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ABORIGINAL TITLE AND EXTINGUISHMENT NOT SO “CLEAR AND PLAIN”: A COMPARISON OF THE CURRENT MAORI AND HAIDA EXPERIENCES

Jacqueline F. Pruner[†]

Abstract: As the end of the United Nations General Assembly’s International Decade of the World’s Indigenous Peoples (1995-2004) approaches, indigenous peoples worldwide are proactively seeking an unprecedented reclamation of aboriginal rights lost since European colonization. One of the most all-encompassing rights that is asserted by indigenous peoples is the right of “indigenous title,” a legal term of art that is both difficult to define and challenging to recognize. Notwithstanding domestic opposition from their respective provincial or national legislatures, both the Haida of Canada and the Maori of New Zealand are currently pursuing recognition of this indigenous right through their respective judiciaries.

Recent case law in both Canada and New Zealand recognize the existence of indigenous title. Further, international law supports both the Haida and the Maori claims. However, manifest differences between the two nations as to what actions constitute extinguishment of indigenous title will probably result in the success of the Haida claim and the failure of the Maori claim. Canada’s constitutionally-based narrow approach contrasts sharply with New Zealand’s flexible statute-based methods of extinguishing indigenous title, which include mere legislative action.

The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof.¹

~ Chief Justice Beverley McLachlin, 2004

One two three four, Maori own the foreshore, two four six eight, don't you bloody confiscate.²

~ Marchers Protesting the Foreshore and Seabed Bill, 2004

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¹ Bloomberg News, *Canadian tribes gain disputed land rights*, SEATTLE POST-INTELLIGENCER, Friday, Nov. 19, 2004, B5 (citing *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.C. 73 at para. 27).

² *Thousands March Against Seabed and Foreshore Legislation*, N.Z. HERALD, May 5, 2004, at <http://www.nzherald.co.nz/storydisplay.cfm?thesection=news&thesubsection=&storyID=3564651&reportID=1162603> (last visited Jan. 14, 2005).

I. INTRODUCTION

The end of 2004 concludes the International Decade of the World's Indigenous Peoples.³ It is claimed that the end of the Twentieth Century hastened a shift “from a capitalist, gain-seeking mentality towards a sympathy and respect for needy and less fortunate humans.”⁴ However, inadequate protection of indigenous land rights, revealed by the continued non-recognition of aboriginal title by some nations, shows that considerable progress must still be made to protect the rights of indigenous peoples worldwide, particularly indigenous land rights.

The Haida, a northern Pacific islands indigenous people, are among those seeking judicial recognition of indigenous title.⁵ The Haida claim aboriginal title for Haida Gwaii, the British Columbian archipelago on which they live.⁶ A recognition of aboriginal title would enable the Haida to control and protect their own lands, seas, air space and natural resources. Likewise, the Maori, a southern Pacific islands indigenous people, seek title to what little land remains free of fee simple title designation—the foreshore and seabed of the Marlborough Sounds of New Zealand.⁷

The similarities between the Haida and Maori claims support similar outcomes. Both peoples share histories of colonization by the British Crown, first as Crown colonies and now as Commonwealth Realms and members of the British Commonwealth of Nations. Both indigenous title claims are under the common law system.⁸ Further, the legal basis for these claims both recognizes this proprietary right as a legal right and that extinguishment for these two claims requires a “clear and plain” intention by the government.⁹

For all their similarities, however, these two Pacific island indigenous title claims are likely to result in opposite outcomes. Although Canada and New Zealand share a common law tradition and significant indigenous populations, the historical, social, and constitutional differences between the

³ U.N. GAOR 3d Comm., 51st Sess., 82nd mtg. at 107, U.N. Doc. A/RES/51/78 (1997), available at <http://www.un.org/documents/ga/res/51/a51r078.htm> (last visited Jan. 14, 2005).

⁴ Amy Sender, Note, *Australia's Example of Treatment Towards Native Title: Indigenous People's Land Rights in Australia and the United States*, 25 BROOK. J. INT'L L. 521, 521 (1999). For an excellent anthology intertwining indigenous rights and the environment, see LAWRENCE WATTERS, *INDIGENOUS PEOPLES, THE ENVIRONMENT AND LAW* (2004).

⁵ See *Haida Nation v. B.C. (Minister of Forests) et al.*, [2002] B.C.T.C. 35; *Haida Nation v. B.C. (Minister of Forests) et al.*, [2002] 164 B.C.A.C. 217, 268 W.A.C. 217, 2002 B.C.C.A. 147, 2002 B.C.A.C. LEXIS 130.

⁶ *Id.*

⁷ See *Attorney-General v. Ngati Apa*, [2003] 3 N.Z.L.R. 643, 2003 N.Z.L.R. LEXIS 74.

⁸ See discussion *infra* Parts II.C.2 and II.D.3 detailing the Haida and Maori claims.

⁹ See discussion *infra* Part III discussing the Haida and Maori legal arguments.

two nations will cause sharply different results from the two claims.¹⁰ The recognition of aboriginal rights in Canada through the Royal Proclamation of 1763 and Canada's Constitution significantly limits the methods of indigenous title extinguishment.¹¹ New Zealand, which lacks both the Royal Proclamation and a written Constitution, much less one recognizing Maori customary rights, has a much broader array of methods to extinguish indigenous title.¹² This difference in extinguishment methods results in the different outcomes for the Haida and Maori claims.¹³

This Comment asserts that while both international law and national case law support the indigenous title claims of the Haida and the Maori, the Haida claim will likely succeed, at least in part, while the Maori claim will likely fail. Part II of this Comment provides a brief history of indigenous rights and title under international, Canadian, and New Zealand law. Part III examines the extinguishment of indigenous title in Canada and New Zealand and concludes that in spite of identical "clear and plain" intention tests, the differences in the available methods of extinguishment explain the different outcomes for the Haida and Maori claims. Part IV asserts that both the Maori and the Haida claims of aboriginal title are supported on several national and international law grounds and should both succeed.

II. "ABORIGINAL TITLE" IS AMBIGUOUSLY DEFINED THROUGH INTERNATIONAL, CANADIAN, AND NEW ZEALAND LAW

International law, Canadian law, and New Zealand law all define aboriginal rights and aboriginal title, although ambiguously.¹⁴ Such rights

¹⁰ James I. Reynolds, *Recent Developments in Aboriginal Law in the United States, Australia and New Zealand: Lessons For Canada?* Part I, 62 THE ADVOCATE 59 (2004).

¹¹ See discussion *infra* Part III.B explaining Canada's recognition of and limits to aboriginal rights.

¹² See discussion *infra* Part III.C comparing New Zealand with Canada's Constitutional recognition of aboriginal rights.

¹³ See discussion *infra* Part III.B-D comparing and contrasting Canada and New Zealand scopes of extinguishment methods.

¹⁴ "Aboriginal title" is "land ownership, or a claim of land ownership, by an indigenous people in a place that has been colonized." BLACK'S LAW DICTIONARY 1522 (8th ed. 2004). This Comment refers to "indigenous rights" and "indigenous title" in their general sense. The phrases "aboriginal rights" and "aboriginal title" specifically refer to such rights in Canada. Likewise, the phrases "Maori customary rights" and "Maori customary title" specifically refer to such rights in New Zealand. New Zealand recognizes that "aboriginal title" and "Maori customary title" are interchangeable expressions. See *Te Runanganui o Te Ika Whenua Inc. Soc'y v. Attorney General*, [1994] 2 N.Z.L.R. 20, 23. Note that the term "aboriginal" denotes a first inhabitant of a region or country. ALPHEUS HENRY SNOW, THE QUESTION OF ABORIGINES IN THE LAW AND PRACTICE OF NATIONS 5 (1921). Note also that "[t]he term 'indigenous' is . . . synonymous with 'aboriginal', 'aborigine' and 'native', and includes such specific groups and terms as Aborigines, Islanders, Maoris . . . Metis, Eskimos and Indians (status and non-status)." GLENN RIVARD, A COMPARATIVE STUDY OF THE STATUS OF INDIGENOUS PERSONS IN AUSTRALIA, CANADA, AND NEW ZEALAND, at II-1, II-2 (1975).

and title are an area of law that is imprecise and slow-to-evolve, much like “an overgrown and poorly excavated site”¹⁵ that is slowly but steadily being uncovered in piecemeal fashion by the international community, including Canada and New Zealand.¹⁶ This imprecision has led to an unnecessarily slow recognition of indigenous title for those peoples who have historically resisted attempts at assimilation and who seek title to the few remaining lands that have not had their indigenous title extinguished.¹⁷ The ambiguity in the definition of indigenous title as a legal term of art is due in large part to its ancient origins.¹⁸ The term ‘indigenous title,’ although not specifically mentioned, is slowly evolving under international law.¹⁹ This term of art also has separate, yet often overlapping, evolutionary paths in both Canada and New Zealand.²⁰

A. *Indigenous Title is Ancient in Origin and Ambiguously Defined*

Despite significant efforts to understand the origins and existence of indigenous rights, no clear, uniform definition has emerged.²¹ The origins of aboriginal and land rights are grounded in ancient Roman law—*Ius Gentium* and *Ius Naturale*.²² Internationally, indigenous rights are loosely defined as rights that attach to indigenous persons and peoples “by virtue of [their] being human and Indigenous.”²³ The doctrine of indigenous title is a specific form of indigenous right—a right to land that is even broader in

¹⁵ Brian Slattery, *Understanding Aboriginal Rights*, 66 CAN. BAR. REV. 727 (1987).

¹⁶ See Julie Cassidy, *Aboriginal Title: “An Overgrown And Poorly Excavated Archeological Site?”* 10 INT’L LEGAL PERSP. 39, 39-40 (1998).

¹⁷ *Id.*

¹⁸ *Id.* at 47-48.

¹⁹ *Id.* at 40.

²⁰ *Id.* The United States and Australia are two other nations currently struggling with aboriginal title. Together, these four nations frequently look to one another for legal precedent regarding aboriginal title. *Id.* See generally James I. Reynolds, *supra* note 10, at 59-71; James I. Reynolds, *Recent Developments in Aboriginal Law in the United States, Australia and New Zealand: Lessons for Canada? Part II*, 62 THE ADVOCATE 177, 177-192 (2004).

²¹ See, e.g., Cassidy, *supra* note 16, at 40-43; Kent McNeil, *Aboriginal Rights in Canada*, 5 TULSA J. COMP. & INT’L L. 253 (1998).

²² The concept of aboriginal rights has its origin in *Ius Gentium*, or the laws of the nation, an ancient Roman law as applied between Roman citizens and foreigners. This law was strongly influenced by the even older *Ius Naturale*, or natural law, which views all men as fundamentally equal since they share the same human qualities and formed the basis for indigenous land rights. For a detailed history of the ancient foundations of aboriginal rights, see Frederika Hackshaw, *Nineteenth Century Notions of Aboriginal Title and their Influence on the Interpretation of the Treaty of Waitangi*, in WAITANGI MAORI AND PAKEHA PERSPECTIVES OF THE TREATY OF WAITANGI 92, 95 (I.H. Kawharu, ed., 1989) [hereinafter PERSPECTIVES].

²³ FERGUS MACKAY, THE RIGHTS OF INDIGENOUS PEOPLES IN INTERNATIONAL LAW 3 (1998), available at http://www.omced.org/cases/case_McKay.pdf (last visited Jan. 14, 2005).

legal scope than a general indigenous right.²⁴ Similar to indigenous rights, indigenous title "at common law is an amorphous doctrine, taking its roots in international law, concepts of English property law, and colonial law and practice."²⁵ Indigenous title has similar definitions in both Canada and New Zealand.²⁶ In both nations, aboriginal title is *sui generis*—unique and distinguishable from other proprietary interests;²⁷ "[i]t is inalienable and cannot be transferred, sold or surrendered to anyone other than the Crown."²⁸

B. *The International Law Defines Indigenous Title Implicitly, Not Explicitly*

International law instruments never reference the phrase "indigenous title." Nonetheless, there is a distinct body of land rights of indigenous peoples emerging in international law to which both Canada and New Zealand are parties.²⁹ The foundation of modern indigenous title protection at the international level is found under the protection of property and minority rights, such as the United Nations Universal Declaration of Human Rights 1948,³⁰ the International Covenant on Civil and Political Rights

²⁴ See generally *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010 (defining indigenous (aboriginal) title as a specific form of indigenous (aboriginal) right).

²⁵ Jamie Bliss, *Direction in Aboriginal Treaty-Making: No Treaty Signed, No Battle Fought: The Foundations of Aboriginal Title in the Yukon*, 3 APPEAL 53, 53, n. 4 (1997). For a comprehensive survey of the theoretical development of the doctrine of aboriginal title, see *Mabo v. Queensland* (1992), 107 A.L.R. 1 (Australian High Court). See also JACK WOODWARD, *NATIVE LAW* 197-201 (1989).

²⁶ The British Crown recognized aboriginal title in the lands it colonized, including New Zealand and Canada. Prior to 1840, the British Crown refused to establish sovereignty over the Maori people of New Zealand without formal tribal permission. PERSPECTIVES, *supra* note 22, at xvi. In Canada, the British Crown enacted the Royal Proclamation of 1763 which recognized aboriginal possession of their lands: "[T]he 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 or purchased by Us, are reserved to them." The Royal Proclamation of 1763, Oct. 7, 1763 (Eng.), http://www.solon.org/Constitutions/Canada/English/PreConfederation/rp_1763.html (last visited Jan. 14, 2005) [hereinafter *Royal Proclamation*].

²⁷ *Delgamuukw*, [1997] 3 S.C.R. at 1014.

²⁸ *Id.* See also *Attorney-General v. Ngati Apa*, [2003] 3 N.Z.L.R. 643, 2003 N.Z.L.R. LEXIS 74, *80.

²⁹ See, e.g., U.N. Universal Declaration of Human Rights 1948, Dec. 10, 1948 [hereinafter *Declaration of Human Rights*], <http://www.unhcr.ch/udhr/lang/eng.htm> (last visited Jan. 14, 2005); U.N. International Covenant on Civil and Political Rights 1966, Dec. 16, 1966 [hereinafter *Covenant on Civil and Political Rights*], http://www.unhcr.ch/html/menu3/b/a_ccpr.htm (last visited Jan. 14, 2005). Canada ratified this covenant on Aug. 19, 1976, and New Zealand on Mar. 28, 1975. United Nations, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES, at <http://www.unhcr.ch/pdf/report.pdf> (last visited Jan. 14, 2005).

³⁰ *Declaration of Human Rights*, *supra* note 29, art. 1.

1966,³¹ and the International Covenant on Economic, Social and Cultural Rights 1966.³²

Specific international instruments premise indigenous title. Article 17 of the United Nations Universal Declaration of Human Rights of 1948 protects individuals and groups against various State acts that may deprive them of property.³³ Article 1 of the International Covenant on Civil and Political Rights (“ICCPR”) states that all peoples have the right to self-determination, to pursue personal development, not to be deprived of their own means of subsistence, and requires States to promote and respect the right of self-determination.³⁴ The International Covenant on Economic, Social and Cultural Rights (“ICESCR”) has exactly the same language in its Article 1.³⁵ Additionally, Article 27 of the ICCPR also states that minority rights of a minority community to enjoy their respective culture, religion, and language, shall not be denied.³⁶ Thus, international law aspires to protect property, self-determination, and minority rights—rights all bundled within aboriginal title.

³¹ Covenant on Civil and Political Rights, *supra* note 29, arts. 1 and 27. Historically, “[a]lmost all the international treaty norms concerning rights to culture were drafted at a time when it was generally expected that minority cultures, especially those of indigenous peoples, would gradually be assimilated into the dominant culture in each State.” Benedict Kingsbury, *The Treaty of Waitangi: Some International Law Aspects*, in PERSPECTIVES, *supra* note 22, at 121, 144. Now, however, that attitude is changing. *See id.* at 144-49. Note also that the International Convention on the Prevention and Punishment of the Crime of Genocide 1948 and the International Convention on the Elimination of All Forms of Racial Discrimination 1966 both address the protection of racial and ethnic groups, though not specifically with regard to indigenous rights. *Id.*

³² International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1996 art. 1, para. 1-3, available at http://www.unhchr.ch/html/menu3/b/a_ceschr.htm (last visited Jan. 14, 2005).

³³ Declaration of Human Rights, *supra* note 28, at art. 17. Article 5(d)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination 1966 reinforces Article 17 of the Declaration of Human Rights. Benedict Kingsbury, *The Treaty of Waitangi: Some International Law Aspects*, in PERSPECTIVES, *supra* note 22, at 121, 138. Documents such as the Declaration of Human Rights are not legally binding and thus have no signatories. The Declaration of Human Rights was ratified through a proclamation by the General Assembly on December 10, 1948, which was considered a triumph as the vote unified very diverse, even conflicting political regimes. *See* UNITED NATIONS ASSOCIATION IN CANADA, QUESTIONS AND ANSWERS ABOUT THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, at <http://www.unac.org/rights/question.html> (last visited Jan. 14, 2005).

³⁴ Covenant on Civil and Political Rights, *supra* note 29, art. 1, paras. 1-3.

³⁵ International Covenant on Economic, Social and Cultural Rights, *supra* note 32.

³⁶ Covenant on Civil and Political Rights, *supra* note 29, art. 27, para. 1. Aboriginal peoples are viewed as “minorities” even though some aboriginal peoples assert that they have special status under international law. This is still the current view of the Human Rights Commission, although other modern instruments, such as the Draft Declaration on the Rights of Indigenous Peoples, the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), and the Convention on the Rights of the Child, are beginning to recognize an aboriginal people as a distinct grouping. *See* MELISSA CASTAN, THE HIGH COURT, HUMAN RIGHTS, AND THE NEW JURISPRUDENCE OF DENIAL 5, available at <http://www.law.monash.edu.au/castancentre/events/2003/castan-paper.pdf> (last visited Jan. 14, 2005).

It remains unclear under Article 27 whether the rights included protect a minority, ethnic, or indigenous group as a whole, or merely individuals belonging to such groups.³⁷ This lack of clarity, however, is being remedied. For example, the United Nations Human Rights Committee recognizes indigenous peoples' special connection with land as a human right.³⁸ Although the rights of Article 27 do not threaten State sovereignty or territorial integrity, individual rights of cultural enjoyment "may consist in a way of life which is closely associated with territory and use of its resources. This is particularly true of members of indigenous communities constituting a minority."³⁹ In addition, this same article recognizes that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples."⁴⁰ Such international instruments aim to affect the national laws of United Nations members like Canada and New Zealand, who ratify such Covenants.⁴¹

C. *The Canadian Definition of Indigenous Title is Patchwork-Like*

Canada currently defines aboriginal title by stitching together law from many different sources. This is of particular relevance in the legal history of the Canadian province of British Columbia ("B.C.") and its relations with the Haida. This history is marked by the Royal Proclamation of 1763 ("Proclamation"), the absence of a treaty, and the Canadian Charter of Rights and Freedoms adopted within Canada's Constitution Act of 1982.⁴² Recent Canadian case law has significantly compounded the ambiguity of aboriginal title in this patchwork of laws.

³⁷ Covenant on Civil and Political Rights, *supra* note 29, art. 27, para. 1; Kingsbury, *supra* note 22, at 121, 144.

³⁸ *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Human Rights Committee, 50th Sess., General Comment 23, art. 27, at 38, para. 3.2, U.N. Doc. HRI/GEN/1/Rev.1 (1994), <http://www1.umn.edu/humanrts/gencomm/hrcom23.htm> (last visited Jan. 14, 2005).

³⁹ *Id.* Although international legal opinion is moving closer to recognition of human rights for groups, Article 27 remains unclear. Arguably General Comment 23 brings international law closer to an acknowledgment of group aboriginal rights, since community is the basis of the culture of such peoples. *Id.*

⁴⁰ *Id.* at para. 7.

⁴¹ Canada ratified the Covenant on International Civil and Political Rights on August 19, 1976 and New Zealand on March 28, 1979. United Nations, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES, available at <http://www.unhcr.ch/pdf/report.pdf> (last visited Jan. 14, 2005).

⁴² Royal Proclamation, *supra* note 26; CAN. CONST. (Constitution Act, 1982). "[A]boriginal title is the only form of property right protected by the Canadian Constitution." Reynolds, *Part I*, *supra* note 10, at 67.

1. *Aboriginal Title and the Royal Proclamation of 1763, Lack of a Treaty, and the Canadian Constitution Act of 1982 Shape Canada's Treatment of Aboriginal Title*

The Proclamation represents the origin of aboriginal title in Canada.⁴³ This British Crown statute is viewed as the "beginning of modern law on the subject" of aboriginal law.⁴⁴ At the time of early European colonization, the British Crown realized that the aboriginal peoples possessed title to the land and had been victims of "great Frauds and Abuses . . . to the great Dissatisfaction of the said Indians."⁴⁵ The Proclamation further declared that the sole means of acquisition of the lands of North America from the aboriginals would be "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. . . ."⁴⁶ Thus, the aboriginals' title to the land pre-dated and endured colonization. The title also could only be transferred by aboriginal peoples to the Crown through a treaty.⁴⁷

Although many treaties with indigenous peoples were signed by the British Crown after the Confederation and the Dominion of Canada,⁴⁸ the Haida still lack such a treaty.⁴⁹ When B.C. joined the Confederation in 1871, the new province did not recognize aboriginal title, and thus did not create treaties to extinguish it.⁵⁰

In 1982, Canada officially recognized aboriginal rights by their inclusion in its Constitution.⁵¹ Section 35 of Canada's Constitution Act officially recognizes and affirms existing aboriginal rights, existing treaty rights, and treaty rights that may be affirmed.⁵² Inasmuch as aboriginal title

⁴³ Royal Proclamation, *supra* note 26.

⁴⁴ SNOW, *supra* note 14, at 19.

⁴⁵ Royal Proclamation, *supra* note 26.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ In these treaties, aboriginal peoples generally gave up their aboriginal title in exchange for reserve land and the right to hunt, fish, and gather on the land they had released to the occupying government. For a digital collection of selected treaties from the National Archives of Canada, see SchoolNet Digital Collections, at <http://collections.ic.gc.ca/treaties/code/> (last visited Jan. 14, 2005).

⁴⁹ B.C. TREATY COMMISSION, WHY, IN THIS DAY AND AGE, ARE WE NEGOTIATING TREATIES IN B.C.? (2004), at http://www.bctreaty.net/files_2/pdf_documents/why_treaties.pdf (last visited Jan. 14, 2005).

⁵⁰ *Id.* The Dominion of Canada eventually became aware of B.C.'s policy regarding aboriginal title and although it questioned its legality, it was slow to force the issue. As a result, the Haida have never signed a treaty, although treaty negotiations were underway. The treaty process is currently at stage two of a six-stage treaty process, but negotiations stalled in 1995, in the face of legal claims. *Id.*

⁵¹ CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 25, pt. II (Rights of the Aboriginal Peoples of Canada), §§ 35, 35.1.

⁵² "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. . . . For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired." *Id.* §§ 35(1), 35(3). Section 25 of this Act

was originally recognized by the occupying government of Great Britain under the Proclamation,⁵³ the Constitution merely reinforces this prior law.

2. *Aboriginal Title is Gaining Clout Under Recent Canadian Case Law*

Most recently, in the seminal case of *Delgamuukw v. B.C.*,⁵⁴ the Canadian Supreme Court further defined the law with respect to aboriginal title.⁵⁵ The Court held that "aboriginal title was a distinct species of aboriginal right."⁵⁶ Aboriginal title is held communally, unlike general aboriginal rights, which are held individually.⁵⁷ Aboriginal title is more than just the recognition of the right of aboriginal peoples to engage in or practice activities on their native land, such as hunting, fishing, and foraging, but also extends to an actual right to the land itself.⁵⁸ Thus, aboriginal title is much more expansive than the right to mere use. Aboriginal title "frames the 'right to occupy and possess' in broad terms and, significantly, is not qualified by the restriction that use be tied to practice, custom, or tradition."⁵⁹

The right of aboriginal title is not static. It may, within limits, evolve with the indigenous peoples asserting it. The *Delgamuukw* reasoning allows for an aboriginal people's way of life and title to accommodate modern-day needs, which may not be aboriginal rights in the traditional sense.⁶⁰ However, there is a limit to this dynamic expansion of use under aboriginal title.⁶¹ The newly-developing uses cannot conflict with the traditional

also states that "[t]he guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal people of Canada" including those rights recognized by the Royal Proclamation of 1763 and any future rights or freedoms that may be acquired through the land claims process. *Id.* § 25.

⁵³ Royal Proclamation, *supra* note 26.

⁵⁴ *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010.

⁵⁵ For a detailed history of aboriginal title under Canadian case law, see McNeil, *supra* note 21. For information on Canada's Comprehensive Claims (Modern Treaties), see INDIAN AND NORTHERN AFFAIRS CANADA DEPARTMENTAL BACKGROUNDER, COMPREHENSIVE CLAIMS (MODERN TREATIES) IN CANADA (March 1996), available at http://www.ainc-inac.gc.ca/pr/info/trty_e.html (last visited Jan. 14, 2005).

⁵⁶ See *Delgamuukw*, [1997] 3 S.C.R. at 1027, referring to *R. v. Adams*, [1996] 3 S.C.R. 101 and *R. v. Cote*, [1996] 3 S.C.R. 139.

⁵⁷ *Id.* at 1014.

⁵⁸ *Id.* at 1016-1017. The cases *R. v. Adams*, [1996] 3 S.C.R. 101, and *R. v. Cote*, [1996] 3 S.C.R. 139, both distinguished aboriginal rights generally from the specific right of aboriginal title, stating that fishing rights in Quebec can exist as aboriginal rights separate from aboriginal title: "[I]t appears that a freestanding Aboriginal right to fish and Aboriginal title to land are conceptually different: the former involves a right to pursue an activity on the land, whereas the latter involves a right to the land itself." McNeil, *supra* note 21, at 265-66.

⁵⁹ See *Delgamuukw*, [1997] 3 S.C.R. at 1015.

⁶⁰ *Id.*

⁶¹ *Id.*

aboriginal rights claim that formed the basis for the title claim.⁶² “The content of aboriginal title contains an inherent limit in that lands so held cannot be used in a manner that is irreconcilable with the nature of the claimants’ attachment to those lands.”⁶³

Although Haida pre-colonization possession is uncontested,⁶⁴ there is some question as to whether aboriginal title still exists today.⁶⁵ In the most recent Haida cases, Canadian courts affirmed aboriginal rights and hinted at the ongoing existence of aboriginal title. In *Haida Nation v. B.C. (Minister of Forests) et al.*,⁶⁶ B.C.’s highest court considered whether the provincial government wrongly transferred Tree Farm License 39 (“T.F.L. 39,” also known as Block 6) from one third party logging company to another without consulting with the Haida.⁶⁷ Block 6 encompasses approximately one quarter of the Haida Gwaii, the traditional Haida lands to which aboriginal title has been asserted.⁶⁸ The B.C. Court of Appeal held that an aboriginal people is defined as a people who have asserted aboriginal title or aboriginal rights.⁶⁹ Further, it held that the Crown and third parties—in this case Weyerhaeuser Company Limited (“Weyerhaeuser”)—are obligated to consult with and accommodate the economic and cultural interests of an aboriginal people about the potential infringements of those rights before those rights are judicially determined by the courts.⁷⁰ The Supreme Court of Canada took this case on appeal; it allowed the Weyerhaeuser Company Limited appeal, but dismissed the Crown’s appeal.⁷¹

Although the highest court of Canada overturned the B.C. Court of Appeal’s ruling that Weyerhaeuser, as a third party forestry contractor holding T.F.L. 39, owed the Haida people a duty to consult and

⁶² *Id.*

⁶³ *Id.*

⁶⁴ The Haida claim to have lived on their islands for over 10,000 years; artifacts at least 9,500 years old have been discovered on the islands. Hannah Hickey, *10,000 years ago in Haida Gwaii*, UVIC KNOWLEDGE (vol. 3, no. 7, Dec. 16, 2002).

⁶⁵ See *Haida Nation*, [2002] B.C.T.C. 35; *Haida Nation*, [2002] 164 B.C.A.C. 217, 268 W.A.C. 217, 2002 B.C.C.A. 147, 2002 B.C.A.C. LEXIS 130.

⁶⁶ *Id.*

⁶⁷ *Id.* This case was appealed to the Supreme Court of Canada and was heard Mar. 24-25, 2004. The Supreme Court reserved judgment on this case, releasing its opinion on November 18, 2004. See SUPREME COURT OF CANADA, ROLE OF THE COURT, at http://www.scc-csc.gc.ca/aboutcourt/role/index_e.asp (last visited Jan. 14, 2005); SUPREME COURT OF CANADA, HEARINGS, at http://www.scc-csc.gc.ca/information/hearings/winter/index_e.asp (last visited Jan. 14, 2005).

⁶⁸ *Haida Nation*, [2002] B.C.T.C. 35 ; *Haida Nation*, [2002] 164 B.C.A.C. 217, 268 W.A.C. 217, 2002 B.C.C.A. 147, 2002 B.C.A.C. LEXIS 130.

⁶⁹ *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010.

⁷⁰ *Id.*

⁷¹ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.C. 73.

accommodate,⁷² it held that B.C. owed such a duty and in fact "failed to engage in any meaningful consultation at all."⁷³ The Crown, be it provincial or federal,⁷⁴ retains a duty to consult and accommodate, a duty which "flows from the Crown's assumption of sovereignty over lands and resources formerly held by the Aboriginal group The Crown alone remains legally responsible for the consequences of its action and interaction with third parties, that affect Aboriginal interests."⁷⁵ Further, this Court recognized that "[t]he Crown may delegate procedural aspects of consultation to industry proponents seeking a particular development. . . . However, the ultimate legal responsibility for consultation and accommodation rests with the Crown. The honour of the Crown cannot be delegated."⁷⁶ In this landmark case, the Supreme Court of Canada upheld that the reason for B.C.'s duty to consult lies in the strong Haida claim to aboriginal title.⁷⁷

These rulings are very encouraging for the Haida. The Haida position, as bolstered by the Proclamation's recognition of aboriginal title, the lack of a treaty, the incorporation of aboriginal land rights in the Canadian Constitution, and the recent court rulings bode well for a successful resolution of the Haida land claims. Compared to the Maori in New Zealand, the Haida are in an excellent position.

D. The New Zealand Definition of Indigenous Title, Although Similar to the Canadian Definition, is More Complicated

The Maori are the sole recognized indigenous group of New Zealand.⁷⁸ The New Zealand definition of aboriginal title is similar to its Canadian counterpart, although aboriginal law in New Zealand is a more "complex interplay of a treaty, case law, legislation, settlement agreements and statutory extinguishments."⁷⁹ Aboriginal title, or Maori customary title, is a land right that is held by the Maori in accordance with "tikanga

⁷² *Id.* at para. 52.

⁷³ *Id.* at para. 79.

⁷⁴ *Id.* at paras. 57-59.

⁷⁵ *Id.* at para. 53.

⁷⁶ *Id.* The Court noted that its ruling regarding no duty to consult or accommodate by third parties does not mean that such parties are free from liability with regard to Aboriginal peoples. "If they act negligently in circumstances where they owe Aboriginal peoples a duty of care, or if they breach contracts with Aboriginal peoples or deal with them dishonestly, they may be held legally liable." *Id.* at para. 56.

⁷⁷ *Id.* at paras. 69-71.

⁷⁸ RIVARD, *supra* note 14, at VI-1.

⁷⁹ Reynolds, *Part II, supra* note 20, at 183. See generally PAUL MCHUGH, THE MAORI MAGNA CARTA: NEW ZEALAND LAW AND THE TREATY OF WAITANGI (1991).

Maori,”⁸⁰ or “Maori customary values and practices,” as defined under the Te Ture Whenua Maori Act or Maori Land Act 1993 (“Maori Land Act”).⁸¹ Although this title pre-dates the establishment of a colonial government by the British Crown, claims made under the 1993 Act define tikanga Maori as based on Maori customary values and customs at the time of the claim, not at the time of British sovereignty.⁸² Such title is thus defined as having existed prior to European contact, even though it is viewed by Europeans under their system of common law: “Even under the common law doctrine of aboriginal title the rights or title of indigenous people are determined according to the customs and laws of those people.”⁸³ Specifically, the legal history of New Zealand in its dealings with the Maori and Maori customary title consists of the Treaty of Waitangi, various land acts unfavorable to the Maori, and case law.⁸⁴

1. *The Treaty of Waitangi Further Complicates Rather than Clarifies Maori Customary Title*

The beginning of the controversial and convoluted legal relationship between the British Crown and the Maori began with the Treaty of Waitangi, signed on February 6, 1840.⁸⁵ Even today, there is no consensus among the Maori regarding the proper interpretation of the Treaty of Waitangi.⁸⁶ Specifically, the ambiguity of Articles 1 and 2 concerning the Maori’s sovereignty have evoked considerable controversy.⁸⁷ In Article 1, the Maori ceded to Queen Victoria *kawanatanga*, or “governance,” a term that the

⁸⁰ Te Ture Whenua Maori Act (Maori Land Act) 1993 (N.Z.), § 129(2)(a); see Attorney-General v. Ngati Apa, [2003] 3 N.Z.L.R. 643, 2003 N.Z.L.R. LEXIS 74, *20-21.

⁸¹ Maori Land Act § 4.

⁸² *Ngati Apa*, 2003 N.Z.L.R. LEXIS at *20-21; Reynolds, *Part II*, *supra* note 20, at 184.

⁸³ Ani Mikaere & Stephanie Milroy, *Treaty of Waitangi and Maori Land Law*, 3 N.Z. L. Rev. 379, 397 (2001). See also MCHUGH, *supra* note 71, at 97.

⁸⁴ Unlike Canada, New Zealand lacks a single written constitution. See MARGARET GREVILLE, AN INTRODUCTION TO NEW ZEALAND LAW & LEGAL INFORMATION 2002, at <http://www.llrx.com/features/newzealand.htm#Constitution> (Sept. 2, 2002) (last visited Jan. 14, 2005). Instead, it has New Zealand’s Constitution Act 1986, which “brings together in one act the most important statutory constitutional provisions and clarifies the rules relating to the governmental handover of power.” Statistics New Zealand – Te Tari Tatau (citing New Zealand Official Yearbook 2000) (on file with author). One such document is the Treaty of Waitangi. For the history of aboriginal title in New Zealand, see Hackshaw, *supra* note 22, at 92, 103.

⁸⁵ R.J. Walker, *The Treaty of Waitangi as the Focus of Maori Protest*, in PERSPECTIVES, *supra* note 22, at 263, 263. See also Bruse Biggs, *Humpty-Dumpty and the Treaty of Waitangi*, in PERSPECTIVES, *supra* note 22, at 263, 300.

⁸⁶ DORA ALVES, THE MAORI AND THE CROWN: AN INDIGENOUS PEOPLE’S STRUGGLE FOR SELF-DETERMINATION 57 (1999).

⁸⁷ The Treaty of Waitangi, 1840 (N.Z.). See also F.M. Brookfield, *The New Zealand Constitution: the search for legitimacy*, in PERSPECTIVES, *supra* note 22, at 1, 4; R.J. Walker, *supra* note 85, at 263-64.

English version translates as "sovereignty."⁸⁸ Yet the Maori word for "sovereignty over land," *mana*, is noticeably absent in the Treaty.⁸⁹ It is arguable, therefore, that the Maori Chiefs would never have signed the Treaty if they had understood it to relinquish their sovereignty.⁹⁰

Likewise, key differences between the original English, Maori and Contemporary English translations of Article 2 raise questions as to exactly what rights the Maori were granted.⁹¹ The original English version guarantees "the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession."⁹² In contrast, the Maori version retains for the Maori "the full chieftanship of their lands their homes and all their possessions" and the Contemporary English version merely grants "the unqualified exercise of their chieftanship over their lands, villages and all their treasures."⁹³

Yet the Maori include the lands and their accompanying natural resources among their "possessions" or "treasures"—in other words, a part of Maori customary title.⁹⁴ The Treaty has likely resulted in at least partial Maori cession of sovereignty over the land.⁹⁵ Notwithstanding modern

⁸⁸ The Treaty of Waitangi, 1840 (N.Z.). See also Brookfield, *supra* note 87, at 1, 4.

⁸⁹ Walker, *supra* note 85 at 263-64.

⁹⁰ *Id.* In his article, Walker draws this conclusion based on this distinction between *kawanatanga* and *mana*. The Maori viewpoint is arguably encapsulated in the statement by the Kaitaia chief Nopera Panakareao: "The shadow of the land goes to Queen Victoria but the substance remains to us." P. ADAMS, FATAL NECESSITY: BRITISH INTERVENTION IN NEW ZEALAND 1830-1847 235 (1977).

⁹¹ The Contemporary English translation is the work of Maori scholar Professor Sir Hugh Kawharu, editor of PERSPECTIVES, *supra* note 22.

⁹² Treaty of Waitangi, 1840 (N.Z.) (original English version).

⁹³ Treaty of Waitangi, 1840 (N.Z.) (original Maori, and Contemporary English versions).

⁹⁴ Further, Article 2 reserved to the Maori *te tino rangatiratanga*—what the 1975 English version terms as "full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties"—which modern controversialists claim as Maori sovereignty. Brookfield, *supra* note 87; Walker, *supra* note 22, at 264.

⁹⁵ PERSPECTIVES, *supra* note 22, at xvii. A "partial" cession occurred, since the Maori arguably retained political autonomy by way of its *rangatiratanga* (Maori sovereignty, or tribal control over tribal resources). This Maori sovereignty (of Article 2 of the Treaty) and Crown sovereignty (of Article 1 of the Treaty) has led to much tension. *Id.* at xviii. See also Kingsbury, *supra* note 31, at 121; LINDSAY COX, KOTA HITANGA: THE SEARCH FOR MAORI POLITICAL UNITY 27 (1994). Note that many *rangatira* (chiefs) did not sign this Treaty and thus do not feel it applies to them. *Id.* at 29. Yet the reinvention of the Treaty has led to a number of changes in the political and judicial treatment of Maori claims, resulting in such advancements as co-management of fishing resources. The specific example of such co-operation was the Sealord Deal, a deed of settlement under the Treaty of Waitangi (Fisheries Claims) Settlement Act, signed in September 1992. See INDIGENOUS STUDIES PROGRAM, THE UNIVERSITY OF MELBOURNE, AGREEMENTS, TREATIES AND NEGOTIATED SETTLEMENTS PROJECT DATABASE, at <http://www.atns.net.au/biogs/A001274b.htm> (last visited Jan. 14, 2005). The goal of the act was to obtain full and final settlement of all claims to commercial fisheries, since the Treaty of Waitangi's language guaranteeing "full, exclusive possession . . . of their fisheries" had never been given full effect. The Maori

Maori dissatisfaction with the Treaty, it remains a flexible document binding both Maori and non-Maori.

2. *The Land Acts Further Complicate Any Assertion of Maori Customary Title*

Maori customary title was systematically extinguished by New Zealand through numerous lands acts.⁹⁶ This extinguishment took place over a period of 130 years from 1862 until the enactment of the Maori Land Act in 1993.⁹⁷ This legislation converted Maori customary title into fee simple title⁹⁸ held by the Crown and included mechanisms to prevent future challenges to its legitimacy.⁹⁹ The acts included provisions that prohibited future judicial challenges to any Crown grants on the basis that the Maori customary title in the land had not been fully extinguished.¹⁰⁰ Under these laws, the extinguishment of Maori customary title was deliberate, resulting in little Maori customary land remaining in New Zealand.

The New Zealand land acts have traditionally impeded the survival of Maori customary title. Under the Native Land Act of 1865, any order vesting title in Maori owners after Court investigation automatically changed the status of Maori customary land into freehold land held in fee by the Crown.¹⁰¹ Starting with the Native Land Act of 1873, legislation was enacted that permitted Maori customary title to be extinguished either by proclamation or by judicial determination that the land had been ceded to the Crown.¹⁰² The 1877 land act further revealed the intention to extinguish

and the government of New Zealand have a 50/50 joint venture in Sealord Products, Ltd. The Maori agreed that customary fishing rights would be replaced by regulations of the Fisheries Commission. *Id.* For a comparison of treaty fishing allocation between New Zealand and the United States, see Kristi Stanton, Comment, *A Call For Co-Management: Treaty Fishing Allocation in New Zealand and Western Washington*, 11 PAC. RIM L. & POL'Y J. 745 (2002).

⁹⁶ *Attorney-General v. Ngati Apa*, [2003] 3 N.Z.L.R. 643, 2003 N.Z.L.R. LEXIS 74. See *infra* Part III.D for an analysis of this destruction of Maori customary title through investigation of title through the Land Court. For a more detailed description of the Land Acts, see *infra* Part III of this Comment. For the history of aboriginal title in New Zealand, see Hackshaw, *supra* note 22, at 103.

⁹⁷ *Ngati Apa*, 2003 N.Z.L.R. LEXIS at *39.

⁹⁸ "Fee simple title" is cross-referenced with "fee simple." BLACK'S LAW DICTIONARY 649 (8th ed. 2004). "Fee simple" is "[a]n interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs." BLACK'S LAW DICTIONARY 648 (8th ed. 2004).

⁹⁹ *Ngati Apa*, 2003 N.Z.L.R. LEXIS at *39; Te Ture Whenua Maori Act (Maori Land Act), 1993 (N.Z.). This 1993 Act was created to further amend the laws relating to Maori lands, claims, and disputes resulting from those lands, as well as to confer jurisdiction upon the Maori Land Court and Maori Appellate Court. See THE UNIVERSITY OF MELBOURNE, SCHOOL OF ANTHROPOLOGY, GEOGRAPHY AND ENVIRONMENTAL STUDIES, AGREEMENTS, TREATIES AND NEGOTIATED SETTLEMENTS PROJECT (May 1, 2002), at <http://www.atns.net.au/biogs/A001295b.htm> (last visited Jan. 14, 2005).

¹⁰⁰ *Ngati Apa*, 2003 N.Z.L.R. LEXIS, at *40-41.

¹⁰¹ Native Land Act, 1865 (N.Z.); *Ngati Apa*, 2003 N.Z.L.R. LEXIS, at *40.

¹⁰² Native Land Act, 1873 (N.Z.); *Ngati Apa*, 2003 N.Z.L.R. LEXIS, at *41.

aboriginal title.¹⁰³ The erosion of Maori customary title continued with the Native Land Act of 1894, which disallowed applying for an investigation of customary land to the Native Land Court without requesting the vesting order.¹⁰⁴ Such an order would automatically convert any land held under Maori customary title into Maori freehold land, which was held in fee simple by the Crown as if by Crown grant.¹⁰⁵

This systematic conversion from Maori customary title to fee simple title shows that the extinguishment of Maori customary title by both the British Crown and the New Zealand government occurred because these governments recognized its existence and independence from Crown title.¹⁰⁶ A mitigation to the ongoing extinguishment of Maori customary title took place in 1993, with the passing of the New Zealand Maori Land Act. Although this act allows the change of status of land from Maori customary land to Maori freehold land, under the Maori Land Act the Maori Land Court may now make a declaration on the status of Maori customary land without that automatic result.¹⁰⁷

3. *New Zealand Case Law Contributes to the Convoluted Evolutionary Path of Maori Customary Title*

Maori customary title was first recognized in New Zealand case law in 1847.¹⁰⁸ In *R. v. Symonds*,¹⁰⁹ the Supreme Court considered whether a private individual with a certificate waiving the Crown's exclusive right to acquire Maori land issued by the Governor of New Zealand could acquire Maori land directly from the Maori. The Court held that the certificate was invalid on procedural grounds.¹¹⁰ One judge reasoned that Maori customary title is "to be respected . . . it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the Native occupiers."¹¹¹

In *Attorney-General v. Ngati Apa*,¹¹² New Zealand established a clearer definition of Maori customary title, derived in part from Canadian law. In this case, the Maori applied to the Maori Land Court for declarations

¹⁰³ Land Act, 1877 (N.Z.); *Ngati Apa*, 2003 N.Z.L.R. LEXIS, at *41.

¹⁰⁴ Native Land Act, 1894 (N.Z.); *Ngati Apa*, 2003 N.Z.L.R. LEXIS, at *41-42.

¹⁰⁵ *Id.*

¹⁰⁶ *Ngati Apa*, 2003 N.Z.L.R. LEXIS, at *40.

¹⁰⁷ Te Ture Whenua Maori Act (Maori Land Act), 1993 (N.Z.); *Ngati Apa*, 2003 N.Z.L.R. LEXIS, at

*42.

¹⁰⁸ *R. v. Symonds*, [1847] NZPCC 387.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 390.

¹¹² *Attorney-General v. Ngati Apa*, [2003] 3 N.Z.L.R. 643, 2003 N.Z.L.R. LEXIS 74.

on the status of the foreshore and seabed lands.¹¹³ Both the Maori Land Court and the Maori Appellate Court ruled on the preliminary issue of jurisdiction, holding that the Maori Land Court had jurisdiction.¹¹⁴ The Crown appealed to the High Court. The High Court ruled in the Crown's favor, stating that the Maori Land Court lacked jurisdiction since all such land was vested in the Crown through common law or statutory law.¹¹⁵ The Maori appealed to the Wellington Court of Appeal, which held that the Maori Land Court did have jurisdiction to hear this case, favorably cited the Canadian *Delgamuukw* case, and recognized that Canadian case law had gone further than New Zealand in defining the contours of indigenous title, since the Supreme Court of Canada "has recognized that, according to the custom on which such rights are based, they may extend from usufructory rights to exclusive ownership with incidents equivalent to those recognized by fee simple title."¹¹⁶ This ruling opened up the possibility that Canada's broader scope of rights for aboriginal peoples may now be available from New Zealand's judiciary.¹¹⁷

The New Zealand Supreme Court also mentioned the possibility of establishing Maori aboriginal title to the foreshore and seabed of Marlborough Sounds.¹¹⁸ Although the Court did not ultimately grant aboriginal title to the foreshore and seabed to the Maori, it expressed, at minimum, a willingness to consider the issue in the future.¹¹⁹ The Court held that the foreshore and seabed qualified as "land" under Section 129(1) of the Maori Land Act.¹²⁰ The Court could not draw distinctions between lake beds, river beds, and seabeds,¹²¹ but also indicated that Maori customary property interests in the seabed may be more difficult to establish than for the foreshore.¹²² The Court recognized that property rights under Maori custom "might well have been established" and that "[m]uch

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at *34.

¹¹⁷ *Id.* at *33-34.

¹¹⁸ *Id.* In the New Zealand legal system at the time *Ngati Apa* was decided, the Court of Appeal in Wellington was the court of final jurisdiction in New Zealand. Appeals were still allowed to the Privy Council in London, England. A few months after the *Ngati Apa* ruling, the Supreme Court Act of 2003 was enacted and New Zealand now has a new highest court: the Supreme Court of New Zealand. Supreme Court Act 2003 (N.Z.). For a detailed history of prior case law for *Ngati Apa*, see Ani Mikaere & Stephanie Milroy, *Treaty of Waitangi and Maori Land Law*, 3 N.Z. L. Rev. 379, 396-98 (2001).

¹¹⁹ *Attorney-General v. Ngati Apa*, [2003] 3 N.Z.L.R. 643, 2003 N.Z.L.R. LEXIS 74. Recognition of such property rights, according to the court, was not "unthinkable." *Id.* at *51-52.

¹²⁰ *Id.*

¹²¹ *Id.* at *50.

¹²² *Id.* at *51-52.

legislation concerned with 'land' applies to seabed and foreshore. . . ."¹²³ Due to the possibility of aboriginal title to the foreshore and seabed, the Court held that the Maori Land Court had jurisdiction to hear the Maori's claim.¹²⁴

Through the Treaty of Waitangi, the land acts and New Zealand case law, Maori customary title has experienced a history of steady erosion as a legal right. This erosion was much greater than that experienced by the Haida of Canada. It all but extinguished Maori customary title.

III. EXTINGUISHMENT IS A GOVERNMENT'S TOOL FOR THE DESTRUCTION OF INDIGENOUS TITLE

Although the opportunity for both the Haida and the Maori to establish aboriginal title has not been legally destroyed, the likelihood of success of their respective claims varies due to differences in the scope of extinguishment¹²⁵ methods available in each nation. The current unanswered question for both the Maori and the Haida is whether their respective claims to aboriginal title still exist. Resolution of this question requires an analysis of several distinct sources of law. First, under evolving international law, extinguishment occurs only if the indigenous peoples affected give their full consent for it to occur.¹²⁶ Second, under both Canadian and New Zealand law, in order for extinguishment to occur, the intent to extinguish must be explicitly "clear and plain" in order to extinguish aboriginal title.¹²⁷ At first glance, the "clear and plain" intention test appears to be protective of indigenous title. However, the Canadian provincial government of B.C. and the national government of New Zealand have long claimed that Haida and Maori aboriginal title was extinguished long ago.¹²⁸ Accordingly, the appearance of security that accompanies the "clear and plain" intention test is a false one, for it is the scope of the

¹²³ *Id.* at *52.

¹²⁴ *Id.*

¹²⁵ Extinguishment is "[t]he cessation or cancellation of some right or interest"—in this case, aboriginal title. BLACK'S LAW DICTIONARY 623 (8th ed. 2004).

¹²⁶ See *U.N. Draft declaration on the rights of indigenous peoples*, art. 10, U.N. Doc. E/CN.4/Sub.2/1994/2Add.1 (1994). "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return." *Id.*

¹²⁷ See *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010; *Attorney-General v. Ngati Apa*, [2003] 3 N.Z.L.R. 643, 2003 N.Z.L.R. LEXIS 74.

¹²⁸ See generally *Delgamuukw*, [1997] 3 S.C.R., *Ngati Apa* [2003] 3 N.Z.L.R. 643; 2003 N.Z.L.R. LEXIS 74.

allowable methods of extinguishment that determines how protective the law of extinguishment is with regard to indigenous title.

A. International Law Strongly Opposes the Extinguishment of Indigenous Title, but Its Enforcement is Weak

Indigenous title claims fall under the purview of the Universal Declaration of Human Rights of 1948¹²⁹ and the International Covenant on Civil and Political Rights 1966.¹³⁰ These instruments could be used to assert that the Haida and the Maori have legitimate claims to indigenous title, be it as a property right, minority right, or indigenous right.¹³¹ Unfortunately, these international instruments have little or no binding power in the international arena.

Recent and developing international law focuses more on indigenous peoples and traditional land rights, although the actual words “indigenous title” are absent from these instruments. For example, the International Labour Organization’s Indigenous and Tribal Peoples Convention 169 of 1989 calls on governments to respect indigenous land values, including cultural and spiritual rights.¹³² As adherents to this Convention, Canada and New Zealand have an obligation to recognize Haida and Maori claims to indigenous title and to make efforts to assist them in proving these claims.

Another example of the focus on indigenous people is General Recommendation XXIII of 1997 of the Committee on the Elimination of Racial Discrimination.¹³³ It recognizes the plight of aboriginal peoples with regard to indigenous title and calls upon states parties to the Convention on

¹²⁹ Declaration of Human Rights, *supra* note 29, arts. 17, 27.

¹³⁰ Covenant on Civil and Political Rights, *supra* note 29, art. 1.

¹³¹ See, e.g., Declaration of Human Rights, *supra* note 29, at arts. 2, 17, 22, 27; Covenant on Civil and Political Rights, *supra* note 29, art. 1; *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Human Rights Committee, 50th Sess., General Comment 23, art. 27, at 38, paras. 3.2,7. U.N. Doc. HRI/GEN/1/Rev.1 (1994).

¹³² The International Labour Organization (“ILO”) Indigenous and Tribal Peoples Convention 169 of 1989 was the first international United Nations Convention to deal specifically with Indigenous Peoples’ human rights, instead of merely property or anti-discrimination of minorities. ILO Convention (No. 169), June 27, 1989, pt. II. See Melissa Castan, *The High Court, Human Rights, and the New Jurisprudence of Denial* (paper presented at the Castan Centre For Human Rights Law Conference, Dec. 4, 2003), at <http://www.law.monash.edu.au/castancentre/events/2003/castan-paper.pdf> (last visited Jan. 14, 2005).

¹³³ General Recommendation 23, U.N. CERD, 51st Sess., Annex V, U.N. Doc. A/52/18 (1997), http://www.bayefsky.com/general/cerd_genrecom_23.php (last visited Jan. 14, 2005). Canada and New Zealand are parties to the Convention on the Elimination of All Forms of Racial Discrimination (“CERD”). The CERD Committee is composed of a number of experts representing some of the member states that review compliance with CERD and issues recommendations regarding compliance and the Convention’s interpretations. State parties are bound by those recommendations. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 8 I.L.M. 678 (entered into force Mar. 13, 1969).

the Elimination of All Forms of Racial Discrimination to recognize and protect land rights of indigenous peoples, and "to take steps to return those lands and territories" that have been taken from indigenous peoples "without their free and informed consent."¹³⁴ Both Canada and New Zealand are parties to this Convention.¹³⁵ The language of General Recommendation XXIII covers indigenous title claims to land, regardless of whether or not such land has been the subject of extinguishment. As a result, such a claim would not only secure the current Haida and Maori claims, but would also likely invite additional Maori claims as a result of past extinguishments of Maori customary title through the Land Courts.

The strongest advocacy for indigenous title thus far appears in the Draft United Nations Declaration on the Rights of Indigenous Peoples ("Draft Declaration").¹³⁶ The Draft Declaration calls for a recognition of indigenous title by all nations, as well as a guarantee to protect that title.¹³⁷ The Draft Declaration defines aboriginal title as the right to complete ownership, control, and use of the aboriginal lands.¹³⁸ The Preamble of the Draft Declaration expresses concern "that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, *inter alia*, in their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests."¹³⁹ As a result, the Draft Declaration views any attempts to dispossess aboriginal peoples of their lands, territories, or resources as the equivalent of ethnocide

¹³⁴ General Recommendation 23, U.N. CERD, 51st Sess., Annex V, U.N. Doc. A/52/18 (1997), paras. 3, 5, http://www.bayefsky.com/general/cerd_genrecom_23.php (last visited Jan. 14, 2005). When restitution is not possible, compensation is suggested as the alternative.

¹³⁵ Canada ratified the Convention on Nov. 15, 1970, New Zealand on Dec. 22, 1972. See United Nations, STATUS OF RATIFICATIONS OF THE PRINCIPAL INTERNATIONAL HUMAN RIGHTS TREATIES, available at <http://www.unhchr.ch/pdf/report.pdf> (last visited Jan. 14, 2005).

¹³⁶ U.N. Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2Add.1 (1994). This Draft Declaration has yet to be adopted by the United Nations. The current Draft was adopted in August 1994 by the U.N. Sub-Commission on the Promotion and Protection of Human Rights and was then submitted to the Commission on Human Rights, which created a Working Group with the intent of adopting the draft by the end of 2004's International Decade of the World's Indigenous Peoples. Unfortunately, adoption of this Draft Declaration by the end of 2004 seems unlikely. See Castan, *supra* note 132, <http://www.law.monash.edu.au/castancentre/events/2003/castan-paper.pdf> (last visited Jan. 14, 2005); UNITED NATIONS, OPEN-ENDED INTERSESSIONAL WORKING GROUP ON THE DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, at <http://www.unhchr.ch/indigenous/groups-02.htm> (last visited Jan. 14, 2005).

¹³⁷ U.N. Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1994/2Add.1 (1994).

¹³⁸ *Id.* art. 26.

¹³⁹ *Id.* pmb1.

and cultural genocide¹⁴⁰—a strong disapproval of any extinguishment of aboriginal title without the consent of the affected aboriginal peoples.

However, great challenges to the international legal recognition of indigenous title exist. Some international legal instruments, such as the Universal Declaration of Human Rights, have no signatories and thus are not legally binding on any nation.¹⁴¹ Accordingly, the Haida and Maori are unlikely to benefit significantly from these international instruments, except for the moral persuasion value. Further, although the Draft Declaration is the strongest of many international instruments advocating for indigenous title, it is currently merely a draft without any binding authority. The laws of Canada and New Zealand control the recognition of aboriginal title in the respective countries.¹⁴²

B. The Haida Claim to Aboriginal Title is Alive and Well Because Canadian Extinguishment of Aboriginal Title is Very Narrow

Canada's Supreme Court determined the necessary criteria to extinguish aboriginal title in *R. v. Sparrow*.¹⁴³ *Sparrow* involved an aboriginal right to fish that Canada asserted was effectively extinguished by the enactment of the Fisheries Act. The Court was not persuaded by this argument and held that "[t]he test of extinguishment to be adopted . . . is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal right."¹⁴⁴ This intention test was upheld in *Delgamuukw*.¹⁴⁵ Thus, two factors are necessary for extinguishment to occur. First, extinguishment can occur only by a Sovereign.¹⁴⁶ Second, the intent to extinguish must be "clear and plain."¹⁴⁷

¹⁴⁰ *Id.* art. 7.

¹⁴¹ The Universal Declaration of Human Rights was ratified by proclamation by the General Assembly on December 10, 1948, with a count of forty-eight votes to none with only eight abstentions. This was considered a triumph as the vote unified very diverse, even conflicting political regimes. See UNITED NATIONS ASSOCIATION IN CANADA, *supra* note 33.

¹⁴² Note that another source of international law exists: customary international law ("CIL"). A state can be bound by CIL even where no binding treaty exists. CIL is defined as "general and consistent practice of states followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 102(2) (1987). However, no norm of CIL regarding aboriginal title can yet be discerned.

¹⁴³ *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

¹⁴⁴ *Id.* at 1099; *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010, 1022.

¹⁴⁵ *Delgamuukw*, 3 S.C.R. at 1022. In this case, extinguishment by adverse dominion (a type of implicit extinguishment that must also meet the "clear and plain" test) was also discussed. Macfarlane, J.A., stated that adverse dominion could only be used by the federal government. *Id.* at 1045. Adverse dominion in this case was rejected by Lambert J.A. in the dissent. *Id.* at 1051. For a summary of the elements of adverse dominion, see Reynolds, *Part II*, *supra* note 20, at 177-179.

¹⁴⁶ *Sparrow*, 1 S.C.R. at 1099; *Delgamuukw*, 3 S.C.R. at 1022.

¹⁴⁷ *Id.*

The Haida claim to aboriginal title has not been extinguished for three reasons. First, the B.C. provincial government could not have extinguished title because it is not a sovereign.¹⁴⁸ Second, in order for the Canadian Federal Government to extinguish aboriginal title, its intent must be "clear and plain," and no such intent has been expressed to date.¹⁴⁹ Third, any aboriginal title extinguishment made "clear and plain" by the Canadian Federal Government must also pass the muster of the Canadian Constitution Act, 1982, which has not yet occurred.¹⁵⁰ Thus, the Haida claim to aboriginal title is a valid one.

1. *Canadian Provincial Extinguishment of Title is Ultra Vires Because It Was Not Extinguished by a Sovereign*

The Haida have not lost their claim to aboriginal title due to any extinguishment by the provincial government of B.C. *R. v Sparrow* holds that only a national sovereign can extinguish an aboriginal right.¹⁵¹ A province is not a sovereign nation.¹⁵² Aboriginal title cannot be extinguished by provincial levels of government, for they lack jurisdiction: "A provincial law of general application cannot extinguish aboriginal rights . . . a law of general application cannot, by definition, meet the standard 'of clear and plain intention' needed to extinguish aboriginal rights without being *ultra vires*."¹⁵³ Thus B.C., as a mere province lacks the power to extinguish the aboriginal title of the Haida.¹⁵⁴

2. *Canadian Federal Extinguishment of Title is Limited Due to the "Clear and Plain" Test*

Although there is no final court decision yet regarding judicial recognition of aboriginal title for the Haida,¹⁵⁵ it is unlikely that the Haida have lost their claim to aboriginal title because there has not been a "clear and plain" action by the Canadian Federal Government. There is no treaty between the Haida and Canada, nor any pre-Constitution Act legislation making it "clear and plain" that Canada intended to extinguish Haida

¹⁴⁸ *Delgamuukw*, 3 S.C.R. 1010.

¹⁴⁹ *Id.*

¹⁵⁰ CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 25, pt. II (Rights of the Aboriginal Peoples of Canada), §§ 35, 35.1.

¹⁵¹ *Sparrow*, 1 S.C.R. at 1099.

¹⁵² *Delgamuukw*, 3 S.C.R. at 1022.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ This case has been filed and is anticipated to be heard by the Supreme Court of Canada in 2005 or 2006.

aboriginal title. The Courts have also strongly hinted at the likely success of the Haida claim.¹⁵⁶

In neither the B.C. Court of Appeal case nor the Supreme Court of Canada appeal of *Haida Nation v. B.C. (Minister of Forests)*¹⁵⁷ did the court specifically hold that the Haida possessed aboriginal title or aboriginal rights to Haida Gwaii.¹⁵⁸ However, both courts determined that the government had an affirmative duty to consult the Haida on issues of resource harvesting.¹⁵⁹ Such a mandatory duty implies an acceptance of aboriginal rights. The courts went further, however, and commented that the Haida would likely be successful in their title claim, due to its strength.¹⁶⁰

Though this case revolves around timber contracts, the Haida's aboriginal title rights to Haida Gwaii are key to the ruling of both the B.C. Court of Appeal and the Supreme Court of Canada. At the B.C. Court of Appeal level, Justice Lambert asserted that there exists a "reasonable probability" that the Haida will establish aboriginal title to at least some parts of the coastal and inland areas of Haida Gwaii, including the coastal areas of Block 6, and a "reasonable probability" that they will establish aboriginal title for the inland areas of Block 6.¹⁶¹ This court refused to issue a judgment on the Haida's claim that the Tree Farm Licence ("T.F.L.") 39 is invalid due to a failure to consult, instead implying that this issue was resolvable under a formal claim of aboriginal title in the courts:

[T]hat the proper time to determine that question would be at the same time as the determination of aboriginal title, aboriginal rights, prima facie infringement, and justification, by a Court of competent jurisdiction. At that time also the question of whether the Provincial Crown title is encumbered by aboriginal

¹⁵⁶ See *Haida Nation v. B.C. (Minister of Forests)*, [2002] B.C.J. No. 1882, 2002 B.C.C.A. 462, 2002 B.C.C. LEXIS 4415.

¹⁵⁷ *Id.*; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.C. 73.

¹⁵⁸ *Haida Nation v. B.C. (Minister of Forests)*, [2002] B.C.J. No. 1882, 2002 B.C.C.A. 462, 2002 B.C.C. LEXIS 4415; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.C. 73.

¹⁵⁹ *Haida Nation v. B.C. (Minister of Forests)*, [2002] B.C.J. No. 1882, 2002 B.C.C.A. 462, 2002 B.C.C. LEXIS 4415 at *56-59; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.C. 73 at para. 53.

¹⁶⁰ *Haida Nation v. B.C. (Minister of Forests)*, [2002] B.C.J. No. 1882, 2002 B.C.C.A. 462, 2002 B.C.C. LEXIS 4415 at *42-43; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.C. 73, at paras. 69-71.

¹⁶¹ *Haida Nation v. B.C. (Minister of Forests) et al.*, [2002] 164 B.C.A.C. 217, 2002 B.C.A.C. LEXIS 130 at *20-21.

title and rights is likely to be determined and argument could be directed to the effect of any such encumbrance on T.F.L. 39.¹⁶²

The Supreme Court of Canada upheld the lower court and referenced this language of "reasonable probability" in its holding.¹⁶³

Thus, the Court implied that the time is ripe for the Canadian court system to hear the Haida's claim to legal recognition of aboriginal title, a strong sign that there has been no "clear and plain" act by the Canadian Federal Government to extinguish aboriginal title.

3. *Extinguishment of Aboriginal Title is Further Restricted Under the Canadian Constitution Act of 1982*

Finally, even assuming that the "clear and plain" intention was met, the Canadian Federal Government's actions must still fall within its legitimate jurisdictional powers.¹⁶⁴ Section 35 of the Canadian Constitution Act of 1982 ["Constitution"] recognizes and upholds existing aboriginal rights, existing treaty rights, and treaty rights that may be affirmed.¹⁶⁵ Yet the Haida have never signed a treaty and thus technically have no established treaty rights.¹⁶⁶ In this situation, Section 25 applies, ensuring that the Canadian Charter of Rights and Freedoms "shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada."¹⁶⁷ This protection includes the rights and freedoms recognized under the Royal Proclamation of 1763 and acquired through the land claims process.¹⁶⁸ Since the Haida's aboriginal title has not been extinguished, it exists to this day and is reinforced by the Constitution.¹⁶⁹

¹⁶² See *Haida Nation v. B.C. (Minister of Forests)*, [2002] B.C.J. No. 1882, 2002 B.C.C.A. 462, 2002 B.C.C. LEXIS 4415 at *46.

¹⁶³ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.C. 73, paras. 69-71.

¹⁶⁴ *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010, 1022.

¹⁶⁵ CAN. CONST. (Constitution Act, 1982) pt. II (Rights of the Aboriginal Peoples of Canada), §§ 35(1), (3). "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired." *Id.*

¹⁶⁶ Although attempts have been made to create a Haida treaty, this process has been stymied (the Haida are at stage two of a six-stage treaty process with B.C.). For more information, see GOVERNMENT OF BRITISH COLUMBIA, TREATY NEGOTIATIONS OFFICE, FIRST NATIONS AND TRIBAL COUNCILS IN THE TREATY PROCESS, COUNCIL OF THE HAIDA NATION, at http://www.gov.bc.ca/tno/negotiation/First_Nations_in_the_process/haida_nation.htm (last visited Jan. 14, 2005).

¹⁶⁷ CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 25.

¹⁶⁸ *Id.* § 25 (a), (b).

¹⁶⁹ *Id.* § 25.

Current Canadian law states that aboriginal title exists anywhere possession by aboriginal peoples has existed and continues to exist if such title has not been extinguished.¹⁷⁰ Applying this rule, the Haida have a strong case if they can prove that extinguishment has not occurred. Proving a lack of extinguishment is likely, at least in part, insofar as any extinguishment by the Province of B.C. is *ultra vires* and any extinguishment by Canada requires a “clear and plain” intention.¹⁷¹ Reducing further barriers for the Haida, Canada must honor sections 25 and 35 of the Constitution.¹⁷²

The only remaining question is whether Canada has extinguished aboriginal title without Haida consent. The *Haida Nation* case implies that it has not.¹⁷³ In the final outcome of *Haida Nation*, the Haida successfully sought declaratory judgment that the provincial Government of B.C., but not the third party of Weyerhaeuser, had a legal duty and obligation to consult.

The Haida are now left with seeking recognition of aboriginal title, which they will likely accomplish through a suit claiming aboriginal title to the entirety of Haida Gwaii, including its seas.¹⁷⁴ To persuade the Haida to drop the aboriginal title legal suit, B.C. offered the Haida approximately 490,000 acres of Haida Gwaii, which is roughly twenty percent of the land to which the Haida claim aboriginal title.¹⁷⁵ The Haida refused this offer, which expired in March 2004.¹⁷⁶ This offer by B.C. implies recognition of the strength of the Haida claim, as well as similar suits by other aboriginal peoples claiming aboriginal title within the province. Lending support to this interpretation by B.C., other provinces, the Government of Canada, and various organizations have joined B.C. as interveners, asserting various defenses.¹⁷⁷

¹⁷⁰ *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010; CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 25, pt. II (Rights of the Aboriginal Peoples of Canada), §§ 35, 35.1.

¹⁷¹ *Id.*

¹⁷² *Id.* §§ 25, 35.

¹⁷³ See *Haida Nation v. B.C. (Minister of Forests)*, [2002] B.C.J. No. 1882, 2002 BCCA 462, 2002 B.C.C. LEXIS 4415, *20-21; *Haida Nation v. British Columbia (Minister of Forests)*, [2004] S.C.C. 73.

¹⁷⁴ The aboriginal title suit was announced on Mar. 6, 2002 and is expected to be heard in 2005 or 2006.

¹⁷⁵ Hal Bernton & Bradley Meacham, *B.C. Offers Haida Tribe 490,000 Island Acres*, SEATTLE TIMES, Sept. 4, 2003, at B4, <http://www.creativeresistance.ca/awareness02/2003-sep04-bc-offers-haida-tribe-490000-island-acres-seattletimes.htm> (last visited Jan. 14, 2005).

¹⁷⁶ *Id.* “We’re not even negotiating a treaty, and they are making a treaty offer,” Guujaaw, President of the Council of the Haida Nation, said in a newspaper interview. The Haida suspended treaty talks with B.C. in 1995. *Id.*

¹⁷⁷ *Scoping the Field of the TFL 39 Case*, PRINCE RUPERT DAILY NEWS, Mar. 25, 2004, at 1, 5. The defenses include: that no fiduciary nor constitutional duty exists prior to judicial determination of aboriginal rights or title; that *Sparrow* has no duty to consult; that the federal, not the provincial, powers

C. *The Maori Claim to Aboriginal Title is Not So Alive and Well Because New Zealand Extinguishment of Maori Customary Title is Very Broad*

The Maori position is not as strong as that of the Haida. While the New Zealand Court of Appeal adopted Canada's *Sparrow* "clear and plain" test for extinguishment, New Zealand has a broader range of options with which to extinguish title. In *Attorney-General v. Ngati Apa*, the Court of Appeal unanimously held that the common law recognition of native property rights continued until lawfully extinguished.¹⁷⁸ Citing Canada's *Sparrow* case, this court stated that "the onus of proving extinguishment lies on the Crown and the necessary purpose must be clear and plain."¹⁷⁹ However, New Zealand's methods of extinguishment are broad, flexible, and open-ended, allowing for extinguishment to occur with relative simplicity.¹⁸⁰ The Maori are not protected, like the Haida, by a Constitutional mandate. In *Ngati Apa*, the Court of Appeal itemized a list of ways to extinguish Maori customary title: "[1] by sale to the Crown, [2] through investigation of title through the Land Court and subsequent deemed Crown grant, or [3] by legislation or other lawful authority."¹⁸¹ These three methods of extinguishment have been systematically used, over time, to deprive the Maori of their customary title. Thus, when compared with the Haida, the Maori are in a much less advantageous position.

1. *A Sale of Land to the Crown Leads to Extinguishment of Maori Customary Title*

Although *Ngati Apa* confirms that Maori customary title may be extinguished by "sale to the Crown," this has not occurred with the foreshore and seabed.¹⁸² This method of extinguishment recognizes that Maori customary title to land existed both prior and subsequent to European colonization: "[t]he Crown has no property interest in customary land and is not the source of title to it."¹⁸³ *Ngati Apa* recognizes that the transfer of sovereignty as a result of the Treaty of Waitangi did not affect customary

hold fiduciary obligations; that the duty to consult does not apply to treaty rights; that a duty on private industry to consult is unworkable; that injunctions should be sought in order to protect aboriginal rights that have yet to be determined by the courts; and that governments must balance aboriginal rights with the greater public interest. Note that a fiduciary duty is owed by the government to its indigenous peoples in both Canada and New Zealand. See Reynolds, *Part I*, *supra* note 10, at 66.

¹⁷⁸ *Attorney-General v. Ngati Apa*, [2003] 3 N.Z.L.R. 643, 2003 N.Z.L.R. LEXIS 74 at *20-21.

¹⁷⁹ *Id.* at *112.

¹⁸⁰ See *id.*

¹⁸¹ *Id.* at *43-44.

¹⁸² *Id.* at *44.

¹⁸³ *Id.*

property.¹⁸⁴ Maori customary property rights “are interests preserved by the common law until extinguished in accordance with the law.”¹⁸⁵ Since the foreshore and seabed of Marlborough Sounds were not sold to the Crown by the Maori, extinguishment by sale to the Crown did not occur.

Whether or not the lands directly above the foreshore and seabed had been sold, or had Maori customary title extinguished by some other means, no longer makes a difference where the issue is title to the foreshore and seabed. Prior to *Ngati Apa*, the *Re the Ninety-Mile Beach* case was the controlling authority.¹⁸⁶ In this case the court held that any Maori customary property in the foreshore had been extinguished once the contiguous land above the high water mark had lost the status of Maori customary land.¹⁸⁷ *Ngati Apa* specifically overruled *Re the Ninety-Mile Beach*.¹⁸⁸ Thus, the doctrine of aboriginal title, or Maori customary title, can extend to any customary rights that might exist in the foreshore and seabed and does not necessarily end at the high and low water marks.¹⁸⁹ Maori customary title to the foreshore and seabed of Marlborough Sounds remains strong.

2. *Investigation of Title Through the Land Court Led to Extinguishment of Maori Customary Title*

Until the Maori Land Act, Maori customary land in New Zealand was slowly and deliberately transferred into freehold or fee simple land, “held of the Crown.”¹⁹⁰ This systematic transfer was accomplished by earlier land acts from 1862 until 1993 and the Maori Land Court.¹⁹¹ The explicit policy of the legislation was “to encourage the extinction of such proprietary customs and to provide for the conversion of such modes of ownership into titles derived from the Crown.”¹⁹² These laws and the Native Land Court meant that any investigation into the feasibility of Maori customary title changed the title of the land to a freehold or fee simple title.¹⁹³

¹⁸⁴ *Id.* at 21-22; see also *R v. Symonds*, [1847] N.Z.P.C.C. 387, 390.

¹⁸⁵ *Ngati Apa*, 2003 N.Z.L.R. LEXIS, at *19-20 (overruling *Re the Ninety-Mile Beach*, [1963] N.Z.L.R. 461 (C.A.)).

¹⁸⁶ *Re the Ninety-Mile Beach*, [1963] N.Z.L.R. 461 (C.A.) (holding that no claim to the foreshore could exist unless the Maori possessed title to the contiguous dry land). See Reynolds, *Part II, supra* note 20, at 185.

¹⁸⁷ *Re the Ninety-Mile Beach*, [1963] N.Z.L.R. 461 (C.A.); *Ngati Apa*, 2003 N.Z.L.R. LEXIS, at *16-17.

¹⁸⁸ *Id.*

¹⁸⁹ *Ngati Apa*, [2003] 3 N.Z.L.R. 643, 2003 N.Z.L.R. LEXIS 74.

¹⁹⁰ *Id.* at *39.

¹⁹¹ *Id.* This court was established in 1865. *Id.* at *38.

¹⁹² *Ngati Apa*, 2003 N.Z.L.R. LEXIS, at *39 (citing Preamble to the Native Lands Act 1865).

¹⁹³ *Id.* at *38.

This systematic destruction of Maori customary title changed with the Maori Land Act. Issues of Maori customary title are now taken to the Maori Land Court without any fear of an automatic default extinguishment of Maori customary title.¹⁹⁴ The two main principles articulated in the Maori Land Act's preamble call for "the retention of Maori land in the hand of the owners, and the effective use, management, and development of the land by or on behalf of the owners."¹⁹⁵ Section 17 calls for "[t]he retention of Maori land and General land owned by Maori in the hands of the owners. . . ."¹⁹⁶ Further objectives for the Maori Land Court are "[t]o protect minority interests in any land against an oppressive majority, and to protect majority interests in the land against an unreasonable minority"¹⁹⁷ and "[t]o ensure fairness in dealings with the owners of any land in multiple ownership. . . ."¹⁹⁸ As a result, *Ngati Apa*'s holding allowing the Maori to take their case to the Maori Land Court is a victory for the Maori, for it no longer means an automatic extinguishment of title upon seeking a ruling of Maori customary title.

A further argument in favor of a successful Maori claim to the foreshore and seabed exists in the fact that the Maori have had past success in claiming similar "lands" located under water. As a result of the various land acts and the Native Land Court's years of freehold orders, very little land remains to which Maori customary title would apply—since in New Zealand private land rights take precedence over Maori claims to land—leaving the Maori to claim the only land that remains: the land which lies under various bodies of water.¹⁹⁹ Such Maori claims have been somewhat successful and have resulted in awards of Maori customary title to certain lakebeds and riverbeds.²⁰⁰ Beyond giving the Maori the right to assert claims of customary rights to the foreshore and seabed in the Maori Land Court, *Ngati Apa* also held that the seabed and foreshore is "land," comparable to river and lake beds.²⁰¹ Due to the recent successes of

¹⁹⁴ Te Ture Whenua Maori Act (Maori Land Act), 1993 (N.Z.)

¹⁹⁵ Mikaere & Milroy, *supra* note 83, at 393-94.

¹⁹⁶ Te Ture Whenua Maori Act (Maori Land Act), 1993 (N.Z.), art. 17(1)(a).

¹⁹⁷ *Id.* art. 17(2)(d); *see also* Mikaere & Milroy, *supra* note 83, at 395.

¹⁹⁸ Te Ture Whenua Maori Act (Maori Land Act), 1993 (N.Z.), art. 17(2)(e).

¹⁹⁹ *See, e.g.,* Tamihana Korokai v. Solicitor-General, [1912] N.Z.L.R. 321 (C.A.) and *Re the Bed of the Wanganui River*, [1955] N.Z.L.R. 419 (C.A.). These cases exemplify specific cases seeking title to lake and river beds respectively. *Id.*

²⁰⁰ *Compare* Tamihana Korokai v. Solicitor-General, [1912] N.Z.L.R. 321 (C.A.) (recognizing that Maori customary title over Lake Rotorua is a question for the Native Land Court) and *Re the Bed of the Wanganui River*, [1955] N.Z.L.R. 419 (CA) (recognizing Maori customary title to Wanganui River) with *Re the Bed of the Wanganui River*, [1962] N.Z.L.R. 600 (CA) (recognizing Maori customary title of Wanganui River converted to Maori freehold title).

²⁰¹ Attorney-General v. Ngati Apa, 2003 N.Z.L.R. LEXIS at *51-52.

customary title claims to river and lake beds, this holding strengthened the Maori's current foreshore and seabed claim.

However, the *Ngati Apa* ruling did not grant Maori customary title to the Maori. The Court merely held that the Maori were entitled to assert a claim of customary rights to the foreshore and seabed.²⁰² Any decisions on the validity of the claim will be made by the Maori Land Court.²⁰³

The highest court in New Zealand hinted at the possibility of success for the Maori's customary title claim.²⁰⁴ However, Professor Paul McHugh, a world expert in aboriginal rights, made a statement to the Waitangi Tribunal that, while exclusive ownership was not likely be granted to the Maori, "very substantial Maori rights over the foreshore and seabed" would likely be granted.²⁰⁵ Such rights could be granted if the New Zealand government does not first intervene and extinguish Maori customary title through legislative action.

3. *Legislation or Other Lawful Authority Leads to Extinguishment of Maori Customary Title*

Under New Zealand law, if the intent to extinguish is "clear and plain,"²⁰⁶ the government can extinguish title "by legislation or other lawful authority."²⁰⁷ The New Zealand Government's reply to *Ngati Apa* was the threat to waive appeal to the Privy Council and to refuse to allow the court to give the Maori exclusive aboriginal title or private title to the foreshore and seabed areas by way of legislative action.²⁰⁸ In short, the New Zealand government plans to use legislative means to unilaterally confiscate the Maori's right to seek a legal claim of either exclusive or non-exclusive customary title to the seabed and foreshore. This reaction by the New Zealand Government is in response to fears that the Maori will prevent non-Maori access to New Zealand's coastline.²⁰⁹

²⁰² *Id.*

²⁰³ Attorney-General v. Ngati Apa, [2003] 3 N.Z.L.R. 643, 2003 N.Z.L.R. LEXIS 74; Michael Cullen, *Straight Down the Middle on Foreshore and Seabed*, N.Z. HERALD, Feb. 12, 2004, at <http://www.nzherald.co.nz/storydisplay.cfm?thesection=news&thesubsection=&storyID=3548693> (last visited Jan. 14, 2005).

²⁰⁴ Ngati Apa, 3 N.Z.L.R. 643, 2003 N.Z.L.R. LEXIS 74; Cullen, *supra* note 205.

²⁰⁵ Cullen, *supra* note 205. This article also goes on to say that Australia and Canada have similar customary rights which are property rights, but which are not ownership as such. Aboriginal title could arguably fall into such a right, which may not be exclusive if co-jurisdiction takes place. *Id.*

²⁰⁶ *Ngati Apa*, 2003 N.Z.L.R. LEXIS at *112.

²⁰⁷ *Id.* at *43-44.

²⁰⁸ Kevin Taylor, *Left Parties Far Apart on Foreshore and Seabed*, N.Z. HERALD, Jan. 23, 2004, at <http://www.nzherald.co.nz/storydisplay.cfm?thesection=news&thesubsection=&storyID=3545127&reportID=1162603> (last visited Jan. 14, 2005).

²⁰⁹ *Id.*

Although a compromise position between the Maori and the New Zealand Government is possible,²¹⁰ the New Zealand Government is not seeking one. In December 2003, the New Zealand Government announced a foreshore and seabed plan.²¹¹ This plan would put these regions into public domain title that cannot be sold and "establish a process by which Maori can attain customary title and have a larger say over coastal development."²¹² What exactly the Maori would have left to claim customary title to once this "public domain" title is implemented is not defined.

The legislative power of extinguishment is one of great strength. New Zealand's own Land Information Minister, John Tamihere, estimated that the Maori would have received at least ten percent of the foreshore and seabed in a court ruling if the New Zealand government had not intervened and threatened to quash the ability of the Maori to pursue its claim in the Maori Land Court through proposed legislation.²¹³ According to Land Information New Zealand surveys, the Maori communally own 1996 kilometers in freehold land, just over ten percent of land on New Zealand's 19,833-kilometer coastline.²¹⁴ This Maori freehold land has never left Maori hands, thus giving it an "extraordinarily strong" legal argument for an aboriginal title claim to the foreshore and seabed.²¹⁵ Regarding this land the Land Information Minister stated that the New Zealand Government "now know[s] absolutely without doubt . . . that no less than this would have got, more than likely, a freehold title The burden of proof . . . is minimal by dint of the fact that they have continued to hold their land and practise their customs on the shoreline."²¹⁶

Thus, even the government of New Zealand itself acknowledges aboriginal title, but political fears seem to have driven the government to the point of denying the Maori their day in court and facing accusations of treaty breach through the government's right to extinguish such title "by legislation or other lawful authority."²¹⁷ Specifically, this denial of a day in court is to

²¹⁰ See *infra* Part IV.B.

²¹¹ Taylor, *supra* note 208.

²¹² *Id.*

²¹³ Ruth Berry, *Tenth of Coast is Maori Says Tamihere*, N.Z. HERALD, Jan. 10, 2004. This statistic was obtained a week before the New Zealand Government announced its foreshore and seabed policy in January 2004, at <http://www.nzherald.co.nz/storydisplay.cfm?thetitle=news&thesubsection=&storyID=3542897&reportID=1162603> (last visited Jan. 14, 2005). *Id.*

²¹⁴ *Id.* Mr. Tamihere stated in this interview that it was "the first time concrete information had been collated quantifying Maori ownership of land beside the foreshore with no Queen's Chain in between." *Id.*

²¹⁵ *Id.*

²¹⁶ Berry, *supra* note 213.

²¹⁷ Ngati Apa, 2003 N.Z.L.R. LEXIS at *44. The New Zealand Government denies that its foreshore plans would equal a treaty breach. See *Government's Foreshore Plans Said Not to Breach Treaty*, N.Z.

occur via extinguishment by the creation of “public domain title” through New Zealand legislation.²¹⁸

The proposed New Zealand legislation to extinguish Maori customary title has caused both a national and international uproar. New Zealand’s Attorney-General Margaret Wilson announced on March 3, 2004, that “Maori already have customary title over the whole coastline.”²¹⁹ Regardless, on April 8, 2004, the government of New Zealand introduced in Parliament a sixty-nine-page Foreshore and Seabed Bill that, if passed, will remove the decision-making authority of *Ngati Apa* from the judiciary, vest ownership of the foreshore and seabed in the Crown, allow general rights of public access, and prevent the Maori from claiming ownership of the foreshore and seabed.²²⁰ “The bill will legislate for crown ownership and allow those claiming customary rights limited avenues to have them recognised short of private ownership” through the High Court.²²¹ As a result of this legislation, New Zealand’s international reputation in the human rights arena is at stake.²²² The U.N. High Commissioner for Human

HERALD, Jan. 29, 2004, at <http://www.nzherald.co.nz/latestnewsstory.cfm?storyID=3546326&thesection=news&thesubsection=general&thesecondsubsection=latest> (last visited Jan. 14, 2005).

²¹⁸ Cullen, *supra* note 203.

²¹⁹ Ruth Berry, *Maori Already Have Customary Title to the Coastline, Wilson Tells House*, N.Z. HERALD, Mar. 14, 2004, at <http://www.nzherald.co.nz/storydisplay.cfm?thesection=news&thesubsection=&storyID=3552787&reportID=1162603> (last visited Jan. 14, 2005).

²²⁰ Foreshore and Seabed Bill, available at <http://www.beehive.govt.nz/foreshore/129bar1.pdf> (last visited Jan. 14, 2005). See also *Foreshore Bill Finally Sees Light of Day*, N.Z. HERALD, Apr. 8, 2004, at <http://www.nzherald.co.nz/storydisplay.cfm?thesection=news&thesubsection=&storyID=3559697> (last visited Jan. 14, 2005).

²²¹ *Beyer Changes Her Mind on Foreshore Bill . . . Again*, N.Z. HERALD, Apr. 18, 2004, available at: <http://www.nzherald.co.nz/storydisplay.cfm?thesection=news&thesubsection=&storyID=3561182&reportID=1162603> (last visited Jan. 14, 2005). The bill got its first reading in Parliament on May 5, 2004 and was expected to be sent to a special select committee until July 12, 2004, to enable public comment. *Id.*; *Seabed Views Sought*, N.Z. HERALD, May 20, 2004, at <http://www.nzherald.co.nz/storydisplay.cfm?thesection=news&thesubsection=&storyID=3567502> (last visited Jan. 14, 2005). The National Party claims it will repeal the bill if elected into power. *Id.* Thousands of protesters marched in protest to the bill on May 5th in a hiko to Parliament. *Thousands March Against Seabed and Foreshore Legislation*, *supra* note 2.

Note also that this issue may go to the Privy Council, which has agreed to hear the appeal of Port Marlborough on November 15 and 16, 2004. *No delay for seabed law, says Cullen*, N.Z. HERALD, July 15, 2004, at <http://www.nzherald.co.nz/storydisplay.cfm?thesection=news&thesubsection=&storyID=3578420&reportID=1162603> (last visited Jan. 14, 2005); *Port Marlborough Puts Seabed Case to Privy Council*, N.Z. HERALD, Sept. 17, 2004, at <http://www.nzherald.co.nz/index.cfm?ObjectID=3592309> (last visited Jan. 14, 2005). New Zealand expects its bill to be passed by Christmas 2004. *Id.*

²²² See Chris Lawrence, *Risk of Red Faces over Seabed Law*, N.Z. HERALD, Mar. 24, 2004, at <http://www.nzherald.co.nz/storydisplay.cfm?thesection=news&thesubsection=&storyID=3556479> (last visited Jan. 14, 2005).

Rights will investigate this legislation,²²³ which not surprisingly has caused a significant rift with the Maori.²²⁴

D. A Comparison of International, Canadian, and New Zealand Extinguishment Laws Reveals a Spectrum of Likely Outcomes

The extinguishment laws of the international community, Canada and New Zealand vary widely and thus may result in different outcomes for the Haida and the Maori. Under international law, extinguishment without indigenous consent is severely discouraged.²²⁵ As compared to Canada, New Zealand has a much stronger case for extinguishment as a result of its series of land acts and the governmental reaction to the recent *Ngati Apa* holding.²²⁶ Although the highest courts of both nations adhere to the same criteria for extinguishment of indigenous title, the methods of extinguishment are much broader for New Zealand than Canada.²²⁷ In New Zealand, aboriginal title can be extinguished by mere legislation enacted by the New Zealand government, so long as the intention is explicit.²²⁸ In Canada the provincial governments lack powers of blanket extinguishment, so any claim by the province of B.C. that they had extinguished title, whether using clear and plain language or not, would be invalid.²²⁹ Further, any Canadian federal government attempts to extinguish title through mere legislation would also be very difficult since aboriginal title is protected by the Canadian Constitution Act.²³⁰ These different limits to extinguishment between New Zealand and Canada will likely result in opposite outcomes of the current Maori and Haida claims to aboriginal title.

²²³ *Seabed Issue to be Considered by UN Body*, N.Z. HERALD, May 4, 2004, at <http://www.nzherald.co.nz/storydisplay.cfm?thesection=news&thesubsection=&storyID=3564328&reportID=1162603> (last visited Jan. 14, 2005).

²²⁴ *Talks Fail to Resolve Government Crisis*, N.Z. HERALD, May 4, 2004, at <http://www.nzherald.co.nz/storydisplay.cfm?thesection=news&thesubsection=&storyID=3564382> (last visited Jan. 14, 2005).

²²⁵ However, international law has merely moral persuasion value and lacks much clout. Hopefully this will eventually change through the evolution of a CIL norm on extinguishment or other "soft" international law.

²²⁶ See generally *New Zealand's Land Acts*; *Attorney-General v. Ngati Apa*, [2003] 3 N.Z.L.R. 643, 2003 N.Z.L.R. LEXIS 74.

²²⁷ Compare *Attorney General v. Ngati Apa*, 2003 N.Z.L.R. LEXIS at *43-44 (allowing extinguishment through several methods, including sale to Crown, Land Court title investigation, legislation or other "lawful authority") with *Delgamuukw*, [1997] 3 S.C.R. 1010, 1022 (allowing extinguishment more narrowly, through specific federal laws "of clear and plain intention").

²²⁸ *Ngati Apa*, 2003 N.Z.L.R. LEXIS at *112.

²²⁹ *Delgamuukw*, 3 S.C.R. at 1022.

²³⁰ B.C. TREATY COMMISSION, *supra* note 49, at 3.

IV. LEGAL, MORAL, AND INTERNATIONAL LAW GROUNDS EXIST FOR RECOGNITION OF ABORIGINAL TITLE

Both the Haida and the Maori claims of indigenous title should succeed for three reasons. First, the legal basis for indigenous title claims for both the Haida and the Maori are sound. Common law, case law and international documents apply to both the Haida and the Maori, for these respective peoples are minorities that face ethnocide and cultural genocide if they are denied possession of that which sustains them—their lands.²³¹ Second, although the historical treatment of its indigenous peoples by Canada and New Zealand are radically different, both nations have a history of treating their respective indigenous peoples unjustly.²³² Claims to indigenous title by the Haida and the Maori present an opportunity for Canada and New Zealand to partially remedy many past wrongs. Finally, the United Nations Draft Declaration on the Rights of Indigenous Peoples, if passed and followed, sets the highest and most idealistic standard regarding indigenous title extinguishment ever known. This Draft Declaration supports both the Haida and Maori cases.

A. *Identical Extinguishment Standards Form the Legal Grounds for Recognition of Aboriginal Title*

The Maori and Haida claims to indigenous title are grounded in natural law, common law, international law, and national case law. Although New Zealand possesses a broader array of the methods to extinguish aboriginal title, both Canada and New Zealand share nearly identical standards with regard to indigenous title.²³³ Both share the same

²³¹ The pre-contact Haida population may have been as high as 30,000. Contact with Europeans beginning in the late 1700s had a devastating impact on the Haida population. Approximately ninety-five percent of the Haida population was wiped out by disease by the late 1800s. A census conducted by the Hudson's Bay company counted 800 Haida in 1885 and 588 in 1915. The population has since rebounded to an estimated 4000 people. THE VIRTUAL MUSEUM OF CANADA, THE HAIDA HOMELAND, at <http://www.virtualmuseum.ca/Exhibitions/Haida/java/english/c+o/co2a.html> (last visited Jan. 14, 2005); Clifford Krauss, *Natives' Land Battles Bring a Shift in Canada Economy*, N.Y. TIMES, December 5, 2004 (on file with author).

In 1769, the Maori numbered 100,000, with no other ethnic group in New Zealand. The Maori population reached its lowest point in 1896, when only 42,113 individuals of Maori descent were living. As of New Zealand's 2001 National Census, over 600,000 people report they are of Maori descent. PETER J. KEEGAN, INFORMATION ON THE MAORI LANGUAGE OF NEW ZEALAND: FAQ ABOUT THE MAORI POPULATION, at http://www.maorilanguage.info/mao_pop_faq.html (Dec. 13, 2003) (last visited Jan. 14, 2005).

²³² See U.N. Draft Declaration on the Rights of Indigenous Peoples, *supra* note 126, pmb1.

²³³ *Delgamuukw*, 3 S.C.R. 1010; *Ngati Apa*, 3 N.Z.L.R. 643, 2003 N.Z.L.R. LEXIS 74.

"clear and plain" extinguishment intention test.²³⁴ Both also acknowledge that there is an entire spectrum of rights that may be granted as indigenous title. "[The Supreme Court of Canada] has recognized that, according to the custom on which such rights are based, [customary property rights] may extend from usufructory rights to exclusive ownership with incidents equivalent to those recognized by fee simple title . . ." ²³⁵ With both legal systems sharing such foundational similarities, both the Haida and Maori claims should succeed.

B. The Governments of Canada and New Zealand Are Morally Bound to Overcome Ill-Founded Fears and Recognize Aboriginal Title to Right Moral Wrongs, and New Zealand Has Much Work to Do

According to the mainstream media, the non-Maori reply to *Ngati Apa* seems to be strong opposition based on fear.²³⁶ The New Zealand government's reaction to this case "was swift and controversial."²³⁷ The Crown, as possessor of sovereignty, "controls the legal and political higher ground . . . [and] has not hesitated to initiate and use legislation as a political weapon . . . in order to appease the fears of the non-Maori voting public."²³⁸ Yet these fears on the part of the non-Maori are ill-founded for at least four reasons.²³⁹ The first three deal with the concern that rights currently available to all New Zealanders will be curtailed if the Maori receive judicial recognition of Maori customary title.²⁴⁰ First, there exists no legally enforceable right to the foreshore and seabed under English common law.²⁴¹ Second, the foreshore and seabed of New Zealand can be "vested in private ownership."²⁴² Third, the fears about the restriction of public access to the shores and sea fail to recognize that a legislative regulatory regime currently exists to regulate publicly accessible foreshore and seabed areas of New Zealand.²⁴³ Fourth, aboriginal title, although based on exclusive ownership,

²³⁴ *Delgamuukw*, 3 S.C.R. 1010; *Ngati Apa*, 3 N.Z.L.R. 643, 2003 N.Z.L.R. LEXIS 74, R. v. Sparrow, [1990] 1 S.C.R. 1075, 1099.

²³⁵ *Ngati Apa*, 2003 N.Z.L.R. LEXIS at *34.

²³⁶ See generally Jeanette Fitzsimons MP, Green Party Co-Leader, *Foreshore and Seabed: Can Customary Title Co-exist with the Commons?*, available at <http://greens.org.nz/searchdocs/other6656.html> (last visited Jan. 14, 2005); Castan, *supra* note 132.

²³⁷ Reynolds, *Part II*, *supra* note 20, at 188.

²³⁸ Ani Mikaere et al., *Treaty of Waitangi and Maori Land Law*, Part III, 2003 N.Z. L. REV. 447, 470 (2003).

²³⁹ See *id.* for a more detailed discussion of the first three reasons.

²⁴⁰ *Id.* at 473-74.

²⁴¹ *Id.* at 473.

²⁴² *Id.* at 474.

²⁴³ *Id.*

does not have to result in exclusive, private ownership.²⁴⁴ The two peoples of New Zealand could share the foreshore and seabed while at the same time allowing the Maori greater control over the regions by way of exercising their customary rights. In *Ngati Apa*, the Wellington Court of Appeal, in citing Canada's *Delgamuukw* decision, recognized that aboriginal title can have a wide range of meanings, "from usufructory rights to exclusive ownership with incidents equivalent to those recognized by fee simple title."²⁴⁵ Therefore, a compromise that could grant the Maori customary title and still ensure non-Maori access to the beaches is possible.

The Maori case claiming Maori customary title represents an opportunity to undo some of the past wrongs of Maori customary title extinguishment. Although in 1847 *Symonds* defined aboriginal title and protected it against extinguishment from all except the Crown, after that ruling New Zealand entered a dark age with regard to its treatment of the Maori.²⁴⁶ What follows from *Symonds* is a series of cases that eroded the concept of aboriginal title.²⁴⁷ In 1975, the erosion stopped with the Treaty of Waitangi Act.²⁴⁸ This Act was created to confirm the principles of the Treaty of Waitangi and ensure its observance through the establishment of a tribunal to make recommendations on claims regarding the practical application of the Treaty and to rule on consistency with the Treaty's principles.²⁴⁹ Its intent reflected that of a nation recognizing its bicultural nature by providing the Maori people with a legal venue through which to

²⁴⁴ *Ngati Apa*, 2003 N.Z.L.R. LEXIS at *34; *Delgamuukw*, [1997] 3 SCR 1010, paras. 110-119 per Lamer, CJ.

²⁴⁵ *Delgamuukw*, [1997] 3 SCR 1010, paras. 110-119 per Lamer, CJ, quoted in *Ngati Apa*, 2003 N.Z.L.R. LEXIS 74, at *34.

²⁴⁶ *R. v. Symonds*, (1847) N.Z.P.C.C. 387.

²⁴⁷ See, for example, a subsequent decision thirty years later by Chief Justice James Prendergast and Justice C.W. Richmond in *Wi Parata v. Bishop of Wellington* in 1877, [1877] 3 NZ Jur (NS) 72, where the justices misunderstood the holding of *Symonds* and American authorities and suggested that in the case of 'primitive barbarians' as opposed to civilized nations, the issue of a Crown grant to a third party extinguished whatever native proprietary rights or native title might exist for the Maori. This ruling in effect made the Treaty a legal nullity, tossing Waitangi into "judicial limbo" for over a century. See COUNCIL FOR ABORIGINAL RECOGNITION, RECONCILIATION AND SOCIAL JUSTICE LIBRARY, at <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/alrc/custlaw2/282.html> (last visited Jan. 14, 2005). *Wi Parata v. Bishop of Wellington*, [1877] 3 NZ Jur (NS) 72; see also Brookfield, *supra* note 87. In the 1903 case, *Wallis v. Solicitor-General*, customary title was made unenforceable against the Crown and codified it in section 155 of the Maori Affairs Act 1953 (undone in the Maori Affairs Restructuring Bill, 1989). *Id.* at 11. For the history of this case, see generally Hackshaw, *supra* note 22.

²⁴⁸ The Treaty of Waitangi, 1840 (N.Z.).

²⁴⁹ See THE UNIVERSITY OF MELBOURNE, SCHOOL OF ANTHROPOLOGY, GEOGRAPHY AND ENVIRONMENTAL STUDIES, AGREEMENTS, TREATIES AND NEGOTIATED SETTLEMENTS PROJECT (May 1, 2002), at <http://www.atns.net.au/biogs/A001255b.htm> (last visited Jan. 14, 2005). "Originally, the Act was limited to claims arising from 1975, but this restriction was amended in 1985 to increase its jurisdiction to include investigation and reporting on historic claims back to 1840." *Id.*

air their Treaty-related grievances against the Crown: the Waitangi Tribunal.²⁵⁰ Not until the Maori Land Act in 1993 did the systematic destruction of Maori customary title end.²⁵¹

New Zealand parallels Canada in its legal foundation of aboriginal title, with two crucial exceptions: New Zealand has not entrenched aboriginal rights into a Constitution and New Zealand can still extinguish aboriginal title with relative ease.²⁵² As a result, the Maori are easily susceptible to the political will of the New Zealand government. This susceptibility opens the Maori up to further cultural persecution should irrational and emotional fears result in legislation that would extinguish Maori title over foreshore and seabed areas, which will occur if the Foreshore and Seabed bill is passed into law.

C. The Promise of the U.N. Draft Declaration on the Rights of Indigenous Peoples Forms the International Legal Ground for Recognition of Aboriginal Title

The Draft Declaration on the Rights of Indigenous Peoples,²⁵³ if passed, will represent the most direct call for protection of the rights of indigenous peoples worldwide. It recognizes that indigenous groups and individuals have a right not to be subjected to ethnocide and cultural genocide by way of "[a]ny action which has the aim or effect of dispossessing them of their lands, territories or resources."²⁵⁴ It would also put an end to the forcible removal from their lands or territories.²⁵⁵ Land rights and restitution of lands lost are also provided for as rights.²⁵⁶ These rights are stronger than the Canadian laws and, therefore, much stronger than the New Zealand laws. If this international declaration is adopted and

²⁵⁰ PERSPECTIVES, *supra* note 22, at xi.

²⁵¹ Te Ture Whenua Maori Act (Maori Land Act), 1993 (N.Z.) In its third periodic report of New Zealand, adopted in 1995, the Human Rights Committee "welcome[d] the important developments that have occurred in relation to the interests of Maori. Among these developments the Committee note[d] the increasing importance of the work of the Treaty of Waitangi Tribunal in dealing with Maori claims against the Crown." U.N. CCPR Human Rights Comm., 53rd Sess., 1393-1395th mtg. at 2, U.N. Doc CCPR/C/79/Add.4705-04-1995 (1995), <http://www.unhcr.ch/tbs/doc.nsf/0/efcc57c442b7aa56c12563f000505188?Opendocument> (last visited Jan. 14, 2005).

²⁵² See *supra* Part III.C for a discussion of the ways aboriginal title can be extinguished under New Zealand law.

²⁵³ U.N. Draft declaration on the rights of indigenous peoples, U.N. Doc E/CN.4/Sub.2/1994/2Add.1 (1994).

²⁵⁴ U.N. Draft declaration on the rights of indigenous peoples, art. 7, [http://www.unhcr.ch/huridocda/huridocda.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument](http://www.unhcr.ch/huridocda/huridocda.nsf/(Symbol)/E.CN.4.SUB.2.RES.1994.45.En?OpenDocument) (last visited Jan. 14, 2005).

²⁵⁵ *Id.* art. 10.

²⁵⁶ *Id.* art. 26, 27.

followed by Canada and New Zealand, both the Haida and the Maori would likely prevail in their claims for recognition of indigenous title.

V. CONCLUSION

Although the question of extinguishment of title has yet to be finally determined for either the Haida or the Maori, the legal foundation to recognize aboriginal title is firmly-rooted in history and the common law, dating back to pre-European contact. Both the Haida and Maori claims should succeed on legal and moral grounds. Evolving international law supports these claims and recent cases in both Canada and New Zealand recognize the existence of aboriginal title and lay out the same "clear and plain" intention test requirement for extinguishment of aboriginal title. However, the difference between the two nations in the scope of methods of extinguishment may result in success for the Haida claim and failure for the Maori claim. New Zealand has a much broader and flexible set of methods than Canada by which to extinguish title. These methods include legislating extinguishment, including the ill-advised New Zealand Foreshore and Seabed Bill, which, if passed, will negate the entire common law history of aboriginal title and deny the Maori a judicial ruling on their claim of Maori customary title.

The New Zealand Maoris' great disadvantage with respect to their claims of aboriginal title does not have to exist. A successful outcome in both cases is implied in the nations' identical "clear and plain" extinguishment intention test. Additionally, the broad spectrum of potential rights to be granted could refute the fears of the non-Maori New Zealand majority. Neither country should ignore this historic opportunity to correct historical moral wrongs. Both should take advantage of this opportunity before the passage of the United Nations Draft Declaration on the Rights of Indigenous Peoples, which strongly supports both aboriginal title claims and may lead to crystallization of international law on this issue. Working toward amicable resolutions of both these claims is in the interests of the Haida, the Maori, and both nations.

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