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Aboriginal Title and Oceans Policy in Canada

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11 Aboriginal title and oceans policy in Canada

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Introduction

The *Oceans Act*[1] of Canada sets out a broad framework for the unified management of Canada's oceans based on an ecosystem approach. In particular, the *Oceans Act* calls on the Minister of Fisheries and Oceans to lead and facilitate the development of a national strategy to guide the management of Canada's estuarine, coastal and marine ecosystems.[2] The *Oceans Act* also reflects awareness that aboriginal rights may affect the development or implementation of policy surrounding oceans management. For example, s. 2(1) of the Act states that ". . . nothing in this Act shall be construed so as to abrogate or derogate from any existing aboriginal and treaty rights of the aboriginal peoples under section 35 of the Constitution Act, 1982."[3] The *Oceans Act* also provides for collaboration with aboriginal organizations[4] in the development and implementation of a national strategy and plans for integrated management of all activities affecting estuarine, coastal and marine waters, and provides for the possibility of aboriginal participation on certain advisory or management bodies,[5] thus creating an opportunity for aboriginal input into Canada's ocean policy in the future.

The extent and nature of the interaction between aboriginal rights and oceans policy may depend on a number of factors, both political and legal. Political factors include the extent to which successive federal governments perceive it to be feasible or necessary to incorporate the recognition of aboriginal interests into oceans policy in light of the collaboration envisaged by the Act. Legal considerations include the kinds of aboriginal rights that Canadian courts may be willing to recognize in relation to ocean areas and how courts interpret and apply the tests which have been developed regarding governmental justification of infringements of aboriginal rights.

This chapter focuses primarily on the first of these legal issues by asking whether the doctrine of aboriginal title[6] could be applied to the seabed.[7] How Canadian courts might reconcile claims of aboriginal title in the seabed with common law rights of fishing and navigation, as well as the international right of innocent passage, is uncertain; however, while it is difficult to offer definitive conclusions, it is possible that the doctrine of

aboriginal title could be applied at least with regard to the seabed beneath Canada's territorial waters. The possible application of aboriginal title to an area of seabed, when taken in conjunction with the collaboration already required by the *Oceans Act*, makes it clear that the participation of First Nations will be an important element of the implementation of an oceans strategy.

Aboriginal title

The starting point for any discussion of aboriginal rights in Canada is s. 35(1) of the *Constitution Act*, which states that "[e]xisting treaty and aboriginal rights are hereby recognized and affirmed." Canadian courts have made it clear that the term "aboriginal rights" encompasses a range of different rights, including:

- title to the land itself;
- site-specific aboriginal rights where exercise of the right is tied to a particular piece of land, although the community does not hold aboriginal title to that land (for instance, the right to hunt or fish in a particular area); and,
- aboriginal rights to carry out certain activities that are not linked to any particular area.[8]

Source of aboriginal title

The first decision in Canadian law that commented on the source of aboriginal title (or "Indian title" as it was referred to at that time) was *St. Catharine's Milling and Lumber Co.* v. *The Queen*.[9] The issue in that case was whether, on the surrender of Indian title, the underlying fee simple lay with the federal or provincial Crown. In the course of deciding in favor of the provincial Crown, the Privy Council referred to the Royal Proclamation of 1763[10] as the basis of Indian title.

Modern Canadian jurisprudence on aboriginal title begins with the 1973 Supreme Court of Canada decision in *Calder* v. *British Columbia (Attorney-General)*.[11] Six of the seven justices of the Supreme Court who heard *Calder* addressed the substantive issues, and all of these six accepted that the area claimed had been inhabited by the claimants and their ancestors "since time immemorial."[12] The Court made it clear that aboriginal title did not have its primary source in any document or agreement and instead characterized aboriginal title as flowing from historic occupation and use of the land: "when settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries."[13]

Subsequent cases have accepted the *Calder* principle that aboriginal title is inherent. The most recent and comprehensive Supreme Court analysis on aboriginal title is the 1997 decision in *Delgamuukw* v. *British Columbia*.[14] In

that case, two First Nations claimed aboriginal title to over 58,000 square miles in British Columbia. Because of deficiencies in the pleadings and errors in the trial judge's assessment of the evidence, the Court held that a new trial would be needed to determine the claim for aboriginal title; however, the Court went on to describe, among other things, the nature of aboriginal title, and the tests for establishing and justifying an infringement of aboriginal title, so as to give guidance to the lower courts. In *Delgamuukw*, Lamer CJC confirmed that aboriginal title flows from "the prior occupation of Canada by aboriginal peoples"[15] but also identified a second source for aboriginal rights; that is, "the relationship between common law and pre-existing systems of aboriginal law."[16]

Nature of aboriginal title

The Canadian law on the nature of aboriginal title has also evolved since *St. Catharine's Milling*. In that case, the Privy Council made its now-famous remark that "the tenure of the Indians was a personal and usufructuary right, dependent on the goodwill of the Sovereign,"[17] thus indicating that aboriginal title is not a right in the land itself. This is no longer the law today, however. In *Calder*, neither Judson nor Hall JJ. attempted to describe in any detail the exact nature of aboriginal title, but Judson J. suggested that ". . . it does not help one in the solution to this problem to call it a 'personal and usufructuary right'."[18] Justice Hall did set out three characteristics that are still part of the doctrine of aboriginal title: aboriginal title is not the same as a title in fee simple; aboriginal title exists in conjunction with the underlying "paramount" title of the Crown; and aboriginal title is inalienable except to the Crown.[19] In the 1983 Supreme Court of Canada decision of *R.* v. *Guerin*,[20] Dickson J. described aboriginal title as a "legal right to occupy and possess certain lands, the ultimate title to which is in the Crown,"[21]and as a *sui generis* title which cannot be transferred to anyone except the Crown.[22]

Delgamuukw contains an extensive discussion of the nature of aboriginal title. The claimants in *Delgamuukw* characterized aboriginal title as "tantamount to an inalienable fee simple"[23] while the provincial government characterized it as no more than a collection of aboriginal rights to engage in specific activities, or, at most "the right to exclusive use and occupation of land in order to engage in those activities which are aboriginal rights themselves. . .."[24] According to Lamer CJC, who wrote the leading opinion:[25]

> The content of aboriginal title, in fact, lies somewhere between these positions. Aboriginal title is a right in the land, and as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to distinctive cultures of aboriginal societies.[26]

Elsewhere in *Delgamuukw*, Lamer CJC reiterated that aboriginal title is a proprietary interest in land rather than a mere license to use and occupy, and that "the Privy Council's choice of terminology in *St. Catharine's Milling* is not particularly helpful to explain the various dimensions of aboriginal title."[27] In keeping with previous case law, *Delgamuukw* also held that aboriginal title exists in conjunction with an underlying fee simple in the Crown. Lamer CJC went on to describe aboriginal title as *sui generis* in a number of ways:

- The source of aboriginal title lies in the "prior occupation of Canada by aboriginal peoples"[28] and in "the relationship between common law and pre-existing systems of aboriginal law."[29]
- "[I]ts characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by references to both common law and aboriginal perspectives."[30]
- Aboriginal title is inalienable except to the Crown.[31]
- Aboriginal title is held communally.[32]
- The activities that may be carried out on aboriginal title land are not limited to traditional uses; however, such land cannot be used in ways that are "irreconcilable with the nature of the community's attachment to the land."[33] This was described by Lamer CJC as an "inherent" limit, which distinguishes aboriginal title from fee simple. On this point, Lamer CJC added that if a First Nation community wished to use its land in a way that is incompatible with this restriction, it must surrender the land to the Crown in exchange for valuable consideration.[34]

Proof of aboriginal title

The decision of Lamer CJC in *Delgamuukw* also discussed how the existence of aboriginal title is to be proved. The test was set out by Lamer CJC as follows:

> In order to establish a claim to aboriginal title, the aboriginal group asserting the claim must satisfy the following criteria:
>
> i the land must have been occupied prior to sovereignty,
> ii if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and
> iii at sovereignty that occupation must have been exclusive.[35]

Extinguishment of aboriginal title

Once aboriginal title is established, the next issue becomes whether the claimants still hold aboriginal title to the area in question, or whether that

title has been lawfully extinguished, either unilaterally by the Crown or bilaterally through a treaty or land claims agreement. The burden of proving extinguishment falls on the party disputing the claim to title.[36] The assumption that aboriginal title could be extinguished is clear in *St. Catharine's Milling*, with its description of aboriginal title as "dependent on the goodwill of the Sovereign."[37] In *Delgamuukw*, the Supreme Court held that since the advent of s. 35(1) of the *Constitution Act, 1982*, aboriginal title can no longer be unilaterally extinguished, although it can still be surrendered to the federal Crown in a land claims agreement. From the time of Confederation until 1982, only the federal Crown had the power to extinguish aboriginal title.[38] This flows from the fact that s. 91(24) of the *Constitution Act, 1867*[39] provides exclusive legislative jurisdiction with regard to "Indians and lands reserved for the Indians" to the federal government. In the pre-Confederation period, the authority to extinguish would have rested with the British Crown, whether that authority was exercised directly or delegated to colonial governments.

A clear and plain intent to extinguish must be shown[40] before a court will accept that a particular piece of pre-1982 federal legislation or particular pre-1982 actions of the federal government had the effect of unilaterally extinguishing aboriginal title. Specifically, Lamer CJC stated in *Delgamuukw* that "[w]hile the requirement of clear and plain intent does not, perhaps, require that the Crown 'use language which refers expressly to its extinguishment of aboriginal rights' . . . the standard is still quite high."[41]

Regulation and justification

The recognition of aboriginal rights in s. 35(1) of the *Constitution Act, 1982* has been interpreted by the Supreme Court to mean that government actions can only limit aboriginal rights when those actions can be justified. The analysis regarding which limitations will be allowed is a two-step process, involving tests for infringement and tests for justification.

If a First Nation wishes to argue that a particular governmental action infringes an aboriginal right, the First Nation must first show that the action interferes with that right. The court will consider such factors as whether the limitation is unreasonable, whether the limitation imposes "undue hardship" on the aboriginal people affected, and whether the limitation denies the holder of the right the "preferred means" of exercising the right.[42] Where an interference is established, a *prima facie* infringement exists and the onus shifts to the Crown to demonstrate that the infringement is justified. In an earlier case involving fishing rights, *R.* v. *Sparrow*, the Supreme Court of Canada set out a two-part test for justification: the legislative objective must be valid, and applying the legislation must be in keeping with the honor of the Crown. The Court also noted that the justification may place a "heavy burden" on the Crown.[43]

In *Delgamuukw*, Lamer CJC discussed the *Sparrow* test in the context of aboriginal title. Lamer CJC made it clear that provincial as well as federal

legislation may be seen by the courts as justifiably infringing aboriginal title.[44] He also stated that in order for legislation which limits aboriginal title to be considered compelling and substantial, the legislative objective must be related to "the recognition of the prior occupation of North America by Aboriginal peoples or . . . the reconciliation of aboriginal prior occupation with the assertion of the sovereignty of the Crown."[45] It was suggested by Lamer CJC that:

> the range of legislative objectives that can justify the infringement of aboriginal title is fairly broad . . . In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose, and in principle, can justify the infringement of aboriginal title. Whether a particular measure or government act can be explained by reference to one of those objectives, however, is ultimately a question of fact that will have to be examined on a case-by-case basis.[46]

The degree and kind of consultation required will be very dependent on the circumstances, and could range all the way from showing that the government had the "full consent of an aboriginal nation"[47] to merely showing that it had discussed decisions affecting aboriginal title land with the relevant First Nation. There are a range of possibilities between these two extremes, and Lamer CJC gave an example of an intermediate point on the spectrum: a requirement that First Nations be involved in making decisions regarding the land. It was also stated by Lamer CJC in *Delgamuukw* that because there is an "inescapable economic aspect" to aboriginal title, the Crown's "duty of honour and good faith" means "compensation will ordinarily be required where aboriginal title is infringed."[48]

Oceans management policy

Application of the doctrine of aboriginal title to the seabed

Having outlined the basic contours of the doctrine of aboriginal title, it is now possible to consider the applicability of that doctrine in the context of the seabed. Where the fee simple to subaquatic land lies with the Crown, it seems logical that this land, like terrestrial areas, could be subject to aboriginal title; in fact one of the *sui generis* aspects of aboriginal title is that it exists as a burden or limitation on the underlying Crown title. Therefore it must first be determined in Canada whether the Crown itself is seen as holding title to the land beneath its territorial waters.

Title below the low water mark

In the 1876 English case of *R.* v. *Keyn*, it was held the Court did not have jurisdiction over an offence committed on a foreign ship in waters within three miles of the English coast. According to the majority, the "dominion" of the common law

> extends no further than the limits of the realm. In the reign of Richard II the realm consisted of the land within the bodies of the counties. All beyond the low water mark was part of the high seas. At that period the three-mile radius had not been thought of. International law . . . cannot enlarge the area of our municipal law, nor could treaties with all the nations of the world have that effect. That can only be done by an Act of Parliament. As no such Act has been passed, it follows that what was out of the realm then is out of the realm now . . . Therefore, although, as between nation and nation, these waters are British territory, as being under the exclusive dominion of Great Britain, in judicial language they are out of the realm and any exercise of criminal jurisdiction over a foreign ship must in my judgment be authorized by an Act of Parliament.[49]

Although *Keyn* was not universally accepted at the time as having settled the issue of title to the seabed,[50] in *Reference Re: Ownership of Offshore Mineral Rights*, the Supreme Court of Canada accepted *R.* v. *Keyn* as representing the law in Canada. As set out in the passage quoted above, however, the Court in *Keyn* acknowledged that the Crown could, by way of legislation, extend its title beyond the low water mark.

Arguably, this is what Canada has done by way of the *Oceans Act*, which states:

> s.7 For greater certainty, the internal waters of Canada and the territorial sea of Canada form part of Canada.
>
> s.8(1) For greater certainty, in any area of the sea not within a province, the seabed and subsoil below the internal waters of Canada and the territorial sea of Canada are vested in Her Majesty in right of Canada.

Certainly this language of vesting is very much the language of real property law.

If sections 7 and 8 of the *Oceans Act* vest the radical fee simple in the federal Crown, this may permit the recognition of aboriginal title in the seabed. Aboriginal title has been described by the Supreme Court of Canada as flowing from continued use and occupation of the land since the time of British sovereignty, and from the relationship between aboriginal systems of

law and the common law. On its face, nothing about this aspect of the doctrine of aboriginal title is inconsistent with a First Nation being able to claim aboriginal title in the seabed. The *Delgamuukw* decision did not, however, deal directly, or even indirectly, with the question of whether the test enunciated for establishing aboriginal title applies equally to submerged lands. In addition to evidentiary hurdles relating to physical possession, the courts will have to determine whether the notion of aboriginal title to the seabed can co-exist with the right of innocent passage at international law, or with established common law principles, such as the public rights of fishing and navigation.

Although the applicability of aboriginal title to the seabed has not been decided by a Canadian Court, the High Court of Australia has held that an aboriginal title claim could not be made to the seabed,[51] noting that recognition of exclusive aboriginal title in the seabed would conflict with the international right of innocent passage and domestic public rights of fishing and navigation.[52] More recently, however, the New Zealand Court of Appeal has acknowledged the potential for aboriginal title to exist in the foreshore and adjacent seabed.[53]

International law

One might argue that the *Oceans Act* cannot be read as vesting title in the Crown (therefore precluding an aboriginal title claim), because any notion of title in the seabed is irreconcilable with the fact that, in international law, foreign vessels have a right of innocent passage through the territorial seas of other nations. Thus in *Yarmirr*, the High Court of Australia held that "[a]s a matter of international law, the right of innocent passage is inconsistent with any international recognition of a right of ownership by the coastal state of territorial waters."[54] International law, however, has come to view the land beneath a coast's territorial waters as forming part of that state's territory in the same manner as does the land above water.[55]

If international law is willing to accept radical Crown title in the seabed as co-existing with the right of innocent passage, then presumably aboriginal title could also co-exist with the right of innocent passage, given that aboriginal title encompasses a more limited set of rights than does Crown title. True, in *Delgamuukw*, Lamer CJC describes aboriginal title as including the right to exclude others; however, this characterization of aboriginal title is not necessarily irreconcilable with the right of innocent passage. The fact that a form of title is seen as encompassing a right to exclude others cannot be automatically incompatible with the international right of innocent passage, since Crown title itself carries with it notions of exclusivity. A key component of both state and private ownership is the power to exclude others except where that power is otherwise limited by law.[56] Where this right to exclude is curtailed with regard to the underlying radical title of the Crown, it seems logical that any aboriginal title that exists as a burden on that radical title would be similarly curtailed.

When the international law perspective is taken in conjunction with the wording of sections 7 and 8 of Canada's *Oceans Act*, there seems to be an argument for saying that both international and Canadian law recognize the federal Crown as holding title to the seabed beneath Canada's territorial waters, although this title is subject to the international right of innocent passage. If that is so, then we are one step closer to saying that the doctrine of aboriginal title (subject to the right of innocent passage) could be applied to the seabed.

While the existence of underlying Crown title and the possibility of reconciling ownership with the international right of innocent passage are necessary prerequisites, these alone do not, however, allow for the conclusion that aboriginal title could exist in the seabed. There is a further argument, which also relates to Lamer CJC's description of aboriginal title as "exclusive," that must be explored; that is, can exclusivity be reconciled with common law rights of navigation and fishing?

Common law rights of public navigation and fishing

Since the time of the Magna Carta, English common law has recognized public rights of fishing and navigation in tidal waters. Further, in *Gladstone* the Supreme Court of Canada stated, with regard to aboriginal fishing rights, that:

> the aboriginal rights recognized and affirmed by s. 35(1) exist within a legal context in which, since the time of the Magna Carta, there has been a common law right to fish in tidal waters that can only be abrogated by the competent legislation . . . While the elevation of common law rights to constitutional status obviously has an impact on the public common law rights to fish in tidal waters, it was surely not intended that, by the enactment of s. 35(1), those common law rights would be extinguished in cases where an aboriginal right to harvest fish commercially existed . . . (I)t was not contemplated by *Sparrow* that the recognition and affirmation of aboriginal rights should result in the common law right of public access in the fishery ceasing to exist with respect to all those fisheries in respect of which exist an aboriginal right to sell fish commercially. As a common law, not constitutional, right, the right of public access to the fishery must clearly be second in priority to aboriginal rights; however, the recognition of aboriginal rights should not be interpreted as extinguishing the right of public access to the fishery.[57]

Does this mean that the existence of public rights of fishing and navigation preclude the possibility that aboriginal title could be established in the seabed? Arguably not, on both constitutional and common law grounds, which are discussed below. It may mean that the public rights would to some degree limit the rights which would otherwise be encompassed by

aboriginal title, but that is substantially different than concluding that there can be no aboriginal title in areas where the common law would recognize rights of fishing and navigation.

The constitutional law argument is as follows: Lamer CJC's comments must be read narrowly, as simply meaning that the constitutionally recognized right of aboriginal fishing is not so extensive as to extinguish completely the common law right to fish. His comments cannot be interpreted as meaning that the common law right will overcome the constitutionally recognized aboriginal right such that the aboriginal right cannot exist, which would be the effect of saying that aboriginal title cannot exist in the seabed because of public rights of fishing or navigation. It was acknowledged by Lamer CJC in *Gladstone* that common law rights must be "second in priority" to constitutional rights. Common law rights can be curtailed or extinguished by the legislature, which is in turn curtailed by the constitution; thus, it is doubtful whether a court would find that common law rights of navigation and fishing could so completely trump constitutionally recognized rights that the doctrine of aboriginal title would be inapplicable to the seabed.

Even leaving aside the constitution and considering only the common law, it seems clear that the existence of title in submerged lands is not negated by public rights of fishing or navigation in the water over those lands. The common law did not resolve the tension between title and public rights by holding that there can be no ownership of the land beneath public waters, but by holding that where there is conflict between the rights associated with title and the public rights, the latter are paramount.[58] At English common law, land beneath tidal waters is held by the Crown, unless the Crown has granted that title to another.[59] Thus a privately held fee simple or even the radical title held by the Crown can co-exist with (but would be subject to) the common law rights of fishing and navigation. Presumably so too could aboriginal title co-exist with public rights.

Building on Lamer CJC's comments in *Gladstone* regarding aboriginal fishing rights, if aboriginal title were found to exist in an area where the common law would recognize public rights of fishing or navigation, the court might have to configure the rights associated with aboriginal title in such as way that the common law public rights were not completely extinguished, but that also recognized the priority of constitutional rights over those grounded only in the common law.

Conclusion

Thus, on the question of whether aboriginal title could be established in the seabed beneath Canada's territorial sea, the following tentative conclusions can be drawn:

- Given that aboriginal title is a "burden" on the underlying Crown title, aboriginal title cannot exist in the absence of that underlying title.

- By way of sections 7 and 8 of the *Oceans Act*, Canada has extended its territory to include the seabed beneath its territorial waters so that the federal Crown holds title to that portion of the seabed.
- Crown title in the seabed co-exists with and is subject to the international right of innocent passage.
- Aboriginal title cannot be more extensive than the Crown title on which it is overlaid; therefore, aboriginal title in the seabed could also co-exist with, but would also be subject to, the international right of innocent passage.
- At common law, the rights of public fishing and navigation are not seen as negating ownership of land beneath tidal waters.
- Therefore even at common law, these public rights should not be seen as negating the possibility of aboriginal title.
- However, at common law, the rights associated with ownership of the land beneath tidal waters are subservient to the public rights of fishing and navigation.
- Given the comments by Lamer CJC in *Gladstone*, it seems unlikely that aboriginal title, once established, would completely extinguish the public rights recognized by the common law; however, it is not clear that the balancing between a constitutionally recognized right and a common law right should necessarily bring the same outcome as the balancing of a common law right against a common law right. In fact, it seems unlikely that a constitutionally protected right should be wholly subservient to a common law right.

Obviously, there would be crucial evidentiary issues involved in any aboriginal title claim to the seabed. Leaving those aside however, and looking solely at the doctrine of aboriginal title, there seems to be a strong argument that the doctrine could apply to the seabed beneath Canada's territorial waters. Such title, if recognized, would be subject to the international right of innocent passage and might also be limited in some way by public rights of fishing or navigation.

Impact on oceans policy

The *Oceans Act* already mandates collaboration with certain aboriginal stakeholders and provides an opportunity for aboriginal participation on advisory and management bodies. The question which policy makers would have to consider is whether recognition of aboriginal title in the seabed would require more accommodation than is already provided in the *Oceans Act*. Canada's oceans policy involves three broad themes: declaring Canada's rights with regard to its territorial waters, the contiguous zone and the exclusive economic zone; providing for the development of a national oceans strategy based on the principles of sustainable development, integrated management and the precautionary principle; and consolidating various aspects

of federal responsibility regarding oceans. Looking at each of these in turn, and considering whether there might be conflict between federal activities based on the themes of the *Oceans Act* and rights arising from aboriginal title:

- The declaration that the seabed beneath Canada's territorial waters is vested in the federal Crown strengthens rather than diminishes the possibility that the doctrine of aboriginal title could be applied to the seabed, since such title always exists in conjunction with underlying Crown title and Crown sovereignty.
- With regard to Canada's oceans strategy, conflict with aboriginal title is less likely to be identified at the level of generality with which the principles of that strategy is articulated in the Act. If aboriginal title were recognized in a portion of the seabed, the issue would be whether the implementation of a particular aspect of the oceans strategy infringed rights flowing from that aboriginal title. For instance, if a First Nation intended to use its aboriginal title area for hunting, fishing and gathering, would the federal government be able to establish a marine protected area within the area held by aboriginal title and restrict the First Nation in its hunting, fishing and gathering activities? According to *Sparrow*, this would constitute a *prima facie* violation of aboriginal title, but both *Sparrow* and *Delgamuukw* make it clear that such an infringement might, depending on the circumstances, be upheld as valid.
- Similarly, potential conflict between aboriginal title and other aspects of the exercise of federal jurisdiction in the *Oceans Act* would require a case-by-case analysis to determine whether federal legislation or activities infringed aboriginal rights and whether such infringement could be justified.

Even allowing for the fact that some limits on aboriginal title would likely be accepted as justified, recognition of aboriginal title in the seabed would significantly affect both how oceans policy is developed in the future and how it is applied. In the development and application of such policy, government will have to school itself to ask the same kinds of questions as it should now be asking with relation to terrestrial land, regarding the possible existence of aboriginal title in the relevant area, the possibility that legislation or policy initiatives might infringe such title, and whether or not such infringements would be seen as justified. Thus, what will be required is an awareness of the law on aboriginal title and a nuanced and contextual analysis of the potential interplay between aboriginal title and the implementation of federal oceans policy.

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Notes

1 S.C. 1996, C-31.

2 *Oceans Act*, note 1, s. 29.

3 *Constitution Act 1982*, s. 35, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, ch. 11.

4 The Act refers to "affected aboriginal organizations" and "entities established under land claims agreements." See for example *Oceans Act*, ss. 29, 31, 32 and 33.

5 *Oceans Act*, note 1, s. 33(2).

6 Other aboriginal rights besides aboriginal title might also be relevant to policy on ocean management. For instance, a First Nation might argue that it holds an unextinguished aboriginal right of fishing, hunting or gathering in a sea area. Furthermore, First Nations who have signed treaties (whether historic or modern day land claims agreements) might argue that the terms of a particular treaty give them rights that would have to be respected by oceans management policy. The focus of this chapter is on aboriginal title claims; rights accruing from treaties or from aboriginal rights other than title are not considered here.

7 Throughout this chapter, when speaking of title, reference is made to the seabed, rather than to the marine resource as a whole.

8 *Delgamuukw* v. *British Columbia* [1997] 3 S.C.R. 1010 [*Delgamuukw*]. See also *R.* v. *Adams*, [1996] 3 S.C.R. 101 [*Adams*], and Brian Slattery "Making sense of aboriginal and treaty rights" (2000) 79(2) *Canadian Bar Review* 196–224. Slattery suggests that cultural rights (for instance, the right to speak one's language, or a community's right to be associated with certain traditional stories or songs) would be an example of aboriginal rights not associated with a particular land area.

9 (1888) 14 AC 46 [*St. Catharine's Milling*]. It should be noted that this case did not involve an aboriginal title claim, and no First Nation was party to the litigation.

10 R.S.C. 1985, Appendix II, No. 1.

11 [1973] S.C.R. 313 [*Calder*]. Although the existence of inherent aboriginal title was recognized in *Calder*, the Nishga'a lost the case. The six justices who dealt with the substantive issues split 3-3 on the question of whether the Nishga'a's title had been extinguished, and Mr. Justice Pigeon dismissed the appeal on other grounds unrelated to aboriginal title. Thus only three of the seven justices were willing to find existing aboriginal title in the area claimed. However, the recognition by the Supreme Court of Canada of inherent aboriginal title, which was seen to continue in existence until extinguished by the Crown, was sufficient to cause the federal government to establish the Office of Comprehensive Land Claims.

12 Ibid., at 317.

13 Ibid., at 328.

14 [1997] 3 S.C.R. 1010.

15 Ibid., at para. 114.

16 Ibid. See discussion below for comments regarding this second source for aboriginal rights.

17 *St. Catharine's Milling*, note 9 at 47.

18 *Calder*, note 11 at 328.
19 Ibid., at 352 where Hall J. stated:

> This is not a claim for title in fee but is in the nature of an equitable title or interest . . . a usufructuary right and a right to occupy the lands and to enjoy the fruits of the soil, of the forests and the rivers and the streams which does not in any way deny the Crown's paramount title as it is recognized by the law of nations . . . The Nishga'a do not claim to be able to sell or alienate their right except to the Crown.

20 [1984] 2 S.C.R. 335 [*Guerin*]. The issue before the Supreme Court of Canada in *Guerin* was whether the *Indian Act*, R.S.C. 1952, c.149, imposed a fiduciary duty on the federal government in dealing with surplus reserve land that had been surrendered to the Crown for the purpose of leasing it. Although *Guerin* did not involve a claim of aboriginal title, Dickson's comments are on point, given his statement: "[I]t does not matter, in my opinion, that the present case is concerned with the interest of an Indian Band in a reserve rather than unrecognized aboriginal title in traditional tribal lands. The Indian interest in the land is the same in both cases." [1984] 2 S.C.R. 379.
21 Ibid., at 382.
22 *Guerin*, note 20 at 336, where Dickson J. stated that this limit on alienability places a fiduciary duty on the Crown in dealing with surrendered lands.
23 *Delgamuukw*, note 8 at para. 110. Since one of the key characteristics of a title in fee simple is its alienability, by describing aboriginal title an inalienable fee simple, the claimants must have been using the analogy to argue that aboriginal title possesses other attributes of the fee simple, such as the fact that there is no limit on the use of fee simple land inherent in the title itself (although of course there are significant limitations on use found at common law and in statutes).
24 Ibid.
25 Decisions were also written by La Forest J. and L'Heureux-Dubé J., both of whom agreed with the outcome. L'Heureux-Dubé J.'s judgment was very brief; La Forest J.'s was somewhat more lengthy. The chief difference between Lamer CJC and La Forest J. seems to be as to the scope of aboriginal title, and in particular, the uses to which aboriginal title land could be put, with La Forest J. "taking a somewhat more restrictive approach to the content of aboriginal title." K. McNeil *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Native Law Centre, Saskatoon: 2001) 65.
26 *Delgamuukw*, note 8 at para. 111.
27 Ibid., at para. 112.
28 Ibid., at para. 114. This is the first time that the Supreme Court of Canada explicitly identified this as a source of aboriginal title. Previous Supreme Court of Canada jurisprudence referred to the occupation of the land, prior to the British claim of sovereignty, as the principal source of aboriginal title, with some cases (such as *Calder*) speaking of the Royal Proclamation 1763 as either a secondary source or simply as confirmation of the inherent title flowing from occupation. The comments in *Delgamuukw* would seem to build on discussion in *R.* v. *Van der Pet* [1996] 2 S.C.R. 507 regarding the function of the *Constitution Act 1982*, s. 35(1).
29 Ibid.
30 Ibid., at para. 112.
31 Ibid., at para. 113.
32 Ibid., at para. 115.
33 Later, Lamer CJC likened this limitation to the doctrine of equitable waste, which prevents the holder of a life estate from carrying out "wanton or extravagant acts of destruction;" for commentary on this restriction, with different

commentators giving varying readings to the scope of Lamer CJC's limitation, see Nigel Bankes "*Delgamuukw*, division of powers, provincial land and resource laws: Some implications for provincial resource rights" (1998) 32 *University of British Columbia Law Review* 317–51; Richard H. Bartlett "The content of aboriginal title and equality before the law" (1998) 61 *Saskatchewan Law Review* 377–91; Brian J. Burke "Left out in the cold: The problem with aboriginal title under section 35(1) of the *Constitution Act, 1982* for historically nomadic Aboriginal peoples" (Spring 2000) 38 *Osgoode Hall Law Journal* 1–37; William F. Flanagan "Piercing the veil of real property law: *Delgamuukw* v. *British Columbia*" (1998) 24 *Queen's Law Journal* 279–326.

34 *Delgamuukw*, note 8 at para. 131.

35 Ibid., at para. 143; see also *R.* v. *Marshall* [2002] NSJ No. 98.

36 This is made explicit in *Calder*, note 11; *Delgamuukw*, note 8; and *R.* v. *Sparrow* [1990] 1 S.C.R. 1075 [*Sparrow*].

37 *St. Catharine's Milling*, note 9 at 47.

38 *Delgamuukw*, note 8 at para. 173.

39 *Constitution Act 1867* (U.K.), 30 & 31 Vict. C. 3, reprinted in R.S.C. 1985, App. II, No. 5.

40 *Delgamuukw*, note 8 at para. 180.

41 Ibid.

42 In *R.* v. *Nikal* [1996] 1 S.C.R. 1013, the Supreme Court of Canada elaborated on the concept of infringement, holding that the mere requirement to have a license to fish is not an infringement of an aboriginal right, although the conditions attached to a license may constitute an infringement. The Court emphasized the need to have one central authority regulating access to the fishery and stated that "a license is the essential first step in the preservation and management of this fragile resource" [1996] 1 S.C.R. 1013 at para. 102. The Court further stated that aboriginal rights do not exist in a vacuum and that there must be a balanced approach to limitations placed on the exercise of these rights.

43 *Sparrow*, note 36 at 186.

44 Ibid. This aspect of the decision has been criticized, see Kent McNeil "Aboriginal title and the division of powers: Rethinking federal and provincial jurisdiction" (1998) 61 *Saskatchewan Law Review* 431 at 435.

45 *Delgamuukw*, note 8 at para. 161, quoting *Gladstone* [1996] 2 S.C.R. 723 [*Gladstone*].

46 *Delgamuukw*, ibid., at para. 165. For commentary on this list of objectives, see Kent McNeil *Defining Aboriginal Title in the 90's: Has the Supreme Court Finally Got It Right?* (Robarts Centre for Canadian Studies, Toronto: 1998) 26; Lisa Dufraimont "From regulation to recolonization" (2000) 58 *University of Toronto Faculty of Law Review* 1.

47 *Delgamuukw*, ibid., at para. 168.

48 Ibid., at para. 169.

49 *Reg. v. Keyn* (1876), 2 Ex. D. 63 [*Keyn*], as quoted in *Reference Re: Ownership of Offshore Mineral Rights (British Columbia)* [1967] S.C.R. 792.

50 See *The Secretary of State for Indian Council v. Sri Raja Chellikani Rama Bao and Others* (1916) 32 *Times Law Reports* 652.

51 *Commonwealth of Australia* v. *Yarmirr & Ors; Yarmirr & Ors* v. *Northern Territory of Australia & Ors* [2001] HCA 56; 184 ALR 113 [*Yarmirr*].

52 The High Court of Australia in *Yarmirr*, ibid., endorsing the decision at first instance of Olney J in *Yarmirr* v. *Northern Territory (No. 2)* (1998) 156 ALR 370 did however recognize the claimants as having a right to fish, hunt and gather in the claimed area, to travel through it, and to "visit and protect places within the claimed area which are of cultural or spiritual importance [and] to safeguard

the cultural and spiritual knowledge of the common law holders" [2001] HCA 56 at para. 2.

53 See *Ngati Apa* v. *Ki Te Tau Ihu Trust* [2003] NZCA 117.

54 *Yarmirr*, note 51 at para. 57.

55 See R.R. Churchill and A.V. Lowe *The Law of the Sea* 3rd edition (Manchester University Press, Manchester: 1999) at 76.

56 See Bruce Ziff *Principles of Property Law* 3rd edition (Carswell, Scarborough: 2000) 7; F. Cohen "Dialogue on private property" (1954) 9 *Rutgers Law Review* 357 at 379.

57 Gladstone, note 45 at para. 67.

58 Gerard V. LaForest *Water Resources Study of the Atlantic Provinces* (Atlantic Development Board, Ottawa: 1968) at 14 states that "the public right of navigation is a paramount right; whenever it conflicts with a right of the owner of the bed or of a riparian owner, it will prevail." The same would appear to be true for the public fishery.

59 Ibid., at 27.