hit-Ton Indians* v. *United States* (1954), 348 U.S. 272, and the approval of that decision in *Calder* v. *Attorney-General of British Columbia, supra* note 7 at 79. The relevant American legislation directing compensation appears at 25 U.S.C. §70a (1964).

[9] *See, e.g., St. Catharines Milling and Lumber Co.* v. *The Queen* (1886), 13 S.C.R. 577, 602 (Strong, J., dissenting), *aff'd* (1888), 14 App. Cas. 46; *Regina* v. *White and Bob* (1964), 52 W.W.R. 193, 205 (B.C.C.A.) (Norris, J.A.). See also the discussion of the breach of faith by the Government of Canada relative to Indian hunting rights in *Regina* v. *Sikyea* (1964), 43 D.L.R. (2d) 150, 158 (N.W.T.C.A.), *aff'd* [1964] S.C.R. 642.

[10] The most recent case is *Calder* v. *Attorney-General of British Columbia, supra* note 7. In describing a series of consultation meetings between the Indian Affairs branch and native peoples, Harold Cardinal states: "Indians everywhere made it obvious that they were interested in treaty rights, aboriginal rights and settlement of land claims first and foremost." H. Cardinal, *supra* note 4 at 121. In view of the apparent refusal of Prime Minister Trudeau to recognize aboriginal rights, further judicial clashes seem inevitable. See Mr. Trudeau's "Vancouver Speech" of August 8, 1969 in *Native Rights in Canada, supra* note 4 at Appendix 8.

[11] See generally McInnes, *Indian Treaties and Related Disputes* (1969), 27 U. of T.F.L. Rev. 52.

[12] The effect of British colonial policies on the law of aboriginal rights in Canada and the United States has been profound. See discussion at notes 146 to 182 and accompanying text, *infra.*

[13] In both Canada and the United States for example, land settlements with the Indians have been accomplished largely by treaties and the creation of Indian reserves.

when dealing with this intricate subject.[14] A comparative study is therefore attempted.

The law of aboriginal rights is really a composite of several doctrines, each with its own slowly evolving theories and dogma. Each of these doctrines in turn must be separately understood before we can comprehend the whole. The various doctrines may be classified as: a) origins and recognition of aboriginal rights; b) content of the right; c) extinguishment of aboriginal title; d) compensation in cases of extinguishment.

The proliferation of American case law on this subject has resulted in greater judicial scrutiny of each of these classifications in the United States than in Canada, where the litigation has been limited. It will therefore be both logical and convenient to begin our examination with the American jurisprudence.

## II ABORIGINAL RIGHTS IN THE UNITED STATES

### *A. Origins and Recognition of Aboriginal Rights.*

The American law of aboriginal rights is derived from several early decisions in the United States Supreme Court. Two cases in particular, *Johnson* v. *McIntosh*[15] and *Worcester* v. *Georgia*,[16] provide the theoretical foundations for the law of original Indian title. While other aspects of the law of aboriginal title have been elaborated upon by later courts, Chief Justice Marshall's rulings in these two cases relative to the origins and recognition of aboriginal rights, have stood virtually unchallenged.

In *Johnson* v. *McIntosh* plaintiffs brought an action in ejectment to regain control over what they alleged was their property. Plaintiffs had received the property under two grants from the chiefs of certain Indian tribes. The same lands were subsequently resold by the same Indians to the United States, which in turn conveyed the land to the defendant McIntosh. The question in the case was "whether (plaintiff's) title can be recognized in the courts of the United States?"[17] In concluding that it cannot, the Court was obliged to inquire into the character of Indian title and the ability of Indians to convey their aboriginal lands to private individuals.

*Worcester* v. *Georgia* arose out of a criminal action by the State of Georgia against Samuel A. Worcester. The basis of the charge was that Worcester, a white missionary, was " 'residing within the limits of the Cherokee nation, without a license,' and 'without having taken the oath to support and defend the constitution and laws of the state of Georgia',"[18] all of which constituted a high misdemeanor under state law. Defendant

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[14] *See, e.g., Calder* v. *Attorney-General of British Columbia, supra* note 7; *Regina* v. *White and Bob, supra* note 9.

[15] (1823), 21 U.S. (8 Wheat.) 240.

[16] (1832), 31 U.S. (6 Pet.) 350.

[17] 21 U.S. at 253.

[18] 31 U.S. at 365.

averred that the law under which he was charged was violative of several treaties entered into by the United States and the Cherokee nation. He urged that these treaties acknowledged the sovereignty of the Cherokees and the freedom to govern themselves without interference by the states. As such, defendant claimed that the law under which he was charged was unconstitutional. The Supreme Court supported defendant's plea and declared the law in question to be "repugnant to the constitution, treaties and laws of the United States"[19] and therefore void. In the course of its decision, the Court dealt with such important issues as the sovereignty of the Indian nations and the origin and nature of their property rights.

In both *Johnson* v. *McIntosh* and *Worcester* v. *Georgia,* Chief Justice Marshall formulated his conclusions respecting aboriginal title by an historical analysis of the discovery and explorations of the American continent and by relying upon established principles and practices of the law of nations.[20]

The Chief Justice thus stated:

> The great maritime powers of Europe discovered and visited different parts of this continent, at nearly the same time. The object was too immense for any one of them to grasp the whole; and the claimants were too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, *suggested by the actual state of things,* was, 'that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.' 8 Wheat. 573.[21] This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle, which shut out the right of competition among those who had agreed to it; *not one which could annul the previous rights of those who had not agreed to it.* It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.[22]
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> Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The right thus acquired being exclusive, no other power could interpose between them.
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> In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were, necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent

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[19] *Id.* at 381.

[20] "[W]e must recognize that our Indian law originated, and can still be most clearly grasped, as a branch of international law, and that in the field of international law the basic concepts of modern doctrine were all hammered out by the Spanish theological jurists of the sixteenth and seventeenth centuries, most notably by the author of the lectures De Indis, Francisco do Vitoria.
While Vitoria is not directly cited in any of the early opinions of the United States Supreme Court on Indian cases, these opinions frequently refer to statements by Grotius and Vattel that are either copied or adapted from the words of Vitoria. It is thus clear that the tradition of legal teaching carried Vitoria's theories on Indian rights to the judges and attorneys who formulated our legal doctrine in this field." Cohen, *The Spanish Origins of Indian Rights in the Law of the United States* (1942), 31 Geo. L.J. 1, 17. See also Cohen, *Original Indian Title* (1947), 32 Minn. L. Rev. 28, 43-45; *Native Rights in Canada, supra* note 4 at 14-18.

[21] The citation is to *Johnson* v. *McIntosh.*

[22] *Worcester* v. *Georgia,* (1832), 31 U.S. (6 Pet.) 350, 369 (emphasis added).

> nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever they please, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.[23]

Marshall's theory was responsive to the competing interests of those European nations which were avariciously attempting to establish control over a vast and unknown continent inhabited by a fiercely independent native populous. Of necessity, the formulation was both novel and suited to the peculiar circumstances of the day.[24]

One thing seems patently obvious from Marshall's analysis. Juridicial recognition of aboriginal title was based upon the practice of the Europeans in respecting the Indian right of occupancy and on the principles of international law. The European settlers (and their courts), perhaps already a little embarrassed at their grandiose claims at having "discovered" America,[25] clearly did not take the even more inflated view that Indian title must somehow receive executive or legislative "recognizance" before it could be admitted to exist.[26]

Marshall's explanation of the origin of aboriginal title undoubtedly represents the least controverted aspect of the American law of aboriginal rights.[27] The Chief Justice's pronouncements upon the nature and content of aboriginal claims however *have* undergone substantial interpretation by subsequent courts. Nevertheless, the fundamental character of Marshall's propositions relative to the nature of original title *has* persevered. As we shall see, this may be more a depressing commentary upon the social attitudes of the members of the judiciary, or at best upon the rigidities of the common law system of precedent, than a cause for celebration at the foresight and wisdom of the great Chief Justice.

### *B. The Content of an Aboriginal Claim*

1. Marshall's Theories. In *Johnson* v. *McIntosh* and *Worcester* v. *Georgia* Chief Justice Marshall asserted that an aboriginal claim was a legally recognized right to occupy those lands held by Indians from time immemorial. On discovery, the legal title or fee to the newly claimed land went

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[23] *Johnson* v. *McIntosh,* (1823), 21 U.S. (8 Wheat.) 240, 253-54.

[24] "As a concept (aboriginal rights) seems to have developed in the context of colonial dealings in North America. The new world and the particular character of its inhabitants were treated as a novel situation." *Native Rights in Canada, supra* note 4 at 14.

[25] "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 inhabitans of the other, or over the lands they occupied; or that the discovery of either, by the other, should give the discoverer rights in the country discovered, which annulled the pre-existing right of its ancient possessors." *Worcester* v. *Georgia,* 31 U.S. at 368.

[26] In this respect and in some tribunals, the law seems to have regressed since the early nineteenth century. See *Calder* v. *Attorney-General of British Columbia, supra* note 7.

[27] But see *id.*

to the State, subject to this aboriginal right of occupancy.[28] The Indians' property right was further limited in that alienation could be made solely to the State or Crown.[29] The Indian title could be destroyed (extinguished) by either conquest (and cession) or by purchase. While the Court stated that the Indians had a "legal and just" claim to their lands, the decisions had the obvious effect of severely limiting the strength of that claim.

Marshall readily conceded that his restrictive interpretation of aboriginal title "may be opposed to natural right, and to the usages of civilized nations",[30] but justified the theory on the basis of conditions and circumstance. Marshall reasoned that the American Indian was savage and warlike. As such, the normal principles of international law whereby property rights in the acquired nation are respected, simply could not apply. Said the Chief Justice:

> Although we do not mean to engage in the defence of those principles which Europeans have applied to Indian title, they may, we think, find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them.[31]

To have fully respected Indian property rights would mean the country would have remained an uninhabitable wilderness reasoned Marshall. The discover-

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[28] It is important to note that Marshall's theories were not wholly supported by precedent and practice. In *Fletcher* v. *Peck* (1810), 10 U.S. (6 Cranch) 48, the Chief Justice rather hesitatingly laid the groundwork for his later holdings when he stated: "The majority of the court is of the opinion, that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seisen in fee on the part of the state (of Georgia). *Id.* at 79. In his dissenting opinion, Mr. Justice Johnson gave strong indication that he viewed Indian title as being absolute. *Id.* at 80. Francis de Vitoria, the first theorist of Indian land rights, took a far more generous view of Indian title than did Marshall: "Vitoria asserted that the Indians were the true owners of the land both from the public and private point of view ... Spain had no claim to the land through discovery he said, because that notion only applied to unoccupied lands." *Native Rights in Canada, supra* note 4 at 14-15. In addition, two of the European nations involved in the exploration and settlement of North America made no assertion of title by discovery. "The Dutch recognized aboriginal title in the land from the beginning of their activities ... The British claimed rights by prior discovery and the Spanish claimed rights by the papal grant. The Dutch and the Swedish based their claims on purchase. *Id.* at 52, citing A. W. Trelease, *Indian Affairs in Colonial New York — the 17th Century* (Cornell University Press, 1960) 45. *Id.* at 54, n.6. Finally, the Northwest Ordinance of 1787, 1 Stat. 50 (1789), guarantees the Indians that their lands will never be taken without their consent and gives no indication of the limited title which Chief Justice Marshall subsequently ascribed to aboriginal rights.

[29] See discussion at notes 22-23 and accompanying text, *supra.*

[30] *Johnson* v. *McIntosh,* 21 U.S. at 261. "The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule that the conquered shall not be wantonly oppressed ... Most usually, they are incorporated with the victorious nation, and become subjects or citizens of the government with which they are connected ... Where this incorporation is practicable, humanity demands, and a wise policy requires, *that the rights of the conquered to property should remain unimpaired. Id.* at 260 (emphasis added). "It is a fundamental principle of international law that acquired rights of foreign nationals must be respected. In the case of State succession this means that the change of sovereignty works no effect upon such rights." 1 D.P. O'Connell, *International Law* (London: Stevens and Sons Ltd., 1965) 436. O'Connell defines acquired rights as comprehending any "legal interest", including "real and personal estate of all kinds." *Id.* at 436-37. See also M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (New York: Negro Universities Press, 1969) 45-47, 337-38; Article 17 (2) of The Universal Declaration of Human Rights provides, "No one shall be arbitrarily deprived of his property." United Nations, Office of Public Information (1948).

[31] *Johnson* v. *McIntosh,* 21 U.S. at 260.

ing nations either had to claim the fee in themselves and enforce their claims by power or purchase, or else abandon their quest for North America. By thus asserting the fee, the various sovereignties could easily parcel out the land to white settlers once the Indians had been removed.[32]

Despite the fact that the Chief Justice obviously had some qualms about this peculiar theory of Indian title, he felt compelled to enforce it. Said Marshall:

> We will not enter into the controversy, whether agriculturalists, merchants and manufacturers, have a right, on abstract principles, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has been successfully asserted.[33]

Even assuming the correctness of Marshall's proposition that a restricted Indian title was necessary for the orderly settlement of North America, it seems utterly fantastic that contemporary courts continue to view aboriginal title in the same way that the United States Supreme Court did in 1823. Marshall carefully explained that his novel theory of aboriginal title was necessitated by the warlike and "savage" character of the native population. It was these peculiar circumstances alone that rationalized a theory which was (and is) nonconforming to the law of nations. Yet the courts continue to employ Marshall's original theories regarding the nature of aboriginal rights, despite the fact that the bases upon which those theories rest have long since disappeared. That the courts have blithely continued to diminish the property rights of Indian people, is evidence that North American tribunals still regard the Indians' concept of land holdings as inferior to that of the white man's.[34] This social and political fact is perhaps more important than all the legal niceties surrounding the question of aboriginal rights. Since it is doubtful that courts will face up to this question however, a more careful examination into the judicial view of original Indian title is in order.

2. Restrictions Upon Alienation. The "holding" in *Johnson* v. *McIntosh* was that the sale of Indian lands to private individuals was void because the "power (of Indians) to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it."[35] The principle that Indians could alienate their lands solely to the government (or to private individuals with government consent)[36] has received the unquestioned approval of subsequent court decisions.[37]

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[32] *Id.* at 260-61.

[33] *Id.* at 259-60. See also discussion at note 25, *supra.*

[34] Felix Cohen has poignantly characterized this attitude as the "managerie" theory of Indian title. Cohen describes the supporters of this view as believing that "Indians are less than human and that their relation to their lands is not the human relation of ownership but rather something similar to the relation that animals bear to the areas in which they may be temporarily confined." Cohen, *Original Indian Title, supra* note 20 at 58.

[35] 21 U.S. at 253-54.

[36] *Mitchel* v. *United States* (1835), 34 U.S. (9 Pet.) 711.

[37] *See, e.g., Holden* v. *Joy,* (1872), 84 U.S. (17 Wall.) 211, 244. See also *Tee Hit-Ton Indians* v. *United States,* (1954), 348 U.S. 272, 280; *United States* v. *Alcea Band of Tillamooks* (1946), 329 U.S. 40, 47; *United States* v. *Cook* (1873), 86 U.S. (19 Wall.) 591, 592; *Worcester* v. *Georgia,* 31 U.S. at 369.

3. The Developing Character of Indian Title. Within the limitations initially imposed upon aboriginal rights, the courts have scrupulously accorded respect toward original Indian title. In the *McIntosh* case, Chief Justice Marshall declared the Indians were "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion."[38] And in *Cherokee Nation* v. *Georgia,* Mr. Justice Baldwin said: "Indians have rights of occupancy to their lands, *as sacred as the fee-simple absolute title of the whites* . . ."[39] The sacrosanct character of Indian title was again affirmed in *United States* v. *Cook,* where the Court, after citing *Johnson* v. *McIntosh,* stated: "The right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy."[40]

Beyond these expressions of obeisance toward native rights, the American courts have stood firm in protecting aboriginal title from the attempted encroachments of homesteaders,[41] railroads,[42] and even administrative officials.[43] A look at several representative cases will indicate the Supreme Court's view of Indian land rights and the extent to which it was willing to protect those rights.

In *Cramer* v. *United States,*[44] the Federal Government brought suit on behalf of three individual Indians against the Central Pacific Railway Company. The plaintiff sought cancellation of a 1904 land patent *issued by the United States* which interfered with the Indians' right of occupancy upon certain lands. The defendants predecessor had received the land as a result of the Act of July 25, 1866. This act excepted from the grant such lands as "shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of."[45] It is of significance to note that the lands were not alleged to be part of a reservation or covered by treaty. Cancellation was sought solely on the ground that the Indians held the land by aboriginal possession.[46] Obviously the exceptive provision of the 1866 Act was a general one and in no way constituted "recognition" of aboriginal title. Moreover, the Court found these Indians ineligible for the homestead privilege in the Act. The question then for the Court was, were the lands "reserved . . . or otherwise disposed of" within the meaning of the Act?[47] In concluding that they were, the Supreme Court

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[38] 21 U.S. at 253.

[39] (1831), 30 U.S. (5 Pet.) 1, 47.

[40] (1873), 86 U.S. (19 Wall.) 591, 593. See also *Miller* v. *United States,* 159 F. (2d) 997 (9th Cir. 1947). "In *Johnson* v. *McIntosh* ... Mr. Chief Justice Marshall stressed the point that, wherever the fee simple title might reside, it could be held in Indian land 'subject only to the Indian right [or title] of occupancy' ".

Like a *leitmotif,* this quoted phrase runs through the Chief Justice's opinion and through subsequent decisions of the Supreme Court." *Id.* at 1000, *disapproved on other grounds, Hynes* v. *Grimes Packing Co.* (1949), 337 U.S. 86, 106, n. 28.

[41] *Holden* v. *Joy* (1872), 84 U.S. (17 Wall.) 211.

[42] *Buttz* v. *Northern Pac. R. R.* (1886), 119 U.S. 55.

[43] *United States* v. *Santa Fe Pac. R. R.* (1941), 314 U.S. 339.

[44] (1922), 261 U.S. 219.

[45] (1886), Ch. 242, §2, 14 Stat. 239.

[46] 261 U.S. at 225.

[47] *Id.* at 227.

said: "Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States."[48] Nor did it matter that the right of occupancy was claimed by individual Indians rather than a tribe: "It is true that this policy has had in view the original nomadic tribal occupancy, but it is likewise true that in its essential spirit it applies to individual Indian occupancy as well . . ."[49] And the court expressly reaffirmed what had been implicit in Chief Justice Marshall's opinion in *Johnson* v. *McIntosh,* namely: "The fact that such right of occupancy finds no recognition in any statute or other formal governmental action is not conclusive."[50] The Court ordered the patent cancelled in respect to those lands possessed by the Indians.

In *United States* v. *Shoshone Tribes,*[51] the Shoshone sued the Federal Government to recover the value of certain natural resources which had been expropriated by the United States. While this case involved a treaty, the issues were discussed largely from the perspective of aboriginal rights. The reason for this is that the treaty in question did not deal with the issue of natural resources. The Court was thus obliged to examine the content of the aboriginal claim existing prior to the treaty.[52]

The Supreme Court described the Indian title as follows:

> For all practical purposes, the tribe owned the land. Grants of land subject to the Indian title by the United States, which had only the naked fee, would transfer no beneficial interest ... The right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee.[53]

In language which bore unmistakably upon aboriginal rights, the Court stated: "Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title. *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 48. *Worcester* v. *Georgia,* 6 Pet. 515, 580. Subject to the conditions imposed by the treaty, the Shoshone Tribe had the right that has always been understood to belong

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[48] *Id.*

[49] *Id.*

[50] *Id.* at 229. In *Buttz* v. *Northern Pac. R. R.* (1886), 119 U.S. 55 the United States granted certain lands to the Northern Pacific Railroad with the express provision that Indian title be extinguished by the United States. In the context of a discussion of *Johnson* v. *McIntosh,* the Court clearly stated the historic rights of the Indian occupants vis-a-vis private individuals or corporations and the government: "The land in controversy and other lands in Dakota, through which the Northern Pacific Railroad was to be constructed, was within what is known as Indian country. At the time the act of July 2nd, 1864; was passed, the title of the Indian tribes was not extinguished. But that fact did not prevent the grant of Congress from operating to pass the fee of the land to the company ... The Indians had merely a right of occupancy ... The grant conveyed the fee subject to this right of occupancy. The Railroad Company took the property with this incumbrance. The right of the Indians, it is true, could not be interfered with or determined except by the United States. No private individual could invade it ..." *Id.* at 67. "It is to be noted that the Indians' right of occupancy in 1864 had not yet been defined by any treaty ... The *Buttz* case stands, therefore, as a clear warning that neither settlers nor railroads can ignore aboriginal Indian title." Cohen, *Original Indian Title, supra* note 20, at 53.

[51] (1937), 304 U.S. 111.

[52] Cohen, *Original Indian Title, supra* note 20, at 54.

[53] 304 U.S. at 116.

to Indians, undisturbed possessors of the soil from time immemorial."[54] Concluding that natural resources "are constituent elements of the land itself",[55] and that the treaty did not provide otherwise, the Court ruled the Shoshones had the right to compensation for the taking of such resources.

The last case which will aid us in understanding the content of aboriginal title as viewed by American courts is *United States* v. *Santa Fe Pacific Railroad Company*.[56] This suit was brought by the United States on behalf of the Walapai Tribe in Arizona to enjoin the defendant from interfering with the occupancy of the Walapais. The defendant claimed full title to the lands in question by virtue of a *government grant* to its predecessor under the Act of July 27, 1866.[57] Section 2 of that Act ordered the United States to extinguish the Indian title to all lands falling within the operation of the Act. The Indian lands involved in the suit were part of the Mexican Cession[58] and had, prior to 1866, received no formal recognition either by statute or treaty. Any rights which the Walapais had were based solely upon possession from time immemorial.[59] What was affirmed in *Cramer* was conclusively proclaimed in *Santa Fe*: "Nor is it true, as respondent urges, that a tribal claim to any particular lands must be based upon a treaty, statute, or other formal government action."[60]

The Court unanimously reaffirmed the long standing policy of the Federal Government and the American courts to respect the Indian right of occupancy. In doing so, the Court reversed the decision of the Court of Appeal, which held that "the United States had never recognized such possessory rights of Indians within the Mexican Cession . . ."[61]. Noting that the decision in *Cramer* had "assumed that lands within the Mexican Cession were not excepted from the policy to respect Indian right of occupancy",[62] the Court went on to reaffirm its view that Indian occupied lands obtained from other nations have all the attributes of unextinguished Indian title.[63] The Court concluded that Indian title existed in at least part of the lands claimed and found that those claims had not been extinguished. Defendant was duly ordered to make an accounting for its use of such lands.[64]

These and similar cases[65] establish that the Supreme Court was prepared to grant substantial protection to aboriginal rights, particularly as against

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[54] *Id.* at 117.

[55] Id. at 116. That aboriginal claims include the ownership of natural resources on the claimed lands had been reaffirmed in *United States* v. *Northern Paiute Nation*, 393 F. 2d 786, 796 (Ct. Cl. 1968); *Miami Tribe* v. *United States*, 175 F. Supp. 926, 942 (Ct. Cl. 1959).

[56] (1941), 314 U.S. 339.

[57] 14 Stat. 292.

[58] Ceded by the Treaty of Guadalupe Hidalgo (1848), 9 Stat. 922.

[59] 314 U.S. at 345.

[60] *Id.* at 347.

[61] *Id.* at 345.

[62] *Id.*

[63] *Id.* at 346. See also discussion at note 76 to 77 and accompanying text, *infra.*

[64] 314 U.S. at 359-60.

[65] See also *Holden* v. *Joy* (1872), 84 U.S. (17 Wall.) 211; *Choteau* v. *Molony* (1853), 57 U.S. (16 How.) 203; *Mitchel* v. *United States* (1835), 34 U.S. (9 Pet.) 464.

private individuals or corporations. In those cases involving governmental action, the Court seemed prepared to go out of its way to utilize legislative protections of pre-existing rights in order to prevent administrative intrusion upon aboriginal claims.

More difficult questions remained, however. Chief Justice Marshall had written that the Government could "extinguish" the Indian right of occupancy. What were the characteristics of such an extinguishment? What if the government alienated aboriginal lands and there was no legislation protecting pre-existing native rights? In this inescapable confrontation between the government and the Indians, would the Court grant the supposedly "sacred" right of occupancy the protection of the Fifth Amendment of the United States Constitution and thereby order compensation?[66] These questions set the stage for a fierce battle which was to take place within the United States Supreme Court, a battle in which the ultimate loser would have been the Indian people, had not Congress come to the rescue "in the nick of time".

### C. *Extinguishment of Aboriginal Title*

As with the policy of eminent domain, the Government's ability to extinguish Indian title has never been doubted or denied. The important questions here relate to executive and legislative policies respecting extinguishment, and the judicial presumptions which have been formed in response to such policies.

Like the other phases of the law of aboriginal rights, the judicially contrived rules of extinguishment are derived from *Johnson* v. *McIntosh*. The policy of extinguishment is of course, the logical sequence to the principle of exclusive dealing discussed earlier.[67] Extinguishment was thus described by Chief Justice Marshall:

> The United States, then, have unequivocally acceded to that great and broad rule by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the title by which it was acquired. They maintain, as all others have maintained, *that discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest* ...[68]

An analysis of Marshall's description would indicate that the Supreme Court viewed the matter of extinguishment as entirely within the realm of the other branches of government, and that following this, the politicians and bureaucrats could nullify the rights of native peoples in whatever manner was convenient. Indeed, as recently as 1941, a unanimous Supreme Court seemed to reaffirm this policy most emphatically:

"Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme.

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[66] The Fifth Amendment to the United States Constitution provides, *inter alia*: "No person shall ... be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

[67] See discussion at note 35 to 37 and accompanying text, *supra*.

[68] 21 U.S. at 259 (emphasis added).

*The manner, method and time of such extinguishment raise political, not justiciable, issues* ... And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts. *Beecher* v. *Wetherby,* 95 U.S. 517, 525."[69]

It may appear then that in a dispute between the government and the Indians over aboriginal rights, the government could act as arbitrarily, or as fairly, as it pleased. Such a view however ignores almost two centuries of official government policy toward native rights, and the judicial views which have been melded in recognition of this official policy.

The policy of Congressional respect for Indian rights was demonstrated as early as 1787 in the Northwest Ordinance. This statute declared that: "The utmost good faith shall always be observed towards the Indians; *their lands and property shall never be taken from them without their consent...*"[70]

The attitude of Congress was further demonstrated in the statutes which granted lands to the railroads. These statutes typically made express provision for the fair extinguishment of aboriginal title. Section 2 of the Act[71] under consideration in *United States* v. *Santa Fe Pacific Railroad* provided: "The United States shall extinguish, as rapidly as may be consistent with public policy and the *welfare of the Indians, and only by their voluntary cession,* the Indian title to all lands falling under the operation of this act..."[72]

These policies have received cognizance in numerous Supreme Court decisions, commencing with the early case of *Worcester* v. *Georgia.*[73] Indeed, the policy of extinguishing Indian title only upon equitable terms has been so consistently applied in American history that not only will the Court

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[69] *United States* v. *Sante Fe Pac. R. R.* (1941), 314 U.S. 339, 347 (emphasis added).

[70] (1789), 1 Stat. 50 (emphasis added).

[71] Act of July 27, 1866, 14 Stat. 292.

[72] Similar language appears in the Act of July 2, 1864, 13 Stat. 365, considered in *Buttz* v. *Northern Pac. R. R.* (1886), 119 U.S. 55. See also *Cramer* v. *United States* (1922), 261 U.S. 219, where the Court construed the exception to the railroad grant in the Act of July 25, 1866, 14 Stat. 239 in favour of the Indians' right of occupancy; Section 14 of the Act creating the territorial government of Oregon (1848), 9 Stat. 323, 329, incorporated by reference all the guarantees of the Northwest Ordinance. See, generally, Cohen, *Original Indian Title, supra* note 20 at 34.

[73] In *Worcester,* Chief Justice Marshall stated that the principle that discovery gave title "gave the exclusive right to purchase, but did not found that right on a denial of the possessor to sell ..." It was rather "the exclusive right of purchasing such lands as the natives were willing to sell." 31 U.S. at 369-70. In his concurring opinion, Mr. Justice McLean described the policy of the early settlers with respect to native lands: "[O]ur ancestors, when they first migrated to this country, might have taken possession of a limited extent of the domain, had they been sufficiently powerful, without negotiation or purchase from the native Indians. But this course is believed to been nowhere taken. A more conciliatory mode was preferred, and one which was better calculated to impress the Indians, who were then powerful, with a sense of the justice of their white neighbours. The occupany of their lands was never assumed, except upon the basis of contract, and on the payment of a valuable consideration. This policy has obtained from the earliest white settlements in this country, down to the present time." *Id.* at 391-92.

presume that the government intended to act fairly,[74] but further, only the most deliberate governmental action will be viewed as properly extinguishing aboriginal rights at all.[75]

A final and very important question involving extinguishment relates to which sovereignty may effect the nullification of Indian title. Aside from the territory held by the original thirteen States, almost all of the United States has been acquired by cession or purchase from other countries.[76] If the European nations had extinguished aboriginal title in the acquired areas, then of course such title would receive no recognition by the United States. In fact, the Supreme Court has held that virtually *all* the territory acquired from the Europeans was subject to outstanding aboriginal claims which had been respected by the foreign owners of the fee.[77] Upon acquisition, the lands became part of the federal domain and were subject to the rules respecting aboriginal rights developed from *Johnson v. McIntosh.* Under these circumstances, only the Federal Government could extinguish Indian title. Could however the various state governments extinguish such title once they were admitted to the Union and had sovereignty over otherwise unclaimed lands within their jurisdictions?[78] Both *Johnson* v. *McIntosh* and *Worcester* v. *Georgia* spoke only in terms of the United States having the ability to extinguish Indian title. This view was reaffirmed in *United States* v. *Santa Fe Pacific Railroad.*[79] But the issue was only fully discussed for the first time in the recent case of *Lipan Apache Tribe* v. *United States.*[80]

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[74] While conceding the ability of the Federal Government to extinguish aboriginal title, the Supreme Court in *Beecher* v. *Wetherby* (1877), 95 U.S. 517, 525 said: "It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race." See also *United States* v. *Alcea Band of Tillamooks* (1946), 329 U.S. 40; *Cramer* v. *United States* (1922), 261 U.S. 219; *Buttz* v. *Northern Pac. R. R.* (1886), 119 U.S. 55.

[75] 314 U.S. at 354. It is of both importance and interest to note that the Court refused to view the forcible removal of the Walapai Indians to a reservation *on order of the Indian Department* as working an extinguishment of their ancestral title. Speaking for a unanimous Court, Mr. Justice Douglas eloquently restated American legislative and judicial policy on this issue: "Their forcible removal in 1874 was not pursuant to any mandate of Congress. It was a high-handed endeavor to wrest from these Indians lands which Congress had never declared forfeited. No forfeiture can be predicated on an unauthorized attempt to effect a forcible settlement on the reservation, *unless we are to be insensitive to the high standards for fair dealing in light of which laws dealing with Indian rights have long been read.*" *Id.* at 355-56 (emphasis added).

[76] The outstanding exception to this pattern was the voluntary union of the independent Republic of Texas with the United States in 1845.

[77] '[T]he right of sovereignty over discovered land was always subject to the right of use and occupancy and enjoyment of the land by Indians living on the land.' *Sac and Fox Tribe* v. *United States* (1967), 179 Ct. Cl. 8, 21. The Supreme Court has recognized this, explicitly or implicitly, in dealing with territory in this country acquired from various other nations. *Worcester* v. *State of Georgia* (1832), 31 U.S. (6 Pet.) 350 (original States); *Chouteau* v. *Molony* (1853), 57 U.S. (16 How.) 203 (Louisiana Purchase); *Cramer* v. *United States* (1923), 261 *U.S.* 219 (Mexican Cession); *Mitchel* v. *United States* (1835), 34 U.S. (9 Pet.) 464 (Florida); *United States* v. *Tillamooks* (1946), 329 U.S. 40 (Oregon); *Tee-Hit-Ton Indians* v. *United States* (1954), 348 U.S. 272 (Alaska); *Lipan Apache Tribe* v. *United States* (1967), 180 Ct. Cl. 487, 493.

[78] The extent of state ownership of land within its boundaries is determined by the terms of admission for each state. See *Minnesota* v. *Hitchcock* (1902), 185 U.S. 373, 391.

[79] (1941), 314 U.S. 339, 347.

[80] (1967), 180 Ct. Cl. 487.

In *Lipan,* the United States Court of Claims was faced with an assertion that the State of Texas could and did extinguish Indian title by a legislative Act of April 29, 1846.[81] On reviewing the implicit contrary assumptions of the extinguishment cases, the court concluded:

> Our view is different: that the State could not extinguish Indian title (at least without the Indians' consent) and that only the Federal Government had the power to abrogate aboriginal ownership by unilateral action. It makes no difference that the lands were State-owned; the Federal Government's power stemmed, not from the ownership of public lands in this instance, but more importantly from the general grant of the right to deal with Indians. The Constitution has vested in the national government the authority to regulate Indian affairs ...[82]
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> ...
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> One aspect of this federal authority is clearly the power to extinguish Indian title.[83]

In the United States then, the only authority which could legally extinguish Indian title was the Federal Government.

*D. Compensation For The Taking of Aboriginal Lands.*

However much the Supreme Court presumed the government to have acted honorably towards the Indian, the question of what happened if the United States undeniably extinguished Indian title without providing just compensation, inevitably arose. It was on this issue that the increasingly enlightened Indian rights decisions of the Supreme Court were to founder.

The early cases dealing with compensation seemed to occasion little substantive difficulty. The Court took the strong view that a deprivation of Indian lands by the Federal Government constituted a compensable expropriation under the Fifth Amendment of the United States Constitution.

A good example is provided in *United States* v. *Klamath Indians.*[84] In 1864, the Klamath Indians held by immemorial possession 20,000,000 acres of what is now Oregon and California. With the exception of a tract reserved for the occupancy of the Klamaths, most of this land was ceded to the United States in a treaty signed the following year. In 1906, the Federal Government conveyed 87,000 acres of the reserved lands to a private corporation without the consent of the Indians and without providing full compensation. The Klamaths brought suit under a special jurisdictional act passed by Congress in 1936.[85] The Supreme Court made explicit the consti-

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[81] *Id.* at 497.

[82] While the United States Constitution does not assign direct authority over Indians to the Federal Government, the latter does possess the exclusive power to make treaties and regulate commerce with Indians. U.S. Const. art. I, §8(3), 10. In Canada, sction 91(24) of the British North America Act delegates exclusive and direct authority over "Indians, and lands reserved for the Indians" to the Dominion. See discussion at notes 210 and accompanying text, *infra.*

[83] 180 Ct. Cl. at 497.

[84] (1937), 304 U.S. 119.

[85] Act of May 15, 1936, 49 Stat. 1276. Aside from the substantive difficulties of proving claims for confiscation of Indian lands, the American Indian has been faced with formidable procedural obstacles. The "Act of March 3, 1863, which gave the Court of Claims the status of a court with authority to render judgements, specifically excepted from the court's jurisdiction 'any claim against the government ... dependent on any treaty entered into ... with Indian tribes." Wilkinson, *Indian Tribal Claims Before the Court of Claims* (1966), 55 Geo. L. J. 511, 511-12. The effect was that Indians with *any* grievance against the government could only obtain relief if Congress passed a special jurisdictional act allowing litigation in the specified dispute. The jurisdictional problem was considerably ameliorated with the 1946 passage of the Indian Claims Comm'n Act (1964), 25 U.S.C. §70. See generally Wilkinson, *id.*

tutional restraints upon government action relative to Indian lands:

> It is appropriate first to observe that while the United States has power to control and manage the affairs of its Indian wards in good faith for their welfare, that power is subject to constitutional limitations, and does not enable the United States without paying just compensation therefore to appropriate lands of an Indian tribe to its own use or to hand them over to others.[86]

Similar and indeed stronger language appears in many of the other "compensation cases".[87]

Our consideration of these cases is not yet complete however. For in each of the compensation cases there was an element which was to become of critical importance in the aboriginal rights decisions of the 1940's and early 1950's. This element consisted of the fact that all the Indian lands involved in the compensation cases had received so-called "recognition" by either treaty or act of Congress. These lands then were typically the well known "Indian reserves". Perhaps because of its ubiquity, or possibly because the Court felt the issue of recognition was of no significant import, the earlier Supreme Court decisions used the same language in describing the nature and content of unrecognized aboriginal title as it did in describing recognized title. Thus in *Shoshone Tribe v. United States*,[88] in which a treaty designated Indian lands, Mr. Justice Cardozo stated: "The right of the Indians to the occupancy of the lands pledged to them, may be one of occupancy only, but it is 'as sacred as that of the United States to the fee'."[89] If the nature of Indian title was the same whether "recognized" or not, should not that title also be afforded the consistent protection of the Fifth Amendment of the Constitution?

Following some anticipatory rumblings in the 1944 case of *Shoshone Indians v. United States*,[90] this issue burst upon the Court two years later in *United States v. Alcea Band of Tillamooks*.[91]

In 1850, Congress authorized the negotiation of treaties with the Indians of the Oregon territory. A treaty with the Tillamook Indians was concluded in 1855 and a reservation was created upon a part of the lands to which the

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[86] 304 U.S. at 123.

[87] *See, e.g., Shoshone Tribe* v. *United States* (1936), 299 U.S. 476, 497; *United States* v. *Shoshone Tribe* (1937), 304 U.S. 111; *United States* v. *Creek Nation* (1934), 295 U.S. 103; *Lane* v. *Pueblo of Santa Rosa* (1919), 249 U.S. 110; *Cherokee Nation* v. *Hitchcock* (1902), 187 U.S. 294.

[88] (1936), 299 U.S. 476.

[89] *Id.* at 497. "Whether this tract, which was known as the Red Lake Indian reservation, was properly called a reservation, as the defendant contends, or unceded Indian country, as the plaintiff insists, is a matter of little moment. Confessedly the fee of the land was in the United States, subject to a right of occupancy by the Indians. That fee the Government might convey, and whenever the Indian right of occupancy was terminated (if such termination was absolute and unconditional), the grantee of the fee would acquire a perfect and unburdened title and right of possession. *At the same time, the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent and then upon such consideration as should be agreed upon. Minnesota* v. *Hitchcock* (1902), 185 U.S. 373, 388-89 (emphasis added) (a treaty covered the lands in question); *Worcester* v. *Georgia* (1832), 31 U.S. (6 Pet.) 350, uniformly cited as one of the cornerstones of the theory of aboriginal rights, itself involved lands guaranteed by treaty. See discussion at notes 38-40 and accompanying text, *supra*.

[90] (1944), 324 U.S. 335. See the dissenting opinion of Douglas, J., at 358, 359-60.

[91] (1946), 329 U.S. 40.

Tillamooks held claim from time immemorial. The treaty however was never ratified by the United States Senate and the Tillamooks brought suit for compensation for the loss of the aboriginal lands lying outside the reservation. The government contended that absent some form of official "recognition", aboriginal lands could be appropriated without incurring liability.[92]

The jurisdictional act under which the suit was brought expressly allowed the adjudication of claims based on original Indian title.[93]. As the Court noted however, the effect of the jurisdictional act was merely to remove "the impediments of sovereign immunity and lapse of time. By this Act Congress neither admitted nor denied liability."[94] The question of compensation for an expropriation absent "recognition", was to be squarely faced then.

The issue, said the Court, turned on the *content* of original Indian title.[95] The Court briefly discussed the leading decisions defining aboriginal rights[96] and reviewed the traditional Congressional policy requiring compensation for the extinguishment of Indian claims.[97] Notwithstanding a strong dissenting opinion by Mr. Justice Reed, the conclusion seemed inevitable. Declared Mr. Chief Justice Vinson for the Court:

> In our opinion, taking original Indian title without compensation and without consent does not satisfy the 'high standards for fair dealing' required of the United States in controlling Indian affairs. *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339, 356 (1941). The Indians have more than a merely moral claim for compensation.[98]

In reaching its conclusion the Court noted that no decisions of the Supreme Court had supported a dichotomy between recognized ("reserved" lands) and unrecognized (aboriginal lands) Indian title.[99] The unquestioned rule that compensation is required for expropriation of recognized Indian title said the Court, is equally applicable to unrecognized title.[100] Not only had there been no cases urging a legal distinction between the two types of title, but the Court took cognizance of what was manifest in its previous decisions — Indian title had traditionally been viewed as having the same

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[92] *Id.* at 42.

[93] The Act of August 26, 1935, 49 Stat. 801 provides, in relevant part: "[J]urisdiction is conferred on the Court of Claims with the right of appeal to the Supreme Court ... to hear ... and render final judgement (on) ... (b) any and all legal and equitable claims arising under or growing out of the original Indian title, claim or rights in, to, or upon the whole or any part of the lands and their appurtenances occupied by the Indian tribes and described in (certain) unratified treaties..."

[94] 329 U.S. at 45.

[95] *Id.* at 46.

[96] *Id.* at 46-47.

[97] *Id.* at 47-49. See discussion at notes 70 to 72 and accompanying text, *supra.*

[98] *Id.* at 47 (citation omitted).

[99] *Id.* at 51.

[100] *Id.* at 52. See discussion at notes 84 to 87 and accompanying text, *supra.*

legal attributes and potency whether it had received Congressional "recognition" or not.[101]

For the Indians and their supporters,[102] *Tillamooks* was nothing short of a stunning victory. The emasculated stature which Chief Justice Marshall had originally given aboriginal title, was now effectively undone. For the first time, aboriginal claims were to be as truly inviolate and sacrosanct as the Supreme Court had so long professed them to be.[103]

The occasion was short lived however. Like the broken promises of history, the high sounding words were but ephemeral rays of hope and the forked tongue of the white man's tribunal would soon enough reveal itself in a subsequent "clarification". Had not Congress fortuitously passed the Indian Claims Commission Act, the 1954 decision in *Tee-Hit-Ton Indians* v. *United States*[104] would have hurtled the cause of aboriginal rights back to its uncivilized legal status in *Johnson* v. *McIntosh*.[105]

In *Tee-Hit-Ton Indians*, a band of Alaskan Indians brought suit under the Fifth Amendment demanding compensation for the taking of certain timber on lands to which the plaintiffs had an aboriginal claim. Procedurally, the suit was brought under the then recently passed jurisdictional act permitting suits for Indian claims accruing after August 13, 1946.[106]

As in *Tillamooks*, the Court determined the basic issue to be "the nature of the petitioner's (Indians') interest in the land, if any."[107] In reviewing that interest, Mr. Justice Reed conveniently ignored the long line of decisions which had consistently viewed original Indian title as being "as sacred as the fee" and had consequently accorded that title a great deal of vitality. Justice Reed preferred to speak of aboriginal rights in pejorative terms, indicating it

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101 "Other cases also draw no distinction between original Indian title and 'recognized' Indian title. 'The Indian title as against the United States was merely a title and right to the perpetual occupancy of the land with the privilege of using it in such mode as they saw fit until such right of occupation has been surrendered to the government When Indian reservations were created, either by treaty or executive order, the Indians held the land by the same character of title, to wit, the right to possess and occupy the lands for the uses and purposes designated.' *Spalding* v. *Chandler* (1896), 160 U.S. 394, 403. Of similar tenor is *Conley* v. *Ballinger* (1910), 216 U.S. 84, 90-91." *Id.* at 52, n. 30.

102 See the enthusiastic discussion of the Tillamooks decision in Cohen, *Original Indian Title, supra* note 20 at 56-58.

103 Even after Tillamooks, Indian title was not the legal equivalent of fee simple. The limitation on alienability for example, continued as before.

104 (1954), 348 U.S. 272.

105 By Chief Justice Marshall's own admission, his theory of aboriginal rights was nonconforming to the law of civilized nations. See discussion at notes 30 to 33 and accompanying text, *supra.*

106 (1964), 28 U.S.C. §1505 provides: "The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians ... whenever such claim is one arising under the Constitution, laws, or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group."

107 348 U.S. at 275.

consisted merely of "permission from the whites to occupy" rather than a tangible "property right".[108]

The holding of *Tee-Hit-Ton* is that there is no right to compensation for an expropriation of Indian lands held only by aboriginal title. (The Court of Claims found that plaintiffs here did indeed have an aboriginal claim to the land in question).[109]

Before we subject this decision to further analytical scrutiny, let us understand its precedential implications. What the United States Supreme Court was effectively saying was that the government could, with impunity, dispose of lands upon which a people had resided and made their home from time immemorial. The unhappy conclusion must be that the *Tee-Hit-Ton* case represents nothing more than a perfidious rationalization for the outright theft of private property by the United States Government.

In reaching its iniquitous decision, the Court gave substance to a dichotomous view of Indian title. The dichotomy was that of "recognized" and "unrecognized" title, with only the former compensable in cases of expropriation.[110] As discussed above, this distinction was considered and expressly rejected in *Tillamooks* and has been implicitly rejected by numerous other Supreme Court decisions.[111]

Indeed, Mr. Justice Reed was able to cite *obiter* remarks of but a single precedent, written by himself, to lend support to his theory that only "recognized title" was compensable.[112] As further support for its holding, the Court quoted at length from several judgments dealing with the issue of extinguishment.[113] As we have seen however, the issue of extinguishment is quite distinct from the question of liability arising from extinguishment. As the Court said in *Tillamooks*: "Admitting the undoubted power of Congress to extinguish original Indian title compels no conclusion that compensation need not be paid."[114]

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[108] *Id.* at 279. In stating that aboriginal title consists of nothing more viable than "permission from the whites to occupy", Mr. Justice Reed regressed even further than the 1823 opinion in *Johnson* v. *McIntosh* in which Chief Justice Marshall described aboriginal rights as constituting a "legal as well as just claim to retain possession of (the soil)." 21 U.S. at 253. While the ultimate holding of *Tee-Hit-Ton* cannot but be admitted, much of its discussion of the nature of aboriginal title is flagrantly inconsistent with the American jurisprudence of native rights, and must therefore be viewed as an aberration.

[109] 348 U.S. at 275.

[110] *Id.* at 288-89. As to the substantive nature of this recognition, the Court said: "There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation." *Id.* at 278-79.

[111] See discussion at notes 88 to 89 and note 101 accompanying text, *supra.*

[112] The cited case was *Shoshone Indians* v. *United States* (1944), 324 U.S. 335, decided by a Court split 5-4. The opinion written by Justice Reed in *Shoshone* was fully supported by only two other justices. Moreover, the assertion that unrecognized title was not compensable was obiter dicta, there being a treaty involved in the case. In *Tillamooks,* the Court expressly rejected the argument that the *Shoshone* case can be cited as support for the theory that only recognized title is compensable. 329 U.S. at 50.

[113] 348 U.S. at 280-81.

[114] 329 U.S. at 47.

Conceding that *Tillamooks* "contains language indicating that unrecognized Indian title might be compensable under the Constitution when taken by the United States",[115] the Court was able to rely upon two intervening decisions which held that *Tillamooks* did not rest upon the Fifth Amendment. In *Hynes* v. *Grimes Packing Company,* Justice Reed, speaking for the Court, ruled that *Tillamooks* "does not hold the Indian right of occupancy compensable without specific legislative direction to make payment."[116] And when *Tillamooks* again came before the Supreme Court solely on the issue of compensation, the Court held that no interest was due on the claim as none of the opinions in the original case "was grounded on a taking under the Fifth Amendment."[117] As our discussion of *Tillamooks* demonstrated, the Court there held the same compensation rules should apply in cases involving recognized title (clearly compensable under the Fifth Amendment) as in those involving non-recognized title.[118] It surely followed then that the Fifth Amendment thus applied to non-recognized Indian title. If the Fifth Amendment was not the basis for recovery in *Tillamooks,* what then was? *Tee-Hit-Ton* supplies us with the incredible answer.

> We think it must be concluded that the recovery in the *Tillamook* case was based upon statutory direction to pay for the aboriginal title in the special jurisdictional act to equalize the Tillamooks with the neighboring tribes, rather than upon a holding that there had been a compensable taking under the Fifth Amendment.[119]

As we have seen, *Tillamooks* went to pains to make clear that the jurisdictional act "neither admitted nor denied liability."[120] The Act was purely procedural and involved no direction to pay whatsoever.

What must be concluded from this? Obviously the Supreme Court was unhappy with its previous decision. Yet rather than admit its true opinion of *Tillamooks,* the Court resorted to deliberate distortion in order to distinguish its former decision.

Mr. Justice Douglas, who voted with the majority on *Tillamooks,* registered a brief dissenting opinion which limited itself to the view that the 1884 Organic Act of Alaska constituted "recognition" of plaintiff's title.[121] Yet the second *Tillamooks* case conclusively demonstrated that the full Court was averse to enforcing aboriginal claims via the Fifth Amendment. Why this sudden and dramatic change of heart by the High Bench? While no conclusive explanation can be advanced, it would be somewhat naive not to consider the fact that the Indian Claims Commission Act became effective the same year (1946) as the first *Tillamooks* decision. Thereafter, most Indian claimants had to rely on the Act to enforce aboriginal claims.[122] Claims for expropriation in the United States do not carry interest except in those cases in which a claim arises under the Fifth Amendment.[123] Thus

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115 348 U.S. at 282.
116 (1949), 337 U.S. 86, 106, n. 28.
117 (1951), 341 U.S. 48, 49.
118 See text accompanying note 100, *supra.*
119 348 U.S. at 284 (citation omitted).
120 329 U.S. at 45. See discussion at notes 93 to 94 and accompanying text, *supra.*
121 348 U.S. at 291.
122 All claims accruing prior to August 13, 1946 had to be pursued via the Indian Claims Comm'n Act (1964), 25 U.S.C. §70.
123 See *United States* v. *Alcea Band of Tillamooks* (1951), 341 U.S. 48 and cases cited therein.

aboriginal claims arising under the Indian Claims Commission Act do not contain interest.[124] Had *Tillamooks* been decided on Fifth Amendment grounds, the plaintiffs there would have recovered substantial interest while their fellow claimants under the Act would not.[125]

There seems little doubt but that the passage of the Indian Claims Commission Act contributed substantially to the shift in the Supreme Court's attitude toward aboriginal claims. The Court broadly hinted at this in its closing passage in *Tee-Hit-Ton*:

> Our conclusion does not uphold harshness as against tenderness toward the Indians, but it leaves with Congress, where it belongs, the policy of Indian gratuities for the termination of Indian occupancy of Government-owned land rather than making compensation for its value a rigid constitutional principle.[126]

It is nevertheless most unfortunate that the poorly reasoned opinion in *Tee-Hit-Ton Indians* represents the last word of the Supreme Court on the constitutional aspect of this important subject.

### *E. Proving Aboriginal Claims Under the Indian Claims Commission Act.*

While a thorough review of the substantive and procedural issues involved in proving aboriginal claims before the Indian Claims Commission is properly the subject of a separate study, our consideration of aboriginal rights would be incomplete if we did not briefly allude to this matter.

In *Otoe and Missouria Tribe of Indians* v. *United States*,[127] the United States Court of Claims held that a taking of bare aboriginal title was compensable under the Indian Claims Commission Act. The issues with which the Claims Commission and the Court of Claims have since had to deal relate to the legal *requisites* for proving an aboriginal claim and the *methods* by which these predicates to a claim may be established.

The decisions of the Court of Claims have accepted as definitive the statement that aboriginal title must rest upon "a showing of actual, exclusive and continuous use and occupancy for a long time prior to the loss of the property."[128] Obviously, this definition incorporates several requirements, each of which must be proved before an aboriginal claim can be made out.

Perhaps the most stringent requirement to be met in stating an aboriginal claim is that of exclusive control. While "joint and amicable possession of the property by two or more tribes or groups will not defeat 'Indian Title' ",[129]

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[124] See *Nooksack Tribe of Indians* v. *United States* (1963), 162 Ct. Cl. 712, 718; Wilkinson, *supra* note 85 at 524-28.

[125] See *Alcea Band of Tillamooks* v. *United States* (Ct. Cl. 1950), 87 F. Supp. 938.

[126] 348 U.S. at 290-91. While most aboriginal claims have undoubtedly "accrued" prior to the cutoff date of August 13, 1946 set out in the Indian Claims Comm'n Act ("accrual" occurs with the act of extinguishment), it is certainly possible that a claim could arise subsequent to that date. The *Tee-Hit-Ton* case, which foreclosed recovery under such circumstances, is surely the most poignant example.

[127] (Ct. Cl. 1955), 131 F. Supp. 265.

[128] *Sac and Fox Tribe of Indians* v. *United States*, 315 F. (2d) 896 (Ct. Cl.), cert. denied (1963), 375 U.S. 921. See also *United States* v. *Santa Fe Pac. R. R.* (1941), 314 U.S. 339, 345; *Lummi Tribe of Indians* v. *United States* (1967), 181 Ct. Cl. 753, 759; *United States* v. *Seminole Indians* (1967), 180 Ct. Cl. 375, 383; *Confederated Tribes* v. *United States* (1966), 177 Ct. Cl. 184, 194.

[129] *Confederated Tribes* v. *United States* (1966), 177 Ct. Cl. 184, 194, n. 6.

extended disputation over control of a particular area will defeat such a claim.[130] Obviously, such conflict must extend beyond an occasional foray by hostile marauders.[131] And the existence of scattered and numerically small groupings of other tribes who in no way challenge the dominion of the claimant tribe, will also be insufficient to defeat the claim.[132]

In addition to exclusive control of a "defined" territory,[133] Indian claimants are required to show actual and continuous use and occupancy of the land. This requirement has been given an expansive interpretation by the courts in light of the customs and habits of many Indian tribes.

A good example of the application of this legal standard is provided by the case of *United States* v. *Seminole Indians.*[134] In the *Seminole* case, the Court of Claims was called upon to determine if, prior to an 1823 treaty of cession,[135] the Seminole Indians had a valid aboriginal claim to the Florida peninsula. While the court held there was little doubt that the Seminoles had exclusive possession of Florida,[136] the question remained: "Was the Seminoles' use and occupancy of the land of an *extent* sufficient to support a recognition of Indian title encompassing virtually all of the Florida peninsula?"[137]

The Government offered several historical facts militating against such a claim. It noted that the permanent Seminole villages were not only limited in number (about 17) but that they were confined almost exclusively to northern Florida. In addition, the total Seminole population did not exceed 2,500 persons up to 1814. As such, the Government contended the Seminoles did not and indeed, could not, occupy the vast Florida peninsula.[138]

As had other courts, the Court of Claims in *Seminole* distinguished between Indians who survived by agriculture and those who subsisted by hunting, trapping, and food-gathering. The Seminoles were clearly in the latter category. Unlike those engaged in agriculture, hunters were required to utilize and temporarily "occupy" large areas of land. The court found that the Seminoles made "extensive use of the southern peninsula" and that of necessity, made temporary encampments in their hunting grounds.[139] Given that the Seminoles had exclusive control of the area, the court reaffirmed that " 'use and occupancy' essential to the recognition of Indian title does not demand *actual* possession of the land, but may derive through intermittent contacts, *Spokane Tribe of Indians* v. *United States,* 163 Ct. Cl. 58, 66 (1963), which define some general boundaries of the occupied land, *Upper*

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130 *See, e.g., Pueblo De Zia* v. *United States* (1964), 165 Ct. Cl. 501; *Confederated Tribes* v. *United States* (1966), 177 Ct. Cl. 184.

131 *See, e.g., Pueblo De Zia* v. *United States* (1964), 165 Ct. Cl. 501, 505.

132 *See, e.g., United States* v. *Seminole Indians* (1967), 180 Ct. Cl. 375, 383.

133 Se cases cited at note 128, *supra.*

134 (1967), 180 Ct. Cl. 375.

135 Camp Moultrie Treaty. The Indians alleged inadequate consideration was received under the terms of the treaty. To reach that issue the court had to first determine the extent of the ceded aboriginal claim in Florida. 180 Ct. Cl. at 378.

136 180 Ct. Cl. at 383.

137 *Id.* (citation omitted).

138 *Id.* at 384.

139 *Id.* at 384-85.

*Chehalis Tribe* v. *United States*, 140 Ct. Cl. 192, 155 F. Supp. 226 (1957) ..."[140]

Nor did the Government's population figures impress the court: "the Government leans far too heavily in the direction of equating 'occupancy' (or capacity to occupy) with *actual* possession, whereas the key to Indian title lies in evaluating the manner of land-use over a period of time. Physical control or dominion over the land is the dispositive criterion."[141]

The final test for aboriginal claims is that of time. While the courts have not set a specific time period before a claim may be fairly stated, the outer limits have been set by the decisions of the Court of Claims. In *Confederated Tribes* v. *United States*, the court stated that the occupation "must be long enough to have allowed the Indians to transform the area into domestic territory so as not to make the Claims Commission Act 'an engine for creating aboriginal title in a tribe which itself played the role of conqueror but a few years before' ".[142] On the other hand, the court in *Seminole* concluded that occupation for 50 years was sufficient "as a matter of law" to satisfy the "long time" requirement for Indian title.[143]

While the legal tests for aboriginal claims are relatively easy to state, enormous difficulties are encountered in proving these typically ancient rights. In attempting to cope with this problem, the Claims Commission and Court of Claims relies upon whatever expert, documentary and testimonial evidence can be brought to bear. Thus the expert testimony of historians, archeologists, anthropologists and ethnologists are frequently resorted to in these cases. In addition, the testimony of tribal leaders relative to tribal history and based upon oral accounts handed down from father to son from time immemorial, has been permitted.[144] Finally, historical accounts, the journals of early trappers and hunters and official documents comprise another source of evidence in the establishment of aboriginal claims.[145]

This review of the American law of aboriginal rights indicates a rather fully developed judicial and legislative consideration of the problem of original Indian title. At this point, we may turn our attention to the situation in Canada. In our analysis of the Canadian experience, we are somewhat impeded by a certain sparsity of judicial development on this question. It may be this apparent lack of Canadian case law which has caused the current Government of Canada to question the viability of aboriginal rights. A consideration of Canadian political history and those judicial rulings which do exist on this subject, and a comparison of these authorities with similar developments in the United States, will however conclusively demonstrate that aboriginal rights exist in Canada and are entitled to the same respect that other property rights are uniformly given in the Dominion.

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[140] *Id.* at 385.

[141] *Id.* at 385-86.

[142] 177 Ct. Cl. at 194.

[143] 180 Ct. Cl. at 387.

[144] *See, e.g., Pueblo De Zia* v. *United States*, 165 Ct. Cl. at 504.

[145] *See, e.g., Confederated Tribes* v. *United States* (1966), 177 Ct. Cl. 184, 198.

## III ABORIGINAL RIGHTS IN CANADA

### *A. Origins and Recognition of Aboriginal Rights.*

The origins of aboriginal rights in Canada is a far more contentious issue than in the United States, where the rule of *Johnson* v. *McIntosh* is uniformly conceded. The most frequently cited source of aboriginal title in Canada is the Royal Proclamation of 1763.[146] While the Proclamation also created boundaries for the provinces of Quebec, East and West Florida and Grenada and dealt with the issue of immigration, a most important part of the document is the announcement of a new policy on Indian affairs.[147] In brief, the Proclamation reserves "for the use" of the several "Nations or Tribes of Indians with whom we are connected" all the lands not included within the limits of Quebec, East and West Florida, or the territory of the Hudson's Bay Company. Further, the chief executive of each colony was forbidden from granting any patent for lands beyond the bounds of his respective territory. Such lands, "not having been ceded to or purchased by" the Crown, were "reserved to the said Indians." Persons who had settled on Indian lands were ordered removed and private individuals were prohibited from making direct purchases of Indian territory. If however, "the Indians should be inclined to dispose of (their) Lands ..." the land could be purchased only by the Crown.

The Proclamation of 1763 is the formalized culmination of more than a decade of British efforts and practices in dealing with the Indians. The history of Indian affairs in British North America reveals that as early as 1754, the British determined that both a uniform Indian policy was a necessity throughout the colonies[148] and that the major component of that policy was to be respect for Indian lands.[149] This latter view is revealed in the pre-

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[146] R.S.C. 1952, vol. VI, p. 6127. The precise date of the Proclamation is October 7, 1763. Those portions of the Royal Proclamation dealing with Indian lands are reproduced as an Appendix hereto and all quoted references to the Proclamation are contained therein. Virtually every Canadian case discussing aboriginal rights has acknowledged that the Royal Proclamation is *a* source of aboriginal rights, though there is disagreement whether it is the *exclusive* source of those rights.

[147] "[T]he first thought of the framers was to allay the alarms of the Indians, and the articles, concerned with Indian relations, from the core of the document and of its policy." Alvord, *The Genesis of the Proclamation of 1763* (Michigan Pioneer and Historical Society, 1908) 22.

[148] "England had allowed, up to (the 1750's), each of the colonies to manage its own relations with the Indians, with the result that there was ... irregularities in dealings with the tribes, a total lack of unity in policy, and consequently a failure to hold the Indians in friendship, made all the more evident by the success of the centralized system of the French.

This was the problem which the Board of Trade undertook to solve in 1754. For this purpose they called in that year the famous congress of delegates at Albany." Alvord, supra note 147 at 24. See also *Regina* v. *St. Catharines Milling Co.* (1885), 10 O.R. 196, 206; *Native Rights in Canada, supra* note 4 at 34-50.

[149] In his dissenting opinion in the Supreme Court of Canada decision in *St. Catharines Milling* v. *The Queen* (1887), 13 S.C.R. 577, Mr. Justice Strong described crown policy as being one which "sufficed to protect the Indians in the absolute use and enjoyment of their lands ..." This policy he states, represents "an accurate description of the principles upon which the crown invariably acted with reference to Indian lands, at least from the year 1756, when Sir William Johnson was appointed by the Imperial Government superintendent of Indian affairs in North America, being as such responsible directly to the crown through one of the Secretaries of State, or the Lords of Trade and Plantation, and thus superseding the Provincial Governments, down to the year 1867 ... " *Id.* at 608.

Proclamation correspondence of Lord Egremont, Secretary of State for the Southern Department, an important office in the control of colonial affairs:

> [I]t may become necessary to erect some Forts in the Indian Country, *with their consent*, yet His Majesty's Justice and Moderation inclines him to adopt a more eligible Method of conciliating the Minds of the Indians by the Mildness of His Government, by protecting their Persons and Property and securing to them all the Possessions, Rights and Privileges *they have hitherto enjoyed, and are entitled to*, most cautiously guarding against any Invasion or Occupation of their Hunting Lands, the Possession of which is to be acquired by fair Purchase only.[150]

The Proclamation then, served to clarify and promote the *pre-existing* policies of the British government.

The Proclamation of 1763 has the force of a statute in Canada and has never been repealed.[151] Frequently denominated the "Charter of Indian Rights", the precise meaning of the Royal Proclamation has generated so much controversy as to further obfuscate an already inordinately complex subject.

An important question relative to the Royal Proclamation involves a dispute over its geographic scope.[152] While there is judicial opinion to the contrary,[153] several cases have held that the Proclamation does not apply to the far North or West, such being "terra incognita" in 1763.[154] It is far beyond the scope and competence of this article to resolve this dispute and no such attempt will be undertaken.

Another very important question pertaining to the Proclamation of 1763 is whether it represents the *exclusive* source of aboriginal rights in Canada. By its assumption that prior to declaration the Crown had to obtain Indian lands by cession or purchase,[155] the Proclamation itself clearly recognizes the pre-existing land rights of native people. In a statement in *St. Catharines Milling and Lumber Company* v. *The Queen*[156] however, the Privy Council

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[150] Cited in *Native Rights in Canada, supra* note 4 at 37 (emphasis added). The original letter is dated May 5, 1763. Note the remarkable similarity in the description of colonial attitudes toward Indian lands by Lord Egremont and Mr. Justice McLean in *Worcester* v. *Georgia*, 31 U.S. at 392. See text and accompanying note 73, *supra*. In a speech given to the Queen from the Senate and House of Commons of Canada on the admission of Rupert's Land and the Northwest Territory into Confederation in 1870, it was declared: "[T]he 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*. Reprinted in R.S.C. 1952, vol. VI, at 6243 (emphasis added).

[151] *Rex* v. *McMaster (Lady)*, [1926] Ex. C.R. 68, 72; *Campbell* v. *Hall* (1774), 1 Cowp. 204, 98 E.R. 1045.

[152] The Proclamation reserves to the Indians "all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West ..."

[153] See the opinion of Norris, J.A., in *Regina* v. *White and Bob* (1964), 52 W.W.R. 193, 218-29 (B.C.C.A.).

[154] *See, e.g., Calder* v. *Attorney-General of British Columbia* (1971), 13 D.L.R. (3d) 64; (1970), 74 W.W.R. 481 (B.C.C.A.); *Regina* v. *White and Bob* 52 W.W.R. at 199 (Sheppard, J.A., dissenting); *Regina* v. *Sikyea* (1964), 43 D.L.R. (2d) 150 (N.W.T.C.A.).

[155] The opening paragraph of that part of the Proclamation dealing with Indians provides that the Indians "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 ..."

[156] (1888), 14 App. Cas. 46.

seemed to imply that the Royal Proclamation constitutes the sole source of aboriginal rights:

> Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown.[157]

In the *St. Catharines* case, the Indian land in question was clearly within the geographic purview of the Royal Proclamation.[158] Obviously then, the character of that land could be ascribed only to that document. The Privy Council had no occasion to nor did it rule on whether the Proclamation represented the exclusive source of aboriginal title throughout the Dominion. It was sufficient that on the facts before the Board, the Proclamation was controlling. *St. Catharines Milling* therefore cannot be regarded as holding that aboriginal rights depend exclusively upon the Proclamation of 1763. Assuming *arguendo* however that the Proclamation *is* the exclusive source of aboriginal rights in Canada, and accepting for the moment the view that the Proclamation is limited geographically,[159] one wonders what land rights inure to native people who reside outside the region professedly contemplated by the Proclamation of 1763. Is it seriously contended that there are two rules respecting the seminal issue of whether aboriginal rights are recognized in Canada at all? It is submitted that the history of British colonial policy toward the Indians and the overwhelming weight of Canadian case law on this point negate any such view. To the contrary, a strong case can be made that the law of aboriginal rights applies throughout Canada and that in those areas not covered by the Proclamation of 1763, the source of those rights is the law of nations, now incorporated into the common law of Canada. And whether the derivation of aboriginal rights be regarded as the Royal Proclamation of 1763 or the law of nations,[160] the *incidents* of Indian title are precisely the same.

The proposition that aboriginal rights exist independently of the Royal Proclamation has received judicial approval. In a series of cases involving Indian hunting rights, Canadian courts have expressed the view that aboriginal rights apply throughout the Dominion notwithstanding the Royal Proclamation's geographic limits. Perhaps most forthright in this position was the late Mr. Justice Sissons of the Territorial Court of the Northwest Territories. In *Regina* v. *Koonungnak,*[161] the court stated:

> This proclamation has been spoken of as the 'Charter of Indian Rights.' Like so many great charters in English history, it does not create rights but rather affirms old rights. The Indians and Eskimos had their aboriginal rights and English law has always recognized these rights.

Similarly, in *Regina* v. *Sikyea,*[162] Mr. Justice Johnson, speaking for a unanimous Northwest Territories Court of Appeal, held that while the Royal

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[157] *Id.* at 54.

[158] A full discussion of the facts of the *St. Catharines* case appears in the text accompanying notes 169 to 172, *infra.*

[159] This assumption will be made for the remainder of this article.

[160] As described in *Johnson* v. *McIntosh* and its progeny.

[161] (1963), 45 W.W.R. 282, 302.

[162] (1964), 43 D.L.R. (2d) 150, *aff'd* [1964] S.C.R. 642.

Proclamation did not extend to either the western Northwest Territories or the Hudson's Bay Territory, "that fact is not important" since the Federal Government had always respected the aboriginal rights of "all Indians across Canada."[103] The *Sikyea* court expressed approval of the 1932 decision in *Rex* v. *Wesley*[104] in which a similar view of aboriginal rights was taken.

Not only the courts, but the executive and legislative branches of the Governments of Canada and Great Britain have repeatedly acknowledged the existence of aboriginal rights throughout Canada. Thus, in the 1869 deed of surrender for Rupert's Land, it is stated:

> 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 (Hudson's Bay) Company shall be relieved of all responsibility in respect of them.[105]

In addition, various Dominion Lands Acts have given express recognition to aboriginal rights and acknowledge the need to satisfy claims arising from the extinguishment of Indian title.[106] Further recognition of the Indians' aboriginal rights is found in the 1943 Memorandum of Agreement between the Government of Canada and the Government of British Columbia.[107]

While these cases and governmental documents have affirmed the existence of aboriginal claims throughout Canada, they have not fully addressed themselves to the origins of these claims.

Several opinions from the decision of the Supreme Court of Canada in the *St. Catharines Milling*[108] case put forth the view that the law of aboriginal rights described in the early American cases is equally applicable to Canada.

*St. Catharines Milling* involved a dispute between the Province of Ontario and the Government of Canada as to the ownership of certain

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[103] *Id.* at 152. The court further stated: "The right of Indians to hunt and fish for food on unoccupied Crown lands has always been recognized in Canada — in the early days as an incident of their 'ownership' of the land, and later by the treaties by which the Indians gave up their ownership right in these lands." *Id.*

[104] [1932] 2 W.W.R. 337, 350 (Alta. S.C.). The conclusions and reasoning of the court in *Rex v. Wesley* were adopted by Mr. Justice Freedman in *Regina* v. *Prince* (1962), 40 W.W.R. 234, 242, whose decision was adopted in turn by the Supreme Court of Canada (*subnom. Prince* v. *Regina*), [1964] S.C.R. 81. See also *Attorney-General* v. *George*, [1964] 2 O.R. 429, 432-33, *reversed on other grounds*, [1966] S.C.R. 267.

[105] Reprinted in R.S.C. 1952, vol. VI, at 6254. As noted, the court in *Regina* v. *Sikyea* (1964), 43 D.L.R. (2d) 150, 152, held that the Royal Proclamation did not apply to the Hudson's Bay Territories. The quoted provision thus constitutes governmental recognition of aboriginal rights in an area not covered by the Royal Proclamation.

[106] In the 1872 Public Lands Act, for example, section 42 states: "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." S.C. 1872, c. 23. A thorough discussion of the many other instances of legislative acknowledgement of aboriginal title appears in A. Hooper, *Aboriginal Title - Has It Been Extinguished in the Northwest Territories?*, 42-46, 109-16. A part of this exhaustive study has been reproduced in *Native Rights in Canada, supra* note 4, at Supp. Report II.

[107] "Whereas from time to time treaties have been made with respect to the personal and usufructuary rights to territories now included in the Province of British Columbia, such considerations including the setting apart for the exclusive use of the Indians of certain definite areas of land known as Indian Reserves . . ." S.C. 1943-44, c. 19.

[108] *St. Catharines Milling* v. *The Queen* (1887), 13 S.C.R. 577.

lands ceded by the Salteaux Tribe of Ojibway Indians in an 1873 treaty with the Dominion. The Province claimed ownership of the lands by virtue of section 109 of the British North America Act. That section guarantees provincial ownership of all lands lying within the boundaries of the respective provinces, subject to any trusts or other interests in those lands.[169] The Dominion claimed that by virtue of the Proclamation of 1763, the content of aboriginal title to lands reserved for Indians was that of fee simple.[170] As such, the Dominion urged that it received the complete title as a result of the treaty. Both the Supreme Court of Canada and the Privy Council held in favor of the Province. The Privy Council ruled that as a result of the Royal Proclamation, the ownership of Indian lands was split, with the Crown holding the underlying legal fee and the Indians possessing a right of occupancy, termed a "personal and usufructuary right" by the Board.[171] At Confederation, said the Board, the Crown in right of the Province became possessed of the proprietary estate and this became a *plenum dominium* upon the surrender of the Indian title.[172]

It is immediately obvious that the nature of Indian title described by Lord Watson in *St. Catharines Milling* is closely analogous to that described by Chief Justice Marshall in *Johnson* v. *McIntosh.* Indeed, Mr. Chief Justice Marshall expressly relied upon the Royal Proclamation as an additional ground for his judgment in the *McIntosh* case.[173] In a review which dwelled upon the explanation for this parallelism of aboriginal rights in the two countries, Mr. Justice Strong in the Supreme Court of Canada offered some keen insights into the origins and nature of Indian title. While Mr. Justice Strong dissented from the Supreme Court's primary holding in *St. Catharines Milling,* his views on Indian title are entirely consistent with those expressed by the Privy Council.

Mr. Justice Strong viewed the decisions of the United States Supreme Court as reflecting the consistent policy of the British Government toward Indian lands.[174] Based on these decisions, he summarized that policy "as consisting in the recognition by the crown of a usufructuary title in the Indians to all unsurrendered lands."[175] After quoting extensively from the

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[169] "All Lands, Mines, Minerals, and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same." Section 109, British North America Act, 1867, 30-31 Vict. c. 3.

[170] (1888), 14 App. Cas. 46, 54.

[171] *Id.* at 54-55.

[172] *Id.* at 55, 57.

[173] "The proclamation issued by the king of Great Britain, in 1763, has been considered, and we think, with reason, as constituting an additional objection to the title of the plaintiffs." 21 U.S. at 262. The Proclamation was further discussed in *Worcester* v. *Georgia,* 31 U.S. at 546-447.

[174] "[W]e must refer to historical accounts of the policy already adverted to as having been always followed by the crown in dealings with the Indians in respect of their lands.
In the Commentaries of Chancellor Kent and in some decisions of the Supreme Court of the United States we have very full and clear accounts of the policy in question." (1887), 13 S.C.R. at 607-08.

[175] *Id.* at 608.

American cases discussed in Part II(A) of this paper, Mr. Justice Strong concluded:

> Therefore, when we consider that with reference to Canada the uniform practice has always been to recognize the Indian title as one which could only be dealt with by surrender to the crown, I maintain that if there had been an entire absence of any written legislative act ordaining this rule as an express positive law, (i.e. the Royal Proclamation of 1763), we ought, just as the United States courts have done, to hold that it nevertheless existed as a rule of the unwritten common law, which the courts were bound to enforce as such ...[176]

Mr. Chief Justice Ritchie, writing a majority opinion for himself and Mr. Justice Fournier, held that the crown possessed legal title to unpatented lands, subject to the Indian right of occupancy.[177] His authority for this proposition was Mr. Justice Storey, an American jurist who wrote extensively on aboriginal title in the United States.[178]

Recently, Mr. Justice Norris, in *Regina* v. *White and Bob*,[179] reviewed the decision in *Johnson* v. *McIntosh* and concluded: "The judgment of the learned chief justice is entirely consistent with the opinion of the Privy Council in *St. Catharines Milling & Lumber Co.* v. *Reg* ..."[180] Mr. Justice Norris also concluded that the Proclamation of 1763 was "declaratory and confirmatory" of aboriginal rights.[181]

Finally, the discussion in *Johnson* v. *McIntosh* makes clear that its theories were not peculiar to the United States but rather were the result of colonial policies applicable to all of North America.[182]

The growing number of Canadian decisions holding that aboriginal title applies throughout Canada lends strong support to the argument that aboriginal rights pre-date the Royal Proclamation of 1763 and survive as common law in those parts of the Dominion not reached by the Proclamation.

The only authority opposing these views has come in a recent decision of the British Columbia Court of Appeal. In *Calder* v. *Attorney-General of British Columbia*,[183] the court held that not only did the Royal Proclamation of 1763 not extend to British Columbia, but that there can be no

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[176] *Id.* at 613.

[177] *Id.* at 599.

[178] *Id.* at 600. It is noteworthy that in attempting to describe the extent of aboriginal rights, in the *St. Catharines* case, Chancellor Boyd in the Ontario High Court and each of the judges in the Ontario Court of Appeal relied upon American authorities, particularly *Johnson* v. *McIntosh*. See (1885), 10 O.R. 196, 209 (Boyd, C.); (1886), 13 O.A.R. 148 (Hagarty, C.J.O.), 159 (Burton, J.A.), 168 (Patterson, J.A.).

[179] (1964), 52 W.W.R. 193 (B.C.C.A.).

[180] *Id.* at 212.

[181] *Id.* at 218.

[182] See 21 U.S. at 595 for a full discussion of British policies toward Indians in North America. After citing the early aboriginal rights decisions of the United States Supreme Court, Mr. Justice Strong in *St. Catharines Milling* stated: The value and importance of these authorities is not merely that they show that the same doctrine as that already propounded regarding the title of the Indians to unsurrendered lands prevails in the United States, but, what is of vastly greater importance, they without exception refer its origin to a date anterior to the revolution and recognize it as a continuance of the principles of law or policy as to Indian titles then established by the British government, and therefore identical with those which have also continued to be recognized and applied in British North America." (1887), 13 S.C.R. at 610.

[183] (1971), 13 D.L.R. (3d) 64, (1970), 74 W.W.R. 481 (B.C.C.A.).

judicial recognition of aboriginal rights absent legislative or executive "recognition" of such title.[184]

*Calder* was an action for a declaration that the aboriginal rights of the plaintiff Indians had never been extinguished. The action was brought by the Nishga Indian Tribe, who reside in the Nass Valley of British Columbia. It was common ground that the Nishga Indians had inhabited a large area in northwestern British Columbia since time immemorial. It was revealed at trial that the Nishgas numbered about two thousand in 1835 and had traditionally subsisted by hunting and food gathering.[185]

Before dealing with the issue of extinguishment, the Court of Appeal took occasion to incorporate the British "Act of State" doctrine into Canadian Indian law, an entirely novel and unprecedented step. The court's review of the Act of State doctrine led it to the conclusion, proposed by the respondent Attorney-General, that there "is no Indian Title capable of judicial recognition in the courts of Canada unless it has previously been recognized either by the Legislature or the Executive Branch of Government."[186]

To support this proposition, the court cites Privy Council cases dealing with colonial situations from Pondoland to India. It may at first be observed that it seems curious that the court should strain to utilize cases arising out of a now discredited imperialist era and from geographically and culturally remote regions, to reach a conclusion antonimic to that of Canadian and American tribunals. But the court's employment of the Act of State doctrine in *Calder* involves far more than what is arguably a poor choice of law. For it is apparent that the *Calder* court has misconstrued the Act of State doctrine itself.

Absent a contrary rule of municipal law, the Act of State doctrine denies a *remedy* to the citizens of an acquired territory for invasions of their rights which may occur during a change of sovereignty.[187] As noted, the action in *Calder* was for a declaratory judgment. Neither damages nor any other form of enforcement for plaintiff's alleged rights were sought. A mere declaration that such rights exist and had not been extinguished was all that plaintiffs asked. It is clear that the 'Act of State' doctrine represents nothing more than a procedural bar to the enforcement of rights in the municipal courts. Each of the cases cited by the court in *Calder* so state.[188]

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184 13 D.L.R. at 73, 74 W.W.R. at 491. After disposing of the Royal Proclamation under the "terra incognita" doctrine, the court had little difficulty in not finding other legislative or governmental recognition. There are, of course, no treaties with the Nishgas or with most other Indians in British Columbia.

185 13 D.L.R. at 70, 74 W.W.R. at 487. The evidence was introduced by Professor Wilson Duff, an anthropologist testifying as an expert witness.

186 *Id.*

187 *See, e.g., Vajesingji Joraversingji* v. *Secretary of State* (1924), 51 Ind. App. 375, 360-61 (P.C.); *Cook* v. *Sprigg*, [1889] App. Cas. 572, 577-79 (P.C.); D.P. O'Connell, *supra* note 30 at 437.

188 *See, e.g., Hoani Te Heuheu Tukino* v. *Aotea Dist.*, [1941] App. Cas. 308, 324: "It is well settled that any rights purporting to be conferred by such a treaty of cession (Treaty of Waitangi) *cannot be enforced* in the courts, except in so far as they have been incorporated in the municipal law." (emphasis added); *Secretary of State* v. *Kamachee Boye Sahaba* (1859), 13 Moore 22, 86, 15 E.R. 9, 33: "It is sufficient to say that, even if a wrong has been done, it is a wrong for which no municipal court of justice *can afford a remedy*." (emphasis added).

This has been made explicit by Professor D. P. O'Connell in his treatise, *International Law*:

> This doctrine, which has been affirmed in several cases arising out of the acquisition of territory in Africa and India, has been misinterpreted to the effect that the substantive rights themselves have not survived the change. In fact English courts have gone out of their way to repudiate the construction, and it is clear that the Act of State doctrine is no more than a procedural bar to municipal law action, and as such is irrelevant to the question whether in international law change of sovereignty affects acquired rights.[189]

By holding that there is no Indian title capable of judicial recognition without a governmental edict to that effect, the *Calder* court effectively nullified plaintiffs legal rights by incorrectly converting a procedural impediment into a substantive rule of law.

Without the procedural bar of the Act of State doctrine, what is the English rule regarding private (including communal) property in acquired lands? In *Amodu Tijani* v. *The Secretary,*[190] the appellant was head chief of the Oluwa community in Southern Nigeria. As such, he controlled the communal lands on behalf of the members of his community. The issue in the case involved the basis of calculating the compensation to be awarded for the taking of appellant's lands under the Public Lands Ordinance of 1903. In reviewing the appellant's land holdings, the Supreme Court of Nigeria ruled that appellant had "merely a seigneurial right giving the holder the ordinary rights of control and management of the land" and that compensation was to be limited to that basis.[191] In his appeal to the Privy Council, appellant urged that compensation be based on the full value of the communal property.

The Public Lands Ordinance provided for compensation in cases of a taking of lands for public purposes. The case thus falls within the "recognition" exception to the Act of State doctrine. That the Ordinance did not go to the substantive recognition of native title is demonstrated by the Court's expressed need "to consider, in the first place, the real character of the native title to the land."[192] In the course of its judgment, the Privy Council noted that the usufructuary right was a "very usual form of native title" and that "[t]heir Lordships have elsewhere explained principles of this kind in connection with the Indian title to reserve lands in Canada."[193] In Lagos, a cession of the land to Great Britain resulted in the Crown's possession of

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[189] D. P. O'Connell, *supra* note 30 at 437-38 (citations omitted). That the Act of State doctrine in no way affects substantive rights is also made clear in *Cook* v. *Sprigg*, [1899] App. Cas. 572, 578, a case heavily relied upon by Mr. Justice Tysoe in Calder: "It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that according to well-understood rules of international law a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation."

[190] [1921] 2 App. Cas 399 (P.C.).

[191] *Id.* at 402.

[192] *Id.*

[193] *Id.* at 403. The Court referred to the decision in *St. Catharines Milling.* As expressly stated in *St. Catharines Milling*, reserve lands refer to all lands reserved for Indians, not merely "Indian reserves". (1888), 14 App. Cas. at 59.

the legal fee. But, said the Board, "this cession (of the fee) appears to have been made on the footing that the rights of property of the inhabitants were to be fully respected. *This principle is a usual one under British policy and law when such occupations take place.*"[194] Following previous decisions,[195] the Board ruled that in light of this policy there is a general *presumption in favor* of the continuance of property rights of the native inhabitants.[196] The appellant was therefore awarded full value for his land.[197] This policy, of course, is in full conformity with the rule of international law respecting property rights in acquired territory.[198] It is also consistent with the Canadian policy of respect for aboriginal lands and with those cases holding that aboriginal rights exist in all parts of the Dominion irrespective of statutory recognition.[199]

The conclusion seems compelling that at least with respect to the "recognition" of aboriginal title, the decision in *Calder* v. *Attorney-General of British Columbia* represents a substantial deviation from Canadian, English and American case law and governmental policy, and is therefore erroneous.[200]

### *B. The Content of the Aboriginal Claim.*

In the *St. Catharines Milling* case, the Privy Council found it necessary to discuss the nature of Indian title in order to resolve the issues before it. In construing the Royal Proclamation, the Board found that aboriginal

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194 [1921] 2 App. Cas. at 407 (emphasis added).

195 *Attorney-General of S. Nigeria* v. *Holt,* [1915] App. Cas. 599; *Oduntan Onisiwo* v. *Attorney-General,* [1912] 2 Nig. L.R. 77.

196 [1921] 2 App. Cas. at 407. "[I]t is not admissible to conclude that the Crown is generally speaking entitled to the beneficial ownership of the land as having so passed to the Crown as to displace any presumptive title of the natives. A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners..." *Id.* See also *Re South Rhodesia,* [1919] App. Cas. 211, 233-34.

197 [1921] App. Cas. at 411.

198 See D.P. O'Connell, *supra* note 30.

199 See discussion at notes 161 to 164 and accompanying text, *supra.* "[T]his proclamation (of 1763), ever since its issue, has been faithfully observed in its integrity, as well within the limits of the then Province of Quebec as in all other . . . British possessions in North America." *St. Catharines Milling* v. *The Queen* (1887), 13 S.C.R. at 652 (Gwynne, J., dissenting). Moreover, correspondence between the Colonial Secretary and Governor Douglas of British Columbia reveal the same policy of respect was to apply to the Far West. Thus in a letter dated April 11, 1859, the Colonial Secretary let the Governor know that the British Government desired that "measures of liberality and justice may be adopted for compensating" the Indians for the surrender of their lands on Vancouver Island and British Columbia. Cited in *Calder* v. *Attorney-General of British Columbia,* 13 D.L.R. at 85, 74 W.W.R. at 505. That such a policy was not ultimately carried out was solely due to a lack of funds and not because of any change in policy. See correspondence, 13 D.L.R. at 86-87, 74 W.W.R. at 506-08.

200 In reviewing the *Calder* case, the writer has concentrated upon the judgment of Mr. Justice Tysoe. The opinion of Mr. Justice Davey concentrates primarily upon the Act of State doctrine and is an abbreviated concurrance of the opinion by Mr. Justice Tysoe. Mr. Justice MacLean quotes extensively from *Johnson* v. *McIntosh* and *Tee-Hit-Ton Indians* v. *United States.* The learned Justice then contends that while the recognition - non-recognition dichotomy in *Tee-Hit-Ton* went to the issue of compensation, the same rules should apply to a declaration of recognition. Mr. Justice MacLean offers no support for this extraordinary conclusion. Certainly none can be extracted from any American case, including *Tee-Hit-Ton.* While that case weakened aboriginal claims against the government, the Court expressly acknowledged the legal existence and protection of "unrecognized" aboriginal title. 348 U.S. at 279.

title consisted of "a personal and usufructuary right, dependent upon the good will of the Sovereign."[201]

There is little doubt but that the latter phrase was used by the Privy Council to denote the Crown's exclusive right to extinguish Indian title and thereby merge the Indians' beneficial use with the legal fee held by the Sovreignty.[202] Quoting the Proclamation of 1763, the Board held that Indian lands "shall be reserved for the use of the Indians, as their hunting grounds . . ."[203] Unfortunately the Board declined the opportunity to define with precision the nature of the Indian right.[204] Moreover, the lack of Canadian case law on this subject has left us with almost no judicial opinion as to the character of aboriginal title, and, more particularly, as to the meaning of a "usufructuary right". The most complete statement has been by Mr. Justice Strong in his opinion in *St. Catharines Milling:*

> It may be summarily stated as consisting in the recognition by the crown of a usufructuary title in the Indians to all unsurrendered lands. This title, though not perhaps susceptible of any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the *absolute use and enjoyment of their lands,* whilst at the same time they were incapacitated from making any valid alienation otherwise than to the crown itself, in whom the ultimate title was ... considered as vested.[205]

This description comports with the modern legal definition of a usufruct, a term derived from Roman law.[206] It is also consistent with the American rule of aboriginal rights and with those Canadian cases which have adopted or approved the American rule. While Canadian judicial authority on this point is sorely lacking, the authority we do have would seem to support the view that the aboriginal rights of Canadian Indians includes the right to hunt, farm and exploit the natural resources on the lands which they possess. Any governmental encroachment upon such lands (e.g. the granting of leases to private corporations to mine natural resources) would of course constitute a partial extinguishment.[207]

As to the primary right to hunt, there is little doubt. The Royal Proclamation expressly so provides and a number of Canadian cases have held

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[201] (1888), 14 App. Cas. at 54.

[202] In the same paragraph Lord Watson noted: "It appears to (their Lordships) to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished." *Id.* at 55. See also *Native Rights in Canada, supra* note 4 at 156-57.

[203] (1888), 14 App. Cas. at 55.

[204] "There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point." *Id.*

[205] (1886), 13 S.C.R. at 608 (emphasis added).

[206] The usufruct has developed as a form of trust, often created by will. It is still employed in countries such as South Africa which derive their law of property from Roman law. A South African text thus describes the right: "Usufruct created by will is therefore the bequest of the *use of a* thing with the right to take and keep its fruits during the duration of the usufruct." H.R. Harlo and E. Kahn, South Africa, *The Development of its Laws and Constitution* (London: Stevens and Sons Ltd., 1960) 634; see *Native Rights in Canada, supra* note 4 at 155-56.

[207] There can of course be a partial expropriation of property and the rules regarding compensation in such a case are the same as in the case of a complete taking. G. Challies, *The Law of Expropriation* (Montreal: Wilson and Lafleur Ltd., 1963) 80.

that the right to hunt is an incident of aboriginal rights.[208] Restrictions upon this right would also have to be considered a violation of the aboriginal title and therefore a partial extinguishment.

This review indicates that the nature and content of aboriginal title is similar in both Canada and the United States. As stated earlier, this is undoubtedly the result of the common legal heritage of the right. This common heritage will also be of assistance in understanding the law of extinguishment of aboriginal title in Canada.

*C. Extinguishment of Aboriginal Title.*

Both the Royal Proclamation of 1763 and *St. Catharines Milling* make clear the uninhibited and exclusive right of the sovereign to extinguish aboriginal title.[209] Until the 1970 decision in *Calder* v. *Attorney-General of British Columbia* however, no Canadian case had attempted to explain how such an extinguishment could be executed.

A preliminary issue on the subject of extinguishment concerns itself with possession of the power under scrutiny. Prior to Confederation, the power to extinguish Indian title resided in the colonies, subject to British approval. By virtue of section 91(24) of the British North America Act, the Dominion has now been given exclusive legislative authority over "Indians, and lands reserved for the Indians". Such an explicit delegation would unquestionably seem to carry with it the sole authority to extinguish Indian title.[210]

In *Calder,* the British Columbia Court of Appeal was asked to declare that the aboriginal title of the Nishga Indians had not been extinguished. After an elaborate review of pre-Confederation legislation, the court concluded that if there ever had been aboriginal title in British Columbia, it had surely been extinguished by such legislation.[211] As noted, *Calder* represents the only elaborated judicial statement on the law of extinguishment in Canada. The Court of Appeal chose to rule on this subject by restating and adopting American law. To do this, the court took selected quotations from *United States* v. *Santa Fe Pacific Railroad*[212] and *Tee-Hit-Ton Indians* v. *United States.*[213] The effect of these adopted judicial statements is that an extinguishment may be accomplished by any means convenient to the sovereign, including the "sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise . . ."[214] and that

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[208] *See, e.g., Regina* v. *Sikyea* (1964), 43 D.L.R. (2d) 150, 152, *aff'd* [1964] S.C.R. 642; *Rex* v. *Wesley,* [1932] 2 W.W.R. 337, 348-50. See also Lysyk, *The Unique Constitutional Position of the Canadian Indian* (1967), 45 Can. B. Rev. 513, 518.

[209] In *St. Catharines Milling,* Lord Watson commented that Indian title subsisted until "that title was surrendered or otherwise extinguished." 14 App. Cas. at 55.

[210] See generally Lysyk, *supra* note 208; cf. *Rex* v. *McMaster (Lady), supra* note 151.

[211] The court referred to some thirteen legislative acts or proclamations. These enactments generally dealt with the pre-emption of unoccupied Crown lands and were designed to throw open the colony to settlement. 74 W.W.R. at 508-17.

[212] (1941), 314 U.S. 339.

[213] (1954), 348 U.S. 272.

[214] 314 U.S. at 347. Cited in *Calder* v. *Attorney-General of British Columbia,* 13 D.L.R. at 79, 74 W.W.R. at 497.

the equity of such an extinguishment is not open to judicial review. While this is undoubtedly an accurate review of American law to the extent that it goes, it nevertheless represents only part of the law of extinguishment. As the discussion in Part II (C) demonstrated, courts in the United States (including the Supreme Court in the *Santa Fe* case) require very strong evidence to rebut the presumption against an extinguishment of aboriginal title.[215] This presumption arose as a result of the history of official obeisance toward aboriginal rights in the United States. If anything, the history of respect for Indian land rights is far stronger in Canada than in the United States, where violent deviations from official policy were notorious. If the American rule of extinguishment is to be applied in Canada, then a similar presumption against extinguishment of original Indian title should follow.[216]

Whether or not Indian title has been extinguished in any particular jurisdiction requires a careful and extensive review of pertinent legislative (and executive) history.[217] All we can do here is provide the theoretical perspective from which such an analysis can proceed. The history of Canada demonstrates the traditional seriousness which the Crown maintained toward Indian rights. While the sovereign undoubtedly has had the authority to extinguish Indian title, the law and consistent political history in this area show that an extinguishment cannot be lightly implied.

In those instances where an extinguishment of aboriginal rights has occurred, the question finally remains whether such a loss is compensable.

### D. *Compensation for the Taking of Aboriginal Lands.*

Although not called upon to do so, the Court of Appeal in *Calder* v. *Attorney-General* gratuitously offered its view on the issue of compensation in cases of extinguishment. Unlike its discussion of "recognition", where the court rejected American authorities in favor of the British Act of State doctrine, here the court declared:

> [W]hatever may be the situation in this regard in relation to natives in some other part of what was once the British Empire, in my opinion whatever rights the Indians in British Columbia possessed which have not been specifically recognized ... may be extinguished by the Crown without compensation and without the consent of the Indians, just as is the case in the United States.[218]

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[215] See discussion at notes 73 to 75 and accompanying text, *supra*. In *Lipan Apache Tribe* v. *United States* (1967), 180 Ct. Cl. 487, 492, the United States Court of Claims recently restated this area of law: "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 [claimant's] rights' in their property, Indian title continues." (citation omitted). Accord, *United States* v. *Northern Paiute Nation*, 393 F. (2d) 786, 793 (Ct. Cl. 1968).

[216] In *Lipan Apache*, the Court of Claims also held that the mere existence of legislation which potentially could annul aboriginal title was insufficient to effect an extinguishment. Thus legislation by the Republic of Texas to remove the Indians "as soon as circumstances permit" could not affect Indian title. Held the *Lipan* court: "We cannot declare, however, that the contemplation of possible future action contingent on other circumstances is clear evidence of present extinguishment." 180 Ct. Cl. at 494.

[217] *See, e.g.*, A. Hooper, *supra* note 166. See also *Calder* v. *Attorney-General of British Columbia*, 13 D.L.R. at 79-98, 74 W.W.R. at 498-522.

[218] 13 D.L.R. at 80, 74 W.W.R. at 498.

The court of course referred to *Tee-Hit-Ton Indians* v. *United States*.[219] The court's reliance upon this case is unfortunate for several reasons. Unlike those Indian rights decisions derived from international law and British colonial policy, *Tee-Hit-Ton* is based upon an interpretation of the Fifth Amendment of the United States Constitution, a peculiarly American enactment. The *Calder* court did not so much as mention the presumption against expropriation without compensation, which constitutes the relevant Canadian authority on this question.[220]

In addition, *Tee-Hit-Ton* was decided at a time when compensation for the vast majority of Indian claims *was* being made, albeit through a statutory arrangement. It was therefore inaccurate for the court to state that unrecognized Indian claims may be extinguished without compensation in the United States. Only those unrecognized claims not within the purview of the Indian Claims Commission Act are non-compensable, and these represent but a tiny minority of the American cases.[221]

The pertinent legal authority on compensation for loss of property rights is well established: "[T]he general rule of law in expropriation cases is and has long been that compensation is given, and any statute providing for expropriation without compensation must be expressed in the clearest and most unequivocal terms."[222] This rule, of course, has been consistently followed by English and Canadian courts.[223]

In *Calder* v. *Attorney-General,* the court assumed for purposes of its discussion of the law of extinguishment and compensation that the Indians had a personal and usufructuary right to their lands.[224] It has been shown that while Indian title may be extinguished, it most definitely contains the legal incidents of private rights. Canadian law recognizes the applicability of the presumption against expropriation without compensation to owners of many forms of interest in property, aside from the fee simple. Indeed, at least one case has applied the rule to the possessor of a usufruct.[225] While the question has yet to be squarely faced by a Canadian court, there seems little reason why this presumption should not be as fully applicable to aboriginal title as it is to other forms of private right.

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[219] (1955), 348 U.S. 272.

[220] The omission is even more surprising in view of the full discussion on this point presented in plaintiff's factum. See Factum for Plaintiff at 42-44, *Calder* v. *Attorney-General of British Columbia* (1971), 13 D.L.R. (3d) 64, (1970), 74 W.W.R. 481.

[221] See discussion at notes 122 to 126 and accompanying text, *supra.*

[222] G. Challies, *supra* note 207 at 77.

[223] *See, e.g., Metropolitan Asylum Dist.* v. *Hill,* [1881] 6 App. Cas. 193, 203, 208; *British Columbia Elec. Railway* v. *Public Utilities Comm'n,* [1960] S.C.R. 837, 845-46; *Leahy* v. *North Sydney* (1905-06), 37 S.C.R. 464, 476.

[224] 13 D.L.R. at 79, 74 W.W.R. at 497.

[225] *Commissaires d'Ecoles* v. *Charbonneau,* [1953] Que. S.C. 477. "The owner of any property or of any interest in any property can claim compensation if the property or any interest therein is expropriated.
Compensation is awarded not only to the owner of the land but to the owner of a servitude, or to a licensee . . . or to a usufructuary." G. Challies, *supra* note 207 at 73 (citations omitted).

While Canadian Indians may thus fairly state a substantive claim for compensation for the unconsented deprivation of their aboriginal rights, the procedural impediments to such a claim appear to be formidable. Without legislative intervention, procedural rules such as statutes of limitations and Crown immunity would seem fatal to any action except one for a declaratory judgment.

## IV CONCLUSION

It has been the purpose of this article to refute the notion that native people have not a legal claim to their aboriginal lands, but merely a moral or ethical one. That they have the latter is irrefutable. But two centuries of political and judicial decisions conclusively demonstrate an outstanding substantive right as well.

Aboriginal rights evolved in both Canada and the United States from the respect accorded native lands by the colonizing powers, particularly Great Britain. It is therefore no coincidence that the theory of aboriginal rights has developed along the same lines in both nations. It is also more than mere chance that leading American decisions have referred to the Royal Proclamation of 1763 and leading Canadian decisions have referred to the early American jurisprudence, in tracing the origins and nature of original Indian title.

Judicial precedent in Canada and the United States reveal that important legal rights exist as incidents to aboriginal title. The attempt to enforce those rights against the government led to a stormy judicial debate in the United States. The ensuing embarrassment to the American people was ameliorated by the enactment of legislation designed to right old wrongs by fair and efficacious means. The Canadian rule on similar claims has yet to be litigated.

What remains important for Canadians is that both the legal and moral right to the recognition of aboriginal claims undeniably exists. How those claims are to be protected and satisfied, must ultimately be determined by the Government and native peoples of Canada.

# APPENDIX

Excerpts from the Royal Proclamation of 1763.*

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—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, 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 Please 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.

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 Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid;

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.

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.

And Whereas Great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the Great Prejudice of our Interests, 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 the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, 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; 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:

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.

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.

Given at our Court at
St. James the 7th Day
of October 1763, in the
Third Year of our Reign.

GOD SAVE THE KING

*Reprinted in R.S.C. 1952, Vol. VI at 6130-31.