

“They Promised to Leave Us Some of Our Land.”  
Aboriginal Title in Canada’s Maritime Provinces

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## **Abstract**

To demonstrate the existence of Aboriginal title, claimants must prove that their ancestors exclusively occupied a given tract of land at the time of the assertion of British sovereignty over that territory. The indisputable presence of Aboriginal peoples in Canada's Maritime Provinces at the time the British acquired sovereignty in the region, coupled with scant European settlement at the time, lead to the conclusion that the Aboriginal occupation in much of the region was exclusive at the relevant dates for assessing Aboriginal title claims. In light of this, this thesis begins by arguing that Aboriginal title existed in the region at the dates of sovereignty, while stopping short of making determinations as to the precise geographical scope of title.

The question that occupies the remainder of this thesis is whether Aboriginal title has been extinguished. This thesis articulates a clear framework for assessing purported incidents of legislative extinguishment of title by identifying the legal parameters governing which legislative bodies had the authority to extinguish Aboriginal title during distinct eras in Canada's constitutional history and providing an analysis of what laws or principles bound the conduct of those legislative bodies. This thesis draws on both contemporary and historical law in providing clear guidelines governing the extinguishment of title and concludes that no evidence of extinguishment exists in the Maritime Provinces.

The final issue this thesis addresses is what happened to Aboriginal lands, and how they came to be in the possession of European settlers, if Aboriginal title was not lawfully extinguished. An analysis of the relevant historical material reveals that what began as a relationship grounded in a system of inter-societal law, given expression through the treaty process, became one in which the British fully extended their own legal regime, assuming jurisdiction *over* Aboriginal peoples. This process allowed the British to embrace a *terra nullius* approach to settlement and land use, denying that the prior inhabitants ever held rights to the territory they occupied. This thesis argues that this *terra nullius* approach, given expression through fee simple grants of settlement and the taking up of lands as Crown lands to be licensed and sold where the Crown saw fit, could not have had the effect of legally extinguishing Aboriginal title in the region.

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\*The quote included in the title of this thesis is excerpted from a speech delivered by Chief Louis Francis Algimou (L’kimu) to the colonial assembly of Prince Edward Island in 1831 enjoining the government to give the Mi’kmaq access to some of their traditional territories. A more complete excerpt can be found in Harald E.L. Prins, *The Mi’kmaq: Resistance, Accommodation, and Cultural Survival* (Orlando: Harcourt Brace, 1996) at 169.

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## Introduction

In the summer and fall of 2013, citizens from the Elsipogtog First Nation in Southeastern New Brunswick protested against shale gas exploration in their traditional territory. On October 17<sup>th</sup>, paramilitary RCMP forces broke up the largely peaceful protests, with several dozen protestors arrested and several police vehicles burned in the ensuing violence. The purported goal of the police action was to enforce a court injunction against the protestors, granted in favour of a shale gas development company, SWN Resources. The protests were part of a broader movement in the Maritime Provinces in which Aboriginal peoples have asserted Aboriginal and treaty rights to their traditional territories and resources. To this end, in October 2013, the Chief and council of the Elsipogtog First Nation passed a Band Council Resolution calling for an end to shale gas exploration in their traditional territory; it stated: “let it be known to all that we as Chief and council of Elsipogtog are reclaiming all unoccupied reserved Native lands back and put in the trust of our people.”<sup>1</sup> This statement is but the latest in centuries of Aboriginal assertions of land rights in Canada’s Maritime Provinces.

In the language of the Canadian legal system an Aboriginal right to the exclusive use and occupation of land is known as Aboriginal title. The federal and provincial governments long held that Aboriginal title had been extinguished in the Maritime Provinces. As Professor Richard Bartlett noted, “[t]he provincial governments of the [Maritime] region and the federal government have always considered that aboriginal title to the land had been extinguished.”<sup>2</sup> Much has changed, however, since the *Calder* decision first forced governments in Canada to reconsider their understanding of Aboriginal rights and title over forty years ago. In particular, “the Supreme Court has gradually elaborated a comprehensive scheme of aboriginal and treaty rights that recognizes them as legal rights and not merely rights held at the pleasure of the Crown.”<sup>3</sup> The recognition of Aboriginal title as a *legal* right has reinforced the protections it is

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<sup>1</sup> Miles Howe, *Elsipogtog Chief Issues Eviction Notice to Texas Based Frackers*, “online”, Halifax Media Coop <<http://halifax.mediacoop.ca/story/elsipogtog-chief-issues-eviction-notice-texas-base/19097>>

<sup>2</sup> Richard H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon: University of Saskatchewan Native Law Centre, 1990) at 33.

<sup>3</sup> Brian Slattery, “Some Thoughts on Aboriginal Title” (1999) 48 UNBLJ 19 at 21 [Slattery, “Some Thoughts on Aboriginal Title”].

afforded at law and modified the conceptual and legal framework governing its extinguishment. As such, extinguishment is no longer presumed to have occurred in the Maritime Provinces.<sup>4</sup>

Given this reality, it is the aim of this thesis to assess whether Aboriginal title continues to exist in the region. A resolution of this question has important implications for the relationship between Aboriginal and non-Aboriginal people and governments in the region. In light of a spate of highly contentious resource development projects,<sup>5</sup> conflict is likely to continue until some determination of the title question is made, be it through negotiation or the courts. The analysis presented here works from the assumption that Aboriginal title did exist at some point in the Maritime Provinces. This assumption presents two further questions. The first is a question of extent: how much of the region, and which areas in particular, were subject to Aboriginal title? This question is beyond the scope of this paper to address in detail, as it would require an extensive historical investigation spanning a vast geographical area and several centuries. As such, the question of *where* title existed will be addressed only inferentially. My focus here will be only on what *types* of land may be subject to title, drawing on enough historical evidence to demonstrate that those lands did in fact exist and to provide context for future research.

Thus, Chapter 1 demonstrates that Aboriginal title did exist in the Maritimes, while stopping short of arguing precisely where that may have been the case. I provide justification for my conclusion that Aboriginal title existed in the Maritimes on three grounds. First, I analyze the clear articulation of the judicial test for proving Aboriginal title provided by the Supreme Court in the *Tsilhqot'in Nation*<sup>6</sup> decision. This establishes a framework through which the precedential value of past court decisions concerning Aboriginal title in the Maritime Provinces and the framework to be applied by future courts may be assessed. Second, I examine the *Marshall* and *Bernard* cases in which the Mi'kmaq of Nova Scotia and New Brunswick were found by the Supreme Court to have failed to establish title in specific locations in those provinces despite victories at the provincial courts of appeal.<sup>7</sup> This decision, I argue, should not be taken as

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<sup>4</sup> As Professor Slattery has stated, “[t]o my mind, then, the question of aboriginal title in New Brunswick and Nova Scotia is very much alive.” Slattery, “Some Thoughts on Aboriginal Title”, *supra* note 3 at 40.

<sup>5</sup> In particular, the proposed Energy East Pipeline project, the Sisson Mine Project, several hydraulic fracturing projects, and a highly contentious forestry management project.

<sup>6</sup> *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 [*Tsilhqot'in Nation*].

<sup>7</sup> A note on spelling, here I use “Mi'kmaw” as an adjective, while “Mi'kmaq” is used as a noun, both in the plural and singular.

evidence that title does not exist in the provinces in question.<sup>8</sup> In fact, as I hope to demonstrate, the appellate level decisions in that case, which held that the Mi'kmaq had established title, apply an analysis much closer to that applied by the Supreme Court in *Tsilhqot'in* than that which the same Court applied in *Marshall/Bernard*. As such, the appellate level decisions in the *Marshall* and *Bernard* cases suggest strongly that title does continue to exist un-extinguished to significant areas in the region. Third, I argue that the treaties of peace and friendship, signed between the British and the Aboriginal peoples of the region, recognize the existence of Aboriginal title. These arguments will be buttressed by an analysis of salient historical material and extant case law which, in light of the *Tsilhqot'in* decision, leave little doubt that title existed in the region at the time when the British acquired sovereignty. In assessing whether title continues to exist, the question then becomes whether it has been extinguished.

Chapter 2 provides a detailed analysis of the legal parameters of the extinguishment of Aboriginal title. This analysis draws on contemporary judicial pronouncements regarding the extinguishment of title, scholarship clarifying and critiquing the court's decisions, and 18<sup>th</sup> and 19<sup>th</sup> century judicial holdings and legal thinking. Contemporary judicial treatments of extinguishment are relied on to establish the framework governing extinguishment that is likely to be applied by courts in future litigation. Prior to the constitutionalization of Aboriginal rights in 1982, extinguishment of Aboriginal title could have occurred in two ways at common law: by voluntary surrender, or unilaterally through legislation. Extinguishment by unilateral legislation must have met two criteria: (1) the legislation being relied on must have been passed by a legislative body that was competent to extinguish Aboriginal title; and (2) the legislation must not have been repugnant to superseding law (i.e. constitutional laws or principles, or British laws extending to the colony in question). Further, any legislation that satisfies these tests is also subject to the common law requirement that it evidence a "clear and plain intent" to extinguish the right in question. In respect of the first of these requirements, I draw on 18<sup>th</sup> and 19<sup>th</sup> century case law and legal thought to determine which legislative bodies may have been competent to extinguish title in the period from the assertion of British sovereignty to confederation. More specifically, I address the authority of the Imperial Crown to legislate in colonies under the royal prerogative, the supremacy of the Imperial Parliament, and the delegated nature of the authority

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<sup>8</sup> This view was shared by LeBel J, who wrote in his concurring opinion in *Marshall/Bernard* that "I do not wish to suggest that this decision represents a final determination of the issue of aboriginal title rights in Nova Scotia or New Brunswick." *R v Marshall; R v Bernard*, [2005] 2 SCR 220, at para 141 [*Marshall; Bernard*].



exercised by both the executive and legislative branches of colonial governments. This provides a clear view of where the authority to legislatively extinguish title resided during different periods of colonial development and the conditions under which that authority may have been delegated, with the aim of identifying particular bodies of legislation that may be examined for evidence of extinguishment.

In Chapter 3 I apply the principles articulated in Chapter 2 to the unique factual circumstances in the Maritime Provinces. I first examine the question of whether title has been extinguished through voluntary surrender. I then address the issue of unilateral legislative extinguishment. This is done first by determining which governmental bodies were competent to extinguish Aboriginal title during different periods in the region's history. In particular, I examine what authority the Imperial Crown held in the region and the jurisdiction of the colonial assemblies during different periods in the development of colonial governance in the region. I then provide a close analysis of legislation from both the colonial and imperial legislatures to assess whether it may have extinguished title. This legislation is assessed on the basis of legislative competence, repugnancy, and the clear and plain intent test. The resulting analysis supports the conclusion that Aboriginal title has likely not been extinguished by legislation in the Maritime Provinces. Further, it develops a framework through which future assertions of extinguishment may be assessed. Having found that Aboriginal title in the Maritime Provinces has likely not been extinguished pursuant to the test established by the Supreme Court, Chapter 3 concludes with an examination of how the Aboriginal peoples of the region were dispossessed of their traditional lands and provides an analysis of the legal parameters of assessing this dispossession in light of my conclusion that Aboriginal title has not been extinguished by voluntary surrender or clear legislation.

This analysis is similar in many respects to that provided in *Our Land: The Maritimes*<sup>9</sup>, by Gould and Semple, though my analysis builds on that work in two important respects. First, that work was published in 1980, before the constitutionalization of Aboriginal rights. Thus, there have been a number of substantial judicial articulations and a great body of scholarly work on the doctrine of Aboriginal title since *Our Land* was published. This work builds on earlier scholarship by incorporating recent developments in the law, especially in the period since the

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<sup>9</sup> G.P. Gould and A.J. Semple, *Our Land: The Maritimes* (Fredericton: Saint Annes Point Press, 1980).

constitutionalization of Aboriginal rights in 1982. Aboriginal title in the Maritime Provinces was litigated at the Supreme Court in *Marshall/Bernard*. This analysis, then, while probing many of the same issues as *Our Land*, benefits from three decades of Supreme Court decisions, including the first judicial declaration of title in the *Tsilhqot'in* decision and the only Supreme Court pronouncement on title in the Maritimes in *Marshall/Bernard*. Second, while much of the historical material drawn on here is similar to that drawn on in *Our Land*, the development of the doctrine of title since that work was published colours the approach to the historical evidence. In particular, my analysis places a much greater emphasis on the issues of exclusivity of occupation and the extinguishment of title, an emphasis which reflects developments in case law. Nonetheless, this work should be taken as complementing, rather than replacing, earlier works on Aboriginal title in the region. Sakéj Henderson's "Mi'kmaw Tenure In Atlantic Canada"<sup>10</sup> and *The Mikmaw Concordat*,<sup>11</sup> in particular, are invaluable contributions to the analysis of title in the Maritime Provinces that have been drawn on heavily here.

In concluding that Aboriginal title has not been extinguished in the Maritime Provinces, this thesis ends where a new discussion begins. Put simply, the recognition that title has not lawfully been extinguished, including by pre-confederation grants of settlement, raises a host of difficult questions regarding how best to reconcile the land rights of Aboriginal peoples with existing third party interests. Though this issue is not addressed in this paper, it should be understood as underlying the conclusions that are reached here.

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<sup>10</sup> James (Sakéj) Youngblood Henderson, "Mi'kmaw Tenure in Atlantic Canada" (1995) 18 Dal LJ 196 at 235.

<sup>11</sup> James (Sakéj) Youngblood Henderson, *The Mikmaw Concordat* (Halifax: Fernwood, 1997).

# 1. Proof of Aboriginal Title

## A. Proving Title

Establishing Aboriginal title requires proof of exclusive occupation at the date of the Crown assertion of sovereignty.<sup>1</sup> The Supreme Court sought to clarify the test for establishing title in *Tsilhqot'in Nation*,<sup>2</sup> where McLachlin CJ followed *Delgamuukw* in grounding the test for establishing title in “occupation” prior to assertion of European sovereignty.<sup>3</sup> She then identified three features that must characterize Aboriginal occupation in order for it to result in a finding of Aboriginal title, stating: “[i]t must be *sufficient*; it must be *continuous* (where present occupation is relied on); and it must be *exclusive*.”<sup>4</sup> McLachlin CJ then discussed the competing approaches to determining sufficiency of occupation that animated the litigation in the lower courts; she then noted, “[t]he trial judge in this case held that ‘occupation’ was established for the purpose of proving title by showing regular and exclusive use of sites or territory.”<sup>5</sup> Recognizing that the “regular and exclusive use” of *territory* may ground Aboriginal title, the trial judge found that title might be found not only to intensively used village or agricultural sites, but also to broad tracts of exclusively used or controlled territory.<sup>6</sup>

The British Columbia Court of Appeal applied a much narrower test, requiring that an Aboriginal group demonstrate that “a definite tract of land with reasonably defined boundaries”<sup>7</sup> was used *regularly and intensively* at the time of the assertion of sovereignty.<sup>8</sup> Put otherwise, the Court of Appeal applied a “site specific”<sup>9</sup> standard in which title could only be proven to small,

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<sup>1</sup> *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, at para 155 [*Delgamuukw*]; *R v Marshall*; *R v Bernard*, [2005] 2 SCR 220 at para 40 [*Marshall*; *Bernard*]; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 24 [*Tsilhqot'in Nation*].

<sup>2</sup> *Tsilhqot'in Nation*, *supra* note 1 at para 24.

<sup>3</sup> *Ibid.* at para 25.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.* at para 27.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.* at para 28.

<sup>8</sup> *Ibid.*

<sup>9</sup> For a discussion of site-specific vs. territorial conceptions of Aboriginal title see Kent McNeil, “Aboriginal Title in Canada: Site-Specific or Territorial?” (2012) 91 *Canadian Bar Review* 745 [McNeil, “Site-Specific or Territorial?”]. McNeil argues that a site-specific approach is “[a] purely proprietary approach, based on occupation of land and the effect given to occupation by the common law” while a territorial approach “is derived from both common law and Indigenous law and has governmental dimensions.”

intensively used, areas. Explaining the consequences of the differing approaches taken by the trial court and the Court of Appeal, McLachlin CJ noted:

For semi-nomadic Aboriginal groups like the Tsilhqot'in, the Court of Appeal's approach results in small islands of title surrounded by larger territories where the group possesses only Aboriginal rights to engage in activities like hunting and trapping. By contrast, on the trial judge's approach, the group would enjoy title to all the territory that their ancestors regularly and exclusively used at the time of assertion of European sovereignty.<sup>10</sup>

In determining the correct approach, McLachlin CJ emphasized the importance of the Aboriginal perspective in assessing title claims, finding that the three characteristics of occupation - sufficiency, continuity, and exclusivity - must be considered in light of this perspective.<sup>11</sup> The requisite characteristics must not be conceived of in a manner that privileges the common law definitions of those terms, and treating those requirements independently from each other, rather than as a single concept, can tend to obscure the Aboriginal perspective.<sup>12</sup> Therefore, "[s]ufficiency, continuity and exclusivity are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established."<sup>13</sup> While these concepts are "useful lenses through which to view the question of Aboriginal title,"<sup>14</sup> courts must be cautious not to employ them in such a manner so as "to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts."<sup>15</sup> Despite this warning, McLachlin CJ proceeded to discuss each of the requirements in turn. I will therefore follow suit and discuss the approach taken to each of these requirements in *Tsilhqot'in*.

### I. *Sufficiency of Occupation*

McLachlin CJ identified sufficiency of occupation as the most pertinent question before the Court; that is, in assessing the merits of the site-specific vs. territorial approach, determining the intensity or degree of occupation required to ground a finding of title is central to the

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<sup>10</sup> *Tsilhqot'in Nation*, *supra* note 1 at para 29.

<sup>11</sup> *Ibid.* at paras 30 – 32.

<sup>12</sup> *Ibid.* at para 31.

<sup>13</sup> *Ibid.* at para 32. It is important to note here that sufficiency, continuity, and exclusivity are framed as *characteristics* of Aboriginal title that can be used to assist a court in determining whether title existed, not *strict requirements* for proving title. This is an important conceptual shift, though it is unclear what the practical impact will be.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

analysis.<sup>16</sup> In contextualizing the inquiry, McLachlin CJ cited *Delgamuukw* with approval, stating that the “question of sufficient occupation must be approached from both the common law perspective and the Aboriginal perspective.”<sup>17</sup>

From the common law, the Court “imports the idea of possession and control of the lands.”<sup>18</sup> The sufficiency of occupation required to establish Aboriginal title, in other words, requires that a common law burden of “possession and control” be met. Crucially in the context of the distinction between site-specific and territorial approaches, McLachlin CJ noted that “[a]t common law, possession extends beyond sites that are physically occupied, like a house, to surrounding lands that are used and over which effective control is exercised.”<sup>19</sup> This is a re-articulation of the well known statement of Lamer CJ in *Delgamuukw* that:

Physical occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to *regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources*.<sup>20</sup> [Emphasis mine]

Thus, in *Tsilhqot'in*, McLachlin CJ framed the common law perspective as emphasizing *control* as opposed to *use*.<sup>21</sup> It seems, then, that even before the Aboriginal perspective is considered, there are serious problems with the view expressed by the Court of Appeal in *Tsilhqot'in (Williams)* that:

Aboriginal title cannot generally be proven on a territorial basis, even if there is some evidence showing that the claimant was the only group in a region or that it attempted to exclude outsiders from what it considered to be its traditional territory.<sup>22</sup>

By requiring an intensity of use that Aboriginal peoples only displayed in respect of small areas of land, the Court of Appeal effectively precluded a finding of title to broad contiguous tracts of land, an approach that stands in contrast to that employed by the trial judge and upheld by the Supreme Court.

If intensive use is not required, the question then becomes what degree of occupation is sufficient to establish title. Determining sufficiency of occupation is “a context-specific

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<sup>16</sup> Ibid. at para 33.

<sup>17</sup> Ibid. at para 34.

<sup>18</sup> Ibid. at para 36.

<sup>19</sup> Ibid. at para 36.

<sup>20</sup> *Delgamuukw*, *supra* note 1 at para 149, citing with approval Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon, 1989), at 201-202 [McNeil, *Common Law Aboriginal Title*].

<sup>21</sup> Kent McNeil, “Exclusive Occupation and Joint Aboriginal Title”, forthcoming *UBC L Rev.* at 9. [McNeil, “Joint Aboriginal Title”].

<sup>22</sup> *William v British Columbia*, 2012, BCCA 285 at para 220 [William].

inquiry.”<sup>23</sup> It is by way of this context-specific inquiry that the Court draws on the unique factual circumstances of the Aboriginal group in question to expand the acceptable indicia of occupation beyond merely “the construction of dwellings through cultivation and enclosure of fields” to include the “regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources.”<sup>24</sup> It is clear from this distinction that “regular use” falls somewhere short of dwelling upon or intensively using. Defining the scope of regular use in this broader sense requires that the context-specific nature of the inquiry apply to both the frequency and intensity of use. For example, the carrying capacity of the land must be considered in assessing the intensity of use; if the land could only support 1,000 people, the fact that it was not more densely populated cannot be used as evidence of an absence of use or occupation.<sup>25</sup> As McLachlin CJ stated in *Tsilhqot’in*, “[t]he intensity and frequency of the use [required to establish sufficient occupation] may vary with the characteristics of the Aboriginal group asserting title and the character of the land over which title is asserted.”<sup>26</sup>

The question of intensity of use, however, has become increasingly intertwined with the question of exclusive occupation. In *Tsilhqot’in*, McLachlin CJ stated that in order to fulfill the *sufficiency* requirement, an Aboriginal group must demonstrate that “it has historically acted in a way that would communicate to third parties that it held the land for its own purposes.”<sup>27</sup> Though this “does not demand notorious or visible use akin to proving a claim for adverse possession,” it nonetheless cannot be “purely subjective or internal.”<sup>28</sup> In other words, the Court will not deem occupation to have been sufficient merely because an Aboriginal group believes that it had exclusive use and occupation of the land in question at the time of the assertion of Crown sovereignty. The Court will require objective evidence of

...a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group.<sup>29</sup>

The requirement, then, is not that land was *used*, but that it “belonged to” or was “controlled by” the Aboriginal group. This “belonging to,” in turn, can be evidenced through exercising control

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<sup>23</sup> *Tsilhqot’in Nation*, *supra* note 1 at para 37.

<sup>24</sup> *Delgamuukw*, *supra* note 1 at para 149 as quoted in *Tsilhqot’in Nation*, *supra* note 1 at para 37 as authority.

<sup>25</sup> *Tsilhqot’in Nation*, *supra* note 1 at para 37.

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.* 38.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

over, or exclusive stewardship of, the territory in question. For this reason, “[c]ultivated fields, constructed dwelling houses, invested labour, and a consistent presence on parts of the land may be sufficient, *but are not essential* to establish occupation” [emphasis mine].<sup>30</sup> Further, as McLachlin CJ stated, “the notion of occupation must also reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic.”<sup>31</sup> Importantly, this phrase clarifies beyond question that semi-nomadic occupation may be sufficient to ground a finding of title. This reflects the important shift from a conception of occupation grounded strictly in common law conceptions of *use*, as in the site-specific conception of title, to occupation through control.<sup>32</sup>

In *Tsilhqot’in*, McLachlin found support in the decision delivered by Cromwell JA, then of the Nova Scotia Court of Appeal, in the *Marshall* portion of the *Marshall/Bernard* decision. There, Cromwell JA likened “the sufficiency of occupation required to establish Aboriginal title to the requirements for general occupancy at common law.”<sup>33</sup> At common law, a person could be considered a “general occupant” if they asserted possession of land when “no one else has a present interest or with respect to which title is uncertain.”<sup>34</sup> In other words, it is the exclusive nature of the occupation that grounds the interest and determines the sufficiency of occupation at common law. What an Aboriginal group must demonstrate, then, are “acts of occupation that demonstrate possession at law.”<sup>35</sup> Again, the acts of occupation that will suffice to demonstrate possession will change depending on the circumstances of the peoples and lands in question.<sup>36</sup> Occupation, as stated above, must also be considered in light of what the Court terms the “Aboriginal perspective.” For the most part, when the Court indicates that it intends to incorporate the Aboriginal perspective, what it is in fact referring to is an analysis of circumstances that, while undeniably creating a more favorable requirement for Aboriginal peoples, is hardly an expression of a “perspective” at all. An acknowledgement that it is not

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<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

<sup>32</sup> This shift is in fact a necessary corollary to the “territorial” – as opposed to “site specific” – conception of title. If title is to be demonstrated over a broad area, the sufficiency requirements cannot be based on “intensive use.” What is unclear is whether the approach is territorial because the test is occupation, or whether the test is occupation because the approach is territorial. For a discussion of these points see McNeil, “Site-Specific or Territorial?”, *supra* note 9 at 752 - 761; *William*, *supra* note 22 at paras 210-217.

<sup>33</sup> *Tsilhqot’in Nation*, *supra* note 1 at para 39.

<sup>34</sup> Ibid.

<sup>35</sup> Ibid. at para 40.

<sup>36</sup> See Ibid., where McLachlin CJ quoted at length Cromwell’s decision in *R v Marshall*, 2003 NSCA 105 at para 137 [*Marshall*, NSCA].

reasonable to require an impossible burden to be met (e.g. requiring written documentation evidencing pre-contact occupation or a standard of land use that would require a greater number of people than the territory could support given the lifestyle and modes of subsistence of the occupants) is not an incorporation of an Aboriginal perspective; rather, it is an acknowledgment that systemic legal biases militating against the recognition of Aboriginal land rights should be mitigated. Crucially though, the Aboriginal perspective is given some substantive role insofar as the Court has noted that an Aboriginal group's *laws* are part of the perspectives that it will take into account.<sup>37</sup>

The essential point is that activities such as hunting can ground title to broad tracts of land so long as there is an intention to exclude others or enjoy the land exclusively. The role of indigenous systems of law is that they can be used as evidence of such exclusivity.<sup>38</sup> Thus, the Court in *Tsilhqot'in* concluded:

There is no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites or farms, as the Court of Appeal held. Rather, a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is “sufficient” use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law.<sup>39</sup>

This standard for determining the sufficiency of occupation will be essential in considering the claims of the Mi'kmaq and Maliseet, especially in light of the Supreme Court's finding in *Marshall/Bernard* that the Mi'kmaq in Nova Scotia and New Brunswick had failed to establish title to the locations in question in those cases.

## II. Continuity

The requirement of continuity only applies “[w]here present occupation is relied on as proof of occupation pre-sovereignty.”<sup>40</sup> In such cases, there must be continuity between pre-

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<sup>37</sup> *Tsilhqot'in Nation*, *supra* note 1 at para 41. The “aboriginal perspective” is discussed in more detail below, see *infra* notes 54, 96.

<sup>38</sup> As Lamer CJ stated in *Delgamuukw*, “[e]xclusivity is a common law principle derived from the notion of fee simple ownership and should be imported into the concept of aboriginal title with caution. As such, the test required to establish exclusive occupation must take into account the context of the aboriginal society at the time of sovereignty. For example, it is important to note that exclusive occupation can be demonstrated even if other aboriginal groups were present, or frequented the claimed lands. Under those circumstances, exclusivity would be demonstrated by the intention and capacity to retain exclusive control.” *Delgamuukw*, *supra* note 1 at para 156.

<sup>39</sup> *Tsilhqot'in Nation*, *supra* note 1 at para 42.

<sup>40</sup> *Ibid.* at para 45.



sovereignty and present occupation.<sup>41</sup> Another way to formulate the continuity requirement is that a court cannot infer pre-sovereignty occupation from present occupation. Even where present occupation exists, evidence must still be brought to establish pre-sovereignty occupation.

The continuity requirement has caused undue confusion, as it is often interpreted to mean that an Aboriginal group seeking to establish title must demonstrate continuity between their occupation at the time of the British assertion of sovereignty and the present. However, as Cromwell JA, then of the Nova Scotia Court of Appeal, stated in *Marshall*:

...continuity of occupation from sovereignty to the present is not part of the test for aboriginal title if exclusive occupation at sovereignty is established by direct evidence of occupation before and at the time of sovereignty. This view is consistent with the basic principle underpinning *Delgamuukw* that title crystallizes at that time. It also responds to the concern that requiring continuity of occupation after sovereignty would undermine the purpose of s.35 by giving effect to displacement of aboriginals by Europeans as a result of post-sovereignty indifference to aboriginal rights.<sup>42</sup>

In other words, requiring continuity between occupation at the time of sovereignty and occupation in the current day would undermine s.35 by legitimizing the dispossession of Aboriginal peoples. Aboriginal title, as a concept, would be fundamentally altered and divorced from its historical roots as a right grounded in pre-sovereignty occupation of territory. The continuity “requirement” would introduce a new mode of extinguishing title, which would see any displacement of Aboriginal people between the date of sovereignty and the present day as validly extinguishing title.<sup>43</sup>

The lack of clarity regarding the continuity requirement was furthered by the explanation provided in *Marshall/Bernard*. There, McLachlin CJ construed continuity as the requirement that the claimants demonstrate that they are descendants of the pre-sovereignty people whose occupation they were relying on to establish the right.<sup>44</sup> A third distinct conception of continuity is found in the Supreme Court’s Aboriginal rights jurisprudence, where it has established a requirement for continuity between pre-contact and present-day practices in proving Aboriginal

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<sup>41</sup> Ibid.

<sup>42</sup> *Marshall*, NSCA, *supra* note 36 at para 182.

<sup>43</sup> See also: Kent McNeil, “Continuity of Aboriginal Rights”, in Kerry Wilkins, ed., *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing, 2004) at 127-50.

<sup>44</sup> *Marshall; Bernard*, *supra* note 1 at paras 67 and 70; Brian Slattery, “Some Thoughts on Aboriginal Title” (1999) 48 UNB LJ 19 at 30-32 [Slattery, “Some Thoughts on Aboriginal Title”].

rights other than title.<sup>45</sup> Thus, the Court has used the term continuity in at least three distinct senses when discussing Aboriginal rights and title. The sense in which the term is employed in *Tsilhqot'in* could easily be eliminated, as it requires nothing more than that the regular test for establishing title be applied whether the Aboriginal group is currently occupying the land being claimed or not. Present occupation is evidence that can be relied upon to help prove occupation at the date of sovereignty. Continuity only arises when present occupation is relied on in this manner and is not a requirement for proving title in and of itself.<sup>46</sup>

### III. *Exclusivity of Occupation*

Exclusivity of occupation is the central requirement for establishing title. As will be seen, the other requirements have effectively been folded into the exclusive occupation test. On the non-intensive use standard, demonstrating *exclusive* use presupposes a level of use sufficient to ground title – the test for sufficiency (intention to control for one's own exclusive use) is no more than a re-articulation of exclusive occupation – exclusive occupation is *by definition* sufficient occupation. In other words, if a group exclusively occupies a territory, the exclusive nature of that occupation is evidence of use sufficient to ground title. While in theory there is a distinction between proving sufficiency of occupation on the one hand and exclusivity on the other, the categories blend together in practice.<sup>47</sup> Indeed, exclusive occupation is defined by the Court as “the intention and capacity to retain exclusive control’ over the lands.”<sup>48</sup> Exclusivity is not based on *use* of the land, but *control* of it; that is, “[e]xclusivity should be understood in the sense of intention and capacity to control the land.”<sup>49</sup> Lamer CJ discussed the exclusivity requirement at length in *Delgamuukw*:

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<sup>45</sup> *R v Van der Peet* [1996] 2 SCR 507; 137 DLR (4<sup>th</sup>) 289 at paras 59-65 [*Van der Peet*]; *Mitchell v MNR* [2001] 1 SCR 911; [2001] 3 CNLR 122 at paras 26, 29 [*Mitchell*].

<sup>46</sup> As Cromwell JA held in *Marshall*, “continuity is not part of the test for aboriginal title where, as here, exclusive occupation at sovereignty is sought to be established by evidence relating directly to the time before and at sovereignty.” *Marshall* NSCA, *supra* note 36 at para 242.

<sup>47</sup> McNeil, “Site-Specific or Territorial?” *supra* note 9 at 754. See also McLachlin CJ’s statement in *Tsilhqot'in*: “[f]inally, I come to exclusivity. The trial judge found that the Tsilhqot'in, prior to the assertion of sovereignty, repelled other people from their land and demanded permission from outsiders who wished to pass over it. He concluded from this that the Tsilhqot'in treated the land as exclusively theirs. There is no basis upon which to disturb that finding.” *Tsilhqot'in Nation*, *supra* note 1 at para 58.

<sup>48</sup> This definition has a long history, it is quoted here from *Tsilhqot'in Nation* at para 47, where it is being cited from *Delgamuukw*, *supra* note 1 at para 156, where it is quoted from the original source of the statement, McNeil, *Common Law Aboriginal Title*, *supra* note 20 at 204.

<sup>49</sup> *Tsilhqot'in Nation*, *supra* note 1 at para 48.

Finally, at sovereignty, occupation must have been exclusive. The requirement for exclusivity flows from the definition of aboriginal title itself, because I have defined aboriginal title in terms of the right to exclusive use and occupation of land. Exclusivity, as an aspect of aboriginal title, vests in the aboriginal community which holds the ability to exclude others from the lands held pursuant to that title. The proof of title must, in this respect, mirror the content of the right.<sup>50</sup>

The intention and capacity to control the land is a matter of fact that is to be determined by the trier of fact. As McLachlin CJ stated in *Tsilhqot'in*:

Whether a claimant group had the intention and capacity to control the land at the time of sovereignty is a question of fact for the trial judge and depends on various factors such as the characteristics of the claimant group, the nature of other groups in the area, and the characteristics of the land in question.<sup>51</sup>

Like the test for determining sufficiency of occupation, assessing exclusivity of occupation requires the trier of fact to consider the historical context of the Aboriginal group and the lands in question.<sup>52</sup> Further, “[a]s with the proof of occupation, proof of exclusivity must rely on both the perspective of the common law and the aboriginal perspective.”<sup>53</sup>

As with the sufficiency framework, the concept of exclusivity is drawn from the common law, while the fact that the court must take into consideration the historical context is said to give credence to the Aboriginal perspective.<sup>54</sup> Exclusive occupation, therefore, can be demonstrated by proving “that others were excluded from the land, or by proof that others were only allowed access to the land with the permission of the claimant group.”<sup>55</sup> In this light, the presence of others *with permission* may actually strengthen a claim of exclusive occupation as “the very fact that permission was asked for and given would be further evidence of the group’s exclusive control.”<sup>56</sup> The presence of other groups also must be assessed in light of the Aboriginal

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<sup>50</sup> *Delgamuukw*, supra note 1 at para 155.

<sup>51</sup> *Tsilhqot'in Nation*, supra note 1 at para 48.

<sup>52</sup> See *Delgamuukw*, supra note 1 at para 156 where Lamer CJ stated: “[e]xclusivity is a common law principle derived from the notion of fee simple ownership and should be imported into the concept of aboriginal title with caution. As such, the test required to establish exclusive occupation must take into account the context of the aboriginal society at the time of sovereignty.”

<sup>53</sup> *Delgamuukw*, supra note 1 at para 156 also *Tsilhqot'in Nation*, supra note 1 at para 49.

<sup>54</sup> As discussed above, it is difficult to see how this can be construed as a “perspective.” What the court is saying in essence is that the historical context should not be assessed in a blatantly euro-centric manner. This is not so much an incorporation of an Aboriginal perspective as it is a realization that the courts should not distort history to facilitate the dispossession of indigenous lands. For discussion from the Supreme Court of Canada see *Marshall; Bernard*, supra note 1 at paras 48-50. This will be revisited in more detail below.

<sup>55</sup> *Tsilhqot'in Nation*, supra note 1 at para 48.

<sup>56</sup> McNeil, *Common Law Aboriginal Title*, supra note 20 at 204 as cited in *Delgamuukw*, supra note 1 at 156 and re-articulated in *Tsilhqot'in Nation*, supra note 1 at para at 48 where McLachlin CJ held that “[t]he fact that permission

perspective. As Lamer CJ stated in *Delgamukw*, that perspective may “lead to the conclusion that trespass by other aboriginal groups does not undermine, and that presence of those groups by permission may reinforce, the exclusive occupation of the aboriginal group asserting title.”<sup>57</sup>

As with the test for determining sufficiency of occupation, the incorporation of the Aboriginal perspective in respect of exclusivity has the potential to be much more substantive than under the current analysis. While weeding out Eurocentric bias should not in itself be construed as substantially incorporating the Aboriginal perspective, the reference to Aboriginal systems of law to substantiate the Aboriginal perspective and act as evidence of the exclusive nature of Aboriginal occupation holds promise. In *Delgamuukw*, Lamer CJ employed terms such as “trespass” and “permission” while discussing of the role of Aboriginal laws.<sup>58</sup> Lamer CJ stated: “aboriginal laws under which permission may be granted to other aboriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation.”<sup>59</sup> In other words, when assessing whether Aboriginal occupation had the requisite sufficiency and exclusivity to ground a finding of title, the internal laws governing the use and occupation of land in the territory which that Aboriginal group occupied must be taken into consideration. This was recognized as essential to establishing title in *Tsilhqot’in*, where McLachlin CJ stated that “[t]he trial judge found that the Tsilhqot’in, prior to the assertion of sovereignty, repelled other people from their land and demanded permission from outsiders who wished to pass over it. He concluded from this that the Tsilhqot’in treated the land as exclusively theirs.”<sup>60</sup>

It is clear, then, that the test for establishing Aboriginal title requires that exclusive occupation at the time of the British assertion of sovereignty be demonstrated. Further, the Court explicitly rejected the “intensive use” standard and noted the connection between the intensity of use required to prove title and the territorial scope of title. In dismissing the findings of the

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was requested and granted or refused, or that treaties were made with other groups, may show intention and capacity to control the land.”

<sup>57</sup> *Delgamuukw*, *supra* note 1 at para 157.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.* The question may be raised as to why it is only the granting of permission to other *aboriginal* groups to use or occupy land that may reinforce the exclusivity of occupation in this manner. This requirement would seem to tether the test for Aboriginal title not to the date of sovereignty, as required, but instead to the date of contact as in respect of “lesser” Aboriginal rights. If granting permission to *non-Aboriginal* groups could strengthen a claim in the same manner as granting permission to *Aboriginal* groups can, the Acadian presence should be carefully assessed. Olive Dickason, for example, argues that the Mi’kmaq understood the Acadians to have only as usufructuary right to lands they occupied in Acadia and that the territory remained part of the Mi’kmaq domain: Olive Patricia Dickason, *Canada’s First Nations: A History of Founding Peoples From Earliest Times* (Toronto: McClelland & Stewart, 1992) at 108.

<sup>60</sup> *Tsilhqot’in Nation*, *supra* note 1 at para 58.

British Columbia Court of Appeal, McLachlin held:

the Court of Appeal based its rejection of Aboriginal title on the legal proposition that regular use of territory could not ground Aboriginal title — only the regular presence on or intensive occupation of particular tracts would suffice. That view, as discussed earlier, is not supported by the jurisprudence; on the contrary, *Delgamuukw* affirms a territorial use-based approach to Aboriginal title.<sup>61</sup>

McLachlin CJ then went on to state that “[b]y examining a large number of individual sites, the trial judge was able to infer the boundaries within which the *Tsilhqot’in* regularly and exclusively occupied the land. The trial judge, in proceeding this way, made no legal error.”<sup>62</sup>

## B. The Marshall/Bernard Decisions

What does this clear application of the title test tell us about the Maritime Provinces? Further, what does it tell us about how we should consider the *Marshall/Bernard* decision? The *Marshall/Bernard* decision dealt with appeals from two cases, one from Nova Scotia and one from New Brunswick. In both cases Mi’kmaq people were charged with illegally removing timber from Crown lands. The defence in both cases argued that Mi’kmaq individuals did not require provincial authorization to harvest timber as they held rights to do so pursuant to treaty right and/or Aboriginal title.<sup>63</sup> As McLachlin CJ stated, “[t]he respondents claim that they hold aboriginal title to the lands they logged and that therefore they do not need provincial authorization to log. They advance three different grounds for title: common law; the Royal Proclamation of 1763 ... and Belcher's Proclamation.”<sup>64</sup> The defendants in both cases were convicted at trial and had their convictions upheld by the summary convictions courts. In both cases the courts of appeal set aside the convictions, with a new trial being ordered in *Marshall* (Nova Scotia) and an acquittal in *Bernard* (New Brunswick).<sup>65</sup>

The trial and appellate level cases in the *Marshall/Bernard* litigation are of particular interest in assessing Aboriginal title in the Maritimes in light of the *Tsilhqot’in* decision. In both the *Marshall* and *Bernard* cases, the different opinions of the trial and appellate level judges rested almost entirely on competing views of which standard should be applied in assessing the

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<sup>61</sup> *Ibid.* at para 56.

<sup>62</sup> *Ibid.* at para 63.

<sup>63</sup> *Marshall; Bernard, supra* note 1 at para 3.

<sup>64</sup> *Ibid.* at para 37

<sup>65</sup> *Ibid.* at para 4.

degree of sufficiency of use required to establish title.<sup>66</sup> In both instances, the trial courts applied an intensive use standard and, as a necessary corollary, embraced a site-specific, as opposed to territorial, conception of title. In other words, the lines drawn between the trial and appellate courts were the same lines drawn between the British Columbia Court of Appeal and the Supreme Court of Canada in *Tsilhqot'in*.<sup>67</sup> As such, we can now assess the competing judgments in *Marshall* and *Bernard* in light of clear and unambiguous precedent from the Supreme Court. As will be discussed in more detail below, this was not the case following the Supreme Court's decision in *Marshall/Bernard*, which sowed considerable confusion by professing to adhere to the same interpretation of *Delgamuukw* as the courts of appeal while nonetheless overturning their decisions and reinstating those of the trial courts while remaining ambiguous on important doctrinal matters.<sup>68</sup> Charting the prevailing arguments through the courts in the *Marshall* and *Bernard* cases provides a clear justification for assuming that title at some point existed in Nova Scotia and New Brunswick.

In the *Tsilhqot'in* decision, McLachlin CJ adopted the reasoning of Cromwell JA from the *Marshall* decision at the Nova Scotia Court of Appeal. In overturning the trial level decision that determined that the Mi'kmaq had failed to establish title, Cromwell JA stated:

In my respectful view, the courts below erred in requiring proof of regular, intensive use of the cutting sites to establish aboriginal title. In my opinion, this standard of occupation misapplies the common law perspective, fails to give equal weight to the aboriginal perspective, and does not take into account the nature of the land under consideration.<sup>69</sup>

In itself, the fact that the Supreme Court in *Tsilhqot'in* explicitly adopted Cromwell JA's reasoning on the most salient points of law relative to the determination of a title claim should indicate that there is a strong possibility that title could be found to have existed in the Maritime Provinces.<sup>70</sup> In assessing whether the Mi'kmaq had demonstrated occupation sufficient to ground title to the particular areas where the charged individuals were harvesting wood, Cromwell stated

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<sup>66</sup> See *Ibid.* at para 44 where McLachlin CJ framed the decision before the Court as being between two competing conceptions of title, stating: “[t]he question before us is which of these standards of occupation is appropriate to determine aboriginal title: the strict standard applied by the trial judges; the looser standard applied by the Courts of Appeal; or some other standard?”

<sup>67</sup> In *Tsilhqot'in* those same disagreements were present between the trial and appellate courts, though unlike in New Brunswick and Nova Scotia, in British Columbia it was the trial court that applied the territorial standard and the Court of Appeal that applied the intensive use, site-specific standard.

<sup>68</sup> For a critique of the doctrinally problematic aspects of the decision see Kent McNeil, “Aboriginal Title and the Supreme Court: What’s Happening?” (2006) 69 Sask L Rev 282 [McNeil, “What’s Happening?”].

<sup>69</sup> *Marshall*, NSCA, *supra* note 36 at para 183.

<sup>70</sup> *Tsilhqot'in Nation*, *supra* note 1 at para 39.

at the appellate level: “[t]he question, in my opinion, is not whether exclusive occupation of the cutting sites was established, but whether exclusive occupation of a reasonably defined territory which includes the cutting sites, was established.”<sup>71</sup> Similarly, in *Tsilhqot’in*, McLachlin CJ held, in dismissing the appellate court’s holdings, that “[t]he alleged failure to identify particular areas with precision likewise only makes sense if one assumes a narrow test of intensive occupation.”<sup>72</sup> This echoes Cromwell’s reasoning in *Marshall* where he argued that the trial judge had “erred in law by requiring the appellants to prove intensive, regular use of the cutting sites.”<sup>73</sup> The evident symmetry between the *Tsilhqot’in* decision and the decisions of the New Brunswick and Nova Scotia courts of appeal in the *Bernard* and *Marshall* decisions, respectively, raises questions about the predictive value of the Supreme Court’s decision in *Marshall/Bernard* in terms of assessing future title litigation in the Maritime Provinces. Though *Marshall/Bernard* is directly on point, following *Tsilhqot’in* there is good reason to suspect that a future claim may produce a different result.<sup>74</sup>

As discussed above, at the NSCA Cromwell JA held that, in applying a site-specific, intensive-use standard, the trial judge had erred in law.<sup>75</sup> This view was shared by the New Brunswick Court of Appeal, where Justice Daigle concluded that, in applying an intensive use standard, the trial judge had “failed to comply with the principles set out in *Delgamuukw* and committed errors of law”<sup>76</sup> and, further, “that he erred in law when his central concern became the proof of specific acts of occupation and regular use.”<sup>77</sup> The New Brunswick Court looked to the common law to ground this conception of title, citing *Calder*<sup>78</sup> alongside one of the famed US Marshall trilogy cases (*Johnson v. M’Intosh*)<sup>79</sup> as standing for the principle that:

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<sup>71</sup> *Marshall*, NSCA, *supra* note 36 at para 184.

<sup>72</sup> *Tsilhqot’in Nation*, *supra* note 1 at para 60.

<sup>73</sup> *Marshall*, NSCA, *supra* note 36 at para 196.

<sup>74</sup> As mentioned above, this view is supported by the concurring decision of Lebel and Fish JJ. For them, the case failed on the facts. Litigation with stronger supporting facts may well yield a different result, especially in light of the clarified framework for proving title.

<sup>75</sup> *Marshall*, NSCA, *supra* note 36 at para 196.

<sup>76</sup> *R v Bernard*, 2003 NBCA 55, at para 115 (Daigle JA) [*Bernard*, NBCA]. The numbering of the paragraphs in this decision restart at the beginning of the decision provided by each justice. To avoid confusion, I note the name of the justice in parentheses rather than attempting to renumber the paragraphs.

<sup>77</sup> *Ibid.* at para 118; see also at paras 123, 124, and 127 (Daigle JA).

<sup>78</sup> *Calder v. British Columbia (A.G.)*, [1973] SCR 313 [*Calder*].

<sup>79</sup> *Johnson v. M’Intosh* (1823) 21 US (8 Wheat.) 543. For an excellent review of *Johnson v. M’Intosh* and an unconventional, yet compelling, assessment of the central findings of the case see Eric Kades, “History and Interpretation of the Great Case of *Johnson v. M’Intosh*” (2001) 19:1 *Law and History Review* 67. For a discussion of the Doctrine of Discovery in the “Marshall trilogy” of cases, beginning with *Johnson*, see Sarah H. Cleveland,

The forthright recognition as a historical fact of the prior occupation of North America by aboriginal peoples embodies the foundation of aboriginal title. Aboriginal title is thus derived at common law from the historic occupation and possession of ancestral lands by aboriginal people and their relationship to those lands.<sup>80</sup>

Daigle JA, then, recognized title as being grounded in the prior occupation of Aboriginal peoples.<sup>81</sup> The recognition that title is grounded in the exclusive occupation of the land leads to the conclusion that the interest title refers to and seeks to protect is that same type of occupation.<sup>82</sup> Daigle JA elaborated, stating that:

...the criteria for occupation and the common law analysis ... stand for the proposition that the common law concept of occupation requires proof of a "definite tract of land" (i.e. the Northwest Miramichi watershed) over which the Mi'kmaq "habitually and exclusively ranged". To constitute occupation, a specific confined area within the claimed territory need not be "in actual use by them at any given moment". Moreover, the aboriginal perspective on the occupation of and association with their lands must be taken into account. On that basis, the hunting grounds of a hunting and gathering aboriginal community, considering their habits and modes of life and the resulting occupation pattern of their lands, would be as much in their actual possession and use as their permanent settlements. The common law does not require proof of intensive, regular or physical use of every narrowly confined area within a claimed territory to constitute occupation of that territory.<sup>83</sup>

Again, this mirrors the approach found in Cromwell's decision in *Marshall*. The courts of appeal in both provinces, then, clearly and unequivocally repudiated the trial judges' decisions grounded on an intensive use standard.

Recalling that my purpose here is to demonstrate why it is reasonable to assume that title did at some point exist in the Maritime Provinces, the similarity between the decisions from the courts of appeal and the Supreme Court's decision in *Tsilhqot'in* is an important consideration, especially in light of the lines of argumentation employed by each in dismissing the site-

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"Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs" (2002) 81:1 Tex L Rev 1 at 30 – 41.

<sup>80</sup> Bernard NBCA, *supra* note 75 at para 3 (Daigle JA).

<sup>81</sup> This recalls the famous quote from *Calder*: "when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries." *Calder*, *supra* note 78 at 145. This is not only a legal statement, it also serves as one possible normative justification for the recognition of Aboriginal rights. See for example Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self Government" (1995) 21 Queen's LJ 173 at 177-180.

<sup>82</sup> Lamer CJ held in *Delgamuukw* that "[t]he requirement for exclusivity flows from the definition of aboriginal title itself, because I have defined aboriginal title in terms of the right to exclusive use and occupation of land. Exclusivity, as an aspect of aboriginal title, vests in the aboriginal community which holds the ability to exclude others from the lands held pursuant to that title." *Delgamuukw*, *supra* note 1 at para 155.

<sup>83</sup> Bernard NBCA, *supra* note 75 at para 90 (Daigle JA); *Delgamuukw*, *supra* note 1 at para 149.



specific/intensive use standard.<sup>84</sup> What is more, it is likely that title could be proven to exist, albeit to a more limited range of land, even on a more restrictive standard. This is precisely what happened at the Nova Scotia Provincial Court where the trial judge in *Marshall* stated that “the Mi’kmaq of the 18<sup>th</sup> century on mainland Nova Scotia probably had aboriginal title to lands around their local communities, but not to the cutting sites.”<sup>85</sup> Thus, even in applying the unduly restrictive intensive use standard that the Supreme Court explicitly rejected in *Tsilhqot’in*, the trial court in Nova Scotia recognized that title likely could be proven. It is clear that the assumption that title existed somewhere is a safe one on the basis that New Brunswick and Nova Scotia courts suggested title likely existed on both the standard that has been unequivocally upheld by the Supreme Court in *Tsilhqot’in* and on the much more restrictive standard.

One item that remains outstanding in this analysis, though, is the fact that the Supreme Court in *Marshall/Bernard* overturned the Courts of Appeal. That the majority did so while giving ambiguous signs about their position on the proper standard only renders the decision more opaque. There are several examples of the lack of clarity brought by the Supreme Court in this decision.<sup>86</sup> In the first instance, McLachlin CJ purported to faithfully apply *Delgamuukw* and, in so doing, emphasized exclusive occupation as the basis of Aboriginal title. She stated: “[t]he common law theory underlying recognition of aboriginal title holds that an aboriginal group which occupied land at the time of European sovereignty and never ceded or otherwise lost its right to that land, continues to enjoy title to it”<sup>87</sup> and, further, that “[t]hese principles were canvassed at length in *Delgamuukw*... which enunciated a test for aboriginal title based on exclusive occupation at the time of British sovereignty.”<sup>88</sup>

McLachlin CJ seemingly incorporated two fundamental principles for assessing the sufficiency of occupation from *Delgamuukw*, namely the requirements that the Aboriginal

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<sup>84</sup> It is also interesting to note that in both the *Marshall/Bernard* and *Tsilhqot’in* line of cases, each level of court consciously situated its decision in the context of competing conceptions of title (i.e. site-specific vs. territorial) except the Supreme Court in *Marshall/Bernard*.

<sup>85</sup> *R v Marshall*, 2001 NSPC 2, at para 143 [*Marshall*, NSPC]. This was also the case in *R v Isaac* [1975] NSJ 412 [*Isaac*], where the court applied the correct standard but the incorrect extinguishment analysis in finding that title had existed to much of Nova Scotia but has likely been extinguished everywhere but Indian reserve lands.

<sup>86</sup> Professor McNeil suggests, for example, that “[w]hile her deviation from the *Delgamuukw* approach was revealed by her colleague LeBel J., her reasons for deviating from it are unclear, especially in light of the fact that she concurred with Chief Justice Lamer's decision in *Delgamuukw* and purported to follow that decision in *Marshall/Bernard*.” (McNeil, “What’s Happening?,” *supra* note 66 at 43). See also McNeil, “Site-Specific or Territorial,” *supra* note 9 at 753, 757 – 759.

<sup>87</sup> *Marshall; Bernard*, *supra* note 1 at para 39.

<sup>88</sup> *Ibid.* at para 40.

perspective be taken into account and that intensive use of specific sites is not required to ground title. She approvingly quoted Lamer CJ, as he then was, who defined “occupation” in *Delgamuukw* as follows:

Occupation may be established in a variety of ways, ranging from the construction of dwellings through cultivation and enclosure of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resources.<sup>89</sup>

Thus, McLachlin embraced a broad definition of “occupation” as including more than only intensively used sites. She was also alive to the evidentiary issues that are inherent to assessing the degree of historical occupation of Aboriginal groups, echoing the New Brunswick Court of Appeal in saying that to “insist on evidence of overt acts of exclusion in such circumstances may, depending on the circumstances, be unfair.”<sup>90</sup> McLachlin CJ then addressed the issue of exclusivity, stating that:

It follows that evidence of acts of exclusion is not required to establish aboriginal title. All that is required is demonstration of effective control of the land by the group, from which a reasonable inference can be drawn that it could have excluded others had it chosen to do so. The fact that history, insofar as it can be ascertained, discloses no adverse claimants may support this inference. This is what is meant by the requirement of aboriginal title that the lands have been occupied in an exclusive manner.<sup>91</sup>

In the passages above it seems as though McLachlin CJ was articulating a standard of occupation consistent with both *Delgamuukw* and the Courts of Appeal in New Brunswick and Nova Scotia. In several other instances, however, McLachlin CJ was much more ambiguous about the correct standard. She stated that

...exclusive possession in the sense of intention and capacity to control is required to establish aboriginal title. Typically, this is established by showing regular occupancy or use of definite tracts of land for hunting, fishing or exploiting resources: *Delgamuukw*, at para. 149. Less intensive uses may give rise to different rights.<sup>92</sup>

While this statement is accurate insofar as it describes the fact that an Aboriginal group may have distinct Aboriginal or treaty rights that are exercisable on a territory over which they do not hold title, it sows confusion insofar as McLachlin CJ draws a distinction between “occupation”

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<sup>89</sup> *Delgamuukw*, *supra* note 1 at para 149 citing McNeil, *Common Law Aboriginal Title*, *supra* note 20 at 202. See also *Marshall; Bernard*, *supra* note 1 at para 56.

<sup>90</sup> *Marshall; Bernard*, *supra* note 1 at para 64.

<sup>91</sup> *Ibid.* at para 65.

<sup>92</sup> *Ibid.* at para 70.

and “use” and relies on a standard that looks to the intensity of use to determine the types of rights that may be derived from that historical use. In *Delgamuukw*, as well as at the appellate courts in the *Marshall/Bernard* cases, and later at the Supreme Court in *Tsilhqot’in*, exclusivity of use is the prevailing factor.

Thus, while on the one hand McLachlin CJ stated that exclusivity could be inferred, she later tethered exclusivity to common law notions of physical occupation:

It was not in error to state, as Cromwell J.A. did, that acts from which intention to occupy the land could be inferred may ground a claim to common law title. However, as discussed above, this must be coupled with sufficiently regular and exclusive use in order to establish title in the common law sense.<sup>93</sup>

Evidence of sufficiently regular and exclusive use, of course, would negate the need to infer an intention to occupy land, rendering it unclear in which circumstances, if any, McLachlin CJ would consider Cromwell JA’s non-erroneous statement to apply. If intention to occupy can be inferred, but only where sufficiently regular use is established, the intention to occupy is redundant at best and cannot ground title alone.

While these statements are largely ambiguous in respect of the applicable standard, several other statements suggest strongly, though perhaps short of explicitly, that the Court applied a site specific, intensive use standard.<sup>94</sup> Thus, McLachlin CJ stated:

It follows from the requirement of exclusive occupation that exploiting the land, rivers or seaside for hunting, fishing or other resources may translate into aboriginal title to the land if the activity was sufficiently regular and exclusive to comport with title at common law. However, more typically, seasonal hunting and fishing rights exercised in a particular area will translate to a hunting or fishing right.<sup>95</sup>

Here, it is suggested that the exclusive occupation standard can be undermined if that exclusive occupation is not year round; further, it required that the use of land “comport with title at common law.” As the Court itself noted, however, the common law does not require continuous use. Needless to say, the Aboriginal perspective is not incorporated in this view.<sup>96</sup> Most

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<sup>93</sup> Ibid. at para 76.

<sup>94</sup> Many commentators have put this view forward. See for example: Paul L.A.H. Chartrand, “*R. v. Marshall; R. v. Bernard: The Return of the Native*” (2006) 55 UNB LJ 135 at 135 where he references the “high standards of proof requiring intensive and regular use of lands” applied by the Court. See also McNeil, “Site-Specific or Territorial,” *supra* note 9 at 752.

<sup>95</sup> *Marshall; Bernard, supra* note 1 at para 58.

<sup>96</sup> That is to say, the Aboriginal perspective is not incorporated in a meaningful construction of the term “perspective.” For a critique of how the Court in *Marshall/Bernard* framed the concept of the “Aboriginal perspective,” see Nigel Bankes, “*Marshall and Bernard: Ignoring the Relevance of Customary Property Laws*”

suggestive though, was McLachlin CJ's statement that:

The trial judge in each case applied the correct test to determine whether the respondents' claim to aboriginal title was established. In each case they required proof of sufficiently regular and exclusive use of the cutting sites by Mi'kmaq people at the time of assertion of sovereignty.<sup>97</sup>

Though the requirement of sufficient and regular use follows the standard set in *Delgamuukw*, requiring exclusive use of the cutting sites themselves applies a site-specific standard and requires an intensity of use seemingly beyond that envisaged by the court in *Delgamuukw*.<sup>98</sup> Any claim that McLachlin CJ did not apply a site-specific standard in *Marshall/Bernard* would seemingly have to say the same of the trial courts.<sup>99</sup> In light of the view expressed in *Marshall/Bernard*, it is worth recalling McLachlin CJ's statement in *Tsilhqot'in*:

For semi-nomadic Aboriginal groups like the Tsilhqot'in, the Court of Appeal's approach results in small islands of title surrounded by larger territories where the group possesses only Aboriginal rights to engage in activities like hunting and trapping. By contrast, on the trial judge's approach, the group would enjoy title to all the territory that their ancestors regularly and exclusively used at the time of assertion of European sovereignty.<sup>100</sup>

At the heart of the lack of consistency is the need to distinguish between "lesser and higher" Aboriginal rights and the requirements for proof of those rights. The concern in *Marshall/Bernard* seems to be that if the bar for title is set too low, there will no longer be any space for other Aboriginal rights, which seems to be what McLachlin CJ thinks the jurisprudence requires. Thus, citing the *Adams* and *Côté* decisions as authority, McLachlin stated:

The common law right to title is commensurate with exclusionary rights of control. That is what it means and has always meant. If the ancient aboriginal practices do not indicate that type of control, then title is not the appropriate right. To confer title in the absence of evidence of sufficiently regular and exclusive pre-sovereignty occupation, would transform the ancient right into a new and

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(2006) 55 UNB LJ 120 at 126. Bankes argues that "while the court recites the relevant approach it pays little more than lip service to the importance of considering the aboriginal perspective precisely because the majority opinion decontextualizes the aboriginal practices from their normative setting." In particular, Bankes notes that the role of Indigenous laws and conceptions of territoriality are absent from the Court's decision in *Marshall/Bernard*.

<sup>97</sup> *Marshall; Bernard*, *supra* note 1 at para 72.

<sup>98</sup> See McNeil, "What's Happening?", *supra* note 66 at 36. Professor McNeil argues that "[b]y endorsing the trial judges' requirement of proof of occupation of the specific cutting sites, McLachlin C.J. appears to have rejected the territorial approach of the Court of Appeal judges, and, as suggested above, conflated the tests for proof of Aboriginal title and other Aboriginal rights."

<sup>99</sup> The only room for manoeuvre here is that McLachlin once referred to the trial judges as having applied "essentially the right test" (emphasis mine) *Marshall; Bernard*, *supra* note 1 at para 78. This comment raises the question of whether adjudicating a constitutional right on the basis of *essentially* the correct legal test is appropriate and whether it furthers the Court's stated goal of reconciliation.

<sup>100</sup> *Tsilhqot'in Nation*, *supra* note 1 at para 29.

different right. It would also obliterate the distinction that this Court has consistently made between lesser aboriginal rights like the right to fish and the highest aboriginal right, the right to title to the land.<sup>101</sup>

This causes confusion in the case concerning what type of proof is required to establish title and which augurs instead for recognition of a more limited right. In the passage above, McLachlin CJ stated both that title is “commensurate with exclusionary rights of control” and required an intensity of use incommensurate with a finding of title on territory which Aboriginal peoples occupied to the exclusion of others. It is as though the full scale of the distinction in approaches between the trial and appellate courts in the *Marshall/Bernard* litigation was not grasped by the Supreme Court, in particular as those approaches pertain to the relationship between the intensity of use required to prove title and the geographical ambit of title.

Part of the problem with the reasoning in *Marshall/Bernard* stems from a lack of conceptual clarity concerning the proof for Aboriginal title and proof for “lesser” Aboriginal rights.<sup>102</sup> This results in a mistaken emphasis on Aboriginal “practices,” with that term coming to be used in the place of both “occupation” and, importantly, “perspectives.”<sup>103</sup> Emphasizing practices at the expense of occupation can colour one’s perspective of the “sufficiency” of occupation required to establish title. Further, as Professor McNeil has pointed out, “[t]he emphasis on practices in fact rearticulates the common law perspective and fails to draw on Lamer CJ’s statements in *Delgamuukw* concerning Aboriginal law.”<sup>104</sup> In other words, reducing the Aboriginal perspective to a “faithful” translation of practices to an equivalent common law right eliminates any meaningful reference to Aboriginal legal traditions.<sup>105</sup> As Professor McNeil stated:

Aboriginal law and the common law had each been proposed as viable, alternative sources, but the Supreme Court had not yet pronounced on the matter. If Aboriginal law was relied upon, the doctrine of continuity would apply, and so Aboriginal title would be derived from, and be defined by, the pre-existing laws of the Aboriginal people in question. If the common law was relied upon, Aboriginal title would depend on occupation of lands by Aboriginal peoples at the time of Crown acquisition of sovereignty and the legal effect given to occupation

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<sup>101</sup> *Marshall; Bernard*, *supra* note 1 at para 77.

<sup>102</sup> *McNeil*, “What’s Happening?”, *supra* note 66 at 30.

<sup>103</sup> *Ibid.* at 29.

<sup>104</sup> *Ibid.*

<sup>105</sup> Paul L.A.H. Chartrand, “*R. v. Marshall; R. v. Bernard: The Return of the Native*” (2006) 55 UNB LJ 135 at 140. Chartrand argues that “[t]he Court rejected the notion that the nature of the interests of the Aboriginal people were to be determined in accordance with their own laws and customs. Instead, the Court implied that Aboriginal laws and values mattered only to the extent these reflected a common law right.”

by the common law...The resulting title is a common law rather than an Aboriginal law title, but it is unlike any previously-known common law interest in land because it has several sui generis aspects, specifically pre-sovereignty source, inalienability, communal nature, and inherent limit.<sup>106</sup>

It should be noted that McLachlin CJ took the opportunity in *Tsilhqot'in* to reject Professor McNeil's interpretation of her decision in *Marshall/Bernard*. Noting that the province relied on McNeil's argument that the Court had rejected a territorial approach to title in *Marshall/Bernard*, McLachlin stated that:

In fact, this Court in *Marshall; Bernard* did not reject a territorial approach, but held only (at para. 72) that there must be "proof of sufficiently regular and exclusive use" of the land in question, a requirement established in *Delgamuukw*.<sup>107</sup>

While it is clear that the standard applied in *Marshall/Bernard* requiring "proof of sufficiently regular and exclusive use" of the land is a feature drawn from *Delgamuukw*, it is how those terms are interpreted and applied that is at issue. As discussed, at the trial level in the *Marshall* and *Bernard* decisions, "regular use" was interpreted in such a manner as to preclude a finding of title over a parcel of land on which the defendants could not prove intense and regular activity; they were, in other words, required to demonstrate physical use and occupation of *each parcel of land* they hoped to establish title to. The courts of appeal, by contrast, found that no such proof was necessary, as the sites fell within the *territory* over which the Mi'kmaq exercised exclusive occupation. What is superficially the same test – i.e. proof of "sufficiently regular and exclusive use" - leads to very different results when the language is carefully parsed.

In sum, in the period following *Delgamuukw*, two clearly defined standards came to be applied in Aboriginal title cases. The trial level courts in New Brunswick and Nova Scotia applied a site-specific, intensive use standard that would, by dint of the requirement of regular, intensive use, necessarily confine title to small specific sites such as villages. The other approach, applied by the Courts of Appeal in those same cases, would apply a standard of occupancy grounded primarily in the *exclusivity* rather than the *intensity* of use, resulting in the possibility of findings of title over broad territories. Though the two standards often employ the same language (regular use, etc.) and can for that reason seem difficult to distinguish, a crucial factor separating them is how they incorporate Aboriginal laws. The cases applying a site-

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<sup>106</sup> McNeil, "What's Happening?", *supra* note 66 at 41.

<sup>107</sup> *Tsilhqot'in Nation*, *supra* note 1 at para 43.

specific standard emphasize the common law requirement of physical occupation, purporting to import the Aboriginal perspective, if at all, only through a ‘translation’ of a pre-sovereignty practice to a modern right. The cases that, following Lamer CJ’s clear outline in *Delgamuukw*, looked to the Aboriginal perspective on the nature of their relationship to, and control over, the land, applied the territorial notion of title. Though McLachlin CJ muddied the conceptual waters considerably in *Marshall/Bernard*, in *Tsilhqot’in* the matter was put to rest, likely for the foreseeable future, with the unanimous court soundly rejecting the British Columbia Court of Appeal’s application of the site-specific standard.

In respect of the question that animates this chapter – that is, can it be assumed that title existed in the Maritime Provinces – four conclusions become clear. First, new litigation is likely to be tried on the standard laid out in *Tsilhqot’in*. For reasons I have outlined above, a decision that faithfully followed *Tsilhqot’in* would apply an analysis much closer to that found in the decisions from the New Brunswick and Nova Scotia Courts of Appeal – cases that found the Mi’kmaq had established title to broad territories in Nova Scotia and Northeastern New Brunswick – than that applied by the Supreme Court in *Marshall/Barnard*. Second, it is clear that even on the more restrictive standard applied by the trial courts, it is very likely that title could be proven to specific intensively used sites. The Nova Scotia trial court in *Marshall* and the Nova Scotia Court of Appeal in *Isaac* confirmed this. Even if a court retreated to the *Marshall/Bernard* framework analysis, it seems that title could be proven to certain well-defined, intensively used sites. Third, there is good reason to believe that a stronger evidentiary case could be made for title in the region. As Lebel J. noted in his concurring opinion in *Marshall/Bernard*, in which he applied an analysis much closer to that adopted by the Supreme Court in *Tsilhqot’in*, the problems with the case were largely evidentiary. This issue was twofold; the courts were looking for the wrong type of evidence<sup>108</sup> and the claimants did not bring enough of the right kind of evidence. In particular, more evidence of the Mi’kmaq legal and political framework, such that it evidences exclusive control of broader territory, should have been brought, while the courts should not have focused so narrowly on evidence of use of the cutting sites themselves. Fourth, *Marshall/Bernard* should not be taken to foreclose a future

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<sup>108</sup> As Daigle J said of the trial judge in the *Bernard* litigation, “In finding (para. 107) that he could not conclude that the land at the locus in quo (Sevogle area) was used on a regular basis, the trial judge was fixated on requiring evidence of actual physical use of the locus of the alleged offence” *Bernard* NBCA, *supra* note 75 at para 91 (Daigle JA).

finding of title in favour of the Nova Scotia or Miramichi Mi'kmaq. This was stated explicitly by Lebel J. in his concurring opinion. It is also the case because, as I have demonstrated above, *Marshall/Bernard* appears to be a departure from the principles articulated in *Delgamuukw*.<sup>109</sup> With *Tsilhqot'in*, the Court realigned its analysis with *Delgamuukw*, at least on the salient features pertaining to proof of title, making the principles articulated in *Marshall/Bernard* dubious in terms of their precedential value.<sup>110</sup>

Nonetheless, while the types of evidence that may suffice to ground title have been clarified in *Tsilhqot'in*,<sup>111</sup> it is clear that the evidentiary burden contributed to the Mi'kmaq's inability to establish title. As Professor McNeil stated following the decision in *Marshall/Bernard*:

In future cases ... I think it will be important for Aboriginal title claimants to present strong evidence of the existence and application of Aboriginal law in relation to land, in addition to evidence of physical occupation, particularly where they are asserting title over their traditional territory rather than over specific sites.<sup>112</sup>

This is perhaps even truer following the *Tsilhqot'in* decision, with a renewed emphasis on the exclusivity of occupation, grounded in *control* rather than intensity of *use*.<sup>113</sup> Thus, as discussed above, the most recent judicial articulations on Aboriginal title, coupled with an analysis of the

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<sup>109</sup> Another possibility, which I do not have the space to fully explore here, is that *Marshall/Bernard* is a paradigmatic example of a “results oriented” judicial decision. This seems possible in at least three senses: first, the violence that erupted in Burnt Church, New Brunswick following the Supreme Court's recognition of a treaty right to harvest fish for a commercial purposes in *R v Marshall (No. 1)*, [1999] 3 SCR 456 [*Marshall #1*], and the Court's subsequent – and unprecedented – revisiting of that decision in *R v Marshall (No. 2)*, [1999] 3 SCR 533 [*Marshall #2*], may have led the Court to feel that it was politically impossible to recognize title to large areas of Nova Scotia and New Brunswick. Second, it may be a case of bad facts making bad law – the Court may have been concerned that recognizing title on the evidence brought by the Mi'kmaq would, in essence, mean that title should be recognized in all of Canada. McLachlin alluded to something along these lines when she expressed concern that recognizing title in this case would eliminate the distinction between Aboriginal title and specific “lesser” Aboriginal rights. A third possibility is that the Court wanted to give the government more time to negotiate modern treaty arrangements and feared that a declaration of title would imperil the negotiating process. In this respect, *Tsilhqot'in* may in part be the Court's response to the limited success of that process. Professor Slattery has argued that much of the ambiguity in *Marshall/Bernard* can be attributed to the courts being torn between a desire to right a great historical wrong — the unlawful dispossession of Indigenous peoples — and deep misgivings about doing so at the expense of third parties and the larger society: Brian Slattery, “The Metamorphosis of Aboriginal Title” (2006) 85 Can Bar Rev 255 at 256 – 57 [Slattery, “Metamorphosis”]. This is, of course, all speculative, but it bears considering what the Court was trying to achieve in the particular circumstances of the time.

<sup>110</sup> Again, it is not the articulation of the basic legal tests in *Marshall/Bernard* that is at issue (regular, exclusive use, etc.) but, rather, the broader implications for competing conceptions of title as a site-specific or territorial right

<sup>111</sup> McNeil, “Joint Aboriginal Title,” *supra* note 21 at 9.

<sup>112</sup> McNeil, “What's Happening?,” *supra* note 66 at 45.

<sup>113</sup> I say “renewed emphasis” as the decision in *Tsilhqot'in* seems to align with Lamer CJ's more explicit reliance on Indigenous law in *Delgamuukw*, an emphasis which seemed to wane in *Marshall/Bernard* despite the superficial incorporation of the “Aboriginal perspective.”



case law emanating from the region, makes it highly probable that title could be proved.

In light of this clarified legal framework, the historical record can be reexamined. As noted earlier, there is a temptation when analyzing evidence to do so in light of the legal test one is applying. That is, the temptation is to look for evidence that will be definitive in light of the test being applied. Evidence from the Maritime Provinces has been examined through the lens of an incorrect legal test (at the trial courts and Supreme Court) and through the lens of the correct test (at the courts of appeal). Though it is beyond the scope of this paper to thoroughly engage the historical record pertaining to proof of title, it is worth briefly reviewing some of the salient features of the historical record that demonstrate the probability of title being proved in light of the *Tsilhqot'in* decision. Again, this analysis is not meant to suggest the precise geographic areas where title may be demonstrated to have existed. Rather, it is meant only to demonstrate the high probability that title could be proven to have existed.

### C. Historical Occupation

The relevant time period that must be examined in assessing Aboriginal occupation for the purpose of establishing title is the date of the British Crown's sovereignty; title is established with reference to Aboriginal occupation of the territory in question at the date of sovereignty. That date was determined by the courts to be 1713 for mainland Nova Scotia, 1759 for New Brunswick, and 1763 for Cape Breton and Prince Edward Island.<sup>114</sup> Taking these dates as a baseline, we can examine the historical record for evidence of the exclusive occupation required to establish title. As discussed above, there are two ways that occupation may be demonstrated. The first is physical use and occupation of land. This reflects the common law requirement that rights to land be established through the physical possession of that land, as evidenced through

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<sup>114</sup> I have accepted these dates here, though that should not be taken as an indication that I consider them settled or correct. Given the importance of the date of sovereignty for determining title, it is an issue that should be examined closely. This is true both in terms of empirical proof of sovereignty and the legality of the assertion of sovereignty itself. For discussion of problems associated with accepting the assertion of sovereignty without qualification, see John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 Osgoode Hall LJ 537; Kent McNeil, "Indigenous Nations and the Legality of European Claims to Sovereignty" and Sandra Tomsons, "Liberal Theory and Aboriginal Sovereignty" in Sandra Tomsons and Lorraine Mayer, eds, *Philosophy and Aboriginal Rights: Critical Dialogues* (Oxford University Press: Don Mills, 2013) at 242-253 and 254-271, respectively. For problems identifying the date of sovereignty, see Margaret McCallum "After Bernard and Marshall" (2006) 55 UNB LJ 73 at 75 note 7. Professor McCallum argues that "[h]istorians may puzzle over the difference between the date of acquisition of sovereignty in New Brunswick and in Cape Breton, especially as the trial judge in *Marshall* concluded that Britain "probably acquired sovereignty over Cape Breton in 1758."

its use. The second is based on control, or the exclusivity of occupation. This reflects both the common law understanding that title may extend to an area under one's exclusive control and the court's attempt to incorporate the "Aboriginal perspective" into the concept of Aboriginal title by relying on Aboriginal conceptions of land use and territoriality to shape the content of title. Importantly, this includes Aboriginal laws and legal systems insofar as they relate to the exclusive control of a given territory.<sup>115</sup>

That the Mi'kmaq, Maliseet, and Passamaquoddy physically occupied many sites in the Maritime Provinces at sovereignty is clear. As Curran J. noted at the Nova Scotia Provincial Court:

When the British acquired sovereignty in 1713, the only people living in most of mainland Nova Scotia were Mi'kmaq. The Mi'kmaq had lived in Nova Scotia since centuries before Europeans arrived. There is no reason to believe any other aboriginal group lived here during that time or later. There were about 2,500 Acadians in the province, but most of them lived in a few concentrated areas along the Bay of Fundy. Besides that, there was just a small British garrison at Annapolis.<sup>116</sup>

He continued:

They [the Mi'kmaq] were living near Port Royal, Minas, Cape Sable, LaHave, Chebucto (Halifax), Musquodoboit and the St. Mary's River in Guysborough County, along the Northumberland Strait and near Chignecto (Amherst). They lived mostly near the coast, but not at fixed locations throughout the year or from year to year. The fur trade was past its peak, but they still used the interior of the province far more intensively than they had before Europeans came.<sup>117</sup>

Though Curran J. stated that "[i]t is almost certain there were substantial tracts of land unclaimed and largely unused between the communities,"<sup>118</sup> he also observed that "[t]he Mi'kmaq communities were not isolated from each other, particularly in the summer. They spoke a common language with little variation in dialect throughout Nova Scotia and beyond. They could and did travel the length and breadth of the mainland using the many interconnected

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<sup>115</sup> *Delgamuukw*, *supra* note 1 at 114; Slatery, "Metamorphosis," *supra* note 109 at 270.

<sup>116</sup> *Marshall*, NSPC, *supra* note 85 at para 126. The lack of a British presence in 1713 is repeated throughout the literature. See for example, William C. Wicken, *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Jr.* (Toronto: University of Toronto Press, 2002) at 99 where he states "[t]he colonial office's decision to rename 'Acadia' Nova Scotia was no more than a symbolic gesture: Nova Scotia remained what it has been before 1713, Acadian and Mi'kmaq" and at 129 where he states that "by 1713 Acadian settlement had not adversely affected the Mi'kmaq." [Wicken, *Mi'kmaq Treaties*].

<sup>117</sup> *Marshall*, NSPC, *supra* note 85 at para 127.

<sup>118</sup> *Ibid.* at para 131.

waterways.”<sup>119</sup> He concluded that “[t]here is no doubt the Mi’kmaq moved at will throughout mainland Nova Scotia in 1713, except perhaps in the Acadian areas and at Annapolis.”<sup>120</sup> It is clear that in 1713, “the colony remained an enclave of the Mi’kmaq and the Acadians.”<sup>121</sup> This state of affairs was echoed in respect of the Mi’kmaq in New Brunswick by Daigle JA, who held that “the evidence clearly demonstrates that by 1759 there had been no displacement by Europeans of the Mi’kmaq occupation of their traditional territory. In fact, no other aboriginal groups or Europeans challenged the exclusive use and occupation of the Northwest Miramichi watershed by the Mi’kmaq between contact in 1500 and British sovereignty in 1759”<sup>122</sup> and further, that “[t]he evidence leads to the inescapable conclusion that the Mi’kmaq were peaceably and exclusively occupying the Northwest Miramichi watershed.”<sup>123</sup>

Curran J. similarly found that there had been little displacement of the Mi’kmaq on Cape Breton, stating that, “the only European settlement of any consequence other than Louisbourg was a small French community at Port Toulouse (St. Peters).”<sup>124</sup> This led him to the extremely important factual conclusion, not disturbed by the higher courts, that:

The question of exclusiveness really does not arise in this case. There was no other aboriginal group in Nova Scotia in 1713 or 1763. On the mainland in 1713 there were a few Acadian enclaves and one small British outpost. In Cape Breton

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<sup>119</sup> Ibid. at para 129. It is useful to compare Curran J.’s comments to Justice Vickers’ description of Tsilhqot’in occupation at the trial level in *Tsilhqot’in Nation*: “[a]t the time of sovereignty assertion, Tsilhqot’in people living in the Claim Area were semi-nomadic. They moved up and down the main salmon bearing river, the Tsilhqox (Chilko River), in season. They fished the smaller lakes to the east and west of the Tsilhqox, particularly in the spring season. They gathered berries, medicines and root plants in the valleys and on the slopes of the surrounding mountains. They hunted and trapped across the Claim Area, taking what nature had to offer. Then, for the most part, they returned on a regular basis to winter at Xení (Nemiah Valley), on the eastern shore of Tsilhqox Biny (Chilko Lake), on the high ground above the banks of the Tsilhqox, and on the shores of adjacent streams and lakes, from Naghatalhchoz Biny (Big Eagle Lake) and eastward into Tachelachied.” *Tsilhqot’in Nation v British Columbia*, 2007 BCSC 1700 at para 953 [*Tsilhqot’in Trial*].

<sup>120</sup> *Marshall*, NSPC, *supra* note 85 at para 131.

<sup>121</sup> Wicken, *Mi’kmaq Treaties*, *supra* note 116 at 109.

<sup>122</sup> *Bernard* NBCA, *supra* note 75 at para 171 (Daigle JA).

<sup>123</sup> Ibid. at para 148 (Daigle). Daigle JA also provided persuasive reasoning on how the courts should approach the task of determining exclusivity of occupation where there is not evidence of active exclusion of other groups. In discussing the exclusivity of Mi’kmaq occupation of an area of Northeastern New Brunswick, he stated: “[t]he picture that emerges from the totality of the evidence is that of peaceable relations between the various aboriginal groups living in New Brunswick, in particular between the Mi’kmaq and Maliseet. The evidence leads to the inescapable conclusion that the Mi’kmaq were peaceably and exclusively occupying the Northwest Miramichi watershed without protest from neighbouring tribes and without challenge to the possession of their lands. In these circumstances, why look for or require evidence of the negative side, of forced exclusion of others, or of hostile acts or violence where none exists. In my view, exclusive occupation of land rather emerges from evidence of positive activities and uses of the land, from the factual reality of peaceable and exclusive occupation.”

<sup>124</sup> *Marshall*, NSPC, *supra* note 85 at para 132. Though Louisbourg was an immense fort for its time, with 1,191 military personnel stationed there by 1734, there was little French presence beyond the fort. Wicken, *Mi’kmaq Treaties*, *supra* note 116 at 102.

between the fall of Louisbourg and 1763 there was one small French community and some scattered French settlers. There is no reason to believe there was any European on any of the cutting sites, or for that matter on most of the mainland or in most of Cape Breton, at the relevant times. That leaves the question of occupancy.<sup>125</sup>

In other words, for the trial Judge, who applied the incorrect and too stringent test for title, exclusivity of occupation was not an issue. As Curran J. noted, this leaves unanswered the “question of occupancy.” That is, the question is not whether Mi’kmaq occupation was exclusive, but whether the intensity or frequency of that occupation was sufficient to ground a finding of title. In light of the clarified framework provided in *Tsilhqot’in*, in which the *intensity* of use has in large part been subsumed into the *exclusivity* of use, this finding is of particular note and further substantiates the view that Aboriginal title existed in many areas.

The Mi’kmaq were also present on pre-sovereignty Prince Edward Island, which was unquestionably an important part of their traditional territory; their name for the Island was Abegweit.<sup>126</sup> While the Mi’kmaq undoubtedly occupied the island before European arrival, the extent of their occupation at the time of the British acquisition sovereignty is more difficult to peg with precision. After the fall of Louisbourg on 26 July 1758, the British decided to evacuate the Acadians and Mi’kmaq from Prince Edward Island, though about 200 of each remained on the island.<sup>127</sup> As of the 1830s there were about 500 Mi’kmaq on the island.<sup>128</sup> An 1838 petition from Oliver Thomas LeBone, Chief of the Prince Edward Island Mi’kmaq, stated that “they were but ‘a skeleton’ of ‘our once numerous tribe.’”<sup>129</sup> Prior to the British acquisition of sovereignty, however, there was a French presence on the island, with many Acadians being expelled from the Island following the fall of Louisbourg.<sup>130</sup>

As with the Mi’kmaq, there is unequivocal evidence of Maliseet occupation in the region. While determining the areas where this occupation may suffice to establish title would require research that is beyond the scope of this analysis, my purpose here, as stated above, is simply to

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<sup>125</sup> *Marshall*, NSPC, *supra* note 85 at para 137. In 1703 there were 1,324 Acadians on mainland Nova Scotia: Wicken, *Mi’kmaq Treaties*, *supra* note 116 at 102.

<sup>126</sup> Rusty Bitterman, “Mi’kmaq Land Claims and the PEI Escheat Movement” (2006) 55 UNB LJ 172 at 173; L.F.S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713 – 1867* (Vancouver: UBC Press, 1979) at 113; Margaret McCallum, “Problems in Determining the Date of Reception in Prince Edward Island” (2006) 55 UNB LJ 3 at 3 [McCallum, “Date of Reception in PEI”].

<sup>127</sup> McCallum, “Date of Reception in PEI,” *supra* note 126 at 4.

<sup>128</sup> Bitterman, *supra* note 126 at 173.

<sup>129</sup> *Ibid.*

<sup>130</sup> By 1742 there were 2, 180 Acadians on Prince Edward Island (Île Royal) and only about 200 by 1758: Wicken, *Mi’kmaq Treaties*, *supra* note 116 at 103; Bitterman, *supra* note 126 at 173.

establish that Maliseet occupation would suffice to prove title *somewhere*. The names given and used by the Maliseet speak to their intimate association with the Saint John River valley. Indeed, the British referred to them as the “St. John River Indians”, while they referred, and often still refer to themselves as Wuastukwiuk, which means ‘people of the Wulastuk (Saint John) River.’<sup>131</sup> The Maliseet travelled the length of the river, camping along its shores in the summer and travelling into the forests in the winter to hunt.<sup>132</sup> As historian W.O. Raymond wrote of the Maliseet,

The dark recesses of the forest, the sunny glades of the open woodland, the mossy dells, the sparkling streams and roaring mountain torrents, the quiet lakes, the noble [Saint John] river flowing onward to the sea with islands here and there embosomed by its tide – all were his. The smoke of his wigwam fire curled peacefully from Indian village and temporary encampment. He might wander where he pleased with none to say him nay.<sup>133</sup>

While such a statement lacks the specificity required to ground a claim for Aboriginal title, it nonetheless provides a clear view of the understanding of pre-sovereignty Maliseet occupation of the Saint John River region from the eyes of an historian at the turn of the 20<sup>th</sup> century. Of particular note is Raymond’s use of the possessive phrase “all were his,” indicating a recognition that the Maliseet ‘owned’, occupied, and held the territory as their own, and the last sentence confirming that Maliseet occupation was exclusive. One of the principal Maliseet sites on the river was at Medoctec, just south of present day Woodstock.<sup>134</sup> Medoctic was well beyond the reach of English settlement until after the arrival of the Loyalists in 1784-85 and was an important portage site linking Maliseet territory to their Abenaki neighbours.<sup>135</sup> There are many

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<sup>131</sup> Wicken, *Mi’kmaq Treaties*, *supra* note 116 at 29.

<sup>132</sup> Alan D. McMillan, *Native Peoples and Cultures of Canada: An Anthropological Overview*, 2d ed (Vancouver: Douglas & McIntyre, 1995) at 49 – 55.

<sup>133</sup> W.O. Raymond, *Glimpses of the Past. History of the River St. John, A.D. 1604 – 1784*. (Miami: Hardpress Publishing, ??) Original, St. John, 1905 at 5. (Oddly, the new publishing of this book does not include a date of publication.)

<sup>134</sup> This site is not to be confused with present day Meductic, which is further south of the traditional site. See D.G. Bell, “A Commercial Harvesting Prosecution in Context: The Peter Paul Case, 1946” (2006) 55 UNB LJ 86. [Bell, “The Peter Paul Case”].

<sup>135</sup> As Professor D.G. Bell has pointed out, “[h]ere commenced the ancient portage and canoe route between the St John valley and both Passamaquoddy Bay and the Penobscot River. Here Malecites maintained a council fire and constructed a stockade, probably for protection against raiding Mohawks; and here, from 1717 to 1767, stood the first Christian chapel in what is now New Brunswick. Medoctec was remote from the Atlantic coast. During the French regime in Acadia, and even after the entry of English-speaking settlers into the St. John valley in the 1760s, it was never within 100 kilometres of the advancing settlement frontier. About the only English speakers who reached the place in pre-Loyalist times were captive.” See Bell, “The Peter Paul Case”, *supra* note 134 at 87. See also a description of the portage route between Meductic to Bangor, Maine, provided by Henry David Thoreau in 1846, which he describes as being 360 miles. Henry David Thoreau, *The Maine Woods* (Cambridge: H.O.

reports from early explorers detailing the Maliseet presence, archeological sites running the length of the Saint John River and around the Grand Lake region, and many early 18<sup>th</sup> century maps representing Maliseet villages from Fredericton to Madawaska.<sup>136</sup> In sum, there is little doubt that the Maliseet occupied the Saint John River and many of its tributaries at the date of the assertion of sovereignty, though the issue of adducing evidence of that occupation sufficient to ground title, and what geographical ambit that evidence might support, is a task for historical researchers.

In respect of both the Mi'kmaq and the Maliseet, the fact that they were there, living on the land in organized societies at the date of the assertion of sovereignty makes it difficult to imagine a scenario in which their occupation would not be sufficient on physical occupation alone to establish title somewhere within what we know to be their traditional territory. Indeed, courts in the *Isaac*, *Thomas Peter Paul*, *Marshall*, and *Bernard* decisions have confirmed this, even if a case has yet to succeed at the Supreme Court. As has been described above, however, it is now clear that occupancy should be assessed not only in terms of physical occupancy, but also in terms of the *exclusive control* of broader territory. Further, occupation can be demonstrated for the purpose of establishing title with reference to prevailing Aboriginal conceptions of territoriality, as evidenced in part by their distinct legal and political orders.<sup>137</sup> In this light, it is notable that Curran J. stated:

The Mi'kmaq had, as Dr. von Gernet put it, “a sense of territoriality.” That was clear from everything they said to the British from 1713 to 1760 and beyond well into the 19<sup>th</sup> century. They made it clear they considered all of Nova Scotia their

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Houghton, 1892) at 317 – 318. This system of waterways was said to have been “used by the Indians from time immemorial.” George Frederick Clarke, *Six Salmon Rivers and Another* (Brunswick Press: Fredericton, 1960) at 92.

<sup>136</sup> Tom F.S. McFeat, “Two Malecite Family Industries: A Case Study” (1962) 4:2 *Antropologica* 233 at 236.

<sup>137</sup> There has been a shift in the types of evidence courts will accept as proof of the existence of Aboriginal rights and, as a corollary, the court's willingness to accept the existence of Indigenous legal and political orders as evidence. See *Delgamuukw*, *supra* note 1 at para 114. At the trial decision in *Tsilhqot'in*, Vickers J. spent considerable time recounting the *Tsilhqot'in* stories that were given as evidence at trial: *Tsilhqot'in Trial*, *supra* note 119 at 146 – 148. While it is unclear how much weight Vickers J. gave to these stories, or how much a future court may, it is nonetheless notable that they are being relied on as evidence. For an analysis of Mi'kmaw legal principles as applied to contemporary jurisprudence, see Jamie Battiste, “Understanding the Progression of Mi'kmaw Law” 2008 31 *Dal LJ* 311. Battiste states: “[t]he creation story of the Mi'kmaw establishes the relations between the Mi'kmaq and their ecology; it also generates Mi'kmaw knowledge and legal traditions behind their aboriginal and treaty rights. Mi'kmaw knowledge is at the root of the oral tradition and ceremonies and in the teachings, stories, and performances that are passed down from generation to generation.” See also James [sakéj] Youngblood Henderson, “First Nations' Legal Inheritances in Canada: The Mi'kmaq Model” (1996) 23 *Man LJ* 1 [Henderson, “Legal Inheritances”]. For Mi'kmaw stories see Rita Joe, ed, “The Mi'kmaq Anthology” (Lawrencetown Beach: Pottersfield, 1997); Alden Nowlan, *Nine Micmac Legends* (Halifax: Nimbus, 1983); Russell Barsh, “Grounded Visions: Native American Conceptions of Landscapes and Ceremony” (2001) 13 *St. Thomas Law Review* 127; Ruth Holmes Whitehead, *The Old Man Told Us: Excerpts From Micmac History 1500 – 1950* (Halifax: Nimbus, 1991).

land, their territory. They repeatedly accused the British of taking their land without permission.<sup>138</sup>

This again speaks to the issue of exclusivity,<sup>139</sup> but perhaps more importantly, it makes clear that the Mi'kmaq considered themselves to have the capacity to exclude others and to do so pursuant to their own internal legal regimes.<sup>140</sup> This was echoed by Professor William Wicken, an expert witness in the both the *Marshall* and *Bernard* cases and a number of other cases involving Aboriginal peoples in the Maritime region. Speaking to the issue of Mi'kmaq control of territory, Wicken stated on the stand in *Bernard* that:

...[T]here was a protocol, there was a relationship, a customary relationship that evolved over time between these people and which governed their relationships. If somebody come [sic] on to your territory then in fact there was a law, if I can use that word, aboriginal law, their law, about how this infringement upon their territory would be dealt with.<sup>141</sup>

This legal regime pre-dated the arrival of Europeans. Professor Sakéj Henderson, commenting on the views expressed by early Europeans in the region, stated:

Neither European adventurers nor missionary priests of the seventeenth century who encountered the sacred order of the Mikmaq (Mikmaki) perceived an unorganised society. They did not find the anarchy that their state of nature theory presumed. Instead, they reported a natural order, with a well-defined system of consensual government and both an international and domestic law.<sup>142</sup>

In other words, at the date of sovereignty, there was a clearly defined territory over which the

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<sup>138</sup> *Marshall*, NSPC, *supra* note 85. Of crucial importance, British officials at the date of sovereignty were “aware that the Mi'kmaq claimed a right to the land.” (Wicken, *Mi'kmaq Treaties*, *supra* note 116 at 122).

<sup>139</sup> *Tsilhqot'in Nation*, *supra* note 1 at para 48; *Delgamuukw*, *supra* note 1 at para 156.

<sup>140</sup> The Maliseet also believed they had the right to exclude others from their territory, as evidenced by their warning to the British to leave the St. John River Valley in 1778. The Maliseet spokesman stated: “the King of England with his Evil Councilors has been Trying to Take away the Lands & Liberties of our Country...Now, as the King of England has no business, nor ever had any, on this River, we Desire you to go away with your men in Peace, & Take all those Men who has been fighting or Talking against Amarica [sic]. If you Dont [sic] go Directly, you must take Care of yourself, your Men, & all your English Subjects, on this River for if any or all of you are Killed it is not our faults, for we give you Warning Time Anough [sic] to Escape.” James P. Baxter, ed, *Documentary History of the State of Maine*, Vol. XVI, Portland, 1910, at 74 – 75 as reprinted in Hamilton, W.D. and W.A. Spray, eds, *Source Materials Relating to the New Brunswick Indian* (Fredericton: Hamray, 1977) at 50 – 51.

<sup>141</sup> *Bernard* NBCA, *supra* note 75 at para 146 (Daigle JA). As will be discussed below, the Mi'kmaq also believed that the treaty of 1726 protected their right to control lands over which they exercised hunting and fishing rights, including “the right to regulate outsiders’ travel through their lands – a right that included regulating the movement of New England traders.” (Wicken, *Mi'kmaq Treaties*, *supra* note 116 at 132); Also, recall the statement made by McLachlin CJ in *Tsilhqot'in*, where she stated: “[f]inally, I come to exclusivity. The trial judge found that the Tsilhqot'in, prior to the assertion of sovereignty, repelled other people from their land and demanded permission from outsiders who wished to pass over it. He concluded from this that the Tsilhqot'in treated the land as exclusively theirs. There is no basis upon which to disturb that finding.” *Tsilhqot'in*, *supra* note 1 at 58.

<sup>142</sup> Henderson, “Legal Inheritances”, *supra* note 137 at 8. See also James (Sakéj) Youngblood Henderson, *The Mikmaq Concordat* (Halifax: Fernwood, 1997) at 34.

Mi'kmaq exercised exclusive occupation, evidenced not only by their use of the land, but by the existence of complex social, political, and economic structures linking communities across the region.<sup>143</sup>

Domestically, the Mi'kmaq political order was structured in part by the regulation of hunting grounds. Hunting groups were “composed of people related through marriage.”<sup>144</sup> These groups “held exclusive hunting, trapping, and fishing rights over a clearly defined territory” and had the authority to request compensation from interlopers.<sup>145</sup> Hunting grounds in the 17<sup>th</sup> century were distributed by the “head of the nation,” indicating a degree of centralized governance beyond the leaders of individual hunting groups. In the 1690's, the missionary Chrestien Le Clercq observed that among the Mi'kmaq of the Gaspé Peninsula (in present day Québec), hunting grounds were distributed “according to the customs of the country, which serve as laws and regulations to the Gaspésians.”<sup>146</sup> At some point Mi'kmaw territory became divided into seven hunting districts covering all of present day Nova Scotia, and Prince Edward Island, eastern New Brunswick, and the Gaspé region of Québec.<sup>147</sup>

While the division of hunting grounds was essential to Mi'kmaw political structures and conceptions of territoriality, the use of hunting grounds was primarily a winter activity. In the summer, hunting groups congregated in summer villages along the coastline adjacent to the territory they occupied during the winter months. Summer villages played an important role in governance, where “affairs were governed through a collective decision making process involving adult village members.”<sup>148</sup> Drawing on his analysis of the negotiation and signing of the 1726 treaty, Professor Wicken has illustrated that “individual leaders were delegated to

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<sup>143</sup> See Wicken, *Mi'kmaq Treaties*, *supra* note 116 at 27, where he stated: “The families that inhabited each of these territories shared a common identity that was shaped by marriage, by cooperative labour, by political structures that mediated internal and external relationships, and by a common historical experience. This identity was reinforced by customs that regulated both community actions and the resources on which these actions depended.”

<sup>144</sup> *Ibid.* at 33.

<sup>145</sup> Individuals could not trespass into the territory controlled by other groups without permission. As professor Wicken stated, “[o]utsider's could travel through another group's territory, but there were protocols governing their movement. Travellers had to recognize the proprietor group's rights.” Further, “[w]hen travellers did not inform the proprietor group of their presence, the latter could confiscate their goods in compensation for violating its rights.” *Ibid.* at 34 – 35.

<sup>146</sup> *Ibid.* at 34

<sup>147</sup> Henderson, *Mi'kmaw Concordat*, *supra* note 142 at 32 – 34. When precisely the council was formed is a matter of debate. As Professor Wicken states, “According to one interpretation, which is based on the contemporary community's oral understanding of its history, the council emerged sometime before 1600. Other researchers disagree, and contend that the Grand Council formed in response to an expanding imperial presence or as a result of the collapse of French authority after 1763.” Wicken, *Mi'kmaq Treaties on Trial*, *supra* note 116 at 53.

<sup>148</sup> Wicken, *Mi'kmaq Treaties*, *supra* note 116 at 44.



represent the interests of a broader political entity, the summer village.”<sup>149</sup> Mi’kmaq political organization in the late 17<sup>th</sup> and early 18<sup>th</sup> centuries, then, was characterized by two distinct elements. Hunting territories, assigned by regional leaders “based on permissions by local, regional or national consensus,”<sup>150</sup> were occupied by extended families related by marriage who held rights to occupy, and use resources in, specified areas. In the summer months, families gathered in summer villages where political decisions were made, including the identification of suitable marriage partners for political purposes. Summer villages were the decision-making centres of the broader political community. This domestic legal and political framework was made possible by the fact that the Mi’kmaq recognized “an affiliation that superseded their family and hunting group. It was this relationship to this territory that formed how individual Mi’kmaq conceptualized the world.”<sup>151</sup> While political affiliation was grounded as much by relationships to people and places as geography, a sense of territoriality prevailed at both local (hunting group) and regional levels.<sup>152</sup> Thus, Professor Wicken argues that “the territorial division of lands for the winter hunt created boundaries within Mi’kmaq society as well as customary laws governing the land and each family’s relationship to it” and “that this relationship identified individual groups of families as inhabiting defined areas, where they enjoyed specific rights and obligations.”<sup>153</sup> The seven districts further formalized the political nature of these divisions. To this one might add the presence of dispute resolution mechanisms, evidenced for example by the protocols regarding restitution for trespass, as further substantiating the characterization of the Mi’kmaq political order as a legal regime.<sup>154</sup>

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<sup>149</sup> Ibid. at 43.

<sup>150</sup> Sakéj Henderson, “Mi’kmaq Tenure in Atlantic Canada” (1995) 18 Dal LJ 196 at 235. [Henderson, “Mi’kmaq Tenure”]

<sup>151</sup> Wicken, *Mi’kmaq Treaties*, *supra* note 116 at 39. This sketch deals only with the most basic framework of the Mi’kmaq political order. For a substantive analysis of the content of the Mi’kmaq legal order see Henderson “Legal Inheritances” *supra* note 137.

<sup>152</sup> See Lennox, Jeffers. “Nova Scotia Lost and Found: The Acadian Boundary Negotiation and Imperial Envisioning, 1750-1755” (2011) 15: 2 *Acadiensis* 3.

<sup>153</sup> Wicken, *Mi’kmaq Treaties*, *supra* note 116 at 35. This should not, however, be construed as property “ownership” in the western sense. As Professor Henderson has argued, “The relationship between the Mi’kmaq and the land embodies the essence of the intimate sacred order. As humans, they have and retain an obligation to protect the order and a right to share its uses, but only the future unborn children in the invisible sacred realm of the next seven generations had any ultimate ownership of the land.” Henderson, “Mi’kmaq Tenure”, *supra* note 150, at 232. See also Henderson, *Mi’kmaq Concordat*, *supra* note 142 at 30-33. For a discussion of how the Mi’kmaq sacred order was/is tied to their sense of territoriality see Henderson, “Mi’kmaq Tenure” at 225 – 230.

<sup>154</sup> See for example Jeremy Webber, “Legal Pluralism and Human Agency” (2006) 44 *Osgoode Hall LJ* 167. Webber argues that processes of normative decision making have a legal character when they are employed to resolve disputes between competing normative claims, allowing the normative claims of the individual actors or parties to remain intact while the conflict between those claims is mediated by way of a shared normative

Professor Henderson has argued persuasively that the Mi'kmaq legal and political order also extended to the international sphere. The international elements of Mi'kmaw law were recognized both by other Aboriginal nations and by the imperial European powers, evidenced, for example, by the fact that in 1719 the British instructed the newly commissioned governor, Richard Philipps, "to deal with the Mi'kmaq according to the protocols of Algonkian diplomacy."<sup>155</sup> The British not only recognized that the Mi'kmaq had existing diplomatic protocols, they instructed their early governors in Nova Scotia to engage the Mi'kmaq according to those protocols.<sup>156</sup> The existence of the Wabanaki Confederacy is further evidence of the international scope of Mi'kmaq, Maliseet, and Passamaquoddy law. When Europeans arrived in the 16<sup>th</sup> century, the the Wabanaki Confederacy included the Mi'kmaq, Maliseet, Penobscot, and Passamaquoddy, groups inhabiting the present day Maritime Provinces, the Gaspé Peninsula, and parts of New England.<sup>157</sup> While the Wabanaki Confederacy was an important pan-national alliance, it was only one part of a broader international legal order, the "Nikmanen Order," in

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framework governing such resolution. As Professor Val Napoleon has argued, a theoretical view of Indigenous law *qua* law can also be grounded in a positivist framework. Napoleon argues that the legal traditions of the Gitksan exhibit the same second order rule making capacity required by Hartian positivism, which Hart assumes is the exclusive purview of a Westphalian nation-state. See Valerie Ruth Napoleon, *Ayook: Gitksan Legal Order, Law, And Legal Theory* (PhD Diss. University of Victoria, 2009) at 240 – 261. In speaking of Indigenous constitutional law, a useful definition of constitutional law was provided by Professor W.J. Ashley, speaking of the Canadian constitution, in 1889. He stated: "[t]he original meaning of "constitution" is, of course, the way in which a thing is made, the manner in which it is arranged, its putting together, its nature. With this agrees the original meaning of the German term which is used as its equivalent: *Verfassung* -a thing's composition, the character of its construction, the arrangement of its parts. In this sense we can talk of any state as having a constitution, and a constitutional history. Every state, by the mere fact that it is a state, i.e., something more than a disconnected number of individuals who chance to live near together, must needs have some form, some characteristics, which cause it to resemble or differ from other political societies: there must be certain ways in which the various elements or parts of which it is composed affect one another." W.J. Ashley. *Nine Lectures on the Early Constitutional History of Canada* (Toronto: Roswell & Hutchison, 1889), at 7.

<sup>155</sup> Geoffrey Plank, *An Unsettled Conquest: The British Campaign Against the Peoples of Acadia* (Philadelphia: University of Pennsylvania, 2001) at 70. Governor Philipps was not keen to follow these directives, which he largely ignored, including a refusal to give gifts, a custom that had been followed by the French for over a century: John Mack Faragher, *A Great and Noble Scheme: The Tragic Story of the Expulsion of the French Acadians From Their American Homeland* (New York: W.W. Norton, 2005) at 157

<sup>156</sup> Reliance on Aboriginal protocols was commonplace in the early treaty-making period. As Sakéj Henderson has written, "[t]he extension of indigenous transnational law to include the British Sovereign is reflected in the Treaties. The early Treaties can be viewed as an extended Aboriginal system of tensions or bridges linking different worldviews to a consensual order. The Georgian treaties typically were made according to Aboriginal, rather than European, protocols." Henderson, "Mi'kmaw Tenure", *supra* note 150, at 240. The result of the reliance on Aboriginal protocols was the development of a voluntary and reciprocal framework that would govern the British relationship with Aboriginal peoples. As Professor Wicken put it, "by signing the 1726 treaty with the Mi'kmaq, Great Britain was acknowledging that its dominion in Nova Scotia would thereafter be exercised through the framework negotiated with the regions indigenous inhabitants, the Mi'kmaq and Maliseet." Wicken, *Mi'kmaq Treaties*, *supra* note 116 at 73.

<sup>157</sup> Henderson, "Mi'kmaw Tenure", *supra* note 150, at 239, see Wicken, *supra* note 116 at 40; Harald E.L. Prins, *The Mi'kmaq: Resistance, Accommodation, and Cultural Survival* (Orlando: Harcourt Brace, 1996) at 117 – 19.

which the Mi'kmaq understood themselves to be active agents.<sup>158</sup> The nations of the Nikmanen Order were allied by consensus and, as such, “[t]he Nikmanen Order illustrates the development of a voluntary transnational law that was not based on the family structure. Instead the order was based on consensual agreements among the indigenous federations and European monarchies.”<sup>159</sup>

The nation-to-nation engagement displayed by members of the Wabanaki Confederacy, both in their dealings with each other and imperial powers, provides further evidence of their domestic political organization. As Professor Wicken has argued, “[s]ince the Mi'kmaq participated in treaty negotiations, they must have had the political capacity to do so. They must have had an explicit political order and common political will or they could not have exerted any influence on the treaty making process.”<sup>160</sup> A group lacking a clear domestic political order, in other words, could not engage in substantive treaty negotiations. As with the Mi'kmaq the Maliseet presence at treaty negotiations and their role in regional diplomacy indicates the existence of a domestic political order able to facilitate such involvement.<sup>161</sup>

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<sup>158</sup> “The boundaries of the Mi'kmaq Nation remained unchanged for centuries, despite shifting alliances among their allies. They were surrounded by either their Nikmaq or the ocean. The Nikmaq (allies or friends) of the Mi'kmaw Nation included: the Beothuk (up river people) in Newfoundland; the Wulustukw keuwiuk (beautiful river people or Maliseet- Passamaquoddy) of southwestern New Brunswick and northeastern Maine; the Eastern “Abanaki” of Maine to Ottawa valley, various Montagnais groups north of the Saint Lawrence River, “Eskimo” or Inuit for the Strait of Belle Isle; and in the 1500s, the Saint Lawrence *Haudenosaunee* (Mohawk).” Henderson, “Mi'kmaw Tenure” *supra* note 150 at 238; see also Henderson, *Mikmaq Concordat* at 32. There are many examples of regional and international diplomacy. In 1721, for example, in response to the Massachusetts government renegeing on a promise to return Abenaki prisoners, “[t]he Norridgewalk Abenaki, who lived along the Kennebec River, summoned their allies to pressure the British to release the prisoners. This council met at Norridgewalk in late July of 1721, and included delegates from the Mi'kmaq, Maliseet, and Passamaquoddy, as well as aboriginal communities along the St. Lawrence River, such as the Huron, Montagnais, and Houdenosaunee from Kahnawake and Kahneseetke. The Huron came from near Quebec and the Houdenosaunee from the Montreal area.” Wicken, *Mi'kmaq Treaties*, *supra* note 116 at 76 – 77.

<sup>159</sup> Henderson, “Mi'kmaw Tenure” *supra* note 150 at 238. See also Henderson, *Mi'kmaw Concordat* *supra* note 142 at 32 where he refers to “a voluntary code of international law (*Nikmanaq*) that regulated treaties and agreements with other Aboriginal nations.” Pre-contact the Mi'kmaq also played the role of middlemen, facilitating trade between the hunting peoples to the north and the agriculturalists to the south. They continued this role post-contact and quickly adapted to maritime trade with the French: Dickason, *Canada's First Nations*, *supra* note 59 at 107; Prins, *supra* note 157 at 49.

<sup>160</sup> Wicken, *Mi'kmaq Treaties*, *supra* note 116 at 40.

<sup>161</sup> An example of intersocietal law governing the relations between the Mi'kmaq and Maliseet was recounted by the New Brunswick Court of Appeal, where it was stated that “[a]ccording to oral tradition about pre-contact incidents, he [Chief Stephen Augustine] relayed the story of the Mi'kmaq and the Maliseet sharing at certain times the mouth of the St. John river and encamping around the Grand Lake areas in their travels. Squabbles and fighting would occur resulting in somebody's being killed. Then the Mi'kmaq and Maliseet entered into a relationship to resolve this fighting. The Mi'kmaq people sent seven of their daughters to live among the Maliseet people, who intermarried with Maliseet and adopted the Maliseet culture. This was done to insure that Mi'kmaq would not attack the Maliseet and respect their territory. In the same way, Maliseet women were brought into Mi'kmaq territory, intermarried and

At the dates of British assertions of sovereignty, then, exclusive Aboriginal occupation can be demonstrated in much of the Maritime region. This is evidenced both by acts of physical occupation and by the existence of legal and political regimes governing the use and occupation of the territory. This is not to say that occupation sufficient to ground a declaration of Aboriginal title can or will be demonstrated over the entirety of this territory. As in the trial decision in *Tsilhqot'in*, evidence of “presence” throughout a “traditional territory” can be recognized while falling short of the evidentiary requirements required to establish title.<sup>162</sup> It should also be mentioned that, though I have focused above on the period around the date of British sovereignty, the legal regimes of Aboriginal peoples in the region continue to exist and were recognized as continuing to govern their internal affairs well into the 19<sup>th</sup> century. In 1823, for example, Nova Scotia Judge T.C. Haliburton wrote of the Mikmaq that “[t]hey never litigate or are in any way impleaded. They have a code of traditionary and customary laws among themselves.”<sup>163</sup> The Mi’kmaq consistently refused to accept colonial jurisdiction over matters they considered internal to them or protected by treaty. As Professor L.F.S. Upton wrote, “[e]very local jurisdiction passed ordinances at one time or another to regulate, among other things, the taking of fish and the lighting of fires in the woods. In moving around the provinces, the Micmacs would not observe such restrictions. They set their camps regardless of the title deeds of newly arrived settlers.”<sup>164</sup> While the colonial and imperial governments understood the importance of regulating the relationship between Aboriginal peoples and newly arrived settlers, “the British had no real interest in attempting to regulate the Natives' internal criminal and civil affairs” and the “Mi’kmaqs and Maliseets continued largely outside the practicalities of the colonizing power's legal system” well into the 19<sup>th</sup> century.<sup>165</sup>

The fact that the Mi’kmaq, Maliseet, and Passamaquoddy were there, living on the land in organized societies, is reason enough to believe that their occupation would have been

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lived in Mi’kmaq bordering communities again to prevent Maliseet attacks and insure respect for Mi’kmaq territory.” *Bernard NBCA*, *supra* note 75 at para 147 (Daigle JA).

<sup>162</sup> See for example *Tsilhqot'in Trial*, *supra* note 119 at 928.

<sup>163</sup> Upton, *supra* note 126 at 143.

<sup>164</sup> *Ibid.* at 144-145. In fact, Professor D.G. Bell has argued that until the late 19<sup>th</sup> century there was a “customary acceptance” of the “privilege” of Aboriginal peoples to harvest “the products of the forest on unfenced, uncleared land.” Bell, “The Peter Paul Case”, *supra* note 134 at 93. The scope of this privilege should not be construed too broadly – it was not uncommon for settlers to restrict Aboriginal access to resources with the precise intention of clearing them from lands: John G. Reid, “Empire, the Maritime Colonies, and the Supplanting of Mi’kma’ki/Wulstukwik, 1780-1820,” (2009) 38:2 *Acadiensis* 78 at 5.

<sup>165</sup> D.G. Bell, “Maritime Legal Institutions Under the Ancien Régime” (1996) 23 *Man LJ* 103 at para 4.

sufficient to ground Aboriginal title. The “intention to control” land, so important following *Tsilhqot’in*, is evidenced by the exclusive nature of the respective group’s occupation of their territory and by the clear sense of territoriality evidenced by their domestic, regional, and international legal regimes. Further, the intention to control is a *common law* requirement. Following *Delgamuukw*, Aboriginal notions of property and territoriality should be used not only as evidence of occupation on the common law standard; the content of title itself is shaped by these Aboriginal perspectives and the evidence required to prove title must be interpreted in a manner that substantiates the *sui generis* nature of the right. In light of this, we can assume that title existed to lands in the Maritime Provinces at the dates of British sovereignty. Before moving on to the question of whether this title has been extinguished, I will first look to the treaties of peace and friendship, which I will argue both recognize Aboriginal title and provide valuable insights into Aboriginal conceptions of territoriality and land use from which the basis for assessing title in the Maritime Provinces can be derived.

#### **D. Title by Treaty**

In addition to the usual method of proving title through historical occupation, it is also possible that title may be recognized and affirmed by treaty in the Maritime Provinces.<sup>166</sup> It is

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<sup>166</sup> In *Degamukw*, the Supreme Court held that treaties may assist in determining the Aboriginal perspective in title claims. Lamer CJ stated that “aboriginal laws under which permission may be granted to other aboriginal groups to use or reside even temporarily on land would reinforce the finding of exclusive occupation. Indeed, if that permission were the subject of treaties between the aboriginal nations in question, those treaties would also form part of the aboriginal perspective.” *Delgamuukw*, *supra* note 1 at para 127. Though Lamer CJ’s comment focuses on treaties between Aboriginal nations, there is no reason that the same reasoning cannot apply to treaties between Aboriginal and European nations. Such treaties were likely not in Lamer’s contemplation because the majority of treaties were signed after the date of sovereignty and were concerned with the cession of land, neither of which is true of the Maritime treaties. Here I will focus only on the treaty of 1725 – 26. This treaty was renewed in 1749, 1752, and 1760 – 61, with the validity of the latter two upheld by the Supreme Court in *Simon and Marshall #1*, respectively. See *R v Simon* [1985] 2 SCR 387 at para; *Marshall #1*, *supra* note 109 at para 21. Though the Mi’kmaq, in particular, have most often relied in the treaties of 1752 and 1760 – 61 to assert their rights, all of the mid-century treaties renewed the provisions of the 1725 -26 treaty. While a thorough analysis of treaty rights in the region would require an analysis of each treaty, the 1725 -26 treaty contains the most explicit provisions regarding land. This treaty is sometimes referred to as the treaty of 1725: *R v Sappier*; *R v Gray*, 2006 2 SCR 6 at 62. The treaty in question was negotiated in November and December of 1725 and ratified by individual communities in 1726. I have followed Professor Wicken in referring to the treaty as the “1726 treaty,” relying on the dates of ratification, though I take no issue with the use of 1725. Much of the confusion about the 1726 treaty results from a lack of clarity regarding the distinction between “Dummer’s Treaty” and “Mascarene’s Treaty.” Put simply, the treaties were negotiated at the same time, with one applying to the Abenaki of New England and the other to the Mi’kmaq, Maliseet and Passamaquoddy. For a full account of the distinction, see Andrea Bear Nicholas, “Mascarene’s Treaty of 1725” (1994) 43 UNB LJ 3. The validity of the treaty and its applicability to the Maliseet

widely acknowledged that the treaties in the Maritime Provinces did not cede land to the Crown.<sup>167</sup> Though it is correct to state that the treaties did not cede land, it is often mistakenly thought that this is a result of the fact that the treaties “said nothing about land.”<sup>168</sup> This view overlooks the fact that the 1726 treaty dealt explicitly with the future settlement of land, the status of existing British settlements, and the status of Aboriginal lands vis-à-vis these settlements.<sup>169</sup> To understand how the 1726 treaty recognizes and affirms Aboriginal title, we must look to both the text of the treaty and the historical context in which the treaties were signed.

Clause 3 of the *Articles of Peace and Agreement* contained in the 1726 treaty states that “the Indians shall not molest any of His Majesty’s Subjects or their Dependants in their Settlements already made or Lawfully to be made.”<sup>170</sup> As discussed above, the British settlement in the region in 1726 was limited to the fort at Annapolis. Even after the founding of Halifax in 1749 the British had very little presence outside the two established forts. The Acadian presence was larger than it had been in 1713, though still confined to lands under agricultural development. By the terms of the treaty, then, any settlement to occur outside those settlements must have occurred ‘lawfully.’ As Professor Wicken has pointed out, though, the term ‘lawfully’ was not defined in the written versions of the treaty. Nonetheless, an analysis of both the broader British policy concerning the acquisition of Indian lands and the unique historical context of the treaties entered into by the Mi’kmaq, Maliseet, and Passamaquoddy provides clear sign posts.

The prevailing British policy in the 17<sup>th</sup> and 18<sup>th</sup> centuries was to purchase Indian lands before settling them.<sup>171</sup> This policy guided the contemplations of the treaty signatories in the

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was conceded by the Crown in *Sappier/Gray* and the Crown was estopped from arguing against the validity of the treaty of 1725-26 on the basis of issue estoppel in *R v Paul*, 2014 NBPC 44 at paras 15-20.

<sup>167</sup> For discussion and complete list of citations see, *infra* at 107 – 110.

<sup>168</sup> As Professor D.G. Bell stated, “[t]he familiar generalization that Nova Scotia treaties do not deal with land is overbroad.” D.G. Bell, “Was Amerindian Dispossession Lawful? The Response of 19<sup>th</sup> Century Maritime Intellectuals” (2000) 23 Dal LJ 168 at 174 [Bell, “Amerindian Dispossession”].

<sup>169</sup> As Professor Wicken argued, “Mi’kmaq concerns regarding future British settlement were addressed in the 1726 treaty.” Wicken, *Mi’kmaq Treaties*, *supra* note 116 at 127. For a thorough account of how the treaties recognize and protect land rights, see *Ibid*. For a substantial argument about how the treaties protect Aboriginal title, see Henderson, “Mi’kmaq Tenure”, *supra* note 150.

<sup>170</sup> Clark, Bruce D., Micmac Grand Council, Lisa Patterson, *The Mi’kmaq Treaty Handbook* (Truro: Native Communications Society of Nova Scotia, 1987) at 19 -20 [*Mi’kmaq Treaty Handbook*].

<sup>171</sup> Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge: Harvard University Press, 2005) at 22 – 28; Wicken, *Mi’kmaq Treaties*, *supra* note 116 at 115, 139; Dickason, *supra* note 59 at 107 – 108; In the United States the Supreme Court has reiterated this policy. In *Minnesota v. Hitchcock* (1902) 185 US at 373 -399, the court stated that “the Indian right of occupancy has always been considered sacred;

Maritime Provinces, a view supported not only by wording of the 1726 treaty, but also by the royal instructions to early colonial governors and the historical context of the treaties. An understanding of the 18<sup>th</sup> century treaties must be developed with reference to the earlier Abenaki treaties. Recalling that the Mi'kmaq, Maliseet, and Passamaquoddy were close allies of the Abenaki as members of the Wabanaki Confederacy, these earlier treaties, four of which were signed from 1678 -1713, provide valuable insights into how the parties would have approached later treaty negotiations.<sup>172</sup> The third clause in the 1726 *Articles of Peace and Agreement*, that which prohibited unlawful future settlements, was drawn explicitly from the earlier Abenaki treaties.<sup>173</sup> Those treaties clearly sought to restrict further settlement to areas agreed upon at the time the treaties were signed and considered purchase, or another form of explicit Aboriginal permission, to be the appropriate means through which the Crown could acquire land for further settlements.<sup>174</sup> Indeed, it was the encroachment of British settlement beyond the borders the Abenaki understood to be established by the treaties that led to the war of 1722 – 1725; as Professor Wicken stated, the “war was about land.”<sup>175</sup> The Mi'kmaq and Maliseet joined the Abenaki as allies against the British in this conflict, which eventually gave rise to the treaty negotiations of 1725.<sup>176</sup> The 1726 treaty, then, was the product of long-standing disputes over British settlement.

The perspective of the Aboriginal negotiators on the issue of settlement was made clear when peace was negotiated in July of 1725. The Penobscot delegates rejected the British claim to

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something not to be taken from him except by his consent and then upon such consideration as should be agreed upon.”

<sup>172</sup> John G. Reid, *Essays On Northeast North America: Seventeenth and Eighteenth Centuries* (Toronto: University of Toronto Press, 2008) at 155. Professor Wicken argues that “[t]he experience of the Abenaki would have been central to how Mi'kmaq leaders understood British policies.”: Wicken, *Mi'kmaq Treaties*, *supra* note 116 at 128.

<sup>173</sup> The 1713 Treaty, for example, to which the Maliseet were signatories, clearly conceived of two types of land, those already under British settlement, and the Indian lands outside those settlements. It stated in part: “That her Majesty’s Subjects, the English, shall & may peaceably & quietly enter upon, improve, & forever enjoy, all and singular their Rights of Land & former Settlements, Properties, & possessions, within the Eastern Parts of the said Provinces of the Massachusetts Bay and New Hampshire, together with all the Islands, Islets, Shoars, Beaches, & Fisheries within the same, without any molestation or claims by us or any other Indians, And be in no ways molested, interrupted, or disturbed therein. Saving unto the said Indians their own Grounds, and free liberty for Hunting, Fishing, Fowling, and all other their Lawful Liberties & Privileges.” W. Daugherty, *Maritime Indian Treaties in Historical Perspective*, Indian and Northern Affairs Canada, Research Branch , 2d ed, Ottawa 1983 at 70 – 71.

<sup>174</sup> The war of 1722 – 1725 was a result of “the British intent to enclose lands and Abenaki attempts to mark the limits of English settlement.” Wicken, *Mi'kmaq Treaties*, *supra* note 116 at 74.

<sup>175</sup> *Ibid.* at 87.

<sup>176</sup> *Ibid.* at 79; See also Prins, *supra* note 157 at 137 – 140.

dominion over their lands and, further, rejected the British claim to be ‘master’ of the lands they had purchased.<sup>177</sup> This later claim is particularly notable, as it suggests that, far from accepting British sovereignty, the Aboriginal delegates viewed themselves as maintaining sovereignty even over lands purchased and settled on by the British.<sup>178</sup> That the delegates believed their consent to be required for British settlement to occur is further evidenced by the response of Penobscot delegate Loron Sagourrab to the British request that he acknowledge the fighting of 1722 – 1725 to have been the fault of the Abenaki. Sagourrab stated simply that he had not come to the negotiations to ask pardon, make submission, or receive commands, but rather to hear propositions for a settlement the British hoped to establish.<sup>179</sup> In other words, the delegates believed that future British settlement was something that had to be negotiated and receive their approval. The delegates rejected the notion that they had submitted to the authority of the King of England; Sagourrab stated: “I recognize him King of all his lands, but... do not hence infer that I acknowledge thy King as my King, and King of my lands.”<sup>180</sup> In Professor Wicken’s view, “[i]t was the British claim to their lands that the Abenaki found most puzzling.”<sup>181</sup>

The perspectives of the delegates at the July 1725 peace conference shed light on the prevailing Aboriginal perspective held by the individual Mi’kmaq, Maliseet, and Passamaquoddy communities tasked with ratifying the subsequent treaty. That treaty, on which negotiations began in Boston on November 11<sup>th</sup> of 1725, was again negotiated by delegates of the Abenaki,

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<sup>177</sup> Wicken, *Mi’kmaq Treaties*, *supra* note 116 at 84. Negotiations began in Boston in mid-July of 1725 with a cessation of arms being announced on July 31<sup>st</sup>. The Mi’kmaq and Maliseet were represented at the July 1725 conference by two Penobscot delegates, Loron Sagourrab and John Ehennekouit, while the British were represented by the Lieutenant-Governor of Massachusetts William Dummer. The treaty would later be ratified by individual communities: *Ibid.* at 83.

<sup>178</sup> This reflects the early Mi’kmaq view of Acadian settlement, in which they considered the Acadians to have a usufructuary right only. Dickason, *supra* note 57 at 108. It also speaks to one of the essential grounds of the treaty. Through the treaty, the British were attempting to get Aboriginal support for the treaty of Utrecht by recognizing the British acquisition of sovereignty.

<sup>179</sup> Wicken, *Mi’kmaq Treaties*, *supra* note 116 at 84.

<sup>180</sup> *Ibid.* For Loron Sagourrab’s full statement see Colin G. Calloway, ed., *The World Turned Upside Down: Indian Voices From Early America*. (Boston: Bedford/St. Martin’s, 1994) at 92 – 94.

<sup>181</sup> Wicken, *Mi’kmaq Treaties*, *supra* note 116 at 85. The British account of the July peace conference differed and it seems that the parties left the conference with differing interpretation of their agreement. The Aboriginal delegates’ views, expressed above, differed from the British account, recorded in English, which stated that the Abenaki had assumed responsibility for the war, submitted to the authority of the English King, promised to honour previous purchases of Abenaki lands, and agreed that disputes between the “Indians and Englishmen” would be settled by British law. The perspective of the Aboriginal delegates discussed above was a view expressed by them some six months later, recounting what had transpired and rejecting that British interpretation. As Professor Wicken has pointed out, the later reliance on the written British copy of the text to “demonstrate that the Penobscot had recognized New England’s title to the lands along the Kennebec [River]” was “a good example of how British officials used a written text to enforce agreements that emphasized their own understanding at the expense of native people’s understanding.”



Penobscot, Maliseet, and Mi'kmaq along with representatives from both Massachusetts and Nova Scotia.<sup>182</sup> Two treaties were signed on December 15 of 1725, one between the Mi'kmaq, Maliseet, and Nova Scotia, the other between the Abenaki, Penobscot, New Hampshire and Massachusetts. Together, these formed the basis of the relationship between the British colonies of north-eastern North America and the Aboriginal peoples of the region.<sup>183</sup>

The interpretation of the Penobscot delegates to the July peace conference underscores the perspective that the Aboriginal parties brought to the subsequent treaty. Like the Abenaki, the Mi'kmaq rejected the assumed British jurisdiction over their lands and asserted that settlement could only occur with their consent.<sup>184</sup> The Mi'kmaq rejected the British assertion that the right of the British to settle lands in Nova Scotia had been acquired from France, stating that the King of France never possessed such a right and that only they had the capacity to grant lands.<sup>185</sup> This returns us to the issue of whether the phrase “lawfully to be made” should be interpreted as meaning “having been purchased or otherwise ceded.” Though the British insisted that previous purchases be recognized and that they had jurisdiction over the entirety of the land in the colonies in question, they accepted the need to purchase lands or otherwise obtain Aboriginal consent before settling them. Thus, Massachusetts negotiators at the 1725 treaty conference stated, “[w]hen we come to Settle the Bounds We shall neither build or settle any where but within our own Bounds so settled, without your Consent” and further promised that “you shall certainly be paid for such Lands as you shall hereafter dispose of to the English.”<sup>186</sup>

British settlement was further restricted by another clause of the 1726 treaty. The treaty promised that the “Indians shall not be molested in their persons, Hunting, Fishing, Planting Grounds nor any other of their Lawfull Occasions.”<sup>187</sup> Lawful settlement under the treaty, then,

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<sup>182</sup> Ibid. at 85 – 86.

<sup>183</sup> Ibid.

<sup>184</sup> Ibid. at 128.

<sup>185</sup> Ibid. at 126 – 127.

<sup>186</sup> Ibid. at 128. As Professor Wicken has pointed, this clearly contemplates two types of land, that already settled by the British or that had been conceded to them (where future settlement may occur), and that outside “our own Bounds so settled” where settlement could only occur with consent and compensation.

<sup>187</sup> Clark, *Mi'kmaq Treaty Handbook*, *supra* note 170 at 19 - 20. The phrase “Lawfull Occasions” was addressed at length by Cain J. at the New Brunswick Provincial Court in the *Sappier* decision. Cain J. found that there were no judicial precedents for the interpretation of this clause, stating that “[t]he Court searched through all of the sources available to it but in vain. Neither the Crown nor the Defense referred the Court to any so it must conclude that there are none.”: *R v Sappier*, 2003 NBPC 2; [2003] NBJ No.25 at para 35. Cain J. went on to state that “[t]he definition of “Occasions” clearly means need and the Signatories to the Treaty of 1725 had a need to use the product of the forest to maintain their traditional way of living. It was not unlawful to cut and carry away wood from the forest in 1725, and therefore liberally construing the expression “Lawful Occasions” would vest in the Signatories that treaty

was not only contingent on Aboriginal consent, “[s]ettlements ‘lawfully to be made’ were those which did not infringe on the areas the Mi’kmaq used for hunting, fishing, and planting.”<sup>188</sup> That is, the treaty recognized that the lands used and occupied by the Mi’kmaq and Maliseet would bound future settlement. As Professor Wicken stated:

In the name of King George, Doucett acknowledged the right of the Mi’kmaq to the lands they used... the British accepted that at the same time as farmers were cultivating land and raising livestock, the Mi’kmaq would live as they had before on other parcels of land outside the British and Acadian settlements.<sup>189</sup>

This is particularly notable in light of the role that the division of hunting grounds played in both the Mi’kmaq social and political order and in the development of a clear sense of territoriality associated with those hunting grounds.

Further evidence that the British had come to accept the need to purchase lands before settling them in Nova Scotia and the broader region is evident from the wording of the royal commissions and instructions sent to early governors in the colony. A standard commission included a clause reading:

And we do hereby likewise give and grant unto you full power and authority, by and with the advice and consent of our said Council, to settle and agree with the inhabitants of our province and territories aforesaid, for such lands, tenements, and hereditaments, as now are, or hereafter shall be in our power to dispose of, and then to grant to any person or persons upon such terms, and under such moderate quit-rents, services, and acknowledgments, to be thereupon reserved unto us, as you, by and with the advice aforesaid, shall think fit.<sup>190</sup>

This clause, which was included in commissions to the early governors of Nova Scotia, is notable as it seems to direct the governor to purchase or otherwise acquire the consent of the Aboriginal inhabitants of the colony – to “settle and agree” with them - before granting the lands

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right.” Ibid. at 44, 47. This can be contrasted with the “taking up clause” of Treaty #3 which was the subject of the *Grassy Narrows* litigation. That clause reserved the right to hunt and fish throughout the territory covered by the treaty “excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada, or by any of the subjects thereof duly authorized therefor by the said Government”: *Grassy Narrows First Nation v Ontario (Natural Resources)*, 2014 SCC 48, at 11. The two clauses of the 1726 treaty I have examined here differ from this provision in two important ways. Rather than a “taking up” clause, the 1726 treaty mandates that future settlement be made lawfully. Second, the hunting and fishing rights are not subject to any exceptions but, rather, are guaranteed to be able to continue “as before.”

<sup>188</sup> Wicken, *Mi’kmaq Treaties*, *supra* note 116 at 127.

<sup>189</sup> Ibid.

<sup>190</sup> See Anthony Stokes, *A View of the Constitution of the British Colonies, in North America and the West Indies, at the Time the Civil War Broke Out on the Continent of America* (London: B. White, 1783) at 162.

to settlers.<sup>191</sup> As will be discussed, in Chapter 3, however, it is not entirely clear that “inhabitants” should uniformly be read to include Aboriginal peoples. If it is read to include Aboriginal peoples, this clause seems to incorporate the treaty provisions regarding the acquisition of land.

Both the broader historical context of early British colonial policy and the specific history of British treaties with the Wabanaki suggest strongly that the term “lawfully” in the 1726 treaty, when used to refer to future settlements, should be understood to mean purchased or otherwise ceded and should be read as creating a restriction on settlement that would adversely affect Aboriginal use and occupation of land for hunting, fishing, and other “lawfull occasions.”<sup>192</sup> As will be discussed in Chapter 3, this requirement should have a bearing on the issue of extinguishment of Aboriginal title in the Maritime Provinces, as the treaties created legally binding guidelines for the acquisition and settlement of Aboriginal lands, guidelines that, if not adhered to, would prevent the valid extinguishment of title by rendering any such purported extinguishment illegal. The issue here, though, is demonstrating the existence of title. Though the source of Aboriginal title is grounded in Aboriginal peoples’ prior occupation of the territory in question, the land provisions of the 1726 treaty recognize an Aboriginal interest in land by requiring that the Aboriginal interest be purchased or ceded before settlement could occur. A policy of acquiring the Aboriginal interest in land prior to settlement would clearly be inconsistent with a belief that they held no interest in the land. Further, provisions recognizing the right to continue to use and occupy lands other than those set aside for settlement also recognized an Aboriginal right to use and occupy the land. As with other treaty and Aboriginal rights, the treaties recognize, rather than create, Aboriginal title. Though this does not speak to the extent of title recognized by the treaties, it may be used as evidence of the existence of title at

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<sup>191</sup> As Sakéj Henderson stated, “[t]he 1749 Commission to Cornwallis, establishing the royal colony of Nova Scotia, renewed the 1719 order and provided for the preconditions of grants of land in fee simple to the colonialists. The first condition was that the Governor was conditionally “directed to make grants of such land in fee simple as are not already disposed of by his Majesty to any person that shall apply to you for the same. ’ Secondly, as a condition antecedent, the Commission required that before the Governor could grant any such land to English subjects, he had “by & with the advice and consent of our said Council to settle and agree with the Inhabitants of our Province for such Lands, Tenements, & hereditaments as now are or hereafter shall be in our power to dispose of. ’ Reading these provisions together, they confirm that the Mikmaq Nation were entitled to their reserved lands under their existing treaties with the Crown in 1726 until they were purchased by the Crown. This ‘settle and agree’ provision was an important condition antecedent, and an explicit constitutional limitation on the colonial Crown’s authority to establish these estates in Nova Scotia.” Henderson, “Mi’kmaw Tenure”, *supra* note 150, at 251. See also G. P. Gould and A.J. Semple, *Our Land: The Maritimes* (Fredericton: Saint Annes Point Press, 1980) at 13.

<sup>192</sup> Professor Wicken agrees on this point, though he argues that the British and Mi’kmaq did not have a shared understanding of what lawful settlement meant; see Wicken, *Mi’kmaq Treaties*, *supra* note 116 at 139 -140.

the time of the assertion of sovereignty and, further, places a legal restriction on the settlement of any Aboriginal lands after 1726. The treaties, and the negotiations leading up to them, should also be used to inform a future court's interpretation of the "Aboriginal perspective."

This interpretation is supported by the Supreme Court's holdings on treaty interpretation. In interpreting a treaty between the Crown and Aboriginal peoples, courts "must take into account the historical context and perception each party might have as to the nature of the undertaking contained in the document under consideration."<sup>193</sup> In interpreting the historical context of the treaty and the perceptions of the signatories, courts are required to give the treaty a "just, broad and liberal construction"<sup>194</sup> and resolve ambiguities and uncertainties "in favour of the Indians."<sup>195</sup> In *Sioui*, Lamer J approvingly cited decision of the United States Supreme Court in *Jones v. Meehan*,<sup>196</sup> where the Court held that a "treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."<sup>197</sup> In *Marshall # 1*, the Supreme Court confirmed that extrinsic evidence may be used in the interpretation of treaties even where there is no evident ambiguity in the treaty.<sup>198</sup> Crucially, the Court in *Marshall #1* held that "where a treaty was concluded verbally and afterwards written up by representatives of the Crown, it would be unconscionable for the Crown to ignore the oral terms while relying on the written terms."<sup>199</sup> The liberal approach to treaty interpretation is grounded in the presumption that the Crown took an honourable approach to treaty making such that a flexible interpretation must be applied, including the use of "context and implied terms to make honourable sense of the treaty arrangement" and the terms of the treaty.<sup>200</sup> In this context, the discussion provided above regarding the historical background of the treaties and the Aboriginal perspectives on their crucial clauses concerning settlement and land use suggest that a faithful application of the

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<sup>193</sup> *R v Sioui* [1990] 1 SCR 1025 at para 16 [*Sioui*].

<sup>194</sup> *Ibid.* at para 19.

<sup>195</sup> *Ibid.* at para 17.

<sup>196</sup> *Jones v. Meehan*, 175 U.S. 1 (1899).

<sup>197</sup> *Sioui*, *supra* note 193 at 19 citing *Jones*, *supra* note 196 at 10 -11. See also *R v Badger*, [1996] 1 SCR 771 at para 52; *Mikisew Cree First Nation v Canada (Minister of Natural Heritage)* [2005] 3 SCR 388 at para 29.

<sup>198</sup> *Marshall #1*, *supra* note 109 at paras 9 – 12.

<sup>199</sup> *Ibid.* at para 12. See also *Guerin v. The Queen* [1984] 2 SCR 335, at 388.

<sup>200</sup> *Marshall #1*, *supra* note 109 at para 14. It should be noted that this long line of precedent regarding treaty interpretation seems to have eluded the Supreme Court entirely in the *Grassy Narrows* decision, where the interpretation of Treaty 3 proceeded without any mention of the historical context in which it was signed, the understanding of the signatories, or, indeed, any of the long list of authorities on the issue (only some of which are mentioned above) See *Grassy Narrows*, *supra* note 187 at 38 – 40.

Supreme Court's clear jurisprudence on treaty interpretation indicates that the treaties should be interpreted as both recognizing and providing a range of protection to the Aboriginal interest in land.

This was the position taken by Turnbull J. at the New Brunswick Court of Queen's Bench in the *Thomas Peter Paul* decision.<sup>201</sup> Here, Mr. Peter Paul, a New Brunswick Mi'kmaq, was charged with illegally removing logs from Crown lands without a license. The defense argued that Mr. Peter Paul had a treaty right to harvest timber from Crown lands and, as such, did not require a license to do so. The *Crown Lands and Forests Act*<sup>202</sup>, the defence argued, could not prevent Mr. Peter Paul from exercising his constitutionally protected treaty right to harvest timber. At the trial level Justice Arsenault agreed with the defence, acquitting Mr. Peter Paul of the charges and holding that the treaty of 1726 protected the right to harvest timber for commercial purposes on a small scale. Such activity, Arsenault J. held, was a "lawfull occasion" as described in the treaty. On appeal at the Court of Queen's Bench, Turnbull J. went further. While he agreed with Arsenault J's conclusion that the defendant should be acquitted, Turnbull J. held that an acquittal was justified not on the basis that the treaty of 1726 protected a right to harvest lumber off Crown land, but because the treaty protected a right to the land itself. He stated:

I am of the opinion that the Indians of New Brunswick do have land rights and that such are treaty rights. I believe it is like a usufructuary right. It does not matter what such rights are called. It is not a right restricted to personal use, but a full blown right of beneficial ownership and possession in keeping with the concept of this is our land - that is your land.<sup>203</sup>

Put otherwise, on Turnbull J's interpretation the treaty of 1726 clearly distinguished between Aboriginal and non-Aboriginal lands and was designed to protect the Aboriginal interest in those lands. As he stated, "[g]overnments must accept that Dummer's Treaty was understood to protect Indian land."<sup>204</sup> Further, while stating that the Aboriginal interest was "like a usufructuary right," Turnbull J. clearly distinguished the type of interest he had in mind from a *merely* usufructuary right, holding that the Aboriginal interest encompassed both beneficial ownership and a right of possession. This view is commensurate with that described above where it was argued that the treaty of 1726 recognized, affirmed, and protected Aboriginal title. Given that Turnbull J. did not

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<sup>201</sup> *R v Peter Paul* [1997] NBJ 439, 153 DLR (4<sup>th</sup>) 131 [*Peter Paul*].

<sup>202</sup> *Crown Lands and Forests Act* NB

<sup>203</sup> *Peter Paul*, *supra* note 201 at para 69.

<sup>204</sup> *Ibid.* at para 71.

call into question British sovereignty itself, it seems clear that he believed that the British assertion of sovereignty “did not affect the existence of aboriginal title in the Province, other than to give the Crown an underlying title to the soil.”<sup>205</sup>

On appeal, however, Turnbull J. was overturned. The New Brunswick Court of Appeal held that the 1726 Treaty “does not create or acknowledge and aboriginal title to land. Indeed, by it Mr. Peter Paul’s ancestors acknowledge not only the Crown’s jurisdiction and dominion over the lands, but also the Crown’s title and rightful possession to the lands.”<sup>206</sup> For reasons that have been detailed above, this conclusion does not appear to be consonant with the intention of either the British or Aboriginal signatories to the treaty. While the Court of Appeal properly identified the Supreme Court’s guidelines concerning treaty interpretation discussed above, it held that there was insufficient evidence tendered at trial to conclusively resolve the ambiguities in the terms of the treaty.<sup>207</sup> Thus, the Court of Appeal overturned both Turnbull J.’s ambitious decision and the more reserved decision of the trial court recognizing a treaty right to harvest timber commercially on a small scale.<sup>208</sup> While the Court of Appeal dismissed Turnbull J.’s findings regarding treaty protected Aboriginal land rights in New Brunswick, they rebuked his decision much more forcefully on other grounds. The Court of Appeal held that Turnbull J. had taken judicial notice of disputed historical facts well beyond the permissible scope of such notice, had decided a matter that had not been argued before the court, had relied on his own external research rather than the evidence put properly before the court, and had decided points of law on which neither party to the case had been given the opportunity to make representations to the court.<sup>209</sup> In the result, the Court of Appeal stated that the case had “evolved from an alleged regulatory violation at trial to...a land claim to the entire Province by the status Indians of New Brunswick.”<sup>210</sup> Thus, there is good reason to treat the decision of the Court of Appeal with some skepticism. While the Court did clearly reject Turnbull J.’s findings regarding a treaty protected

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<sup>205</sup> Slattery, “Some Thoughts on Aboriginal Title,” *supra* note 44 at 36

<sup>206</sup> *The Queen v Paul* (22 April 1998), Fredericton 264/97 (NB CA); 1998 CanLII 12246 (NB CA) at 16 [*Queen v Paul*].

<sup>207</sup> *Ibid.* at 20.

<sup>208</sup> *Ibid.* at 26.

<sup>209</sup> *Ibid.* at 4, 8 – 14. At page 14 the Court of Appeal stated that “Turnbull, J. erred in not only relying on his exclusive post-argument historical research, research that formed the basis for his decision that Mr. Peter Paul could rely on aboriginal title as a defence, but also by using such research, particularly without giving the parties the right to respond.”

<sup>210</sup> *Ibid.* at 7. Interestingly, the Court of Appeal itself also came to a conclusion on a matter other than that put to the trial court, holding that “Mr. Peter Paul’s claim is thus best characterized as an aboriginal right to harvest and sell timber” (*Ibid.* at 24) and finding that no evidence had been produced which satisfied the *Van der Peet* test.

right to land, it did so largely on procedural and technical grounds. The Court of Appeal's analysis of the substantive issue of treaty protected land rights was cursory and relied on an evidentiary record put forward to argue a separate matter (the Court having stated that Turnbull J. relied on external materials which they could not consider). The question of whether the peace and friendship treaties protect an Aboriginal right to land should be properly argued before a court with the assistance of a complete evidentiary record. As argued above, there is good reason to believe that a court may decide such a case differently if the matter were properly pleaded on the basis of a more complete evidentiary record.

### **E. Summary**

There is good reason to assume that Aboriginal title can be proven to have existed in the Maritime Provinces. Though the exact parameters of that title are subject to future research, the historical record clearly indicates that there had been very little displacement of Aboriginal peoples by European settlement at the dates of the British assertion of sovereignty. Knowing that the Mi'kmaq, Maliseet, and Passamaquoddy peoples were living in the region, governing it through their indigenous legal, social, political, and economic structures, it is clear that the degree of occupation required by the Supreme Court to establish title can be evidenced somewhere. Further, the Supreme Court's explicit embrace of the territorial conception of title expands the geographical range over which title is likely to be found. Additionally, the treaties should be relied on not only as evidence that title was not ceded, but also as evidence of recognition by the British of Mi'kmaw title and as a body of law governing future dealings concerning Aboriginal lands. Having established that title is very likely to have existed in the Maritime Provinces, the remainder of this paper will focus on the question of extinguishment.

## 2. Modes of Extinguishment: Voluntary Surrender and Unilateral Legislation

Assuming, for the reasons outlined above, that Aboriginal title can be demonstrated to have existed in the Maritime Provinces, the central question becomes one of extinguishment; that is, where Aboriginal title can be proven to have existed, has it been legally extinguished? This chapter outlines the ways in which Aboriginal title was capable of being extinguished in both the pre-confederation and post-confederation eras. Having articulated the legal framework governing extinguishment, subsequent chapters will provide an assessment of instances of possible extinguishment in the Maritime Provinces with the aim of assessing whether unextinguished Aboriginal title continues to exist in the region.

Historically, extinguishment of Aboriginal rights and title could occur in two ways at common law: by voluntary surrender or unilaterally through legislation.<sup>1</sup> Since Aboriginal rights received constitutional protection in 1982, they are no longer extinguishable through unilateral legislation and any infringement of such rights must be justified pursuant to the standards established by the Supreme Court.<sup>2</sup> Accordingly, voluntary surrender is now the only means by which title may be extinguished. As McLachin CJ stated in *Marshall/Bernard*:

The common law theory underlying recognition of aboriginal title holds that an aboriginal group which occupied land at the time of European sovereignty and never ceded or otherwise lost its right to that land, continues to enjoy title to it. Prior to constitutionalization of aboriginal rights in 1982, aboriginal title could be extinguished by clear legislative act (see *Van der Peet*, at para. 125). Now that is not possible.<sup>3</sup>

This extinguishment framework is derived from both the common law and the constitutionalization of Aboriginal rights. The source of Aboriginal title is Aboriginal people's

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<sup>1</sup> *R v Van der Peet* [1996] 2 SCR 507 at para 110: "the early practices of the British recognized aboriginal title or rights and required their extinguishment by cession, conquest or legislation." [*Van der Peet*]. See also *R v Sparrow* [1990] 1 SCR 1075 at paras 35-37 [*Sparrow*]; *Mitchell v MNR* [2001] 1 SCR 911 at para 11 [*Mitchell*].

<sup>2</sup> *Van der Peet*, *supra* note 1 at para 28. See also *Mitchell*, *supra* note 1 at para 11 where McLachlin CJ stated that "[t]he common law status of Aboriginal rights rendered them vulnerable to unilateral extinguishment, and thus they were "dependent upon the good will of the Sovereign": see *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 (P.C.), at p. 54. This situation changed in 1982, when Canada's constitution was amended to entrench existing Aboriginal and treaty rights."

<sup>3</sup> *R v Marshall; R v Bernard*, [2005] 2 SCR 220 at para 39 [*Marshall; Bernard*].



prior occupation of the land.<sup>4</sup> Aboriginal rights, including title, survived the assertions of sovereignty of colonizing European powers and, as such, continue to exist until they are legally extinguished. Thus, the “existing Aboriginal and treaty rights” recognized and affirmed under s.35(1) are those which had not been extinguished prior to April 17, 1982. As Professor Slattery explains:

...the phrase "existing aboriginal and treaty rights" does not cover rights extinguished by legislation or other acts before the commencement date. In principle, then, no conflict can arise between rights "existing" on that date and acts passed before then, because the former are defined and limited by the latter. The real problem is determining whether an act passed before the commencement date actually extinguished the right in question.<sup>5</sup>

Assessing whether a given right has been extinguished, then, requires an analysis of whether the right has been voluntarily surrendered or unilaterally extinguished by legislation prior to 1982. Prior to 1982, extinguishing Aboriginal title by unilateral legislation required that two criteria be met: the legislative body must have been competent to legislate in respect of both common law property rights and Aboriginal lands - that is, the legislation must not have been *ultra vires* the legislative body which enacted it - and the legislation in question must not have been repugnant to higher order constitutional laws or principles by which the legislative body was bound.<sup>6</sup> Though title can no longer be extinguished through unilateral extinguishment, these principles remain fundamental in assessing the historical dispossession of Aboriginal lands and determining the continued existence of Aboriginal title.<sup>7</sup> In the context of this paper, this mode of extinguishment will be of central significance. Should legislation be found which meets these criteria, a further common law requirement stipulates that the intention to extinguish rights must have been “clear and plain.”

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<sup>4</sup> *Calder v. British Columbia (A.G.)*, [1973] SCR 313 at 328 [*Calder*]; *Guerin Guerin v. The Queen* [1984] 2 SCR 335 at 376 [*Guerin*]; *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at paras 114, 126 [*Delgamuukw*].

<sup>5</sup> Brian Slattery, “The Hidden Constitution: Aboriginal Rights in Canada” (1984) 32:2 *The American Journal of Comparative Law* 361 at 385 [*Slattery*, “Hidden Constitution”]. See also *Sparrow*, *supra* note 1 at para 23 where Lamer CJ and LaForest J stated that “[t]he word “existing” makes it clear that the rights to which s. 35(1) applies are those that were in existence when the Constitution Act, 1982 came into effect. This means that extinguished rights are not revived by the Constitution Act, 1982. A number of courts have taken the position that “existing” means being in actuality in 1982.”

<sup>6</sup> Framing this as an issue of competence and repugnancy was adopted from Bruce Clark’s argument in *Native Liberty, Crown Sovereignty*. See Bruce Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (McGill-Queen’s University Press: Montreal & Kingston, 1990) at 71 [Clark, *Native Liberty, Crown Sovereignty*].

<sup>7</sup> As described above, existing Aboriginal rights in s.35(1) are rights that were not extinguished prior to s.35 coming into force: *Sparrow*, *supra* note 1 at 1090.

## A. Voluntary Surrender

The practice of acquiring the Aboriginal interest in land prior to settlement, be it by purchase or cession, dates to the earliest days of British colonization.<sup>8</sup> The ability of Aboriginal peoples to voluntarily enter into agreements with the Crown that have the effect of extinguishing title has never been questioned; rather, “[i]t has always been considered possible for a native people to cede aboriginal lands to the Crown by treaty, and this historical practice is reflected in the wording of sec. 35(1).”<sup>9</sup> This policy was given legal force in the Royal Proclamation, 1763, which “laid down a uniform legal regime governing native title, whereby native groups were recognized as holding communal rights to their unceded lands, subject only to a restriction of alienation.”<sup>10</sup> As Professor Slattery stated, “[t]he Proclamation of 1763 has a profound significance for modern Canada. Under its terms, aboriginal peoples held continuing rights to their lands except where these rights have been extinguished by voluntary cession.”<sup>11</sup> In other words, the Proclamation not only established legal parameters for acquiring Aboriginal lands, it also confirmed that Aboriginal land rights were communally held, continued to exist where they had not been extinguished, and that they could, from that point on, be extinguished only by voluntary surrender to the Crown.<sup>12</sup>

Following the Royal Proclamation, Aboriginal title could not be extinguished by transfer to any party other than the Crown, owing to the general inalienability of Aboriginal lands to any party other than the Crown; that is, transfers of land to parties other than the Crown could not be

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<sup>8</sup> Banner, Stuart. *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge: Harvard University Press, 2005) at 48; Dickason, Olive Patricia. *Canada's First Nations: A History of Founding Peoples From Earliest Times* (Toronto: McClelland & Stewart, 1992) at 109.

<sup>9</sup> Slattery, “Hidden Constitution”, *supra* note 5 at 387.

<sup>10</sup> *Ibid.* at 373. The necessity to clear Aboriginal title by treaty has long been recognized as a legal imperative. See for example the description of the signing of the numbered treaties as a “legal imperative” from the Crown perspective in James Daschuk, *Clearing the Plains: Disease, Politics of Starvation, and the Loss of Aboriginal Life* (Regina: University of Regina Press, 2013) at 79.

<sup>11</sup> Slattery, “Hidden Constitution”, *supra* note 5 at 372. It is also important to note that the Proclamation should not be read as a product of Crown benevolence. Eric Kades, for example, has pointed out that one function of prohibiting alienation to parties other than the Crown was to create a monopsony in favour of the Crown. See Eric Kades, “History and Interpretation of the Great Case of Johnson v. M<sup>3</sup>Intosh” (2001) 19:1 Law and History Review 67 at 111-112.

<sup>12</sup> As such, the Proclamation recognized, rather than created, Aboriginal title. See *Guerin*, *supra* note 3 at 379. The authority to legislatively extinguish title could not have existed until such time as the jurisdiction of the Imperial Parliament was extended over the lands in question through the acquisition of sovereignty. In the Maritime Provinces, then, the possibility of legislative extinguishment pre-dated the Proclamation.

made legally and, therefore, could not have had the effect of validly extinguishing title.<sup>13</sup> The prohibition on alienation derived from the Royal Proclamation remained in force post-confederation until the *Statute of Westminster* in 1931 and restrictions on alienability of Indian reserve lands have been incorporated into the *Indian Act*.<sup>14</sup> In *Chippewas of Sarnia*, the Ontario Court of Appeal held that the legal framework established by the Royal Proclamation, in particular the prohibitions on alienation and the procedural requirements governing the acquisition of Aboriginal lands, were and are a part of the common law and exist independently of the Proclamation.<sup>15</sup>

As Professor McNeil has pointed out, however, this framework governing the voluntary surrender of lands fails to take into account the fact that an absolute surrender of title may not have been permissible under given indigenous legal regimes.<sup>16</sup> McNeil argues that “where the law of an Aboriginal nation prohibits an absolute transfer of that nation's title, voluntary extinguishment by treaty or land claims agreement would not be possible.”<sup>17</sup> This can be construed in two ways. First, it could be presumed that Aboriginal nations have acted in a manner that does not violate their own laws. This presumption should not be read so as to minimize Aboriginal agency or capacity to surrender lands and enter into meaningful treaty negotiations. Rather, it should be used as an interpretive tool in resolving ambiguities and interpreting historical context where surrenders are relied on as evidence of extinguishment. On this view, evidence of historical surrenders would be assessed first with reference to the prevailing indigenous laws governing such surrenders. Should that law be found to prohibit such surrenders, that finding would colour the interpretation of the evidence relied on to demonstrate the validity of the surrender.<sup>18</sup> Second, the Supreme Court has been clear in stating that the nature of Aboriginal title itself is shaped in part by the “Aboriginal perspective.”<sup>19</sup> Incorporation

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<sup>13</sup> Kent McNeil, “Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, Jurisprudence” (2002) 33 Ottawa LR 301 (QL) at 3 [McNeil, “Extinguishment of Aboriginal Title”].

<sup>14</sup> On inalienability Kent McNeil, “Self-Government and the Inalienability of Aboriginal Title” (2002) 47 McGill L J 473.

<sup>15</sup> *Chippewas of Sarnia Band v Canada (Attorney General)*, [2000] OJ No. 4804; 51 OR (3d) 641 at paras 195 – 99. Inalienability has also been recognized as a characteristic of Aboriginal title quite apart from the Royal Proclamation: see *Delgamuukw*, *supra* note 4 at para 113; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 74. Inalienability except to the Crown was also given statutory force in respect of Indian reserve lands in the *Indian Act* (RSC, 1985, c-I-5) ss.37 – 39.

<sup>16</sup> McNeil, “Extinguishment of Aboriginal Title”, *supra* note 13 at 4

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.* at 5.

<sup>19</sup> *Delgamuukw*, *supra* note 4 at paras 82-83, 112, 147-149.

of the Aboriginal perspective requires that courts interpret historical facts in a manner that does not unfairly prejudice Aboriginal claimants (e.g. looking to the carrying capacity of territory in interpreting what population numbers say about the intensity of land use).<sup>20</sup> Further, it requires that Aboriginal laws and legal traditions be taken into consideration. The incorporation of the Aboriginal perspective bears not only on the evidentiary standard for establishing title, but also on the very nature of the title interest itself. As Lamer CJ stated in *Delgamuukw*, Aboriginal title is “*sui generis* in the sense that its 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.”<sup>21</sup> That is, the characteristics of the interest protected by Aboriginal title are shaped in part by Aboriginal legal systems. At a practical level, then, a prohibition on the absolute surrender of title under indigenous law would preclude such a surrender if the Aboriginal party was assumed to be acting in accordance their own law and would provide an important interpretive lens through which to assess purported surrenders of land. At a theoretical level, the nature of the proprietary interest itself would prohibit an absolute surrender.<sup>22</sup> In this scenario, the Aboriginal interest in land could not be subject to extinguishment by surrender once it had “crystallized” at the date of the assertion of British sovereignty as the nature of the interest itself would be inimical to such extinguishment. These considerations aside, voluntary surrender is one mode of possible extinguishment of Aboriginal title. The other is unilateral legislative extinguishment prior to 1982.

## **B. Legislative Competence**

At British and Canadian law, the powers of government are divided between executive, legislative, and judicial branches.<sup>23</sup> In assessing whether a given act of government was competently carried out, the range of powers belonging to each branch must be clearly identified. Competence must be assessed both in terms of distinct branches of government (i.e. legislative

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<sup>20</sup> Ibid. See also *Tsilhqot'in Nation*, *supra* note 15 at para 35-38; *Marshall/Bernard*, *supra* note 3 at paras 45-48.

<sup>21</sup> *Delgamuukw*, *supra* note 4 at para 112.

<sup>22</sup> For more discussion see, Sakéj Handerson, “Mi’kmaw tenure in Atlantic Canada” (1995) 18 Dalhousie LJ 196 at 216 – 236 [“Mi’kmaw Tenure”].

<sup>23</sup> Sir John G. Bourinot, *Canada Under British Rule 1760 – 1900* (London: C.J. Clay & Sons, 1900) at 5 [Bourinot, *British Rule*]. Hereafter, I will use the phrase “division of powers” to refer to the division of legislative powers in a federal system and the phrase “separation of powers” to refer to the separation between the executive, legislative and judicial branches.

and executive), and in terms of distinct governments operating within the same overarching constitutional framework. As Lamer C.J. stated in *Delgamuukw*, “[i]n a federal system such as Canada’s, the need to determine whether aboriginal rights have been extinguished raises the question of which level of government has jurisdiction to do so.”<sup>24</sup> In the context of the historical extinguishment of title, this analysis requires an assessment not only of federal and provincial jurisdiction, but also of colonial and imperial jurisdiction.<sup>25</sup> At the outset, it must be noted that the relationship between the imperial and colonial governments changed considerably over time - what was true when peninsular Nova Scotia came under British Sovereignty in 1713 had changed considerably by the time Nova Scotia’s first assembly was called in 1758, again a century later when the province had achieved responsible government, and, shortly thereafter, the terrain shifted again with Nova Scotia joining the Dominion of Canada at confederation. The principles identified during one period do not necessarily carry over to another. While the most important distinction is between pre- and post-confederation periods, significant changes also occurred within each of those eras. During the pre-confederation era the gradual move to responsible government in the colonies saw their law-making authority increase.<sup>26</sup> In the post-confederation era, Canadian independence from imperial influence was gained slowly. As such, caution must be taken not to speak of the powers of a given level of government in too sweeping a manner, as the law sees considerable flux over the course of several centuries. When and how that change occurred is an important part of understanding the nature of the powers themselves and, while I will confine myself for the most part to the period relevant to this study (sovereignty until the present), I will supplement this with additional context where appropriate.

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<sup>24</sup> *Delgamuukw*, *supra* note 4 at para 172.

<sup>25</sup> A note on terminology. The relationship between the imperial and colonial governments was directed by a well developed body of law, at times referred to as “colonial law” (distinct from the law developed in the colonies and meant to denote law about colonial governance) or “imperial law” meant to denote the law of the empire. Professor Mark Walters, adopting the term “imperial law” states that: “There were both legislative and non-legislative sources of imperial law. Legislative sources included statutes of the English (later British) Parliament and, in certain cases, instruments issued under the royal prerogative and passed under either the Great Seal (like proclamations, orders-in-council, commissions, and letters patent) or the royal sign manual and signet (like royal instructions to colonial governors).” Mark D. Walters, “Mohegan Indians v. Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America” (1995) 33 Osgoode Hall LJ 785 (QL) at para 6 [Walters, “Mohegan Indians”]. I will follow Professor Walters in using the term “imperial law” to refer to that body of law, drawn from – or given expression though - the diverse range of sources he identifies, that governed the relationship between the imperial government and the colonies. Colonial law, in turn, will be used to refer to laws developed in the colonies themselves.

<sup>26</sup> Arthur Berriedale Keith, *Responsible Government in the Dominions*, (Oxford: Clarendon, 1912) at 2-6.

## I. Executive and Legislative Authority

Law-making is an activity constitutionally assigned to elected legislatures or bodies acting upon authority delegated by such a legislature. Executive authority, by contrast, is typically political or administrative in nature and has its source of authority in statute or royal prerogative.<sup>27</sup> Put otherwise, “[t]he executive power carries out and enforces the law of the land by the machinery which that law affords,” while “[t]he legislative power makes law and alters it.”<sup>28</sup> The importance of the distinction between executive and legislative authority derives from the different scope of authority that inheres in each branch of government. In respect of property rights, it is foundational to the British and Canadian systems of constitutional law and parliamentary governance that such rights can be extinguished or infringed only under the auspices of explicit legislative authority.<sup>29</sup> Thus, property cannot be taken by the exercise of prerogative power except if authorized by statute or during wartime and, even then, compensation is required.<sup>30</sup> Private property has been protected from “executive taking” since at least 1215 when the Magna Carta placed a prohibition on the taking of land by the executive branch.<sup>31</sup> Proprietary interests in land can only be extinguished by lawful authority. Unless

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<sup>27</sup> Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown and the Relative Rights and Duties of the Subject* (London: Butterworth and Son, 1820) at 2; John Locke & J.W. Gough, ed, *The Second Treatise of Government and a Letter Concerning Toleration* (London: A.R. Mowbry & Co., 1948) at 66 – 74; Christopher Vincenzi, *Crown Powers, Subjects and Citizens* (London: Pinter, 1998) at 7.

<sup>28</sup> Bourinot, *British Rule*, *supra* note 23 at 5.

<sup>29</sup> The Crown could acquire land for the purposes of defence of the realm, but even then compensation needed to be paid: *Attorney-General v De Keyser's Royal Hotel Limited* [1920] AC 508 at 519 [*De Keyser's*]; Henry Winthrop Ballantine, *Blackstone's Commentaries* (Chicago: Blackstone Institute, 1915) at 466. As Professor McNeil stated “legal rights [including property rights] can only be infringed or taken away by or pursuant to unequivocal legislation.” McNeil, “Extinguishment of Aboriginal Title”, *supra* note 13 at 9.

<sup>30</sup> See *De Keyser's*, *supra* note 29 where the Court stated that “the Crown is not entitled in virtue of its ancient prerogative apart from statute to take the land of a subject compulsorily.” See also *Burmah Oil Company (Burma Trading) Ltd v. Lord Advocate* [1965] AC 75 at 79, 83 [*Burmah Oil*], where the Court stated that “[t]he prerogative right of the state to take the citizen's property is founded on necessity” and that there is no common law case “suggesting the existence of a prerogative right to seize or destroy the subject's property without compensation” even where property is damaged at a time of war.

<sup>31</sup> Article 39 of the Magna Carta reads in part: “No freeman shall be taken or imprisoned, or disseised... unless by the lawful judgement of his peers, or by the law of the land.” See Mabel Hill & Albert Bushnell Hart. *Liberty Documents: With Contemporary Exposition and Critical Comments Drawn From Various Writers* (Cambridge: John Wilson and Son, 1901), at 18. Similarly, the *Liberty of Subject Act*, 1354 reads in part: “no man of what estate or condition that he be, should be put out of his lands or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought to answer by due process of law.” (28 Edw. 3) CAP III. Both of these provisions were included in the 1628 Petition of Right. Article IV of the Petition restated the provisions of the aforementioned Act verbatim, explicitly incorporating the Act. Article III of the same Petition incorporated the provision of the Magna Carta quoted above, stating: “And where also by the statute called, 'The Great Charter of the Liberties of England,' [the Magna Carta] it is declared and enacted, that no free- man may be taken or imprisoned or be disseised

expressly granted by the legislative branch, the executive does not possess such authority.<sup>32</sup> Conversely, there is no inherent limit on the authority of the legislative branch to interfere with property.<sup>33</sup> In the British and Canadian traditions, this authority can be legislatively delegated to the executive or any other subordinate body.

Courts have relied on principles of statutory interpretation to establish a degree of judicial oversight over this process, requiring a “clear legislative intent” to legally effectuate the extinguishment property rights.<sup>34</sup> Further, ambiguities will be interpreted as favouring property owners, and courts will look for compensation to be provided wherever land is taken pursuant to legislative authority - unless compensation is expressly limited by the legislation itself.<sup>35</sup> Courts have been consistent in stating that the executive branch cannot extinguish property rights in the absence of clear and plain legislation permitting such an action.<sup>36</sup> Before any of the characteristics unique to *Aboriginal* title are considered, this should be the basic level of protection afforded to Aboriginal title lands.<sup>37</sup> That is, any protections that Aboriginal title receives pursuant to its status as an Aboriginal right should be considered in addition to the protections it receives as a common law property right. Conceptual clarity in this respect is

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of his freehold or liberties, or his free customs, or be outlawed or exiled, or in any manner destroyed, but by the lawful judgment of his peers, or by the law of the land.” See *The 1628 Petition of Right* (3 Charles I) C. I. reprinted in Hill & Hart, at 67 – 71. Confirming the longstanding nature of these rights (or liberties) following the signing of the 1628 Petition, Charles I stated, “it must needs be conceived I granted no new, but only confirmed the ancient liberties of my subjects.” Charles First’s Speech at the Prorogation of Parliament, June 26<sup>th</sup>, 1628. See *Ibid.* at 72. For a discussion of how British statutes from the 14<sup>th</sup> – 17<sup>th</sup> centuries renewed and expanded upon the Magna Carta and the Magna Carta’s longstanding effect on the constitutional discourse in England and the American colonies see A.E. Dick Howard, *The Road From Runnymede: Magna Carta and Constitutionalism in America*. (Charlottesville: The University Press of Virginia, 1968).

<sup>32</sup> McNeil, “Extinguishment of Aboriginal Title”, *supra* note 13 at 9. The history of the division of powers between the Crown and the Parliament should not be oversimplified. For an account of the tensions between the Crown and Parliament during the Stuart reign, which ultimately resulted in the recognition of the supremacy of parliament, see C. Gordon Post. *Significant Cases in British Constitutional Law* (New York: The Liberal Arts Press, 1957) at xii. For a full account of the powers of Parliament, see Thomas Erskine. *The Constitutional Law of England Since the Accession of George the Third* (London: Longmans, Green and Co., 1912) esp. at 9-12, 57-70.

<sup>33</sup> *Burmah Oil*, *supra* note 30 at 80. The court stated that “there is no question of the supremacy of Parliament authorizing a taking without compensation.”

<sup>34</sup> *Sparrow*, *supra* note 1 at 1097.

<sup>35</sup> *Newcastle Breweries Limited v. The King* [1920] 1 K.B. 854 at 856.

<sup>36</sup> As Hall J. stated in *Calder*, “proving that the Sovereign intended to extinguish the Indian title lies on the respondent and that intention must be “clear and plain”: *Calder*, *supra* note 4 at 404. Similarly, Lamer C.J. stated in *Delgamuukw*, “the standard which has been set by this Court for the extinguishment of aboriginal rights ... was laid down in *Sparrow*, *supra*, at p. 1099, as one of “clear and plain” intent.” *Delgamuukw*, *supra* note 4 at para 180.

<sup>37</sup> McNeil, “Extinguishment of Aboriginal Title”, *supra* note 13 at 10. As Professor McNeil has argued, “the Supreme Court held in *Delgamuukw* that Aboriginal title is a proprietary interest in land. So even before receiving constitutional recognition in 1982, it should have enjoyed the same common law protection as other property rights.”

important to ensure that the *sui generis* nature of Aboriginal title not be applied in a manner that derogates from the protections afforded property rights at common law.<sup>38</sup>

Despite the clear and longstanding principles prohibiting the extinguishment of proprietary rights by the executive branch, there has been a considerable lack of clarity in Canadian law concerning the extinguishment of Aboriginal title by unilateral executive act. Two factors have contributed to this opacity. First, there have been competing arguments regarding the characterization of Aboriginal title as a proprietary interest.<sup>39</sup> Second, inconsistent terminology and a lack of substantive judicial analysis regarding the authority of the Imperial Crown and Imperial Parliament have rendered clarity in respect of jurisdictional issues in the pre-confederation era difficult to achieve.

The nature of Aboriginal title (i.e. what type of interest it confers on title holders) determines which governmental body had the authority to extinguish it. While it has long been clear that the executive could not unilaterally extinguish proprietary rights, it has perhaps not always been clear that Aboriginal title should be considered a property right.<sup>40</sup> The Judicial Committee of the Privy Council articulated a characterization of the interest that Aboriginal title refers to as something less substantial than a right to the land itself in the *St. Catherine's Milling* decision.<sup>41</sup> More specifically, Lord Watson's characterization of Aboriginal title as a "personal and usufructuary right, dependent upon the good will of the Sovereign"<sup>42</sup> has led to mischaracterizations of title that have, in turn, led to problematic conceptions of how title may be extinguished.<sup>43</sup> There are two aspects of Lord Watson's statement that have shaped the discourse

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<sup>38</sup> See John Borrows and Leonard Rotman "The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 36 Alta L Rev 9 at 11-13 where the authors argue that, whereas Aboriginal difference has often been penalized at common law, the reliance on the *sui generis* characterization may extend positive protections to rights that are unique to Aboriginal peoples.

<sup>39</sup> For an analysis of these competing views, see *Delgamuukw v. British Columbia*, 1991 CanLII 2372 (BC SC) at 518 – 577 [*Delgamuukw Trial*]. After reviewing the relevant authorities, Justice McEachern rejected the characterization of Aboriginal title as a proprietary interest. The Supreme Court has since then, however, been unequivocal in holding that Aboriginal title is such an interest: *Delgamuukw*, *supra* note 4 at para 113; *Tsilhqot'in Nation*, *supra* note 15 at 69 – 71.

<sup>40</sup> This explanation runs into some difficulty, as Aboriginal property rights were in fact often recognized. What may be more accurate is to say that Aboriginal property rights were selectively recognized and, for certain periods, their existence seems to have been forgotten. While cases from *St. Catherine's Milling* to the trial decision in *Delgamuukw* framed Aboriginal title as merely usufructuary in nature, this contrasts with many statements from the colonial era that recognized Aboriginal "ownership" of the land, as well as British practices of purchasing or otherwise acquiring the Aboriginal interest in land prior to settlement.

<sup>41</sup> *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 App. Cas. 46 at 54.

<sup>42</sup> *Ibid.* at 54.

<sup>43</sup> See for example *R v Isaac*, where the Nova Scotia Court of Appeal held that, despite being "unable to find any record of any treaty, agreement or arrangement after 1780 extinguishing, modifying or confirming the Indian right to



on extinguishment: the characterization of title as “personal and usufructuary,” and the view that title was “dependent upon the good will of the Sovereign.” Coupled with Watson’s assertion that Aboriginal title has its source in the Royal Proclamation, the latter of these views led to the belief that “Aboriginal title is subject to the will of the Crown, and so is extinguishable by the executive without legislative authorization.”<sup>44</sup> The characterization of the Aboriginal interest as “personal and usufructuary,” rather than proprietary, caused a lack of conceptual clarity regarding which common law protections the right was owed.

Canadian courts have, however, moved away from Lord Watson’s characterizations in *St. Catherine’s Milling*. In *Calder*, the Court addressed the framing of title as a mere “personal and usufructuary” right and concluded that the Privy Council’s choice of terminology was not particularly helpful in explaining the various dimensions of Aboriginal title with Judson J. dismissing Lord Watson’s characterization.<sup>45</sup> The Court has repeatedly held that Aboriginal title is “personal” only in the sense that it is inalienable except to the Crown.<sup>46</sup> The Court also rejected Lord Watson’s position that title could be extinguished unilaterally by the Crown by virtue of the fact that it was enjoyed at “the goodwill of the Sovereign,” where Hall J. held that title could only be extinguished by specific legislation passed by a competent legislative authority or by surrender to the Crown.<sup>47</sup>

Thus, the position of the Privy Council in *St. Catherine’s Milling* has been modified in two important respects. First, the Court has recognized that the source of Aboriginal title is the prior occupation of the land by Aboriginal peoples, not a decree or proclamation from the Crown.<sup>48</sup> In *Guerin*, Dickson re-affirmed the statements pertaining to the sources of title made in *Calder*, stating that the Aboriginal “interest in their lands is a pre-existing legal right not created by Royal Proclamation, by s.18(1) of the *Indian Act*, or by any other executive order or legislative provision.”<sup>49</sup> Second, the Court has emphasized that title is a proprietary right,

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hunt and fish, or any other record of any cession or release of rights or lands by the Indians,” only recognized title to Indian reserve lands, seemingly accepting the view that title was extinguished elsewhere by other, undetailed, means. *R v Isaac*, [1975] NSJ 412 at 73-86 [*Isaac*].

<sup>44</sup> *St. Catherine’s*, *supra* note 41 at 54

<sup>45</sup> *Delgamuukw*, *supra* note 4 at para 112.

<sup>46</sup> *Ibid*. See also *Attorney-General for Quebec v Attorney-General for Canada*, [1921] 1 AC 401 (PC, [1921] 1 AC 401 at 408.; *Guerin*, *supra* note 4 at 382.

<sup>47</sup> *Calder*, *supra* note 4 at 404; McNeil, “Extinguishment of Aboriginal Title” *supra* note 13 at 13.

<sup>48</sup> *Delgamuukw*, *supra* note 4 at para 114; *Marshall/Bernard*, *supra* note 3 at para 38; *Tsilhqot’in Nation*, *supra* note 15 at para 25; McNeil, “Extinguishment of Aboriginal Title”, *supra* note 13 at 16.

<sup>49</sup> *Guerin*, *supra* note 4 at 379.

rejecting the notion that the phrase “personal and usufructuary” limits the proprietary nature of Aboriginal title. Rather than “personal,” the Court has adopted the terminology used by Dickson J. in *Guerin v The Queen*, where the term *sui generis* emerges.<sup>50</sup> The source of Aboriginal title, as arising from occupation prior to British sovereignty, and its combination of elements of common law rules of property and those found in indigenous legal systems, contributes to Aboriginal title’s unique treatment in the common law. In *Delgamuukw*, Lamer C.J. emphasized that the *sui generis* nature of such title did not derogate from its protection as a common law property right. He stated:

This Court has taken pains to clarify that aboriginal title is only “personal” in this sense [that it is inalienable except to the Crown], and does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a licence to use and occupy the land and cannot compete on an equal footing with other proprietary interests.<sup>51</sup>

Put otherwise, Aboriginal title is a proprietary interest due all of the same legal protections afforded other proprietary interests at common law. As detailed above, this means that the executive could not extinguish Aboriginal title absent a clear statement from the legislative branch delegating it the authority to do so. Thus, it is clear that the authority to extinguish Aboriginal title was held by the legislative, as opposed to executive, branch. Further, the Supreme Court of Canada has held that “during the colonial period, the power to extinguish aboriginal rights rested with the Imperial Crown.”<sup>52</sup> This suggests that the authority to extinguish title in the pre-confederation period sat exclusively with the Imperial Parliament.

It has been illustrated, then, that the authority to extinguish property rights was strictly legislative in nature, though there were circumstances (e.g. in a colony acquired through conquest or cession that had not yet been promised representative institutions or where authority had been appropriately delegated) in which legislative authority was held by the Crown. Though this preliminary jurisdictional issue is relatively straightforward in respect of the authority to extinguish property rights, the jurisdictional lines between the Imperial Crown and Parliament in respect of their relationships to the colonies and, in particular, Aboriginal peoples, are not always as clear.

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<sup>50</sup> McNeil, “Extinguishment of Aboriginal Title”, *supra* note 13 at 14. See also *Delgamuukw*, *supra* note 4 at para 114; *Tsilhqot’in Nation*, *supra* note 15 at para 72. For a detailed analysis of the *Sui Generis* concept as it applies to Aboriginal rights, see Borrows and Rotman, *supra* note 38; Brian Slattery, “The Metamorphosis of Aboriginal Title” (2006) 85 Can Bar Rev 255 at 269-286 [Slattery, “Metamorphosis”].

<sup>51</sup> *Delgamuukw*, *supra* note 4 at para 113; *Canadian Pacific Ltd. v Paul*, [1988] 2 SCR 654 at 677.

<sup>52</sup> *R v Sappier; R v Gray*, 2006 2 SCR 6 at 58 [Sappier/Gray].

## II. *The Imperial Crown, Imperial Parliament, and the Royal Prerogative*

In the pre-confederation era, the authority to extinguish Aboriginal rights rested with the Imperial government. Given that rights could only be extinguished legislatively, it follows that the authority to extinguish title rested exclusively with the Imperial Parliament, a power which it would retain in theory until at least 1931. As statements from the Supreme Court on the matter suggest, however, the central role of the Crown in the administration of colonial governance and in maintaining relationships with Aboriginal peoples has complicated this assessment. For example, as noted above, Bastarache J. wrote for the majority in *Sappier/Gray*, “during the colonial period, the power to extinguish aboriginal rights rested with the Imperial Crown.”<sup>53</sup> This follows the statement from Hall J. in *Calder* that “the onus of proving that the Sovereign intended to extinguish the Indian title lies on the respondent”<sup>54</sup> and Dickson CJ and La Forest J’s holding in *Sparrow* that “the Sovereign’s intention must be clear and plain if it is to extinguish an aboriginal right.”<sup>55</sup> As it has been seen that the Sovereign did not possess legislative authority to extinguish proprietary rights except in a limited range of circumstances, there is a clear contradiction between the Court’s unequivocal statements that title may only be extinguished by *legislation* and the statements above which assign the authority to extinguish to the “Crown” or “Sovereign.” Given this apparent contradiction and lack of judicial reasoning concerning the choice of terminology, it will be useful to clearly identify the powers of the executive and legislative branches of both imperial and colonial governments in assessing pre-confederation extinguishment of Aboriginal title.

The principle of parliamentary sovereignty is foundational to British constitutional law. Though gained gradually, by 1688 the King-in-Council had clearly become subordinate to the will of Parliament.<sup>56</sup> As Sir Kenneth Roberts-Wray put it, “[t]he sovereignty of Parliament, as a

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<sup>53</sup> Ibid.

<sup>54</sup> *Calder*, *supra* note 4 at 404.

<sup>55</sup> *Sparrow*, *supra* note 1 at 1099. At the trial level in *Delgamuukw*, Justice McEachern held that the omission of any express language requiring *statutory* extinguishment in *Sparrow* indicates that the Court in that case did not require evidence of legislative intent, but rather of intent writ large: *Delgamuukw Trial*, *supra* note 39 at 668. As will be discussed below, this view is grounded in a mischaracterization of Aboriginal title as a usufructuary, rather than proprietary, right. As a proprietary right, title was protected by common law prohibitions on executive taking.

<sup>56</sup> Edward Creasy, *The Rise and Progress of the English Constitution*, 16th ed (London: Richard Bentley & Son, 1892) at 168 – 274, 336.

principle of constitutional law, is so elementary that there is little scope here for discussion.”<sup>57</sup> Nonetheless, the Crown retained significant authority, particularly in respect of colonies and the empire’s relationship with the prior inhabitants of those colonies. Such was the importance of the prerogative powers in the establishment and administration of colonial affairs that even the bedrock principle of parliamentary sovereignty took hold somewhat more slowly in that arena.

At the time of England’s first forays into establishing trans-Atlantic colonies, the administration of colonial governance was under the exclusive purview of the Sovereign. When Virginia became the first successful British colony in North America in 1607<sup>58</sup>, there was no specified imperial government department to deal with the colonies and “the whole administration, both executive and legislative, was exercised by the Sovereign and Privy Council with the very occasional interference of Parliament.”<sup>59</sup> The British sovereigns thought of the early colonies “rather as part of their own demesnes than as subject to the jurisdiction of the state.”<sup>60</sup> Early 17<sup>th</sup> century attempts by the Imperial Parliament to legislate in respect of the fishery off the coasts of Virginia and New England were rebuffed by Crown Ministers who held that the Parliament had no authority to legislate there.<sup>61</sup> The first substantial legislation from Parliament respecting the colonies was the *Navigation Act*, 1651.<sup>62</sup> The increase in trans-Atlantic trade which compelled the passage of the *Navigation Act* also required the development of a more robust administrative apparatus for managing colonial affairs. To that end, in 1660 Charles II delegated (by order-in-council) the responsibility for managing the affairs of British dependencies to a committee of the Privy Council.<sup>63</sup> The powers of this committee being too

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<sup>57</sup> Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (New York: Frederick A. Praeger, 1966) at 139; Charles Clark, *A Summary of Colonial Law, the Practice of the Court of Appeals From the Plantations, and of the Laws and Their Administration in All the Colonies* (London: C. Doworth & Sons, 1834) at 10. See also A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10<sup>th</sup> ed. (London: Macmillan, 1959) at 39 where he stated that “[t]he principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.”

<sup>58</sup> The Charter authorizing the establishment of the colonies was granted in 1606 and the first settlers arrived on May 13, 1607. Howard, *supra* note 30 at 23.

<sup>59</sup> Arthur Mills. *Colonial Constitutions: An Outline of the Constitutional History and Existing Government of the British Dependencies* (London: John Murray, 1856) at 2.

<sup>60</sup> *Ibid.* at 2. As will be discussed below, categorizing a colony as part of the personal demesnes of the Sovereign, as opposed to held by the Sovereign in right of the Crown, came to have important legal consequences.

<sup>61</sup> *Ibid.* It is important to recall that at the time of the earliest colonial settlement, the relationship between the Imperial Crown and Parliament was much less clearly defined than it would later become.

<sup>62</sup> *Ibid.* For detailed discussion of the *Navigation Act*, 1651 see Hugh Edward Egerton, *A Short History of British Colonial Policy*, 2<sup>nd</sup> ed (London: Methuen & Co, 1908) at 60 – 63.

<sup>63</sup> Mills, *supra* note 59 at 3 – 4.

limited to permit the effectual performance of its intended role, the committee was abolished some six months after its creation and in its place the “Council of Foreign Plantations,” which sat in the Star Chamber at Westminster and was wholly separate from the Privy Council, was established.<sup>64</sup> Thus, the early iterations of the committee responsible for the management of colonial affairs were created by orders in council and were delegated their authority by the Crown.

Throughout the better part of the next century committees and boards were variously formed and modified until, in 1782, the Council of Trade and Plantations (as it was then called) and the Office of the Secretary of State for Colonies were abolished by an Act of Parliament.<sup>65</sup> The Act also authorized the King to establish a committee of the Privy Council to carry out the duties of the recently abolished entities. In 1784, the Committee of the Privy Council on Trade and Plantations (to be known as the Board of Trade) was formed by order-in-council pursuant to the authority granted the Crown by the aforementioned statute. From at least 1782 on, then, the administration of colonial affairs was undertaken by the King or Queen-in-council by means of authority delegated by statute rather than by royal prerogative.<sup>66</sup> As of the passage of the *Navigation Act* in 1651 at the latest, the Imperial Parliament legislated in respect of the colonies.<sup>67</sup> Unquestionably, by the dates relevant to the determination of Aboriginal title in the Maritime Provinces (the date of sovereignty, 1713 in Nova Scotia), parliamentary supremacy was firmly established. This is not to suggest that the King or Queen was without legal authority; the executive continued to possess a clear range of authority. Rather, it means that the legislative branch was paramount and could, if it wished, legislate in respect of matters that fell within the

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<sup>64</sup> Ibid.

<sup>65</sup> 22 (Geo. III) cap 82.

<sup>66</sup> Where Parliament legislated in respect of a prerogative matter, the supremacy of Parliament acted to displace the prerogative, making the act legislative rather than prerogative. Further, “if statutory powers exist that cover the same ground as a prerogative power, the government is, in general, not free to choose between them but must act under the statute.” Thomas Poole, “United Kingdom: The Royal Prerogative” (2010) 8 Int’l J Const. L 146 at 148. See also *De Keyser’s*, *supra* note 29 at 518.

<sup>67</sup> There are many more examples of Parliament exercising this authority, for example, The Stamp Act, 1765 and the Quebec Act, 1774. Though the Stamp Act was highly contentious and played no small part in the events leading to the American revolution, even the majority of American thinkers did not question the right of the Imperial Parliament to legislate in respect of the colonies – their opposition rested almost entirely on the argument that Parliament could not legislate in respect of the *internal affairs* of the colonies or impose taxes on them without their consent. See *Peripheries and the papers on the Stamp Act crises*. See Richard Bland, *An Inquiry Into the Rights of the British Colonies* (Williamsburg: Alexander Purdie & Co., 1922).

purview of the Crown, including the colonies or, indeed, the powers of the Crown itself.<sup>68</sup>

While Parliament may have been paramount, the royal prerogative was central to the establishment and administration of the colonies. So central was the exercise of the prerogative that one prominent commentator stated that “[a]ll dependent territories owe their existence to the Prerogative.”<sup>69</sup> Though sweeping, such a statement is almost certainly justified, some notable exceptions notwithstanding.<sup>70</sup> There were several types of colony, including proprietary, charter, crown, and provincial.<sup>71</sup> In all instances the constitutive commissions delegating the authority to establish governmental institutions and establishing the governor as head of the civil government were granted by the King/Queen-in-council.<sup>72</sup> Of particular importance here, though, are provincial colonies, that being the only type present in the Maritime Provinces at the dates relevant to this inquiry. The Sovereign granted commissions to governors which delegated the authority to raise a government.<sup>73</sup> The commissions established the governor as head of the executive branch of the colonial government and representative of the Sovereign and delegated the authority to establish an executive council and legislature. The authority of colonial governors was detailed in the royal commission establishing the colony and in subsequent royal instructions.<sup>74</sup> These instruments are considered prerogative instruments. The legislative authority of the Sovereign pursuant the royal prerogative, then, was constitutive in nature. The constitutive power was a prerogative legislative power to establish the constitutional basis of colonial governments through the constitutive power of the Crown.

Despite this importance, the prerogative power in colonies was not absolute. The range of prerogative powers exercisable in a colony, in particular the extent of the prerogative legislative authority, was determined to a large extent by the manner in which the colony was acquired. According to the prevailing legal norms of the colonial era, colonies could be acquired by

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<sup>68</sup> Anthony Stokes, *A View of the Constitution of the British Colonies, in North America and the West Indies, at the Time the Civil War Broke Out on the Continent of America* (London: B. White, 1783) at 182.

<sup>69</sup> Roberts-Wray, *supra* note 57 at 150.

<sup>70</sup> The governments of Quebec and Ontario, for example, were established by Act of Parliament: J.E. Read, *The Early Provincial Constitutions* (1948) 26:4 Can Bar Rev 622 at 632. Thus, it was possible for Parliament to exercise constitutive power and, as discussed earlier, where Parliament legislated in respect of a prerogative matter, the act was legislative rather than prerogative.

<sup>71</sup> Stokes, *supra* note 68 at 149.

<sup>72</sup> T. Olawale Elias, *British Colonial Law: A Comparative Study of the Interaction Between English and Local Laws in British Dependencies* (London: Stevens & Sons, 1962) at 37.

<sup>73</sup> *Ibid.* at 39.

<sup>74</sup> *Ibid.*

settlement, conquest, or cession.<sup>75</sup> In a colony that had been acquired through conquest or cession, the English sovereign (i.e. the executive) possessed a nearly unlimited legislative authority in the colony.<sup>76</sup> This principle was derived from “[t]he other principle which guided the lawyers of the day [which] was the doctrine then prevalent at international law of the absolute power possessed by a conqueror over the people of the country he conquered.”<sup>77</sup> As a conquering power was presumed to hold absolute power over conquered or ceded territory and peoples, the Crown assumed legislative authority in respect of those territories.<sup>78</sup> The granting of colonial constitutions, however, extinguished the legislative power of the imperial executive in respect of ordinary legislation.<sup>79</sup> The legislative power of the executive extended only to colonies that were acquired by conquest or cession and then only until such time as provision had been made for the establishment of a colonial government by means of a constitution (i.e. a governor’s

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<sup>75</sup> Charles James Tarring, *Chapters on the Law Relating to the Colonies* (London: Stevens & Haynes, 1882) at 3. See also Mills, *supra* note 59 at 18. Writing in 1856, Mills stated that “[t]his classification affects not only the constitutional history of the Dependencies, but their political and legal relations with the parent State at the present day.” Indeed, acts of conquest and cession are themselves prerogative acts: Roberts-Wray, *supra* note 57 at 105. It can be difficult to determine with precision whether a colony was acquired by conquest or cession. Though this is of little consequence for the exercise of the royal prerogative in the colony, it may affect the date of acquisition of the colony. As discussed above, this could have important implications for determining the date of sovereignty and, therefore, the date at which Aboriginal claimants must demonstrate proof of occupation in a title claim. For discussion of the challenges in identifying whether a colony was acquired by conquest or cession see Roberts-Wray at 105. This is distinct from the question of how the colonial government was established (by charter, commission, etc. as described above.)

<sup>76</sup> Keith, *Responsible Government*, *supra* note 26 at 3; Chitty, *supra* note 27 at 29; Roberts-Wray, *supra* note 57 at 150. The prerogative legislative power was circumscribed by the requirements that the Sovereign was bound by the terms of the treaty or other instrument through which the cession of territory occurred and that the laws the King put in place were still bound by the King’s subordination to Parliament and could not be contrary to fundamental principles: Mills, *supra* note 59 at 21; Tarring, *supra* note 75 at 14.

<sup>77</sup> Keith, *supra* note 26 at 3; *Campbell v Hall* (1774) 1 Cowp 204, 98 ER 1045 at 210 where Lord Mansfield provides several examples in which the King legislated for a territory acquired by conquest. For example, Lord Mansfield states: “Besides the garrison, there are inhabitants, property, and trade in Gibraltar: ever since that conquest the King has made orders and regulations suitable to those who live, &c. or trade, or enjoy property in a garrison town.”

<sup>78</sup> See *Campbell v Hall*, *supra* note 77 at 211: “No question was ever started before, but that the King has a right to a legislative authority over a conquered country; it was never denied in Westminster-Hall; it never was questioned in Parliament. Coke’s report of the arguments and resolutions of the Judges in Calvin’s case, lays it down as clear. If a King (says the book) comes to a kingdom by conquest, he may change and alter the laws of that kingdom; but if he comes to it by title and descent, he cannot change the laws of himself without the consent of Parliament. It is plain he alludes to his own country, because he alludes to a country where there is a Parliament.” The same is true where a territory is ceded, with the stipulation that “[i]n ceded colonies the sovereign’s legislative powers is the same as in conquered colonies, except that if the treaty of cession regulate the right of legislation, the terms ought to be obeyed.” Tarring, *supra* note 75 at 18. Chitty notes that the Crown “possessed a legislative right over” what he calls “a dependent conquered nation.” Chitty, *supra* note 27 at 27.

<sup>79</sup> Tarring, *supra* note 75 at 14, 17; Chitty, *supra* note 27 at 29.

commission).<sup>80</sup> Importantly, once representative institutions of colonial government were promised, the Crown could not revoke them. That is:

Even if a Colony had been acquired by conquest, if the Crown had bestowed upon it a representative constitution, that constitution could not be recalled by the power which had granted it, and therefore an Imperial Act was needed to secure the reversal of a policy which might have proved imprudently generous.<sup>81</sup>

In colonies acquired by settlement the situation was somewhat different.<sup>82</sup> As “it was not possible to deprive an Englishman of the inestimable advantages of English law,”<sup>83</sup> the English law was said to follow an English citizen wherever they were not under the jurisdiction of another sovereign. That is, “if he settled in parts abroad which were not under a legitimate foreign sovereignty, he carried with him so much at least of the English law as was appropriate to the circumstances in which he found himself.”<sup>84</sup> As a result, the prerogative legislative authority of the Sovereign was limited in settled colonies from the moment they were so acquired. This did not affect the constitutive power, but it raises questions as to how the Sovereign could delegate to a legislature a legislative authority which it did not itself possess. The answer seems to be derived from the same principle which serves to limit the prerogative in the first instance; that is, as an English citizen could not be deprived of “the inestimable advantages of English law,” they carried with them the right to representative institutions. Put otherwise, the colonists in a settled colony possessed “an inherent right to self-government.”<sup>85</sup>

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<sup>80</sup> Tarring, *supra* note 75 at 14. The only exception being “unless, indeed, the Crown had reserved a right of revocation in the instrument by which the constitution was granted.” Keith, *supra* note 26 at 3. See also Mills, *supra* note 59 at 19.

<sup>81</sup> Keith, *supra* note 26 at 3 – 4. As Keith put it: “[i]t might, however, have been thought that if such grants of favour could be made they could also be taken away, but that view, which was certainly the natural one, was finally disposed of by the decision of the case of *Campbell v. Hall*, when it was laid down after long delay and much hesitation, but in decisive terms, by Lord Mansfield, that a grant of a representative constitution could not be recalled, and that the legislative power of the Crown in respect of a conquered or ceded colony departed when the Crown had granted such a constitution.”

<sup>82</sup> Where a colony was acquired through settlement or the “occupation of vacant territory,” the English common law and as much of the statute law as is applicable to the circumstances of the colony were immediately in force. The legislative power of the Crown was limited by virtue of the fact that its exercise was contrary to the common law of England that followed the settlers to the newly settled territory. Mills, *supra* note 59 at 18 – 19; Chitty, *supra* note 27 at 30.

<sup>83</sup> Keith, *supra* note 26 at 1; Tarring, *supra* note 75 at 3.

<sup>84</sup> Keith, *supra* note 26 at 1. As Joseph Chitty stated, “[w]herever and Englishman goes he carries with him as much of English law and liberty as the nature of his situation will allow.” Chitty, *supra* note 27 at 30.

<sup>85</sup> Mills, *supra* note 59 at 19; Similarly, Sir Kenneth Roberts-Wray stated that settlers “appear to have some sort of inherent right to expect the Crown to grant them the means to legislate for themselves.” Roberts-Wray, *supra* note 57 at 151. See Howard, *supra* note 30 at 16 – 17 for the language of English Rights and Liberties. Especially, the language of English rights and liberties employed in the early colonial Charters. The 1606 Virginia Charter, for example, promised the colonists the “liberties, franchises, and immunities” of Englishmen. As Professor Howard



It is important to note that a colony did not have to be uninhabited to be acquired through settlement. The term “settlement” here is a legal category rather than a strictly descriptive term. As such, colonies, according to a commentator from the era, may have been formed by “settlement of an unoccupied or barbarous country.”<sup>86</sup> As it is clear that few, if any, British colonies were “unoccupied” prior to British assertions of sovereignty, settlement clearly applies most precisely to the latter category. This view, that a “barbarous country” may have been acquired by settlement rather than conquest, is a consequence of the view that English law followed a citizen unless they were under the jurisdiction of another Sovereign.<sup>87</sup> Under this view, a “Sovereign” was essentially a head of state recognized by the other heads of state of Western Europe. Settlement of “barbarous” countries follows the principle of discovery, which purported to grant exclusive jurisdiction over a given territory to whichever European nation was the first to “discover” the lands in question.<sup>88</sup> Principal among the rights accruing to discovery were the exclusive right to settle the lands in question and to treat or otherwise negotiate with the native inhabitants regarding settlement.<sup>89</sup> Thus, the legislative authority of the Sovereign in colonies acquired by cession, as those in the Maritime Provinces, was limited as soon as those colonies were granted constitutions with representative institutions. Coupled with the judicial pronouncements that make clear that unilateral extinguishment of Aboriginal title involves an exercise of legislative power, this suggests that it was only possible for the Imperial Parliament to extinguish title in the pre-confederation era. As discussed above, however, the courts have yet to articulate extinguishment in this manner. The Supreme Court of Canada has held that the

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argues, “Whatever such language meant to the drafters of colonial charters, it meant something to the colonists who relied on it, as King and Parliament were to discover in the eighteenth century.”

<sup>86</sup> Tarring, *supra* note 75 at 3. As Professor Margaret McCallum put it: “we are dealing here with an abstraction - a “new” colony exists as a juridical entity, but not, at least in its “newness”, as a physical territory. The “new world” which the European powers carved up into New France, New Holland, New England, New Spain, and so on, was already home to peoples who had their own explanations of how the territory they occupied came to be theirs, and their own laws and customs for maintaining order in their territory.” Margaret McCallum, “Problems in Determining the Date of Reception in Prince Edward Island.” 55 UNB LJ 3 2006, at 4. This rule has created many problems. While in a colony acquired by conquest or cession the laws then in place in the colony remained until modified by the colonizing power, rules pertaining to settlement assumed a lack of existing law. As it was rarely in fact the case that there was no law in the territory, a host of conflicts of laws problems immediately arose. For an analysis of these issues in the context of the famous case of *Phillips v Eyre*, (1870) LR 6 QB 1 see R.W. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford: Oxford University Press, 2005).

<sup>87</sup> Keith, *supra* note 26 at 1; Chitty, *supra* note 27 at 30. As Charles Clark argued, “[i]t has been said that all unchristian or immoral institutions are *ipso facto* abrogated and in lieu of them the rules of natural equity are to be administered by the King or by such judges as he shall appoint.” Charles Clark, *supra* note 57 at 4-6.

<sup>88</sup> *Calder*, *supra* note ?? 4 at 383-84, quoting *Worcester v Georgia* 31 U.S. (6 Pet.) 515 (1832) at 542-44.

<sup>89</sup> *Ibid.*

ability to extinguish Aboriginal rights was exclusive to the “Imperial Crown” or the “Sovereign.”<sup>90</sup>

These statements from the Court may, however, prove problematic. While the Imperial Crown could extinguish rights by prerogative legislation where colonies were acquired by conquest or cession, this would not have been true of those acquired by settlement where the prerogative power was limited. Further, the Crown lost its prerogative legislative power once colonies acquired by conquest or cession were granted representative institutions.<sup>91</sup> While the power to extinguish rights rested with the Imperial Crown during certain periods of the colonial era, those periods were typically very short.<sup>92</sup> Historically, it seems the only body with the authority to extinguish Aboriginal title by unilateral legislation was the Imperial Parliament or an executive or legislative body delegated the authority to do so. One argument, then, would suggest that Bastarache J. was speaking of the “Imperial Crown” in a unitary sense, meaning only to distinguish Imperial from colonial authority. On this interpretation, the framework discussed above, wherein the capacity to unilaterally extinguish proprietary rights through legislation sat exclusively with the Imperial Parliament, may still apply. In other words, if we assume that the term “Imperial Crown” is meant here to include both the legislative and executive (the King/Queen-in-Parliament), as sharing in Imperial sovereignty, the analysis provided above concerning the scope of authority of the executive and legislative branches vis-à-vis proprietary rights suggests that the power to extinguish title would rest solely with the Imperial Parliament, a finding which would not contradict Bastarache J.’s statement (but would still be at odds with the view that the “Sovereign” could legislatively extinguish rights, as was held in *Sparrow* and by Hall J. in *Calder*, unless, given parliamentary sovereignty, this referred to the King/Queen-in-Parliament).<sup>93</sup>

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<sup>90</sup> *Sappier/Gray*, *supra* note 52 at 58. See also *Badger*, *supra* note 4 at 41 where the Court stated that “a clear and plain intention on the part of the *government*” (emphasis mine) is required to extinguish treaty rights.

<sup>91</sup> Tarring, *supra* note 75 at 17.

<sup>92</sup> New Brunswick, for example, despite being acquired by conquest, was under the jurisdiction of a colonial government from the date of British sovereignty. As a result, the legislative prerogative of the Crown would never have applied. This is also true of Prince Edward Island. Nova Scotia, acquired by cession in 1713, was granted a colonial constitution no later than 1749, though I argue it was in fact 1719, meaning the Crown’s legislative power would have last merely 6 years. This issue is addressed at length in the context of the Maritime Provinces *infra* at 109-116.

<sup>93</sup> For example, E.J. Payne stated that “[e]ach and every [colonial government] has the Sovereign of Great Britain for its head. The Sovereign acts in this, as in other matters of State, through the Government, which is responsible to the Parliament of the United Kingdom. The share of the Crown in the government of the colonies therefore really

On another interpretation, however, Bastarache J. was alive to the distinction between the Imperial Crown and the Imperial Parliament and chose explicitly to identify the Crown as holding powers of extinguishment. This reading would align more closely with the use of the term “Sovereign” in other decisions. Unfortunately, there is little in the decisions to suggest either interpretation. In *Sappier/Gray*, Bastarache supports his statement by citing *Delgamuukw* as authority, though the statement relied on from *Delgamuukw* (at paragraph 15) is equally ambiguous, and is in fact merely a restatement of a finding from the trial decision that the Supreme Court does not itself comment on; the language of “Imperial Crown” is adopted directly from that decision.<sup>94</sup> Tellingly, the view that extinguishment falls to the “Crown” in the trial decision in *Delgamuukw* rests on the erroneous view that Aboriginal rights “exist at the pleasure of the Crown” and are not proprietary in nature.<sup>95</sup> Thus, the term “Imperial Crown” in this instance is derived from a context in which a mischaracterization of the nature of Aboriginal title led to erroneous conclusions about how title may have been extinguished. In *Sappier/Gray*, the role assigned the Imperial Crown in relation to the extinguishment of rights seems to have been pulled from *St. Catherine’s Milling* by way of the trial decision in *Delgamuukw*. Given that both of those decisions have been overturned on important points concerning both the nature and extinguishment of Aboriginal title, we should look upon the conclusion with some skepticism.

Given this, the wording adopted by the Supreme Court in *Sappier/Gray* illustrates an important issue. It is clear that jurisdiction to manage the relationship with Aboriginal peoples

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belongs to Parliament.” J.S Cotton & E.J. Payne, *Colonies and Dependencies* (London: MacMillan & Co., 1883) at 139.

<sup>94</sup> See *Sappier/Gray*, *supra* note 56 at para 58 and *Delgamuukw*, *supra* note 4 at para 15. The explanation provided at the trial level in *Delgamuukw* is not entirely satisfactory. Justice McEachern stated that the “Crown authority in those days [pre-confederation] was undivided. Thus no division of powers question can arise about the authority of the Crown to extinguish aboriginal rights in the colonial period.” *Delgamuukw Trial*, *supra* note 39 at 654. McEachern cites no authority for this proposition and it is hard to know precisely what he meant. Colonial era legal writing on the matter explicitly recognized a distinction between executive and legislative powers. While the “division” of powers might more formally reference the division within a federal system, there was a clear “separation” of powers in the pre-confederation era, mention of which McEachern seems to have omitted.

<sup>95</sup> *Delgamuukw*, *supra* note 4 at 15. At the trial level McEachern J. stated that “Aboriginal interests are communal, consisting of subsistence activities and are not proprietary... Common law aboriginal rights exist at the pleasure of the Crown and may be extinguished when the intention of the Crown is clear and plain. This power reposed with the Imperial Crown during the colonial period.” *Delgamuukw Trial*, *supra* note 39 at 578. McEachern cites *Calder* as authority on this point, holding that “both judgments [Judson and Hall] assume a right of the Crown to extinguish aboriginal interests which supports the conclusions of the St. Catherine’s case that aboriginal rights are subject to the pleasure of the Crown.” *Ibid.* at 544.

rested with the Imperial government. As the Ontario Court of Appeal stated in *Chippewas of Sarnia*<sup>96</sup>:

First and foremost, dealings between the English Crown and First Nations were viewed as involving relations between sovereign nations to be governed by agreements or treaties made by the English Crown and the First Nations. Relations with the First Nations were an imperial concern to be administered primarily through the exercise of the royal prerogative.<sup>97</sup>

There are competing views, however, of the separation of powers between the Imperial Crown and the Imperial Parliament in this arrangement and it seems clear from the decision in *Sappier/Gray* that the distinction is not always delineated as clearly as it could, and perhaps should, be.

Though it seems unlikely that Bastarache J. indeed intended to identify the Imperial Crown, as opposed to Parliament, as having the capacity to extinguish rights, it is worth exploring what such a position might portend. Support for this position is provided by one interpretation of the Privy Council's 1743 decision in *Mohegan Indians v. Connecticut*.<sup>98</sup> As Sakéj Henderson has argued:

[t]he 1743 decision in *Mohegan Indians* clarified the status of the First Nations in the imperial law of Great Britain. It recognised treaty federalism and Aboriginal law as the twin bases controlling the common law in Canadian colonisation. Henceforth, controversies between Aboriginal nations and colonial authorities were exclusively under his majesty's foreign jurisdictions, as subject to the royal prerogative, rather than the parliament of the United Kingdom or any colonial or local assembly. Treaties with Aboriginal nations or tribes created independent and separate jurisdictions in the imperial law, as distinct from colonial authority.<sup>99</sup>

Henderson argues that the relationship with Aboriginal nations falls under the Crown's jurisdiction over "foreign jurisdictions" and, as such, is a distinct jurisdiction within Imperial law that is beyond the reach of both colonial governments and the Imperial Parliament. He goes on to suggest that the traditional analysis of imperial law, which has been articulated above and which

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<sup>96</sup> *Chippewas*, *supra* note 15.

<sup>97</sup> *Ibid.* at 51.

<sup>98</sup> Joseph H Smith, *Appeals to the Privy Council from the American Plantations* (New York: Columbia University Press, 1950), c. 7.

<sup>99</sup> James [Sakéj] Youngblood Henderson, "First Nations' Legal Inheritances in Canada: The Mi'kmaq Model" (1996) 23 *Man LJ* 1 (QL) at para 26 [Henderson, "Legal Inheritances"]. Professor McNeil disagrees with the argument that the prerogative power continued to govern relations with Aboriginal peoples once British sovereignty had been acquired. In his view First Nations no longer fell under the prerogative power to manage foreign jurisdiction once British sovereignty had been extended to indigenous territory. This argument is distinct from the legality of that assertion of sovereignty. See Kent McNeil, "Indigenous Rights Litigation, Legal History, and the Role of Experts" (2014) 77 *Sask L Rev* 173. Further, the Imperial Parliament could always legislate if it decided to: e.g. see the *Foreign Jurisdiction Act*, 1890, 53 & 54 *Vic*, c 37.

focuses only on the relationship between the colonies and Great Britain, “ignores the distinct branch of prerogative Treaties and Legislation that developed in British law concerning Aboriginal nations and the Crown.”<sup>100</sup> Henderson grounds his position in two distinct arguments. The first relies on extensive analysis of the historical experience of the Mi’kmaq and theorizing about the nature of the treaty relationship.<sup>101</sup> For the purposes here I will address a separate argument grounded in the *Mohegan Indians* case.<sup>102</sup> Henderson argues that,

[c]onsistent with the crown concept of treaty federalism and the Mohegan decision, royal instructions in New England, Nova Scotia, and other colonies respected Aboriginal governments and their legal systems, in particular their proprietary rights. These prerogative instructions accepted Aboriginal legal systems and land tenure, and implemented the policy of fair and honest purchases from First Nations.<sup>103</sup>

On this view, the relationship with First Nations was under the jurisdiction of the Imperial Crown by way of the royal prerogative. The nature of colonial government lends some credence to this view, as “[a]ll dependent territories owe or owed their existence as such to Royal pleasure, manifested by exercise of prerogative powers and in the great majority of cases, their constitutions and legal systems have (or had) the same root.”<sup>104</sup> Colonial governments were created by and through the royal prerogative. By way of the prerogative in external affairs, jurisdiction was acquired in new territories.<sup>105</sup> As discussed above, the prerogative authority continued in colonies acquired by conquest or cession.<sup>106</sup> It is only in colonies acquired by settlement, or conquered and ceded colonies where a representative legislature had been promised that “the Prerogative is plainly and substantially limited.”<sup>107</sup>

It is clear that at the time that colonies were conquered or ceded they were under the jurisdiction, both legislative and executive of the Imperial Crown. As discussed above, under the standard analysis offered by 19<sup>th</sup> century British courts and commentators, the prerogative could no longer be exercised in a law-making capacity once a colony was granted a constitution featuring an assembly.<sup>108</sup> Thus, while the prerogative could still be exercised in the same manner

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<sup>100</sup> Henderson, “Mi’kmaq Tenure”, *supra* note 22 at 197.

<sup>101</sup> *Ibid.*

<sup>102</sup> Henderson, “Legal Inheritances”, *supra* note 99 at para 17.

<sup>103</sup> *Ibid.* at para 27.

<sup>104</sup> Roberts-Wray, *supra* note 57 at 150.

<sup>105</sup> *Ibid.*

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> See *Campbell v. Hall*, *supra* note 77; Roberts-Wray, *supra* note 57 at 152.

as it could in Britain, it became constrained and subject to the will of parliament and no longer extended to ordinary legislation. Drawing on *Mohegan Indians*, Henderson suggests that the modified scope of the prerogative applied only to the settlers and the colonial governments themselves, not Aboriginal peoples and nations. While not explicitly on point, one can find some support for this view in the commentary of Sir Kenneth Roberts-Wray, who stated that “[t]hese general principles [concerning the prerogative] can, it is submitted, apply only to settlers properly so called; they cannot extend to a remote area, for example in the Antarctic, where there are no permanent residents.”<sup>109</sup> Though this would seem not to apply to distinguish Aboriginal peoples from settlers, it is important to recall that this body of law was developed in a context in which a colony could be deemed uninhabited for the purposes of settlement despite the presence of Aboriginal peoples.<sup>110</sup> Embracing this view, however, would suggest that the relationship with Aboriginal peoples was governed through the prerogative because they lacked any standing or capacity to engage the imperial powers as nations, a clearly untenable position. Indeed, Henderson’s claim is in fact the opposite – that Crown recognition of the sovereignty and nationhood of Aboriginal peoples caused the relationship with them to be governed under the royal prerogative to manage foreign jurisdictions.

This argument needs to be unpacked. The *Foreign Jurisdiction Act*, 1890 defines a “foreign country” as “any country or place out of Her Majesty’s Dominions.”<sup>111</sup> Roberts-Wray argues that the Foreign Jurisdiction Acts, a series of Acts which were replaced by the 1890 version,

were intended to regulate the exercise of jurisdiction in two classes of case... (i) jurisdiction in independent foreign countries (e.g. Turkey and China) where, by treaty, the Queen had special jurisdiction, principally to set up Courts for the trial of cases involving British subjects; and (ii) jurisdiction in primitive countries, mainly in Africa, where British authority was broader and acquired by less formal means, though as no more than limited jurisdiction and administration were normally in contemplation, it was not unnatural to regard such countries as ‘foreign,’ even if they were placed under Her Majesty’s protection.<sup>112</sup>

The Act draws a distinction, however, between the types of territories it contemplates as being “foreign countries” and those acquired by conquest or cession, which would be considered part

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<sup>109</sup> Roberts-Wray, *supra* note 57 at 151.

<sup>110</sup> It is also telling that Roberts-Wray’s text, considered a leading modern authority on colonial law, fills nearly one thousand pages without mention of Aboriginal peoples or their rights.

<sup>111</sup> 1890 c.37 (Reg. 53 & 54 Vict.) s.16.

<sup>112</sup> Roberts-Wray, *supra* note 57 at 73.

of Her Majesty's Dominions.<sup>113</sup> Henderson grounds his argument that Aboriginal nations fell under the category of foreign jurisdictions on his reading of the *Mohegan Indians* decision as standing for the principle that "treaty federalism and Aboriginal law [were] the twin bases controlling the common law in Canadian colonization." The difficulty with this view is that once colonies became part of "Her Majesty's Dominions" they appear to no longer have fallen under the category of foreign jurisdictions as far as British law was concerned. Whether Aboriginal nations were considered "foreign jurisdictions" under British law likely changed over time. As discussed above, in the early 17<sup>th</sup> century all colonial activity fell under the purview of the Crown. In rejecting parliamentary attempts to legislate in respect of the colonies, Ministers explicitly relied on the argument that the colonies had not yet become "dominions." Once a territory became a dominion of the Crown, however, it is unlikely that the Aboriginal peoples within that territory would have been considered part of a foreign jurisdiction. While it may be true that "[t]he provinces are constructs of the European imagination,"<sup>114</sup> the question of whether Aboriginal peoples in colonies that had been classified as dominions were considered foreign jurisdictions for the purposes of the prerogative is a question of British law. This view, however, has the problematic attribute of accepting without question the ability of the British Crown to assert dominion over Aboriginal nations and, by the mere assertion of sovereignty, gain jurisdiction and radical title over their lands, in the process transforming them from "nations" to "domestic dependent nations" to borrow US Chief Justice Marshall's terminology.<sup>115</sup> Nonetheless, Henderson's argument speaks to a characterization in British law and must be assessed on that basis.

There is also some question as to whether the *Mohegan Indians* decision recognizes the range of sovereignty that Henderson suggests. Professor Mark Walters argues that the case does not support the conclusion that native nations on reserved lands within British colonies were, from the perspective of British law, sovereign in the international sense. However, the case does confirm that British law recognized

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<sup>113</sup> Section I of the Act states: "It is and shall be lawful for Her Majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory." 1890 c.37 (Reg. 53 & 54 Vict.) s.1.

<sup>114</sup> Sakéj Henderson & Adrian Turner, "Aboriginal Land Claims in the Atlantic Provinces" in Ken Coates, ed, *Aboriginal Land Claims in Canada: A Regional Perspective* (Mississauga: Copp Clark Pittman, 1992) at 131.

<sup>115</sup> For a thoughtful discussion of the problems associated with accepting that indigenous land rights could have been transformed by the mere assertion of British sovereignty see Borrows, John. "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 Osgoode Hall LJ 537.

that such nations were, in certain circumstances at least, governed internally by systems of Aboriginal customary law and government which were independent from the local legal systems of the colonies in which they were located.<sup>116</sup>

Professor Walters stops short of arguing that the case recognizes First Nations as sovereign nations. In fact, in arguing that the case stands for the proposition that “native nations on reserved lands within colonial boundaries were *not necessarily* subject to colonial municipal law but might retain an independent status”<sup>117</sup> [emphasis mine], he acknowledges that native nations within colonial boundaries *may have been* subject to colonial law. This scenario would presumably require that the authority to legislate in respect of Aboriginal peoples and their rights be delegated in the relevant colonial charter or governor’s commission. This position is in line with several cases discussed above, including the holding of the Supreme Court in *Sappier/Gray*, insofar as it would place relationships with Indigenous nations under Imperial rather than colonial authority until such time as the authority to legislate in respect of Aboriginal rights was clearly delegated. On the issue of sovereignty, Professor Walters is circumspect, arguing that the case “does not clearly recognize or deny rights of Aboriginal sovereignty.”<sup>118</sup>

Professor Henderson’s claim is broader, as he argues that the case puts the relationship with First Nations under the exclusive jurisdiction of the Crown in the exercise of its prerogative, *outside* the reach of the Imperial Parliament. Again, there is ample support for the view that First Nations relations was a matter of imperial, and even executive, authority. It is clear, though, that despite the fact that laws of the Imperial Parliament did not operate in dominions unless specifically extended to them, the Imperial Parliament had jurisdiction to legislate if it chose to.<sup>119</sup> As the Privy Council stated in *Campbell v. Hall*, “[a] country conquered by the British arms becomes a dominion of the King in the right of his Crown; and, therefore, necessarily subject to the Legislature, the Parliament of Great Britain.”<sup>120</sup> Insofar as Henderson implies that the prerogative was not subject to the will of the Imperial Parliament, then, he appears to have

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<sup>116</sup> Walters, “Mohegan Indians” *supra* note 25 at para 3. Walters ultimately argues that the case may be interpreted as consistent with the continuity of Aboriginal customary laws and governments as quasi-sovereign systems within British colonial territories, or it may be interpreted as consistent with the continuity of Aboriginal customary laws and governments as forming systems which constituted components of the British imperial order -- systems which, therefore, were subject to and derived legal legitimacy from British imperial sovereignty. It is important to note that Aboriginal nations could be protected from prerogative power and colonial legislatures by constitutional and imperial law while being under the sovereignty of the Crown.

<sup>117</sup> *Ibid.* at para 68.

<sup>118</sup> *Ibid.* at para 69.

<sup>119</sup> Elizabeth Brown, “British Statutes in the Emergent Nations of North America 1609 – 1949” (1963) 7 *Am J Legal Hist* 95 at 96.

<sup>120</sup> *Campbell v Hall*, *supra* note 77 at 208.



been mistaken.<sup>121</sup> When a colony was acquired, it was acquired in right of the Crown which *ipso facto* extended the jurisdiction of the Imperial Parliament over that territory as far as British law was concerned.<sup>122</sup> Nonetheless, the difficult question Henderson raises is whether the power of the Imperial Parliament extended only to colonial governments and subjects or to First Nations as well.

What is at issue is not immaterial; it may determine whether the Imperial Parliament in fact had the authority to extinguish rights by unilateral legislative Act. Within imperial law, the answer seems straightforward, with the possible exception of the *Mohegan Indians* decision. This question, though, ultimately turns on the question of sovereignty. If it is accepted that the British assertion of sovereignty legally transferred jurisdiction over First Nation's land to the imperial government, then the supremacy of the Parliament vis-à-vis the Crown and colonies would prevail. If the assertion of sovereignty is effectively disputed, the Imperial Parliament could no more unilaterally extinguish Aboriginal title in North America than it could acquire a part of France by unilateral legislation. The idea that Aboriginal title could be unilaterally extinguished relies on a legal construction of title as a property right already subordinate to imperial sovereignty.<sup>123</sup>

The underlying distinction here is between sovereignty, on the one hand, and proprietary rights on the other. At common law there is clear support for “the principle that a change in sovereignty over a territory does not in general affect the presumptive title of the inhabitants.”<sup>124</sup> The doctrine of continuity presumes that rights continue to exist until such point as they are extinguished. Notably, where a colony was acquired by conquest or cession, this principle extended to the laws of the prior inhabitants. In other words, rights to property continued to exist following the British acquisition of the colony “[i]nsofar as they had not already been abrogated by act of state, were not inconsistent with subjection to British sovereignty ... and were not

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<sup>121</sup> As Professor Slattery has stated, “[i]n both settlements and conquests, the authority of the Imperial Parliament was held to be as extensive as in Great Britain, that is, under the standard view, without legal limits.” Brian Slattery, *The Independence of Canada*. Osgoode Hall Law School: 1982, at 11. The existence of the *Foreign Jurisdiction Acts* discussed above is another salient example of the power of the Parliament to legislate in respect of prerogative matters, in that case legislating explicitly about the scope of the prerogative power in foreign jurisdictions.

<sup>122</sup> As discussed, the Crown retained legislative power in a conquered or ceded colony until such time as representative institutions were promised. Even here, though, the principle of parliamentary sovereignty acts to extend the jurisdiction of the Imperial Parliament to all territories the Crown has acquired.

<sup>123</sup> This is a position that has been upheld repeatedly by the Supreme Court: *Tsilhqot'in Nation*, *supra* note 15 at para 39. The concept of reconciliation that has gained favour under the McLachlin court seeks explicitly to “reconcile Aboriginal interests with the assertion of Crown sovereignty.” Find in *Haida Nation*

<sup>124</sup> *Guerin*, *supra* note 4 at 376-78. See also Slattery, “Some Thoughts on Aboriginal Title” at 34-35.

contrary to British conceptions of justice and humanity.”<sup>125</sup> Thus, at British law, sovereignty could be acquired without affecting the property rights of prior inhabitants.<sup>126</sup> Henderson’s argument is based on the view that such “[d]omestic legal fictions should not be applied to foreign lands.”<sup>127</sup> In other words, sovereignty vis-à-vis other western states could be acquired without the Crown acquiring radical title to land; that is, without extending the legal fiction of the “original title of the Crown”, upon which the whole of British property law is founded, to indigenous lands. However accurate this may be as a normative statement, the question here revolves around its accuracy as a legal statement in the context of the British colonization of North America.

The question of sovereignty raises another set of legal questions, the scope of which it is beyond this paper to address in any further detail.<sup>128</sup> The purpose here is only to note that it is only the legitimization of the Crown assertion of sovereignty that allows for legislative infringement of Aboriginal property rights. This is reflected in historical practice, where the practice in the early stages of colonization in North America recognized the property rights of Aboriginal peoples and required Aboriginal lands to be purchased before they could be settled on.<sup>129</sup> The question posed at the beginning of this section – i.e. the relationship between the

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<sup>125</sup> Walters, “Mohegan Indians” *supra* note 25 at para 7.

<sup>126</sup> See Brian Slattery, *The Land Rights of Indigenous Canadian Peoples As Affected by the Crown’s Acquisition of their Territories* (PhD diss; Oxford, 1979) [Slattery, *The Land Rights of Indigenous Canadian Peoples*]; Brian Slattery, “Paper Empires: The Legal Dimensions of French and English Ventures in North America” in John McLaren, A.R. Buck, Nancy E. Wright. *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) at 51; See also McLachlin in dissent in *R v Van der Peet* 1996 2 SCR 507 at para 264 where she cites a long list of common law precedent for this view.

<sup>127</sup> Henderson, “Mi’kmaw Tenure, *supra* note 22 at 201. It should be noted that underlying Crown title, the basis for which is a fiction, has been applied consistently by the courts in Canada, NZ and Australia: see Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon, 1989) at 82-84). For an alternative approach, see Ulla Secher, *Aboriginal Customary Law: A Source of Common Law Title to Land* (2014).

<sup>128</sup> It should also be noted that despite growing out of the same body of Imperial law, the approach to First Nations sovereignty has varied in important respects between the United States and Canada. While the United States has, subject to some restrictions, continued to recognize First Nation’s sovereignty in their land, the courts in Canada have yet to recognize the inherent sovereignty of Aboriginal nations. See: Kent McNeil, “Aboriginal Governments and the Charter: Lessons From the United States” 17 Can J L&Soc 73 2002; Kent McNeil, “Judicial Approaches to Self-Government since *Calder*: Searching for Doctrinal Coherence”, in Hamar Foster, Heather Raven, and Jeremy Webber, eds., *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007), 129-52.

<sup>129</sup> Banner, *How the Indians Lost Their Land*, *supra* note 8 at 10 – 29. Though Banner recognizes that Aboriginal property ownership was not respected in all cases and that purchases were not the only way that Aboriginal lands were acquired, he argues persuasively that both law and practice in the 17<sup>th</sup> and early 18<sup>th</sup> centuries recognized Aboriginal ownership and saw purchase as the only legal means of acquiring title despite a tendency among some English theorists to adopt a view of the “New World” as *terra nullius* on the Lockean basis that much of it was uncultivated. As Banner points out, even where a Lockean or agriculturalist argument was relied on as justification for taking Indian lands, in most cases the practice was to purchase the lands in question. See also Craig Bryan

Imperial Parliament and the Imperial Crown, particularly in the exercise of the royal prerogative, as it concerned Aboriginal rights in North America – immediately invokes the question of sovereignty. This in turn makes it clear that the capacity to extinguish Aboriginal title by unilateral legislative act presumes that the sovereignty question is settled.

Having said that, it is not necessary in the context of this paper to resolve competing interpretations of *Mohegan Indians* or determine whether the relationship with Aboriginal nations was a responsibility of the Imperial Crown pursuant to the prerogative to manage foreign jurisdictions. Whether it be because they were characterized as foreign jurisdictions or for some other reason, it is clear that much of the relationship between the imperial government and Aboriginal nations was a prerogative matter, governed, as Henderson indicates, by a body of prerogative treaties and legislation. The prerogative legislative authority, however, was limited in conquered and ceded colonies where representative institutions had been granted. Thus, the imperial executive could maintain political relations with indigenous nations, including the authority to accept voluntary surrenders of rights and title through treaty, but could not unilaterally extinguish those rights. Though the doctrine of parliamentary supremacy extended to prerogative affairs and, by extension, dealings with any Aboriginal peoples inhabiting a territory the Crown claimed as a dominion, such legislative action was rare and the supremacy of Parliament does little to alter the role that the imperial government played in circumscribing the authority of colonial governments vis-à-vis Aboriginal peoples. Thus, whichever position one holds on the matters discussed in the preceding paragraphs, neither contradicts the role of the imperial government as described by Bruce Clark. Clark stated:

Conjure up an image of the imperial government balancing the scales of power, the scales weighted on the one hand with the indigenous tribes and on the other with the colonial governments of the colonists. Although the balance could have been left to a political question, to be determined on an ad hoc basis as future events might dictate, it was not. The balance was determined instead by established rules of constitutional law, knowable a priori. The crucial principles were subordination and delegation – the colonial governments were *subordinate* to the imperial government, and could validate only such legislative acts as were

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within the mandate of power expressly *delegated* by the imperial to the colonial governments.<sup>130</sup>

This is nowhere more apparent than in respect of the Royal Proclamation, 1763. Though the Royal Proclamation served a number of functions, its importance in the context of this paper is that it mandated a “complete overhaul of the process of acquiring Indian land.”<sup>131</sup> Professor Slattery aptly summarized the goals of the Proclamation:

the central idea of its Indian provisions is very simple: to ensure that no Indian lands in America are taken by British subjects without native consent. This objective is secured by three main measures: colonial governments are forbidden to grant any unceded Indian lands, British subjects to settle on them, and private individuals to purchase them, with a system of public purchases adopted as the official mode of extinguishing Indian title.<sup>132</sup>

The Proclamation was prerogative legislation of a constitutional nature and, as such, could not be modified by colonial legislatures.<sup>133</sup> Upon acquiring French territories in North America, the British hoped, through the Proclamation, to remove one of the central points of contention between themselves and the Indian inhabitants – the presence of white settlers on Indian lands.<sup>134</sup> Though the Proclamation was, according the Ontario Court of Appeal, “a mode of imposing the imperial power on conquered colonies in North America,”<sup>135</sup> in doing so it created a constitutionalized basis for Aboriginal land rights.<sup>136</sup> While it is important to note that the Proclamation is not a source of Aboriginal title, it stands as an important recognition of the

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<sup>130</sup> Clark, *Native Liberty, Crown Sovereignty*, *supra* note 6 at 59. As Professor Elizabeth Brown put it, “[t]hese commissions instructions, and statutes were the constitutional framework within which the statutes of Great Britain were introduced into the several Canadian jurisdictions.” Brown, *supra* note 119 at 102.

<sup>131</sup> Banner, *supra* note 8 at 92.

<sup>132</sup> Slattery, Brian. “The Hidden Constitution: Aboriginal Rights in Canada” (1984) 32:2 *The American Journal of Comparative Law* 361 at 369 [“Hidden Constitution”].

<sup>133</sup> Roberts-Wray, *supra* note 57, at 375. The question of whether the Proclamation could be repealed by Canadian statute, at least prior to the Statute of Westminster, is a more complicated matter and will be addressed in more detail in a subsequent chapter. See Slattery, “The Hidden Constitution” *supra* note 132 at 369 note 30.

<sup>134</sup> Slattery, “Hidden Constitution,” *supra* note 132 at 369.

<sup>135</sup> *Chippewas*, *supra* note 15 at para 186.

<sup>136</sup> In *Delgamuukw*, Lamer C.J. suggested that “the treatment of “aboriginal title” as a compensable right can be traced back to the *Royal Proclamation, 1763*”: *Delgamuukw*, *supra* note 4 at para 203. While compensation for title is no doubt a feature of the Proclamation, it is clear that the practice of purchasing Indian lands – and implicitly recognizing their ownership in the process – dates back to the early 17<sup>th</sup> century. See Banner, *supra* 8, at 10-29; Slattery, *Land Rights of Indigenous Canadian Peoples*, *supra* note 126 at 109-114. It is also important not to misconstrue the effect or intention behind the Proclamation. While it did have the effect of protecting First Nations from unscrupulous purchasers and recognized Aboriginal rights to land, it did not do so out of a sense of altruism, but self-interest. The Proclamation also placed severe limitations on the ability of First Nations to manage and dispose as they saw fit. As Banner points out, this is a restriction that the imperial government would never have placed on white settlers: Banner, *supra* note 8 at 94. Nonetheless, judges have often referred to the Royal Proclamation as the Indian bill of rights. See Lord Denning in *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta*, [1982] QB 892, [1981] 4 CNLR 86.

ongoing existence of Aboriginal rights to land.<sup>137</sup> Further, despite the fact that the Royal Proclamation was a unilateral declaration, it became “a formal part of the treaty relationship with the Indian nations.”<sup>138</sup>

What this illustrates is that, while the Imperial Parliament had the authority to extinguish Aboriginal title pre-confederation, the Imperial Crown and Parliament instead used a variety of means, including ordinary legislation and prerogative legislation, to create a constitutional framework that clearly framed both constitutional competency and repugnancy. Colonial governments were bound to act within the confines of the powers delegated to them and in accordance with the constitutional principles and laws established by the imperial government. The authority to extinguish Aboriginal title rested with the Imperial Parliament unless it had been delegated to another body.

### III. *The Colonial Executive*

Before investigating the powers of the colonial executive, it should be recalled that I concluded above that it was not possible for the executive to extinguish Aboriginal title unless it had been delegated the authority to do so. Extinguishing legal rights, including property rights, is the exclusive purview of the legislative branch and has been for several centuries. Eliminating such rights requires clear and plain legislation to that effect. Nonetheless, it is worth detailing the scope of authority inhering in the executive branch of colonial governments for several reasons. First, the executive branch of colonial governments often had an executive council that had legislative powers.<sup>139</sup> Governors were also responsible for approving laws made by the elected legislatures, thus playing an important role in the legislative process. Second, clearly delineating the scope of authority of the executive and legislative branches of colonial governments will

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<sup>137</sup> See concurring decision of LeBel J. in *Marshall/Bernard*, where he held that “[t]he *Royal Proclamation* of 1763 is evidence of British recognition of aboriginal modes of possession of the land.” *Marshall/Bernard*, *supra* note 3, at 133.

<sup>138</sup> Chippewas of Sarnia, *supra* note 15 at para 201. The process through which the Royal Proclamation became a formal part of the treaty relationship was negotiated in the Treaty of Niagara in 1764. This treaty was negotiated in the summer of 1764, at the request of the Crown, and involved more than 2000 Chiefs. Here, the provisions of the Proclamation were read by the British representative who committed to the enforcement of the terms of the Proclamation: *Ibid* at paras 54-56. See also John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 125-126, 149-150; Paul Charles Williams, *The Chain* (LL.M. Diss. Osgoode Hall Law School, 1982).

<sup>139</sup> This was true of both New Brunswick and Nova Scotia, for example.

provide insights into the nature of colonial governance and the relationship between First Nations, colonial governments, and the Crown, even if such insights are in the end related only obliquely to the question of extinguishment itself. Third, the colonial executive was a representative of the Imperial Crown that applied the Crown's policies in the colonies.<sup>140</sup> Thus, if there existed any powers of extinguishment with the Crown, those would have been able to be delegated to the colonial executive. Fourth, this further analysis may prove valuable if there are any errors or omissions in my previous conclusions respecting the powers of the executive.

The Imperial Crown appointed colonial governors by means of a royal commission that conferred upon them powers and specific legal authority.<sup>141</sup> Subsequent formal instructions laid out specific duties and rules of conduct.<sup>142</sup> A governor's authority, therefore, was delegated in nature. As such, the executive branch of colonial governments was subordinate to the imperial government and cannot be conceived of as having possessed sovereign authority – the authority of the governor was delegated, “derived from his commission, and limited to the powers thereby expressly or impliedly entrusted to him.”<sup>143</sup> The specific instruments by which the powers of colonial governors were delegated were important in both their form and their content. In respect of form, the commissions by which governors were appointed were granted “by letters patent under the great seal.”<sup>144</sup> Subsequent royal instructions “bore the signet and sign manual of the King.”<sup>145</sup> These formal mechanisms were the only means by which authority could be delegated.<sup>146</sup> It follows that other means of purported delegation could not have had the legal effect of delegating authority. In light of the extensive correspondence between colonial governors and the colonial office in London, it is particularly important that the form of

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<sup>140</sup> Stokes, *supra* note 68 at 149.

<sup>141</sup> Tarring, *supra* note 75 at 24. See also Elizabeth Brown, “British Statutes in the Emergent Nations of North America 1609 – 1949” 7 *Am. J. Legal Hist.* 95 1963, at 101 where the author states that, unlike in the early American colonies, the Charter was not used as an organizational device in Canada, with the exception of the 1670 Charter granted to the Hudson's Bay Company. This is largely true, though Brown overlooks the 1621 Charter to Sir William Alexander granting the entirety of the present day Maritime Provinces and part of Quebec. This charter may have been omitted as its terms were never satisfied and it has little impact on subsequent colonization. For a detailed discussion of Charters colonies and the impact of charters on Aboriginal land rights see Slattery, *Land Rights of Indigenous Canadian Peoples*, *supra* note 126 at 105-111.

<sup>142</sup> Tarring, *supra* note 75 at 24; Clark, *Native Liberty*, *supra* note 6 at 59; Chitty, *supra* note 27 at 34 – 35.

<sup>143</sup> *Musgrave v Pulido* L.R. 5 App. P.111 as quoted in Tarring, *supra* note 75 at 24. See also: Clark, *Native Liberty*, *supra* note 6 at 58 – 59.

<sup>144</sup> Alpheus Todd, *Parliamentary Government in the British Colonies* (Boston: Little, Brown, and Company, 1880) at 77; Clark, *Native Liberty*, *supra* note 6 at 59; Stokes, *supra* note 68 at 150.

<sup>145</sup> Clark, *Native Liberty*, *supra* note 6 at 60 relying on Chalmers *Opinions of Eminent Lawyers* I: 225.

<sup>146</sup> It could also be done by Act of the Imperial Parliament. The *Quebec Act*, 1774 and *Constitution Act*, 1867 are examples.

instrument relied on as evidence of delegation be scrutinized.<sup>147</sup> Crucially, “it was not open for governors to assume from mere dispatches expressing opinions or sentiments a jurisdiction to make laws upon a subject.”<sup>148</sup> Only instruments bearing the signet and sign-manual of the king or the great seal of Great Britain could legally delegate authority and transfer jurisdiction.

One example illustrates the importance of form and the extent to which governors were bound by formal delegations of authority. It was well established that upon a change in governor, the succeeding governor was appointed by “letters-patent under the Great Seal.”<sup>149</sup> These formal mechanisms could be time consuming to produce and, as such, a workaround was sought that would allow the succeeding governor to take office and perform the duties of that office while awaiting the formal documentation. Though as 19<sup>th</sup> century treatise writer Alpheus Todd explained:

[a]s the preparation and issue of these formal and authoritative instruments usually takes considerable time, it became the practice, prior to the year 1875, to issue a minor commission, under the Royal sign-manual and signet, to a newly appointed governor, empowering him, meanwhile, to act under the commission and instructions given to his predecessor in office. But, doubts having been raised in certain cases, whether these minor commissions effectually authorized the holder to perform all the duties and functions appertaining to his office [the practice was discontinued] under the advice of the law officers of the Crown.<sup>150</sup>

Even a temporary “minor commission” bearing the signet and sign manual, then, was considered to be inadequate by the law officers of the time to confer authority beyond that explicitly detailed in the instrument. The temporary commission could not referentially confer the powers granted in the commission of the previous governor. A commission issued by way of letters patent, bearing the Great Seal, and explicitly detailing the authority to be held by the incoming governor was the only way to effectuate such a delegation. Coupled with the explicit statements referenced above, this example makes it clear that any communications not bearing the signet and sign-manual or great seal could not legally delegate authority. It is also clear that even those involved in the day-to-day operations of colonial governance did not always understand the high legal standards required to delegate power. Nonetheless, it was considered a matter of sufficient importance that the law officers felt compelled to modify the practice.

That this distinction is of considerable importance in the contemporary context is evident

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<sup>147</sup> Clark, *Native Liberty*, *supra* note 6 at 64

<sup>148</sup> *Ibid.*

<sup>149</sup> Todd, *supra* note 144 at 77.

<sup>150</sup> *Ibid.*

from the Supreme Court's decision in *Calder*.<sup>151</sup> There, Judson J. relied on a letter to the governor of British Columbia, James Douglas, from the secretary of state for the colonies, E.B. Lytton, as evidence that governor Douglas had been delegated discretionary power in dealing with Aboriginal land issues.<sup>152</sup> It is useful to reprint the dispatch in full as it illustrates the importance of form. The dispatch states:

I have to enjoin upon you to consider the best and most humane means of dealing with the Native Indians. The feelings of this country would be strongly opposed to the adoption of any arbitrary or oppressive measures towards them. At this distance, and with the imperfect means of knowledge which I possess, I am reluctant to offer, as yet, any suggestion as to the prevention of affrays between the Indians and the immigrants. *This question is of so local a character that it must be solved by your knowledge and experience*, and I commit it to you, in the full persuasion that you will pay every regard to the interests of the Natives which an enlightened humanity can suggest. Let me not omit to observe, that it should be an invariable condition, in all bargains or treaties with the natives for the cession of lands possessed by them, that subsistence should be supplied to them in some other shape, and above all, that it is the earnest desire of Her Majesty's Government that your early attention should be given to the best means of diffusing the blessings of the Christian Religion and of civilization among the natives.<sup>153</sup>[Judson J.' emphasis]

Judson J. interpreted this dispatch as delegating discretionary authority to Governor Douglas. The highlighted passage is particularly telling, as matters of local concern were under the authority of colonial governments pursuant to their commissions. Thus, Judson J. refers to the colonial government as “the sovereign authority elected to exercise complete dominion over the lands in question.”<sup>154</sup> It appears that Judson J. may have conflated the “full executive powers”<sup>155</sup> of the governor with “sovereign authority.”<sup>156</sup> As discussed above, colonial governments had an authority that was delegated in nature.<sup>157</sup> Only formal instruments bearing the signet and sign-manual of the King or the Great Seal could delegate jurisdiction and, at least in some cases, even that was considered insufficient by the law officers.

A competing interpretation was provided by Justice Hall. Hall cited the same communication, though tellingly emphasized different passages. Hall J. placed his emphasis on

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<sup>151</sup> Clark, *Native Liberty*, *supra* note 6 at 64, where he states that “[o]nce again, the *Calder* case illustrates the pitfalls of insufficient attention to this matter of form.”

<sup>152</sup> *Ibid.*

<sup>153</sup> *Calder*, *supra* note 4 at 329.

<sup>154</sup> *Calder*, *supra* note 4 at 344.

<sup>155</sup> *Ibid.* at 326.

<sup>156</sup> *Ibid.* at 344. See also Clark, *Native Liberty*, *supra* note 6 at 64-65.

<sup>157</sup> See for example *Cameron v. Kyte* (1835) 3 Knapp 332.



the first and last sentences of the passage quoted above. In doing so, he construed the letter not as granting the authority to dispose of Indian lands, but as recognizing the restrictions on the powers of the colonial government, reminding the governor of his obligations under the law.<sup>158</sup> Indeed, Hall J. noted that “[a] Governor had no powers to legislate other than those given in the commission.”<sup>159</sup> Given this, Hall J. held:

If in any of the Proclamations or actions of Douglas, Seymour or of the Council of the Colony of British Columbia there are elements which the respondent says extinguish by implication the Indian title, then it is obvious from the Commission of the Governor and from the Instructions under which the Governor was required to observe and neither the Commission nor the Instructions contain any power or authorization to extinguish the Indian title, then it follows logically that if any attempt was made to extinguish the title it was beyond the power of the Governor or of the Council to do so and, therefore, *ultra vires*.<sup>160</sup>

This illustrates two important points. First, it confirms that any action taken by a governor outside the powers granted in a governor’s commission and royal instructions should be considered *ultra vires*. Second, it again illustrates the importance of form. While Hall J. held that the dispatch to Governor Douglas did not delegate authority beyond that conferred in the royal commission, he did so not on the basis that such an instrument *could not* do so, but rather on his interpretation of the content of the dispatch. As Bruce Clark has noted:

As a result of not paying due attention to the form of the instrument, an extremely important point (the extinguishment of aboriginal rights in British Columbia) was therefore treated largely as a matter of interpretation of a mere letter, a letter better to have been set aside in order to concentrate upon genuinely relevant instruments.<sup>161</sup>

A governor did not possess, and could not legally exercise, powers outside of those stated in the commission and instructions.<sup>162</sup> In *Cameron v. Kyte* (1835) the Judicial Committee of the Privy Council held that the governor of the colony of Berbice could not modify the commission (i.e. salary) to be recovered by the colony’s deputy vendue master as the power to make such a

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<sup>158</sup> *Calder*, *supra* note 4 at 409, 412.

<sup>159</sup> *Ibid.* at 406.

<sup>160</sup> *Ibid.* at 413.

<sup>161</sup> Clark, *Native Liberty*, *supra* note 6 at 65.

<sup>162</sup> See Roberts-Wray, *supra* note 57 on this point. A governor was required to obey dispatches, especially if following them was mandated in the commission or instructions establishing the office. These dispatches, however, were directory in nature and could not confer new powers or jurisdiction. This is implicit in Hall J.’s reasoning, as he identified only the commission and instructions as potential sources of the delegated authority to extinguish rights.

modification was beyond the scope of those delegated.<sup>163</sup> The Privy Council held that a governor “has only such portion of the sovereign authority as is expressly or by implication conferred.”<sup>164</sup> In other words, a governor cannot “be considered as having a delegation of the whole Royal power in any colony.”<sup>165</sup> In *The Queen v. George Clarke* (1848), this principle was held in New Zealand to apply equally to the granting of lands:

The Governor of a Colony, it would be admitted, had no power ex-officio to convey the lands of the Crown to a subject: he commonly executed conveyances of Crown lands it was true; but always by an authority expressly delegated to him either by the Crown or by Act of Parliament.<sup>166</sup>

It is clear from the foregoing that colonial governors, even where they could act in a legislative capacity, could not extinguish title unless the power to do so was expressly or impliedly delegated by means of the proper legal instrument. As the Privy Council stated in *Cameron v. Kyte*, “if the Governor be an officer merely with a limited authority from the Crown, his assumption of an act of sovereign power, out of the limits of the authority so given to him, would be purely void.”<sup>167</sup> Given these restrictions, it is of the utmost importance to determine what range of authority was delegated to specific governors in assessing extinguishment of title. Some important powers they may have been granted included: executive powers regarding colonial assemblies (prorogation, dissolutions, etc.), the power to grant or refuse assent to legislation, and the power to grant Crown lands.<sup>168</sup> Nonetheless, none of these powers were inherent to the office of the colonial governor – each power must have been delegated; any party attempting to demonstrate extinguishment of title by an act of a the executive branch of a colonial government, be it legislative or otherwise, bears the burden of demonstrating that the authority to do so was explicitly delegated by the proper instruments.

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<sup>163</sup> *Cameron v Kyte*, *supra* note 157 at 609. See also Tarring, *supra* note 75 at 28.

<sup>164</sup> *Ibid.* at 607-08. See also J.S Cotton & E.J. Payne, *Colonies and Dependencies* (London: MacMillan & Co., 1883) at 140, where the authors state that “[t]hrough the governor is the Crown's vice-regent in the colony, he does not possess general sovereign power, his authority being limited by his commission, by the laws of the colony, and by the general regulations of the Home Government.”

<sup>165</sup> Tarring, *supra* note 75 at 29.

<sup>166</sup> *The Queen v George Clarke* (1848), as reprinted in *Report of the Proceedings of a Trial in the Supreme Court at Auckland, on a Writ of Scire Facias* (Wellington: R. Stokes, 1848) at 3.

<sup>167</sup> Tarring, *supra* note 75 at 28.

<sup>168</sup> Chitty, *supra* note 27 at 35; The power to give assent to bills, however, is itself circumscribed by the governor's royal instructions, which “direct him to reserve certain bills, usually such as deal with the currency, the army and navy, differential duties, the effect of foreign treaties, and matters affecting the mother-country, for the actual assent of the Crown at home, or to assent to such bills only with a clause suspending their operation until they have been confirmed at home.” Cotton & Payne, *supra* note 164 at 140 – 141. See also Stokes, *supra* note 68 at 184 – 185.

#### IV. Legislative Authority in the Colonies

Legislative authority in colonies could reside in several bodies and be distributed in various configurations. The 19<sup>th</sup> century treatise writer Charles Tarring described several classes of colonial government. In the first, termed Crown colonies, “the Crown has the entire control of legislation while the administration is carried on by public officers under the control of the Home Government.”<sup>169</sup> In Crown colonies, legislative power either rested entirely with the governor or was exercised by the governor and an executive council appointed by the Crown.<sup>170</sup> The second class of colony Tarring identified were those “possessing representative institutions, but not responsible government.”<sup>171</sup> While the Home Government retained control over the appointments to public offices in this arrangement, the Crown’s control over legislation was limited to the veto power.<sup>172</sup> Under this configuration the ability to elect law makers was beginning to appear in the colonies, with laws being made by the governor with the concurrence of either a single legislative chamber in which half the members were elected and half appointed by the Crown or two legislative chambers, one elected, the other appointed.<sup>173</sup> In the third class of colony, those possessing both representative institutions and responsible government, the Home Government retained no powers of appointment other than the governor and held only a veto power in respect of legislation.<sup>174</sup> Thus, legislative authority in the colonies was variable and subject to change over time. Nonetheless, the separation of powers were clearly delineated and colonial authority was subject to explicit legal constraints.<sup>175</sup>

The role of the governor in legislative affairs, then, depended on the institutional arrangements in the colony.<sup>176</sup> While the initiation of laws typically only began with the

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<sup>169</sup> Tarring, *supra* note 75 at 44. For a similar description of these three categories see Chitty, *supra* note 27 at 30-31.

<sup>170</sup> Tarring, *supra* note 75 at 44.

<sup>171</sup> *Ibid.* at 45. Tarring further argued that “where the sovereign has once granted legislative powers to a colony, he cannot afterwards himself exercise those powers in reference to local matters.” *Ibid.* at 15; Chitty, *supra* note 27 at 32.

<sup>172</sup> Tarring, *supra* note 75 at 45.

<sup>173</sup> *Ibid.* at 45 – 46.

<sup>174</sup> *Ibid.*

<sup>175</sup> These changes are important in the context of this paper as the provinces in question belonged to several of the classes described above throughout the time period relevant to this inquiry. Mainland Nova Scotia, for instance, transitioned from Crown colony to responsible government in the period between the British assertion of sovereignty in 1713 and confederation in 1867.

<sup>176</sup> As discussed in the previous section, these powers also had to be explicitly delegated by means of the proper legal instruments. The analysis here is based on the powers that were conferred broadly across colonies by means of relatively uniform royal commissions.

governor in colonies lacking representative assemblies, this was not a steadfast rule.<sup>177</sup> Despite assuming a less direct role in the development of legislation as colonies moved toward responsible governments, as late as 1882 Tarring could state that “[i]n every colony the Governor has authority to give or withhold assent to laws passed by the other branches or members of the legislature. Without his assent no laws are binding.”<sup>178</sup> Thus, while the precise legislative role of the governor varied over time, the office held a degree of control over colonial legislation.<sup>179</sup> The governor had a “negative voice” in the legislature, a voice which was characterized by the powers of disallowance, adjournment, prorogation, and dissolution.<sup>180</sup> That is, in addition to the general power to withhold assent, the governor also had a range of powers in respect of the functioning legislative body itself that would allow a degree of “negative” control to be exercised over legislation and the legislative process. As mentioned above, where representative institutions existed, a bicameral legislature, with one chamber appointed and one elected, was typical. Prior to the establishment of responsible government, the appointed council was typically “selected from those who have the best fortunes and most considerable influence in the colony.”<sup>181</sup> The council, though often referred to as the “executive council,” exercised both legislative and executive powers.<sup>182</sup> They were appointed by warrant from the Crown or by the governor’s instructions, though they could be dismissed only by the Crown, the governor only having the power to suspend.<sup>183</sup> Where a colony had responsible government, members of the executive council were appointed and dismissed by the governor, though by convention a member of the executive would step down if they lost the confidence of the elected assembly.<sup>184</sup> Importantly, where responsible government had been achieved, the governor was bound to act on the advice of the executive council; a governor may have acted without such advice where the

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<sup>177</sup> Tarring, *supra* note 75 at 27

<sup>178</sup> *Ibid.* at 48. This is, of course, still true, but the power has been rendered obsolete by constitutional convention.

<sup>179</sup> Edward Robert Cameron, *The Canadian Constitution: As Interpreted by the Judicial Committee of the Privy Council* (Winnipeg: Butterworth, 1915) at 3. Cameron states that “[t]he Governor, as the representative of the sovereign, and a necessary party to all legislative acts, from the first exercised an effective control over all colonial legislation.” It should be noted, however, that following the shift to responsible government the governor was required by convention to grant royal assent on the advice of the colonial government. Royal assent, in other words, could not be withheld.

<sup>180</sup> Clark, *A Summary of Colonial Law*, *supra* note 57 at 30.

<sup>181</sup> *Ibid.* at 28

<sup>182</sup> Chitty, *supra* note 27 at 34

<sup>183</sup> *Ibid.* See also Tarring, *supra* note 75 at 40.

<sup>184</sup> Tarring, *supra* note 75 at 41.

public interest required it, though in such cases the action always must have conformed to the explicit rules laid out in the royal instructions.<sup>185</sup>

The elected branch of the typical bicameral colonial legislature was an assembly raised by the governor pursuant to the royal commission received for the purpose of establishing government in the colony.<sup>186</sup> The law making power of the elected assembly was circumscribed by the royal commission to which it owed its existence and was limited to making law concerning local affairs and for peace, order, and good government of the colony.<sup>187</sup> The representative assembly had a delegated authority to make “laws for its interior government.”<sup>188</sup> The assembly’s legislative activity did not, however, exist in a vacuum; rather, a formal process was to be followed in which laws were to be made “with the concurrence of the governor and the council.”<sup>189</sup> Further, the legislative jurisdiction of the assembly was restrained by other means. While the assembly had the “power to make laws suited to the exigencies of the colony,” it was confined by the requirement that those laws be “agreeable as nearly as may be to the laws of England.”<sup>190</sup> The principle of repugnancy required that “all law, bye-laws [sic], usages, and customs, which shall be in practice in any of the plantations, repugnant to any law made or to be made in this kingdom relative to the said planation, shall be utterly void and of none effect.”<sup>191</sup> This principle was distinct from the powers of disallowance and will be addressed below.

Laws developed in the colonies were also subject to disallowance not only by the governor (prior to responsible government), but also by the Imperial Crown.<sup>192</sup> Thus, some

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<sup>185</sup> Ibid.

<sup>186</sup> Clark, *A Summary of Colonial Law*, *supra* note 57 at 28.

<sup>187</sup> Chitty, *supra* note 27 at 33. He states: “Nor can any of the colonial assemblies make laws unless empowered by the Crown so to do; and if when empowered they exceed the prescribed limits, their enactments are void.” Of course, what, precisely, fell within the sphere of “local affairs” was often a contentious matter. It was in fact typically quite a capacious category that only limited the legislature from legislating in respect of purely external matters. The interpretation of “local affairs” changed as colonies shifted toward responsible government. Nonetheless, the authority of the colonial legislature was constrained by the instruments through which its authority was delegated. It should also be noted that this analysis applies most clearly to colonies in what are now commonwealth countries. In the American colonies, while the same constitutional principles of delegated authority applied, a broader scope of legislative authority in the colonies was argued for consistently throughout the 18<sup>th</sup> century. See Jack P. Greene, *Periphery and Center: Constitutional Development in the Extended Politics of the British Empire and the United States 1607-1788* (New York: W.W. Norton, 1986).

<sup>188</sup> Clark, *A Summary of Colonial Law*, *supra* note 57 at 7. The distinction between Acts and Ordinances is important to keep in mind; representative assemblies make Acts, while ordinances are created by non-representative institutions, such as when a governor makes laws on advice of the executive council: Tarring, *supra* note 75 at 48.

<sup>189</sup> Clark, *A Summary of Colonial Law*, *supra* note 57 at 28.

<sup>190</sup> Ibid.

<sup>191</sup> Chitty, *supra* note 27 at 31.

<sup>192</sup> Tarring, *supra* note 75 at 48

colonies “have legislatures of their own which propound laws for their internal government, subject to the approval of the Queen in Council.”<sup>193</sup> The power of disallowance held by the Crown existed even in colonies where the royal prerogative to legislate no longer existed.<sup>194</sup> Importantly, both the laws of the colonies and the legislative institutions themselves were considered subordinate to the power of the “mother country.”<sup>195</sup> Though, again, a colony was no longer subject to prerogative legislation of the Crown once representative institutions had been established.<sup>196</sup> In this light, it is important to note that the delegated nature of colonial assemblies rendered them fundamentally different, in their sources and scope of authority, from the Imperial Parliament.<sup>197</sup>

Thus, the legislative power in the colonies was constrained in three ways. First, the commission from which the colonial government’s authority was derived limited the scope of colonial legislation to matters of local concern. Crucially, “Indian affairs were no concern of the colonial legislatures.”<sup>198</sup> Second, legislation was subject to disallowance by both the governor and the Imperial Crown and could be annulled by the Imperial Parliament; colonial legislation, in other words, was subordinate to the will of both branches of the imperial government. Crucially, positive affirmation of colonial legislation was required; it was not enough that the imperial government did not disallow it. Third, colonial legislation was constrained by a requirement that it not be repugnant to English law that extended to the colony. These limitations were subject to some degree of variation as the colonies moved to responsible government, but they represented a tangible restriction on legislation in the colonies.

The repugnancy doctrine represented an important, and at times contentious, limitation on the legislative authority of colonial assemblies. Though it was relatively rare for the King-in-

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<sup>193</sup> Ibid. at 20. See also *Cameron, supra* note 179 at 3, where it is said that “[a]lthough, as we shall find, provision was made in the Commissions and Royal Instructions given to the Governors, for the establishment of Legislative assemblies, the same instructions reserved to the King in his Privy Council the power of disallowance, and the supremacy of the British Parliament was proclaimed (6 Geo. III, c. 12) by enacting that ‘Parliament had, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America subject to Great Britain.’”

<sup>194</sup> As Charles Clark stated, “every colony, whether acquired by occupancy, by conquest, or by cession, is subject at all periods of its existence, as part of the British dominions, to the legislative authority of the *British Parliament*, by whose power, paramount (where both apply) to that of the king in council, its existing laws may in all cases be either wholly or in part repealed, and new laws, or a new constitution, be at pleasure imposed.” Clark, *A Summary of Colonial Law, supra* note 57 at 10.

<sup>195</sup> Tarring, *supra* note 75 at 20.

<sup>196</sup> Clark, *A Summary of Colonial Law, supra* note 57 at 27.

<sup>197</sup> Chitty, *supra* note 27 at 36.

<sup>198</sup> *Chippewas supra* note 15 at para 51. This crucial jurisdictional point should not be obscured by the fact that imperial ministers often sought to slough off their responsibility onto the colonies.

council to disallow a piece of colonial legislation or for a court to deem it void by way of repugnancy, it is clear that “colonial governments acquiesced in the restriction on local legislative competence and formulated their policies with reference to it.”<sup>199</sup> The doctrine, which appeared first in 1609 in the second Virginia Charter, came to be repeated in numerous colonial charters and governor’s commissions.<sup>200</sup> Though it is beyond the scope of this paper to address at length, Professor Campbell provides two possible justifications for the development of the doctrine. Campbell argues first that it was likely derived from the view that the Crown could not delegate law making authority that would allow the delegated authority to pass laws contrary to those of England.<sup>201</sup> Drawing on this principle, the view was advanced that where the corporate form was used to establish government by charter, that government would be subject to the same restrictions as other corporate bodies whose by-laws would be considered void *ab initio* if they were repugnant to common law or statute law.<sup>202</sup> Second, Campbell argues that this same principle was then extended to colonial governments raised by commission rather than charter and that “the Crown lawyers apparently assumed that legislatures constituted by Royal Commission stood on precisely the same footing as legislatures in the chartered colonies.”<sup>203</sup> Repugnancy provisions therefore came to be included in numerous charters and commissions and were later reinforced by imperial statute and the courts.<sup>204</sup> In *Winthrop v Lechmere*, for example, the Privy Council held that “by the Charter their power of making laws is restrained and limited in a very special manner, (viz) such laws must be wholesome and reasonable, and [not] contrary to the laws of this realm of England.”<sup>205</sup> This case is notable as it dealt specifically with property rights, with the Privy Council holding that, despite the fact that it was *intra vires* the General Assembly of Connecticut to legislate in respect of property rights pursuant to the colonial Charter, the law in question was nonetheless void by way of repugnancy to the laws of England.<sup>206</sup>

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<sup>199</sup> Enid Campbell, “Colonial Legislation and the Laws of England” 2 U Tas L Rev 148 1964-1967, at at 149.

<sup>200</sup> Ibid. at 149, see also Brown, “British Statutes” *supra* note 119 at 97 – 98. As Brown notes, in the early charters the doctrine of repugnancy was not applied universally, with each individual charter making different provisions.

<sup>201</sup> Ibid. at 149 .

<sup>202</sup> Ibid. at 149 – 150.

<sup>203</sup> Ibid. at 150.

<sup>204</sup> See s. 9 of the Act for Preventing Frauds, and Regulation of Abuses in the Plantation Trade, 1696, 7 & 8 Will. III, c. 22. and *Winthrop v. Lechmere*, as quoted in Campbell, *supra* note 199 at 150 -151.

<sup>205</sup> *Winthrop v Lechmere* (1728) Privy Council 7 Connecticut Colonial Records, 571 in James Brown Scott ed., *Judicial Settlement of Controversies between States the American Union* 93 1918, at 94.

<sup>206</sup> Ibid. at 94-96; Campbell, *supra* 199 at 151.

Considerable difficulties arose in the 18<sup>th</sup> century, however, concerning the application of the doctrine. Though the doctrine had the potential to severely restrict colonial legislation, interpretation became a difficult matter as courts attempted to discern what level of local variance from the laws of England was acceptable.<sup>207</sup> Further, it was unclear whether the doctrine was to apply only to those English laws which were in effect in the colony in question or to the entire body of English law. The Privy Council came to take a broader view on the matter, not limiting the doctrine to only those laws in effect in the colony.<sup>208</sup> In the early 19<sup>th</sup> century these issues came to a head in New South Wales when the role of judges in the legislative process became a contentious issue. Issues of interpretation and enforcement caused ongoing problems for the application of the doctrine. This began calls for increased legislative clarity concerning the doctrine of repugnancy.<sup>209</sup>

The difficulties surrounding the issue of repugnancy gave rise to the *Colonial Laws Validity Act*, 1865. The crucial questions for this essay are: first, what effect did the Act have on colonial legislation that would otherwise have been inoperable on grounds of repugnancy or beyond the jurisdiction of the colonial government? Second, did the Act save colonial legislation that would have otherwise been inoperable to the extent that it contradicted prerogative legislation or constitutional principles? The importance of the *Colonial Laws Validity Act* is clear if we recall the relationship between colonial laws and Aboriginal title. The issue that I have been concerned with here is whether colonies had the capacity to extinguish Aboriginal title through legislation. As has been illustrated, such power existed only insofar as it had been expressly or impliedly delegated and where such delegation conformed to the formal requirements governing such transfers of authority. The effect of the *Colonial Laws Validity Act* on the validity of colonial legislation may be instrumental in assessing whether a given piece of legislation may have extinguished title.

The Act, given royal assent on June 29<sup>th</sup> 1865, was said to resolve “once and for all any doubts which might be raised as to the constitutionality of colonial Acts without exact English

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<sup>207</sup> Campbell, *supra*, note 199 at 154.

<sup>208</sup> Ibid. It is important to note that repugnancy provisions in royal instructions applied only to laws dealing specifically with the colony or laws specifically mentioned in the commission or instructions.

<sup>209</sup> Ibid. at 155 -156.



precedent.”<sup>210</sup> The Act sought to provide clarity regarding the constitutionality of colonial laws, taking aim not only at future, but also past legislation. As Professor Campbell wrote:

s.3 of the Colonial Laws Validity Act 1865 cut the Gordian knot by the simple expedient of declaring repugnancy to English law no longer to be a ground for adjudging colonial enactments void and inoperative. This provision, it should be noted, applied not only to future colonial legislation but also to legislation already passed. Its effect, therefore, was to validate legislation which at the date of its passing, lacked the force of law.<sup>211</sup>

While the Act maintained the supremacy of the Imperial Parliament and imperial legislation, it brought about a “fundamental constitutional change” by eliminating “the old rule requiring colonial enactment to conform as near as possible with the fundamental principles of English law.”<sup>212</sup> The important exception to this new principle was in the case of repugnancy to “British legislation extending to the colony by paramount force.”<sup>213</sup> Where colonial legislation was repugnant to British legislation extending to the colony, the supremacy of the British legislation was invoked to render the colonial legislation void and inoperative to the extent of the repugnancy.<sup>214</sup> British legislation would be construed as extending to a colony “when it [was] made applicable to such colony by the express words or necessary intendment of any Act of Parliament.”<sup>215</sup>

Royal instructions did not render colonial law inoperative in the same manner as legislation extending to the colony under the Act.<sup>216</sup> S.4 of the Act states that no colonial law that had been assented to by the governor would be inoperative only because it was repugnant to royal instructions about that matter.<sup>217</sup> That is, royal instructions about a given matter would no longer be paramount to colonial legislation. This did not extend to constitutional documents, such as the letters patent or royal commission.<sup>218</sup> In effect, this precluded a colonial legislature from stripping the governor of power that was fundamental to the foundational sovereignty of the Crown. This restraint is owing to the constitutional nature of the royal commissions. Though the colonial legislatures had the authority under the Act to modify the constitution, powers, and

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<sup>210</sup> Ibid. at 175; Tarring, *supra* note 75 at 55.

<sup>211</sup> Ibid. at 175.

<sup>212</sup> Ibid. at 148.

<sup>213</sup> Ibid.

<sup>214</sup> *Colonial laws Validity Act*, 1865 (28 & 29 Vict. C.63) s.2. See also Tarring, *supra* note 75 at 21.

<sup>215</sup> Tarring, *supra* note 75 at 55 – 56.

<sup>216</sup> *Colonial laws Validity Act*, *supra* note 214; Tarring, *supra* note 75 at 56.

<sup>217</sup> Ibid.

<sup>218</sup> Ibid. Tarring, *supra* note 75 at 56 – 57.

procedures of the legislature itself, such laws “shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council, or colonial law for the time being in force in the said colony.”<sup>219</sup> Any such laws would still be subject to possible disallowance.

The effect of the *Colonial Laws Validity Act* was to create a clearer division of powers between the imperial and colonial governments. The colonial legislatures could make laws pertaining to the “peace, order, and good government” of the colonies, thereby assuming legislative control over matters of a local character, while the colonies ultimately remained subordinate where the Imperial Parliament wished to legislate in respect of the colony. The doctrine of repugnancy was circumscribed by the Act to provide colonial legislatures greater means to adapt to local circumstances, while the doctrine was reaffirmed in respect of Imperial legislation targeting a colony.<sup>220</sup>

The combined effect of the doctrine of repugnancy and the laws pertaining to how colonies were acquired, was that English law prevailed in respect of matters that concerned the empire and where imperial legislation targeted a colony specifically, while matters of local concern were left to localities. Though the retroactive applicability of the *Colonial Laws Validity Act*, 1865 obviated the need for colonial laws to be commensurate with those of England except where an Act applied specifically to the colony, colonial legislatures remained constrained by the jurisdiction granted under the royal commission to which they owed their existence. A party wishing to rely on colonial legislation as evidence of extinguishment of Aboriginal title, therefore, must demonstrate that the colonial legislature in question was delegated the authority to extinguish Aboriginal rights and that the law by which such extinguishment was to occur was not repugnant to any imperial law pertaining specifically to the colony.

## V. Post-Confederation

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<sup>219</sup> Ibid.

<sup>220</sup> As Professor Enid Campbell stated, “the result was that when authority was granted to a colonial legislature, representative or non-representative, to make laws for the peace, order and good government of the colony, that legislature would be taken to possess ‘the utmost discretion of enactment for attainment of the objects pointed to’, subject only to those limitations on the subject-matter of legislation laid down in the colonial constitution and to overriding Imperial legislation: Campbell, *supra*, note 199 at 148.

With the passage of the *Constitution Act*, 1867, new jurisdictional lines were drawn. The BNA Act of 1867 was an Imperial Statute and could therefore only be amended by the Imperial Parliament.<sup>221</sup> It was only because the colonies were subordinate to the Imperial Parliament that the BNA Act could have constitutional force. This arrangement left some confusion as to the precise nature of the relationship between the imperial, dominion, and provincial governments. More precisely, a question arose as to whether the powers of the dominion and provincial governments should be characterized as delegated. As one author has argued:

When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subject and area, the local legislature is supreme and has the same authority as the Imperial Parliament or the Parliament of the Dominion.<sup>222</sup>

While the powers of the provincial legislatures were described here as “plenary and ample,” the source and limits of that authority has led others to emphasize the subordinate nature of both provincial legislatures and the federal parliament.<sup>223</sup> The argument that the federal and provincial governments remained subordinate after 1867 is based on the fact that the imperial government could, if it wished, continue to legislate in respect of the Canadian dominion and its provinces. Thus, the local legislatures did not have “the same authority” as the Imperial Parliament. As Professor McNeil has argued, “[t]here can be little doubt that the Imperial Parliament's authority to extinguish Aboriginal title prior to Confederation would have continued thereafter, since the Parliament at Westminster retained authority to legislate for Canada when it enacted the *Constitution Act*, 1867.”<sup>224</sup> Similarly, the protections afforded to Aboriginal lands right by way of imperial legislation (including prerogative legislation) and the common law survived the passage of the BNA Act.

Regardless, the division of powers between federal and provincial legislatures in the BNA Act is clear:

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<sup>221</sup> Bourinot, *British Rule*, *supra* note 23 at 65.

<sup>222</sup> Cameron, *supra* note 179 at 36.

<sup>223</sup> Clark, *Native Liberty, Crown Sovereignty*, *supra* note 6 at 58.

<sup>224</sup> McNeil, “Extinguishment of Aboriginal Title,” *supra* note 13 at 12.

the respective powers of the parliament of the Dominion and the legislatures of the provinces are stated in express terms in the constitution; any subject that does not fall within the powers of the provincial governments belongs to the Dominion. This is intended to prevent disputes, as far as possible, as respects the powers of the separate governments.<sup>225</sup>

One power so expressly stated is the “make Laws for the Peace, Order, and good Government of Canada, in relation to... Indians, and Lands reserved for the Indians” in s.91(24).<sup>226</sup> The apparent ambiguity of this phrase sowed confusion about whether the ability to legislate in respect of, and thereby extinguish, Aboriginal title was exclusive to the federal legislature.<sup>227</sup> In *Delgamuukw*, the province put forward a more limited reading of s.91(24), arguing “that “Lands reserved for the Indians” are lands which have been specifically set aside or designated for Indian occupation, such as reserves.”<sup>228</sup> Lamer C.J. rejected this argument, holding that it ran counter to the Privy Council’s decision in *St. Catherine’s Milling* where the Privy Council stated that had it been intended s.91(24) be limited to reserve lands, such a limitation would have been made explicit.<sup>229</sup>

Thus, in *Delgamuukw*, Lamer CJ held that the power to extinguish title rested with the federal government. Lamer C.J. held:

Since 1871, the exclusive power to legislate in relation to “Indians, and Lands reserved for the Indians” has been vested with the federal government by virtue of s. 91(24) of the *Constitution Act, 1867*. That head of jurisdiction, in my opinion, encompasses within it the exclusive power to extinguish aboriginal rights, including aboriginal title.<sup>230</sup>

As it has been demonstrated that the extinguishment of rights is the exclusive purview of the legislative branch, Lamer C.J.’s use of the term “federal government” should be understood to refer to the federal parliament. That is, since 1871, “the exclusive power to extinguish aboriginal rights, including aboriginal title” rested with the federal parliament. This limits the power of the provincial government to grant title lands to third parties. Relying on *Delgamuukw*, Justice Vickers stated at the trial level in *Tsilhqot’in*:

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<sup>225</sup> Bourinot, *British Rule*, *supra* note 23 at 125.

<sup>226</sup> *British North America Act, 1867*: <http://canada.justice.gc.ca/eng/rp-pr/csjsjc/constitution/lawreg-loireg/p1t13.html>. Accessed April 3, 2015.

<sup>227</sup> *Delgamuukw*, *supra* note 4 at para 174: “The debate between the parties centred on whether that part of s. 91(24) confers jurisdiction to legislate with respect to aboriginal title.”

<sup>228</sup> *Ibid.*

<sup>229</sup> *Ibid.*

<sup>230</sup> *Ibid.* at 173.

Given that the jurisdiction to extinguish has only ever been held by the federal government, the Province cannot and has not extinguished these rights by a conveyance of fee simple title to lands within the Claim Area.<sup>231</sup>

And further:

[R]egardless of the private interests in the Claim Area (whether they are fee simple title, range agreements, water licences, or any other interests derived from the Province), those interests have not extinguished and cannot extinguish Tsilhqot'in rights, including Tsilhqot'in Aboriginal title.<sup>232</sup>

It is clear that the provinces at no point had the capacity to extinguish Aboriginal title.<sup>233</sup> From 1867 – 1982 the jurisdiction to extinguish Aboriginal rights resided with the federal Parliament. The Imperial Parliament could have also extinguished title until it renounced legislative power in Canada in the *Statute of Westminster* in 1931, though there is no evidence that this power was ever exercised.

### C. Clear and Plain Intent

As discussed, the two central issues in assessing legislative extinguishment are jurisdiction (competence) and repugnancy. Should it be demonstrated that the legislation being relied on as evidence of extinguishment was passed by a competent legislative body and was not repugnant to any prevailing constitutional documents or principles, a further requirement mandates that the legislation exhibit the “clear and plain intent” to extinguish title.<sup>234</sup> As Dickson CJ stated in the *Sparrow*<sup>235</sup> decision, “[t]he test of extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain if it is to extinguish an aboriginal

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<sup>231</sup> *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 997 [*Tsilhqot'in Trial*].

<sup>232</sup> *Ibid.* at para 998. The view that provincial grants of land could not have had the effect of extinguishing title raises difficult questions about the status of third party interests. These questions will be addressed in Chapter 3.

<sup>233</sup> The Supreme Court in *Tsilhqot'in*, however, extended the capacity to infringe Aboriginal title to the provincial governments by holding that inter-jurisdictional immunity no longer applies in respect of s.91(24). As the Court justified this move on the grounds that s.35(1) of the *Constitution Act*, 1982 now provides the protection that the division of powers was intended to provide, it seems unlikely that the weakening of inter-jurisdictional immunity in respect of s.91(24) could be applied retroactively to support a provincial capacity to extinguish Aboriginal title. Nonetheless, the Court has opened the door to a range of arguments legitimizing Provincial extinguishment of title by reading down inter-jurisdictional immunity in respect of s.91(24). See *Tsilhqot'in Nation*, *supra* note 15 at paras 128 – 152.

<sup>234</sup> As a practical matter, these inquiries could be rearranged, as any would be fatal to an asserted extinguishment. For the sake of expediency, it may in some cases make sense to apply the clear and plain intent test before assessing competence and repugnancy.

<sup>235</sup> *Sparrow*, *supra* note 1.

right.”<sup>236</sup> In *Calder*, Hall J. “concluded that if a right was to be extinguished, it must be done by specific legislation, not by general land legislation.”<sup>237</sup>

The “clear and plain intent” standard, though, does not require an explicit statement extinguishing the right in question. That is, while the intention to extinguish the right in question must be clear, the standard is below that of an explicit statement. As Bastarache J. stated for the majority of the Supreme Court in the *Sappier/Gray* decision, “intent need not be expressed and therefore aboriginal rights may also be extinguished implicitly.”<sup>238</sup> The Court, in other words, has left the door open to the possibility that implied intent to extinguish rights may suffice. Nonetheless, the standard remains quite high. As Lamer C.J. wrote in *Gladstone*:

While to extinguish an aboriginal right the Crown does not, perhaps, have to use language which refers expressly to its extinguishment of aboriginal rights, it must demonstrate more than that, in the past, the exercise of an aboriginal right has been subject to a regulatory scheme.<sup>239</sup>

This follows the view expressed by Dickson CJ and LaForest J in *Sparrow* that, although the exercise of a right may have historically been curtailed by government act or regulation, such control does not in itself extinguish a right. In other words, “that the right is controlled in great detail by the regulations does not mean that the right is thereby extinguished.”<sup>240</sup> A general piece of legislation or set of regulations that had an incidental effect on the exercise of a right will not suffice; even if not explicitly stated, the extinguishment of the right must have been a purpose of the legislation being relied on to demonstrate extinguishment.<sup>241</sup>

## D. Summary

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<sup>236</sup> Ibid. at 1097. See also *Calder*, supra note 4 at 404; *R. v. Gladstone*, [1996] 2 S.C.R. 723, at para 31; *R v Adams* (1996) 3 SCR 101 at 48. Though this is a clear statement of the “clear and plain intent” test, the use of the term “Sovereign” here is problematic as the capacity to extinguish rights is a legislative, rather than executive, power. The details of this argument will be addressed at length below.

<sup>237</sup> *Tsilhqot'in Nation Trial*, supra note 231 at para 486.

<sup>238</sup> *Sappier; Gray*, supra note 52 at para 57.

<sup>239</sup> *Gladstone*, supra note 237 at para 34.

<sup>240</sup> *Sparrow*, supra note 1 at 1097.

<sup>241</sup> Accepting that the intent required to extinguish a right need not be made explicit may be problematic. In essence what the test says is that Parliament may have extinguished Aboriginal rights if it wanted to do so, though it is acceptable if it would have rather not stated its intention explicitly. This may invoke the Honour of the Crown, the constitutional requirement that the Crown act honourably in its dealings with Aboriginal peoples. Can it be said that the Crown in Parliament acted honourably if it intended to eliminate an Aboriginal right yet failed to make that intention explicit?

Once Aboriginal title has been established, the burden is on the party seeking to establish that title has been extinguished to prove such extinguishment. As has been outlined above, prior to the constitutionalization of Aboriginal rights in 1982 extinguishment could have occurred in two ways: by voluntary surrender or unilaterally through legislation. There are a number of restrictions circumscribing these modes of extinguishment. Extinguishment by voluntary surrender, from 1763 until at least 1931, must have conformed to the Indian land provisions laid out in the Royal Proclamation, 1763. The relevant provisions of the Royal Proclamation, which restrict the alienation of Aboriginal lands to parties other than the Crown and establish procedural requirements for acquiring the consent of the Aboriginal community for any surrender, also seem to have been incorporated into the common law.

In assessing extinguishment by unilateral legislation, the first consideration is whether the legislative body which passed the legislation being relied on had the jurisdiction to extinguish Aboriginal title. The legal authority to legislatively extinguish Aboriginal rights in the pre-confederation period was a legislative power that resided with the Imperial Parliament. Two important exceptions existed to this rule. First, in colonies acquired by conquest or cession, the royal prerogative included the power to legislate until such time as a governor was authorized to establish a legislative assembly.<sup>242</sup> Second, the authority to legislatively extinguish rights could be delegated to colonial authorities by the Imperial Parliament. In a conquered or ceded colony, such as those in the Maritime Provinces, this authority could also be delegated by the Imperial Crown until such time as a legislative assembly was granted. Until that point the Crown had the authority to legislate in respect of both constitutive and ordinary legislation and a delegation could have occurred by either means. Though the Crown retained its constitutive power following the granting of an assembly, its authority to legislate in respect of ordinary matters, such as property rights, was limited. It seems, then, that prerogative acts could not have been used to delegate authority to extinguish property rights in settled colonies or colonies acquired by cession or conquest where a legislative assembly had been granted, as the Crown no longer held that power and could not delegate a power it did not itself possess. In the post-Confederation era, exclusive jurisdiction to extinguish Aboriginal rights resided with the federal parliament by way of s.91(24) of the *Constitution Act*, 1867.

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<sup>242</sup> Henry Jenkins, *British Rule and Jurisdiction Beyond the Seas* (Oxford: Clarendon, 1902) at 6.

There are, therefore, four types of legislation that may have had the effect of extinguishing Aboriginal title: (1) imperial legislation until 1931; (2) prerogative legislation prior to the promise of a representative assembly, or enacted under the authority delegated by the Imperial Parliament; (3) colonial legislation enacted under the delegated authority discussed above; (4) federal legislation prior to 1982. If colonial legislation is relied on, the onus rests with the party seeking to demonstrate extinguishment that the jurisdiction to do so was delegated by the proper legal instruments.



### 3. Extinguishment in the Maritime Provinces

Aboriginal title is no longer presumed to have been extinguished in the Maritime Provinces.<sup>1</sup> Indeed, courts at all levels have acknowledged that title has not been entirely extinguished. The Nova Scotia trial Court and Court of Appeal in *Marshall* and *Isaac*, respectively, held that title has likely not been extinguished to reserve lands or small territories around traditional village sites, the New Brunswick Court of Queen’s Bench held that the treaties of peace and friendship recognize and protect Aboriginal title, and the courts of appeal in both New Brunswick and Nova Scotia held in the *Bernard* and *Marshall* cases that title could be proven and had not been extinguished to broad tracts of territory. The Supreme Court of Canada in *Marshall/Bernard* did not foreclose the possibility of title being proven in the region, thereby acknowledging that title has not been extinguished *prima facie*. The question of extinguishment in the Maritime Provinces, then, is still very much alive. As detailed in the previous chapter, extinguishment at common law could occur in one of two ways: by voluntary surrender or through unilateral legislative act. The burden of demonstrating extinguishment rests on the party seeking to prove such extinguishment. As Hall J held in *Calder*, “the Nishgas are the owners of the lands that have been in their possession from time immemorial and, therefore, the burden of establishing that their right has been extinguished rests squarely on the respondent.”<sup>2</sup> A party seeking to establish that title has been extinguished in the Maritime Provinces, then, would have to demonstrate that title was extinguished by voluntary surrender or a unilateral legislative act passed by a competent body.

#### A. Voluntary Surrender

The treaties relevant to the Maritime Provinces were canvassed in some detail in Chapter 1.<sup>3</sup> There I put forward the argument that, far from ceding land, the treaties in fact recognize and protect Aboriginal land rights. While that argument has thus far found little support in the courts,

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<sup>1</sup> Brian Slattery, “Some Thoughts on Aboriginal Title” (1999) 48 UNBLJ 19 at 40 [Slattery, “Some Thoughts on Aboriginal Title”]. As Slattery put it, “[t]o my mind, then, the question of aboriginal title in New Brunswick and Nova Scotia is very much alive.”

<sup>2</sup> *Calder v. British Columbia (A.G.)*, [1973] SCR 313 at 375.

<sup>3</sup> See: *Infra* at 43 – 53.

the Court of Queen's Bench decision in the *Thomas Peter Paul* case notwithstanding, the conclusion that the treaties do not cede land is well established. As Dickson CJ stated unambiguously in *R v Simon*, "[n]one of the Maritime treaties of the eighteenth century cedes land."<sup>4</sup> This was reaffirmed in *Marshall # 1*, where Binnie J. wrote for the majority that "there is no applicable land cession treaty in Nova Scotia."<sup>5</sup> Turnbull J. put it more strongly still in the *Thomas Peter Paul* decision, stating: "I refuse to accept any contention that the Indians ceded Indian title" in the treaties.<sup>6</sup>

While the court in *Marshall/Bernard* did not explicitly state that title had not been ceded by treaty, it implicitly recognized as much by focusing its analysis on whether title had been proven – this would have been an unnecessary inquiry had it been extinguished by treaty. Further, the Supreme Court had the opportunity in that case to overturn statements from the Courts of Appeal holding that the treaties did not cede land, and it did not do so. The most telling evidence, though, may be the fact that the Crown itself, in the *Simon* decision, relied on the fact that the treaties did not cede land to argue that they could not be categorized as treaties.<sup>7</sup> Here, the Crown put forward the argument that "because the Treaty did not deal with the ceding of land or delineation of boundaries," it should not be considered a treaty as the term is used in s.88 of the Indian Act.<sup>8</sup>

Voluntary surrenders of title could also have occurred by means other than treaty, though such surrenders were bound by the terms of the Royal Proclamation, 1763, which prohibited alienation other than to the Crown and required that Aboriginal consent be acquired at a public meeting. There were undoubtedly many small surrenders made in the Maritime Provinces. In New Brunswick, for example, Barnaby Julian, chief of the Mi'kmaq reserve at Red Bank (aka

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<sup>4</sup> *R v Simon* [1985] 2 SCR 387 at 50. At the Nova Scotia Court of Appeal, Cromwell JA noted that "the Supreme Court of Canada on two occasions has expressed the view that the 1760 - 61 treaties do not cede land": *R v Marshall*, 2003 NSCA 105 at 99. In *R v Isaac* [1975] NSJ 412, at 57, the Court of Appeal held that "[n]o Nova Scotia treaty has been found whereby Indians ceded land to the Crown, whereby their rights on any land were specifically extinguished, or whereby they agreed to accept and retire to specified reserves." Similarly, Professor Slattery has concluded that "[t]reaties of cession have been signed for large parts of Canada, notably in Ontario and the Prairie Provinces. But no such treaties exist for the Atlantic Provinces, and parts of Quebec, British Columbia, the Yukon, and the Northwest Territories, as well for pockets of land elsewhere." Brian Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984) 32:2 *The American Journal of Comparative Law* 361 at 372.

<sup>5</sup> *R v Marshall (No. 1)*, [1999] 3 SCR 456 at para 21 [*Marshall #1*].

<sup>6</sup> *R v Peter Paul* [1997] NBJ 439 at para 12 [*Peter Paul*].

<sup>7</sup> This is also recognized on the Department of Aboriginal Affairs and Northern Development website, which recognizes that "[u]nlike later treaties signed in other parts of Canada, the Peace and Friendship Treaties did not involve First Nations surrendering rights to the lands and resources they had traditionally used and occupied." <https://www.aadncaandc.gc.ca/eng/1100100028589/1100100028591#a3>.

<sup>8</sup> *Simon*, *supra* note 4 at 47.

Metepenagiag Mi'kmaq Nation), "had assumed the right to sell and lease the greater part of the reserve of 10,000 acres on the Little South West [Miramichi River]." <sup>9</sup> It is beyond the scope of this paper to determine the legality of these many surrenders, as they are wrapped in a nest of competing claims, leases, and sales. <sup>10</sup> Many sales were made to third parties by individuals without the consent of the community and much land was settled by squatters whom the government lacked the resolve to remove. Lands surrendered in the pre-confederation period by means other than treaty must be assessed against the standards established in the Royal Proclamation. Even the most ambitious of these type of surrender, however, represent relatively small areas of land in considering Aboriginal title in the region.

The fact that the treaties did not cede land leaves unilateral legislation as the only other means by which title may have been extinguished. It is particularly important to assess other modes of extinguishment in the Maritimes for reasons alluded to by Binne J. in *Marshall #1*, where he stated:

While it is true that there is no applicable land cession treaty in Nova Scotia, it is also true that the Mi'kmaq were largely dispossessed of their lands in any event, and (as elsewhere) assigned to reserves to accommodate the wave of European settlement which the Treaty of 1760 was designed to facilitate. It seems harsh to put aboriginal people in a worse legal position where land has been taken without their formal cession than where they have agreed to terms of cession. <sup>11</sup>

The question that remains to be addressed is whether the dispossession that Binnie J. alluded to, the gradual confining of Aboriginal peoples to reserves that represented but a fraction of their traditional territories, was undertaken in a way that legally extinguished Aboriginal title. The remainder of this chapter will focus first on the question of legislative extinguishment of title. Having discussed the framework for legislative extinguishment in the Maritimes and assessing instances of possible extinguishment, I will turn to the issue alluded to by Binnie J. That is, if Aboriginal title was not ceded, and if it was not extinguished by legislation, how were the Aboriginal peoples dispossessed of their lands and was such dispossession lawful?

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<sup>9</sup> W.D. Hamilton, "Indian Lands in New Brunswick: The Case of the Little South West Reserve." (1984) 4 *Acadiensis* 3 at 16.

<sup>10</sup> See *Ibid.* for a thorough review of these difficulties in respect of a single Mi'kmaw First Nation in the Miramichi region of New Brunswick.

<sup>11</sup> *Marshall #1*, *supra* note 5 at para 21.

## B. Extinguishment by Unilateral Legislation

### I. Legislative Competence

The analysis of possible extinguishment of Aboriginal title in the Maritime Provinces begins in the old colony of Nova Scotia, which was ceded to the British by the French at the Treaty of Utrecht in 1713.<sup>12</sup> Until 1784 New Brunswick was a part of Nova Scotia, while Prince Edward Island and Cape Breton remained under French control until 1763 when they were ceded to Britain at the Treaty of Paris and annexed to Nova Scotia in the Royal Proclamation issued that year.<sup>13</sup> Cape Breton subsequently became an independent colony in 1784, a status it maintained until 1820.<sup>14</sup> Prince Edward Island became an independent colony in 1769, at which point a colonial government, consisting of a Lieutenant Governor and a Council, was formed. The Council possessed both executive and legislative powers, while an elected assembly was formed and met in 1773.<sup>15</sup> In the period from 1713 – 1784, then, any extinguishment in present day peninsular Nova Scotia or New Brunswick can be assessed with reference to the actions of the colonial government of Nova Scotia or the imperial government acting in respect of Nova Scotia. From 1763 – 1769, the same is true of PEI and for Cape Breton from 1763 – 1784 and from 1820 onward. The constitutions of New Brunswick and Prince Edward Island were closely modeled on that of Nova Scotia and are subject to the same legal considerations.<sup>16</sup> The constitutions in the

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<sup>12</sup> Sir John G. Bourinot, *Builders of Nova Scotia* (Toronto: The Copp-Clark Co., 1900) at 27-28 [*Builders of Nova Scotia*]; Brian Slattery, *The land rights of indigenous Canadian peoples, as affected by the Crown's acquisition of their territories* Thesis (D. Phil.) University of Oxford, 1979 at 128 [Slattery, *Land rights of Indigenous Canadian peoples*]. The entire region was in fact granted to Sir William Alexander by means of a Charter in 1621. This has been ignored when establishing the date of sovereignty in the region, likely because Alexander never fulfilled the requirements of the Charter. For a discussion of the effect of the charter see Slattery, *Land Rights of Indigenous Canadian peoples* at 106-107 and Brian Slattery, “Paper Empires: The Legal Dimensions of French and English Ventures in North America” in John McLaren, A.R. Buck, Nancy E. Wright. *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) at 70-71. For a detailed analysis of the context in which the Charter was granted and the reasons why Alexander had difficulties fulfilling its provisions, see John G. Reid, “Sir William Alexander and North American Colonization” in John G. Reid, *Essays On Northeastern North America: Seventeenth and Eighteenth Centuries* (Toronto: University of Toronto Press, 2008) at 25-39.

<sup>13</sup> Mills, Arthur. *Colonial Constitutions: An Outline of the Constitutional History and Existing Government of the British Dependencies* (London: John Murray, 1856) at 214.

<sup>14</sup> Isaac, *supra* note 4 at 60. Cape Breton “was under the government of Nova Scotia from 1763 to 1784 when it was given a separate government consisting of a lieutenant-governor and council having very limited legislative as well as executive functions. This constitution remained in force until the reannexation of the island in 1820 to Nova Scotia of which it still forms a part.” Bourinot, *Builders of Nova Scotia*, *supra* note 12 at 29.

<sup>15</sup> Arthur Berriedale Keith, *Responsible Government in the Dominions*, (Oxford: Clarendon, 1912) at 5; Bourinot, *supra* note 12 at 30.

<sup>16</sup> J.E. Read, *The Early Provincial Constitutions* (1948) 26:4 Can Bar Rev 622 at 630.

Maritime Provinces were prerogative in nature, gradually developed by prerogative instruments, primarily governors' commissions and royal instructions.<sup>17</sup> Both the form and legal authority of the colonial governments in the Maritimes were detailed in these prerogative instruments. That is, in addition to detailing the authority of colonial governments, these prerogative constitutional instruments provided for the establishment of representative legislative bodies and imported from the British Constitution the clear division between executive and legislative bodies.<sup>18</sup>

A bicameral legislature was not established in Nova Scotia until 1758.<sup>19</sup> Prior to the founding of Halifax in 1749, the government "was vested solely in a governor who had command of the garrison stationed at Annapolis."<sup>20</sup> Until that point, Nova Scotia was largely under military rule.<sup>21</sup> Governor Philipps was issued a commission in 1719 authorizing him to appoint a council of no less than twelve people. The council served legislative, executive, and some judicial functions.<sup>22</sup> The legislative authority of the council, however, was very limited in scope.<sup>23</sup> In 1749 the seat of government was moved to the newly established settlement at Halifax, with the newly appointed Governor Cornwallis appointing a twelve-person executive council.<sup>24</sup> Though Cornwallis also had the authority to summon a general assembly pursuant to the royal commission establishing him as governor, such an assembly was not called for another nine years. The delay in summoning an assembly had important consequences for the legislative authority of the Governor and Council. When the issue of the legislative authority of the Governor and Council was raised, the Attorney and Solicitor General of England stated in 1755 that "the Governor and Council of Nova Scotia had no authority from His Majesty to make

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<sup>17</sup> Bourinot, *Builders of Nova Scotia*, *supra* note 12 at 27-28. As Elizabeth Brown has stated, "[t]hese commissions instructions, and statutes were the constitutional framework within which the statutes of Great Britain were introduced into the several Canadian jurisdictions." Elizabeth Brown, "British Statutes in the Emergent Nations of North America 1609 – 1949" 7 *Am. J. Legal Hist.* 95 1963 at 102.

<sup>18</sup> This division was discussed at length at pages 59 – 99.

<sup>19</sup> Keith, *supra* note 15 at 4-5. Keith suggests that the legislature then established was done so "under the royal prerogative to create a legislature in a settled Colony."

<sup>20</sup> Beamish Murdoch, "An Essay on the Origin and Sources of the Law of Nova Scotia" (1984) 8 *Dal LJ* 185 at 187. See also Sir John G. Bourinot, *Canada Under British Rule 1760 – 1900* (London: C.J. Clay & Sons, 1900) at 52-53 [Bourinot, *Canada Under British Rule*].

<sup>21</sup> The early governors were all high ranking military officials and often received commissions reflecting their dual role. See for example the Commission to Samuel Vetch, Governor of Nova Scotia and Annapolis Royal, 17 August 1717 in Nova Scotia Archives: Records and Manuscripts From British Repositories: Letters Patent, Commissions and Instructions, Commissions to Governors, Nova Scotia 1710-1776, MG 40 B12 Pt.1 at 9-10 [*Commission and Instructions, Nova Scotia Archives*]. See also Bell, D.G. "Maritime Legal Institutions Under the Ancien Régime" (1996) 23 *Man LJ* 103 (QL) at para 9.

<sup>22</sup> Bourinot, *Builders of Nova Scotia*, *supra* note 12 at 52-53 see also: Keith, *supra* note 15 at 4-5.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*

laws.”<sup>25</sup> This opinion was based on the view that legislative activity was beyond the scope of the royal commission granted to Governor Cornwallis.<sup>26</sup> As the Governor and Council were found to have no legislative powers by virtue of the fact that such powers were not granted in the royal commission and instructions to Governor Cornwallis, it is clear that the power to legislatively extinguish Aboriginal rights was beyond the scope of authority of the colonial government in the period 1749-1758. Once empowered to summon an assembly, the legislative power of the executive was greatly diminished. This contemporary analysis provides valuable insight into the powers of colonial governors in the 18<sup>th</sup> century.

The royal commission establishing Cornwallis as governor stated that he was commissioned to the office “with all the rights members appurtenances whatsoever thereunto belonging,”<sup>27</sup> rights which clearly did not include the authority to legislate. The commission further stated:

[W]e do hereby require and command you to do and execute all things in due manner that shall belong unto your said Command and the Trust We have reposed in You according to the several powers and authorities granted or appointed You by the present Commission and the Instructions herewith given you or by such further powers Instructions and authorities as shall at anytime hereafter be Granted or appointed you under our Signet and Sign Manual or by Order in our Privy Council and according to such reasonable Laws and Statutes as hereafter shall be made or agreed upon by you with the advice and consent of our Council and the Assembly of our said Province under your government hereafter to be appointed...you the said Edward Cornwallis with the advice and consent of our said Council and Assembly or the major part of them respectively shall have the full power and authority to make constitute and ordain Laws and Statutes and

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<sup>25</sup> Murdoch, *supra* note 20 at 189. It had long been believed that a decision delivered by Chief Justice Belcher concurred with that of the Imperial law officers. John Bourinot, for example, stated that “[d]uring nine years the governor-in-council carried on the government without an assembly, and passed a number of ordinances, some of which imposed duties on trade for the purpose of raising revenue. The legality of their acts was questioned by Chief Justice Belcher, and he was sustained by the opinion of the English law officers, who called attention to the governor's commission, which limited the council's powers” (Bourinot, *supra* note 12 at 52-53). Subsequent scholarship, however, has shown that Belcher in fact believed that “the primitive circumstances of Nova Scotian society justified the application of the 17th-century Virginian precedent of legislating for a colony in the absence of an elected assembly”: S. Buggey, “Belcher, Jonathan,” in *Dictionary of Canadian Biography*, vol. 4, University of Toronto/Université Laval, 2003–, accessed August 4, 2015, [http://www.biographi.ca/en/bio/belcher\\_jonathan\\_4E.html](http://www.biographi.ca/en/bio/belcher_jonathan_4E.html). Nonetheless, it is important to note that, while the characterization of Belcher's decision was mistaken, the English law officers did determine that the legislative activity of the Governor and Council was invalid with reference to the Governor's commission.

<sup>26</sup> Keith, *supra* note 15 at 4-5, Bourinot, *Builders of Nova Scotia*, *supra* note 12 at 52.

<sup>27</sup> Commission to Edward Cornwallis, Governor in Chief of Nova Scotia, 6 May 1749, *Commissions and Instruction, Nova Scotia Archives*, *supra* note 21 at 35 [*Commission to Cornwallis*].

Ordinances for the publick [sic] Peace Welfare and good Government of our said province and the people and Inhabitants thereof.<sup>28</sup>

Thus, while Cornwallis was issued a seemingly expansive range of powers, including the authority to “make laws,” he was to do so only upon the advice not only of the executive council, but also of an elected assembly. As Cornwallis was authorized to summon a legislative assembly, the legislative power of the office of the governor and the council, as representatives of the British Crown, was immediately limited.<sup>29</sup> The legislative role of the governor, then, was limited to the power of disallowance, as the commission stated that the governor “shall have a negative office in the making and passing of all Laws Statutes and Ordinances.”<sup>30</sup> The commission also included a repugnancy clause limiting the legislative authority of the colony, stating that the governor was not permitted to assent to any laws which were repugnant to the laws of England.<sup>31</sup>

The authority of the governors and councils in Nova Scotia in the 1713 – 1749 period may be assessed upon the same reasoning as that employed by the Attorney and Solicitor General of England in respect of the legislative authority of Governor Cornwallis and his Council. The authority to establish an executive council was not granted to a Nova Scotia governor until 1719. As mentioned above, the legislative authority of the council then established by Governor Philipps was limited, both in terms of the scope of powers delegated to the colonial government by the relevant prerogative instruments and in the geographic reach of the ordinances they did pass. Thus, “[t]heir acts did not extend beyond temporary regulations relative to trade in grain in the Bay of Fundy, or else local enactments touching the people of the village of Annapolis.”<sup>32</sup> Again, this was a constitutional matter (i.e. the scope of powers delegated was limited) and a practical matter; the British had no functional control over Nova Scotia outside the fort at Annapolis Royal.<sup>33</sup>

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<sup>28</sup> Ibid.

<sup>29</sup> *Campbell v Hall* (1774) 1 Cowp 204, 98 ER 1045.

<sup>30</sup> *Commission to Cornwallis*, *supra* note 27 at 43.

<sup>31</sup> Ibid. at 42. For detailed discussion of the powers of colonial governments see *infra* at 65-99.

<sup>32</sup> Bourinot, *Builders of Nova Scotia*, *supra* note 12 at 22; For a discussion of the symbolic importance of renaming Acadia and its towns see Wicken, William C. *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Jr.* (Toronto: University of Toronto Press, 2002) at 99.

<sup>33</sup> Though “Acadia”, present day peninsular Nova Scotia, was ceded to the British in 1713, the British (more precisely, New Englanders.) had “conquered” the province in 1710. As discussed in Chapter 2, however, this is somewhat misleading. What the British in fact conquered in 1710 was the fort and garrison at Annapolis Royal. Well into the 18<sup>th</sup> century, the British had no effective control over areas outside the immediate vicinity of the fort. Thus, while the authority of the colonial governors and council theoretically extended to all of the territory ceded under the Treaty of Utrecht, their power over that territory was gained slowly.

The tenuous British control over the colony was reflected in the early commissions. Col. Nicholson, for example, received two commissions in 1712. The first was military in nature, appointing Nicholson as the “General and Commander in Chief” of the British forces “employed or to be employed in our Province of Nova Scotia or Acadia.” While this commission also empowered Nicholson to make rules and ordinances, they were only to be applicable to the soldiers in Nova Scotia.<sup>34</sup> The main concern was providing for punishment for mutiny or desertion. In the second 1712 commission, Nicholson was appointed Governor, extending his authority to all British subjects in Nova Scotia, but not granting any authority to make laws, statutes, rules or ordinances. Col. Samuel Vetch was commissioned as Governor of “Nova Scotia and of ye [sic] town and Garrison of Annapolis Royal” in 1714. As with the 1749 commission to Governor Cornwallis, Vetch and Nicholson were enjoined to execute the duties of the Governor’s office and “all manner of things thereunto belonging.” As discussed above, though, these duties did not in themselves include legislative powers and no such powers were mentioned in the commissions. Subsequent commissions to Col. Richard Philipps and Capt. John Doucet in 1717 (as Governor and Lieutenant-Governor, respectively) are nearly identical in form and content to that of 1714.

It was not until 1719 that Governor Philipps was instructed to form a twelve-person council and an assembly, both with legislative capacity.<sup>35</sup> This is also the first commission that delegated the authority to grant lands for the purposes of settlement. The issue of settlement will be dealt with in more detail below. An assessment of the impact of these early commissions on the legislative jurisdiction of the colonial governors and the Imperial Crown must look to when an assembly was “promised” in Nova Scotia.<sup>36</sup> The 1749 commission clearly instructed Cornwallis to summon and call a general assembly of the freeholders and planters (according to usage and custom in other plantations in America).<sup>37</sup> An assembly was mentioned as early as 1719, though, and in the subsequent commission to each incoming governor. The 1749 commission is the first to use the word “elected” in respect of the assembly or to signify who was qualified for election. It is also the first to grant the governor powers of prorogation,

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<sup>34</sup> Commission to Francis Nicholson, *Commission and Instructions, Nova Scotia Archives, supra* note 21 at 7 [*Nicholson’s Commission*].

<sup>35</sup> Commission to Richard Philipps, *Commissions and Instruction, Nova Scotia Archives, supra* note 21 at 17 [*Philipps’ Commission*].

<sup>36</sup> For discussion see *infra* at 70-72.

<sup>37</sup> Commission to Cornwallis, *supra* note 27 at 40.



disallowance, etc. that characterize the executive powers vis-à-vis the legislature in the British constitutional system and clearly establish the governor as the head of civil government in the colony. Importantly, the 1719 commission to Governor Philipps grants the governor authority to make laws “with the advice of council and assembly.”<sup>38</sup> Nonetheless, the instructions regarding the summoning of an assembly are much more robust in the 1749 commission and most commentators have pointed to 1749 as the date when Nova Scotia received a constitution.<sup>39</sup> It is unclear, then, whether the royal prerogative was limited by the promise of an assembly in 1719 or 1749. There is reason, though, to think that it may have been 1719.

Beamish Murdoch, sometimes referred to as “Nova Scotia’s Blackstone,” asserted that “[o]n the conquest and subsequent cession of this country to the English Crown, the Monarch of England became sole lord and proprietor of the dominion, with the full right of legislating for the land and its inhabitants.”<sup>40</sup> However, he went on to state that “[i]n the instructions to the Governor of Nova Scotia there were always directions to call an assembly of the people, but owing to the almost entire absence of British inhabitants this instruction remained long inoperative.”<sup>41</sup> This would seem to suggest that the 1719 commission should be interpreted as providing instructions to call an assembly. Indeed, granting the authority to make laws under the advice of an assembly makes little sense absent an assembly and seems to require that such an

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<sup>38</sup> Commission to Richard Philipps, *Nova Scotia Archives*, *supra* note 27 at 17.

<sup>39</sup> See for example Bourinot, *Builders of Nova Scotia*, *supra* note 12 at 22-24; Read, “Early Provincial Constitutions” *supra* note 16 at 626; Brown, “British Statutes in North America”, *supra* note 17 at 102-103. The period during which Halifax was founded is also recognized as being a period when the administration of colonial governance was reformed and made much more efficient. See Andrew D.M Beaumont, *Colonial America and the Earl of Halifax 1748 – 1761* (Oxford: Oxford University Press, 2015).

<sup>40</sup> Murdoch, *supra* note 20 at 188. This statement should be understood as a justification for the dispossession of Aboriginal peoples of their land as much as a statement of Imperial law. Murdoch here espouses what Brian Slattery has referred to as the theory of discontinuity. Slattery states: “[t]his doctrine holds that in instances where English law is introduced into a newly-acquired territory the local inhabitants are automatically deprived of their existing land rights. This is thought to come about, not because of the change of sovereignty itself... but because of the application of English law. The reasoning is as follows. It is a fundamental principle of English law that the King is the original proprietor and lord paramount of all lands within the realm, and the sole source of title to the soil. The courts will only recognize private land titles which can be shown to derive, directly or indirectly, from a Crown grant. The local inhabitants of a newly-acquired territory normally cannot show this, as their titles stem from ancient possession or other sources pre-dating the Crown. Therefore, the doctrine contends, their rights cannot be recognized in the courts of the new sovereign.” Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983), at 12. As D.G. Bell has pointed out, Murdoch in fact went further, dispelling the notion that the Aboriginal inhabitants possessed any title even prior to the assertion of Crown sovereignty, arguing that recognizing Aboriginal title to land would be the equivalent of recognizing that “wild beasts” held title to the land: D.G. Bell, “Was Amerindian Dispossession Lawful? The Response of 19th Century Maritime Intellectuals” (2000) 23 Dal LJ 168 [Bell, “Amerindian Dispossession”].

<sup>41</sup> Murdoch, *supra* note 20 at 189.

assembly be called before laws can be made. Thus, Murdoch's assertion that the Crown retained "the full right of legislating" in Nova Scotia must be qualified. As has been seen, it was a fundamental principle of imperial law that the royal prerogative to legislate in colonies was limited when an assembly was granted. The "full right of legislating" that Murdoch refers to, if considered to extend to ordinary legislation, would have applied in Nova Scotia only from 1713 to either 1719 or 1749. Alternatively, the "full right of legislating" may be interpreted as meaning the right to legislate equal to the right to legislate in England, though, as has been seen, this was a very limited authority. Thus, while Murdoch wrote that the legislative power of the Crown "was exercised only as far as necessity demanded, and only by means of the commissions issued by the Crown to the several Governors and the royal instructions given in connection with them,"<sup>42</sup> he may have overlooked the fact that this may have been the case not because of restraint on the part of the Crown, but because the authority to legislate by way of prerogative had been drastically curtailed in either 1719 or 1749. Given the wording of the 1719 commission, and Murdoch's statement that the instruction to establish an assembly was "long inoperative" (a phrase that suggests more than the nine years between 1749 and 1758), it is difficult to argue that the authority to call an assembly was not granted in 1719, despite that commission lacking the more detailed instructions provided in 1749. It is clear that the 1719 commission limited the legislative authority of the governor until an assembly was formed.<sup>43</sup> The authority of the Crown to legislate in respect of ordinary legislation under the auspices of the royal prerogative was extinguished in either 1719 or 1749.<sup>44</sup>

Thus, there were important limitations on the authority of colonial governors and the Imperial Crown (King-in-Council) in the Maritime Provinces. As discussed in Chapter 2, the legislative power of the Crown existed in a ceded colony only until such time as an assembly was granted. Given that we have also seen that Aboriginal title could only have been extinguished by legislation (or voluntary surrender), it is clear that legislation from the Imperial Crown could not have extinguished title after 1749 at the latest (in my opinion, 1719). Further, a reading of the royal instructions and commissions to early governors makes it clear that the colonial executive was limited not only by the British constitutional restrictions on the legislative

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<sup>42</sup> Ibid. at 188

<sup>43</sup> Brian Slattery Slattery, *Land rights of indigenous Canadian peoples*, *supra* note 12 at 137-141

<sup>44</sup> Professor Slattery, relying on the 1719 *instructions*, suggests that the the royal prerogative was not limited until 1749: Ibid. at 136-137. My view is that the 1719 *commission* to Governor Philipps grants him the power to summon a 12 person assembly.

activity of the executive branch, but also by the fact that the power to extinguish rights had not been delegated. The authority of the governor to legislate independently of the assembly was limited in 1719. Consequently, the only body with the constitutional capacity to extinguish Aboriginal title from 1719 to 1758 was the Imperial Parliament.<sup>45</sup> These limitations extended to the territory that is now New Brunswick from 1759<sup>46</sup> and Prince Edward Island and Cape Breton from 1763. Put otherwise, despite the fact that New Brunswick, PEI, and Cape Breton were acquired by cession, the legislative authority of the Crown was limited as soon as they came under British control by virtue of the fact that they were promptly annexed to a province that already had a representative assembly. Despite this, considerable Aboriginal lands were taken during this period by way of settlement, which was authorized in the royal commissions. This issue will be dealt with in detail below.

In this first period of analysis, focusing on the colonial government of Nova Scotia until a colonial assembly was summoned on October 2<sup>nd</sup> 1758, there is no evidence that the authority to legislatively extinguish Aboriginal rights was ever delegated to colonial authorities. Indeed, until 1758, it is not clear that legislative authority existed at all beyond local ordinances within the explicit terms of the royal commissions. That is, prior to 1758, the only means of extinguishment were legislation from the Imperial Parliament, prerogative legislation or legislation from the colonial executive prior to 1719 or made under authority delegated by the Imperial Parliament. Authority for such action does not appear to have been delegated.<sup>47</sup> Following the division of Nova Scotia in 1769 and again in 1784, each of the colonies were governed by the same principles under very similar constitutions.<sup>48</sup>

Given these limitations on prerogative and executive authority, the question then becomes whether colonial legislatures in the Maritimes had the authority to legislatively extinguish title. As discussed in Chapter 2 the jurisdiction of colonial assemblies was delegated

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<sup>45</sup> This appears to be a moot point as there is no evidence of prerogative legislation being used during this time but for the commissions and royal instructions to governors.

<sup>46</sup> This is the date the Supreme Court has accepted as the date of the acquisition of British sovereignty. The English believed that the territory was ceded to them along with peninsular Nova Scotia in 1713. As discussed above, the territory became part of Nova Scotia upon British acquisition, making it subject to the Nova Scotian government and the limitations on that government's authority.

<sup>47</sup> The issue of delegation of authority to grant lands for settlement will be dealt with below in the section title "How Were Aboriginal Lands Taken?"

<sup>48</sup> On the power of the Crown to annex and separate colonies where the royal prerogative has been limited due to the establishment of a legislature: *Cape Breton (in Re)* 13 Eng Rep 489 1809-1865 (PC).

in nature.<sup>49</sup> If colonial legislation is relied on to demonstrate extinguishment, it must be demonstrated that the colonial assembly in question was delegated the authority to extinguish title. Colonial legislatures were delegated authority to legislate in respect of the “Peace Welfare and good Government” of the colony.<sup>50</sup> As Sir Roberts-Wray has argued, “[w]hether a particular enactment is calculated as matter of fact or policy to secure peace, order and good government is not a question into which the Courts will inquire. In short, it is apparent that the Courts have attached little value to the actual words but have concerned themselves with the general doctrine of legislative competence.”<sup>51</sup> The phrase, then, is best understood as conferring an expansive, rather than limited authority, seeming only to limit the jurisdiction of the colony to internal matters, that is colonial legislation could not have extra-territorial application.<sup>52</sup>

Determining whether “Peace Welfare and good Government” included the authority to extinguish Aboriginal title is a complicated task. In *Sappier/Gray*, Bastarache J held that “it is not at all clear that the colonial legislature of New Brunswick was ever granted the legal authority by the Imperial Crown to extinguish aboriginal rights.”<sup>53</sup> This would suggest that the initial delegation of authority to legislate in respect of local matters did not include the authority to extinguish such rights. Any authority to extinguish rights, then, would have to have come from a subsequent delegation, a delegation which, it seems, would have to have been made by the Imperial Parliament. If Aboriginal title could only be extinguished by legislation, and if the Imperial Crown did not have the authority to legislate after 1749 at the latest, then it is difficult to see how the Crown could delegate the authority to extinguish such rights.<sup>54</sup> While it is possible that the Crown could delegate such authority in the original commission and instructions establishing government in the colony (owing to the fact that until that time the Crown could legislate broadly under the prerogative in conquered or ceded colonies), the Crown

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<sup>49</sup> As Sir Kenneth Robert-Wray put it, “the decisive and only test of validity for any law of a subordinate legislature is whether it is within the legislative powers granted,” Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (New York: Frederick A. Praeger, 1966) at 369.

<sup>50</sup> This is the wording in the 1749 commission to Thomas Carleton. This wording, or the alternative “peace order, and good government,” were a common feature of colonial commissions. “Order” and “welfare” in this context are functionally synonymous: see Roberts-Wray, *supra* note 49 at 369.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.* See also Read, “Early Provincial Constitutions,” *supra* note 16 at 636.

<sup>53</sup> *R v Sappier; R v Gray*, 2006 2 SCR 6 at 58.

<sup>54</sup> Aside from the authority to accept and negotiate voluntary surrenders of land, as discussed above.

no longer possessed such authority once an assembly was promised.<sup>55</sup> The Crown presumably could not delegate an authority greater than that which it possessed, meaning that only the Imperial Parliament could delegate the authority to extinguish rights after 1719 (1749 at the latest) in the Maritime Provinces.

One problem with this analysis is that, on the face of it, it seems to directly contradict historical practice. The American colonies, under similar constitutions as those of the Maritimes, legislated repeatedly in respect of Indians and Indians lands,<sup>56</sup> and in the mid-19<sup>th</sup> century the assemblies in Nova Scotia, New Brunswick, and Prince Edward Island did the same. The Maritime Provinces all employed Indian Commissioners appointed by the colonial governments.<sup>57</sup> Though it is beyond the scope of this paper to determine whether in all of the cases just mentioned authority was properly delegated to the colonial legislatures, it does not appear to have been delegated by the Imperial Parliament. The fact that colonial legislatures legislated in respect of Aboriginal affairs, then, suggests on its face that their initial grant of authority and subsequent directives from the Crown were thought to have grounded their jurisdiction.

The language of the 1749 commission to Governor Cornwallis also seems on its face to suggest an authority to legislate “for” Aboriginal peoples; it grants the power to “make constitute and ordain Laws and Statutes and Ordinances” for the “Peace Welfare and good Government of our said province and the people *and Inhabitants* thereof” [emphasis mine].<sup>58</sup> If the term “inhabitants” includes Aboriginal peoples, then the authority delegated to the legislature to legislate for “Peace Welfare and good Government” in the Maritime provinces would seem to have extended to Aboriginal peoples. As discussed in Chapter 1, it is not clear whether “inhabitants” was meant to include Aboriginal peoples. The term is used in several senses that seem to exclude Aboriginal people. In Thomas Carleton’s 1784 instructions, for instance, the term is used to denote the group from which members of the executive council may be chosen.

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<sup>55</sup> See Hall J in *Calder* where he held that the authority to legislatively extinguish rights would have been found in the commission or instructions if it had been delegated: *Calder*, *supra* note 2 at 406-407.

<sup>56</sup> See Slattery, *Land Rights of Indigenous Canadian Peoples*, *supra* note 12; Mark D. Walters, “Mohegan Indians v. Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America” (1995) 33 Osgoode Hall LJ 785 at paras 15-16; Colin G. Calloway, *The Scratch of a Pen: 1763 and the Transformation of North America* (New York: Oxford University Press, 2006) at 53.

<sup>57</sup> L.F.S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713 – 1867* (Vancouver: UBC Press, 1979) at 90, 101, 117.

<sup>58</sup> Commission to Cornwallis, *supra* note 27.

Most suggestive, perhaps, is clause 84, which instructs Carleton to “take care that all Planters Inhabitants and Christian Servants, be listed under good Officers, and when and as often as shall be thought fit, mustered and trained, whereby they may be in a better readiness for the Defence of our said Province under your Government.”<sup>59</sup> It is doubtful that it was intended that Aboriginal peoples be included in this group in the 18<sup>th</sup> century. Most other uses of the term, though not excluding Aboriginal people, certainly seem not to have them in contemplation; instead, Aboriginal people are referred to as “neighbours.” The one exception I have found is the earlier 1729 instructions to Governor Philipps, which instruct the Governor to provide a reward to any white man who married “an Indian woman, native and inhabitant of Nova Scotia.”<sup>60</sup> It seems that the term “inhabitant” likely did not have a legal definition and instead must be understood in the context in which it was used; the provisions relating to land settlement discussed in Chapter 1, for example, seem to include Aboriginal people, while the provisions requiring military service almost certainly do not. The meaning of the term, then, must be assessed on a case-by-case basis with reference to the context in which it is used. Whether “inhabitants” included Aboriginal people in the context of the initial grant of legislative authority to the colonial governments, however, may not be as important as it first seems, for reasons that will be made clear below.

In assessing the apparent contradiction between the view that the authority to extinguish Aboriginal title could only have been delegated by the Imperial Parliament and the fact that colonial legislatures legislated in respect of Aboriginal peoples in the seeming absence of such a delegation, we must recall the precise nature of the powers inhering in each branch of government to assess what may and may not have been delegated. It is clear that the responsibility to manage Aboriginal affairs in the colonies was left to the King/Queen-in-council, an authority which was exercised primarily through the various committees of the Privy Council (various configurations of the Board of Trade) and a Minister of State responsible for colonial affairs. Once British sovereignty had been acquired, the relationship with Aboriginal peoples fell within the purview of colonial administration more generally.<sup>61</sup> This is evidenced by the frequent

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<sup>59</sup> 1784 Royal Instructions to Thomas Carleton, PANB, available online at <http://archives.gnb.ca/exhibits/forthavoc/html/Royal-Instructions.aspx?culture=en-CA> [*Instructions to Carleton*].

<sup>60</sup> 1729 Royal Instructions to Governor Philipps, Nova Scotia Archives, Records and Manuscripts from British Repositories, Letters Patent, Commissions and Instructions: Instructions to Governor’s of Nova Scotia 1708-1731, MG40, B13, Pt. 1 [*Instructions to Philipps*].

<sup>61</sup> See full discussion *infra* at 75-82.

communications between governors and the Board of Trade and relevant secretary of state concerning Aboriginal issues. The 1784 instructions to Governor Thomas Carleton are illustrative of the range of authority Governors were delegated in respect of Aboriginal affairs. Carleton was to maintain correspondence with the Indians, inducing them to be both good neighbours and British Subjects and, further, to enter into treaties of peace and friendship with them.<sup>62</sup> The 1729 instructions to Richard Philipps directed him to offer a reward to any white man who married an Indian woman.<sup>63</sup> Governors, then, were delegated the authority to enter into treaties and were tasked with maintaining relationships with Aboriginal peoples. These relationships were political in nature. The nature of the authority delegated to the Colonial Governors, then, reflected the authority of the Imperial Crown.<sup>64</sup> That authority was limited by its status as the executive branch of government. Aboriginal title could only have been extinguished by legislation and legislating was beyond the constitutional bounds of the executive branch.

The conclusions arrived at in the foregoing analysis are dependent to an extent on matters of interpretation. If “inhabitants,” as used in the royal instructions, is meant to include Aboriginal peoples, then it appears that the colonial assemblies were delegated the authority to pass laws which extended to Aboriginal peoples. In other words, they were under the jurisdiction of the colonial government. Whether this extended to the authority to extinguish rights is not clear. If such a delegation needed to be explicit, then it clearly was not. Thus, the situation would mirror that of the Provinces post-confederation, where laws of general application apply on Indian reserve lands but the provinces cannot legislate in respect of Indian lands.<sup>65</sup> It should also be noted, however, that, at least in the case of New Brunswick, the colony itself did not believe it

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<sup>62</sup> The instruction read: “63. And Whereas it is highly necessary for Our Service that you should cultivate and maintain a strict Friendship and good correspondence with the Indians, Inhabiting within Our said Province of New Brunswick, that they may be induced by degrees not only to be good Neighbours to our Subjects, but likewise themselves to become good subjects to Us, you are therefore to use all proper means to attain those Ends, to have Interviews from time to time, with the several heads of the said Indian Nations or Clans and to endeavour to enter into Treaty with them promising them Friendship and Protection on Our part.” See *Instructions to Carleton*, *supra* note 59.

<sup>63</sup> *Instructions to Philipps*, *supra* note 35.

<sup>64</sup> As Charles Clark stated, the “political and military administration is consequently vested in a governor.” Charles Clark, *A Summary of Colonial Law, the Practice of the Court of Appeals From the Plantations, and of the Laws and Their Administration in All the Colonies* (London: C. Doworth & Sons, 1834) at 3 [Clark, *A Summary of Colonial Laws*].

<sup>65</sup> Though the Supreme Court modified the law in *Tsilhqot’in* to permit provincial laws of general application to infringe Aboriginal title if such infringement can be justified, provinces are still prohibited from legislating in respect of “Indian lands.” *Tsilhqot’in Nation v British Columbia*, 2014 SCC 44 at paras 129 – 152 [*Tsilhqot’in Nation*].

had jurisdiction to legislate in respect of Indian lands until such delegation had been made by the Colonial Office. That is, whether the term “inhabitants’ as it was used in the royal instructions included Aboriginal peoples or not, the colonial government believed it required a further delegation of authority to legislate in respect of Indian lands. If “inhabitants” did not include Aboriginal people, or if a delegation for the purposes of extinguishment needed to be more explicit, authority to extinguish rights would have to have been delegated subsequently. After 1719 (or 1749), this subsequent delegation could only have come from the Imperial Parliament, as the only body with the jurisdiction to legislatively infringe rights. Again, while this conclusion is at odds with the management of Aboriginal affairs by the executive branch, a clear analysis of the distinct powers held by each branch of government reveals that the types of delegations typically made by the Imperial Crown are not incommensurate with the position that the authority to legislatively extinguish title could only come from the Imperial Parliament.

## II. *Repugnancy*

Repugnancy functions in two senses: (1) colonial laws could not be repugnant to higher order constitutional laws and principles; and (2) the “doctrine of repugnancy” voided any colonial laws which were repugnant to imperial laws applying to the colony.

In respect of higher order constitutional laws and principles, two important examples are the Royal Proclamation, 1763, and the treaties of peace and friendship. The Royal Proclamation was held by the Supreme Court to apply to the Maritime Provinces in the *Marshall/Bernard* decision.<sup>66</sup> While the Imperial Parliament possessed the authority to legislate contrary to the terms of the Proclamation if it wished to do so, the Proclamation bound all colonial governments in the territories where it applied. The “Indian provisions” of the Proclamation, which prohibited alienation of Indian lands to any party other than the Crown and established procedural requirements guiding the acquisition of Indian lands by the Crown, applied in the Maritime Provinces from 1763 onward, acting to protect the Aboriginal interest in their lands. Similarly, the treaties of peace and friendship constrained the discretionary authority of British and colonial governments respecting future settlement and resource management. As discussed at length in Chapter 1, the treaties created a body of inter-societal law governing the relationship between

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<sup>66</sup> *R v Marshall; R v Bernard*, [2005] 2 SCR 220 at para 87 [*Marshall; Bernard*].



Aboriginal peoples and the British and colonial governments. While the doctrine of Parliamentary supremacy could be invoked to support the view that the Imperial Parliament could have legislated contrary to the terms of one of the Maritime treaties, there is no evidence that it did so explicitly. Since 1982, of course, treaties have been given formal constitutional protection and can only be infringed subject to the test articulated in *Badger*.

In *Bernard*, the New Brunswick Court of Appeal skirted the competency question by relying on the argument that the *Colonial Laws Validity Act, 1865*<sup>67</sup> retroactively validated colonial laws that would otherwise be void for repugnancy. Robertson J. stated:

The legitimacy of colonial legislation was confirmed by the Colonial Laws Validity Act. That Act retroactively validated all laws passed by a legislature in any British Dominion by deeming them valid and effectual from the date of their having received Royal Assent. The only exceptions were with respect to statutes that had previously been disallowed or repealed.<sup>68</sup>

With respect, this analysis overstates the effect of the *Colonial Laws Validity Act*. The Act stated that laws which were void for repugnancy to British law would no longer be void, but confirmed that colonial law was subject to, and could not contradict, any imperial law concerning the colony itself.<sup>69</sup> This would have included the Royal Proclamation, as well as the constitutional framework establishing governmental jurisdiction. In other words, the *Colonial Laws Validity Act* could not have operated to revive a law which would have been *ultra vires* a colonial legislature, as the constitutional framework establishing that jurisdiction was constituted by imperial laws about the colony. Robertson J. seems to have recognized this, at least in part, as he went on to state that “[t]o the extent that the Royal Proclamation is applicable [despite the passage of the CLVA], extinguishment of aboriginal title can only occur with the consent of the aboriginal community.”<sup>70</sup> In *Calder*, Hall J confirmed not only that the Proclamation continued to apply following the *Colonial Laws Validity Act*, but that the Act in fact made the Proclamation law in jurisdictions it may not originally have applied to; he held that that “the Colonial Laws Validity Act applied to make the Proclamation the law of British Columbia.”<sup>71</sup> Thus, colonies continued to be bound by the Royal Proclamation and the *Colonial Laws Validity Act* could not function to retroactively save laws that were in violation of the Proclamation. In recognizing that

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<sup>67</sup> 1865 (U.K.), 28 & 29 Victoria, c. 63.

<sup>68</sup> *R v Bernard*, 2003 NBCA 55 at para 177 (Robertson JA) [*Bernard*, NBCA].

<sup>69</sup> Read, “Early Provincial Constitutions” *supra* note 16 at 624 – 625.

<sup>70</sup> *Bernard*, NBCA, *supra* note 68 at para 177 (Robertson JA).

<sup>71</sup> *Calder*, *supra* note 2 at 395.

the Proclamation continued to apply, Robertson J acknowledged that imperial legislation that extended to the colony in question, be it ordinary or prerogative legislation, was not affected by the *Colonial Laws Validity Act*. His error was in not extending this analysis to the Governors commissions. While s.5 of the *Colonial Laws Validity Act* provided colonial legislatures with the capacity to amend prerogative constitutions, absent such amendment they would continue to be bound by their provisions.

In the result, colonial laws which were repugnant to British law, and have therefore been considered void *ab initio*, were retroactively given the force of law by the *Colonial Laws Validity Act*. The Act, however, could not function in itself to modify the jurisdiction of colonial governments. While colonial laws would not be considered void for contradicting royal instructions, jurisdiction itself still had to be delegated by way of the proper constitutional instruments. As such, the authority to extinguish Aboriginal rights remained with the Imperial Parliament as jurisdiction to do so could not have been transferred by retroactively validating colonial laws that were *ultra vires* the colonial assembly when they were passed.

### III. *Clear and Plain Intent*

Most extinguishment claims in the Maritime Provinces have been assessed by way of the clear and plain intent test. In *Sappier/Gray*, Bastarache J. eschewed the jurisdictional analysis in favour of application of the clear and plain intent test. This approach followed that taken by lower courts in both New Brunswick and Nova Scotia. Second, as the legislation that has been assessed on the clear and plain intent standard is that put forward by the Crown to prove extinguishment, it can be assumed that this is the legislation which the Crown attorneys thought most likely to demonstrate extinguishment. Though this does not mean that legislation which was not brought forward by the Crown may not have extinguished title, it provides valuable insight into the types of legislation the Crown may rely on and, as such, is helpful as a starting point.

In the *Bernard* litigation, the Crown relied at the trial and appellate levels on four pre-confederation statutes to prove extinguishment.<sup>72</sup> In fact, the Crown only relied on this legislation to prove extinguishment of the Aboriginal right to harvest timber, as a “parasitic”

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<sup>72</sup> *Bernard*, NBCA, *supra* note 68 at para 177 (Daigle JA)

right derived from title, and not of Aboriginal title itself. Daigle JA rejected this framing, holding:

Nowhere in the Canadian aboriginal jurisprudence have I found the notion of piecemeal extinguishment being sanctioned by the courts. Short of extinguishment of aboriginal title, legislation purporting to limit access to resources, such as timber in this case, which would otherwise be available pursuant to aboriginal title, must be analyzed in terms of infringement and justification. To fail to recognize the distinction between these two approaches is to confuse regulation and extinguishment.<sup>73</sup>

The New Brunswick Court of Appeal applied the clear and plain intent test in analyzing the four pieces of pre-confederation legislation relied on by the Crown. The first was an 1840 act entitled: “An Act to provide for the more effectual prevention of Trespasses and protection of Timber growing on Crown lands within this Province, 3 Victoria, Cap. LXXVII.” The remaining three were: an 1850 act entitled “An Act for the better prevention of Trespasses on Crown Lands and Private Property, 13 Victoria, Cap. VII,” a revision of the 1850 legislation “reproduced as Chapter 133 of the Revised Statutes of New Brunswick 1854 but relabelled Of Trespasses on Lands, Private Property, and Lumber, R.S.N.B. 1854, c.133” and an 1862 amendment to Chapter 133: see c. XXIV S.N.B. 1862.<sup>74</sup> As can be seen, the Crown in fact relied on two pieces of legislation and an additional two legislative amendments to the 1850 Act.

The 1840 Act “prohibits any person from cutting, felling, removing or destroying various species of trees and lumber made from them without right derived from the Crown to do so.”<sup>75</sup> Robertson JA dismissed the submission that this Act extinguished the Mi’kmaq treaty right to harvest logs on two grounds. First, he held that the legislation gave implicit recognition of the right to harvest trees from Crown land by virtue of the fact that the treaty right was in fact derived from the Crown and therefore not subject to the relevant provision of the Act.<sup>76</sup> Second, the Act did not, implicitly or explicitly, evince the requisite clear and plain intent to extinguish the right. As Robertson JA held, the purposes of the Act were regulatory and penal in nature and thus cannot “be equated with an implicit intention to extinguish aboriginal rights.”<sup>77</sup>

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<sup>73</sup> Ibid. at para 178.

<sup>74</sup> *Bernard NBCA*, *supra* note 68 at paras 181 – 184 (Robertson JA).

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

The 1850 Act made it a misdemeanour offense for anyone to remove logs or timber from any granted or ungranted lands without legal authority.<sup>78</sup> As explained by Robertson JA, the Act further provided that:

[T]he property in timber taken from Crown lands held under lease or licence is in the lessee or licensee. Section 3 authorizes the lessee or licensee to recover damages in any action for trespass or replevin. The Crown submits that in recognizing a licensee to be the owner of the timber, the legislation negates any notion of a right vested in an aboriginal community.<sup>79</sup>

A later amendment to this Act deemed licensees to be in possession of the lands on which they held timber licences, giving them the ability to bring actions in trespass and replevin against parties that removed timber without permission.<sup>80</sup> The Crown argued that this amendment undermined the ability of the Mi'kmaq to establish title by demonstrating that they did not have exclusive occupation of the lands in question. This argument was rightly dismissed by Robertson JA by pointing to the fact that the occupation must have been exclusive at the date of the assertion of Crown sovereignty, in this case 1759.<sup>81</sup> An inability to demonstrate exclusive occupation subsequent to the date of sovereignty would have no effect on the ability to prove title.

The last piece of legislation the Crown put forward once again expanded the definition of “licensee” so that the licensee could bring an action despite “any law, usage or custom to the contrary.”<sup>82</sup> While Robertson JA recognized that this phrase may seem to include Aboriginal rights, he dismissed this possibility, holding:

This is true until one places the phrase in its historical context. Under the common law and equity a person who might otherwise be labelled a trespasser could assert a right to enter on Crown lands for logging purposes provided that person could establish, for example, adverse possession or a profit à prendre. It seems to me that the true purpose of the 1862 amendment is to extinguish any non-consensual right to cut Crown timber that a person may have acquired through the application of common law and equitable principles. In the present case, we are dealing with a right established under a consensual agreement and, therefore, the legislation could not have the effect of implicitly extinguishing a right which arises by agreement and not by prescription. With respect to aboriginal title, it arises because of historical occupation prior to the assertion of British sovereignty, not

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<sup>78</sup> Ibid. at para 182 (Robertson JA).

<sup>79</sup> Ibid.

<sup>80</sup> Ibid. at para 183.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid. at para 184.

by prescription. The Indians were first in time and cannot be compared to someone who squats on another person's lands.<sup>83</sup>

That is, the consensual nature of a treaty right differentiates such rights from the categories of customary and usage based rights which he interpreted the Act to be contemplating. Further, the nature of Aboriginal title as a right whose source is derived from pre-sovereignty occupation distinguishes it from those same categories.

The salient feature of the legislation relied on by the Crown to demonstrate extinguishment in *Bernard* was that it dealt with access to Crown lands.<sup>84</sup> As Robertson JA noted, “[a]t the end of the day the Crown’s argument can be reduced to the simple proposition that by vesting licensees and lessees with ownership of timber growing on Crown lands, the legislature intended to extinguish aboriginal title and any treaty right to harvest and sell timber growing on the same lands.”<sup>85</sup> Robertson JA disagreed, holding that the statutes controlling access or granting timber licences to Crown lands did not possess the intent required to extinguish Aboriginal and treaty rights.<sup>86</sup>

This reasoning was adopted again by the NBCA in the *Gray* decision, where Robertson JA held that his “concurring opinion and that of Justice Daigle in *Bernard* is a sufficient basis for purposes of disposing of any argument that an existing aboriginal right was extinguished by either pre- or post-Confederation provincial legislation.”<sup>87</sup> In the *Sappier* litigation, in which Maliseet individuals from the Woodstock First Nation relied on treaty and Aboriginal rights to harvest lumber from Crown lands as a defense to a charge of unauthorized possession of lumber taken from Crown lands, the Crown did “not allege that the right was extinguished by either pre- or post-Confederation legislation”<sup>88</sup> at the appellate level. Further, the Crown accepted that the asserted Aboriginal and treaty rights, should they be proven, had been infringed by the *Crown*

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<sup>83</sup> Ibid. at para 187.

<sup>84</sup> An argument can be made that Crown lands legislation of the type relied on in *Bernard* is, by its very definition, precluded from applying to Aboriginal title lands. In *Tsilhqot'in*, the Supreme Court held that the British Columbia *Forest Act* could not apply to Aboriginal title land because, once title has been recognized, that land is not Crown land and so not subject to Crown lands legislation. The Court stated: “Once Aboriginal title is confirmed, however, the lands are “vested” in the Aboriginal group and the lands are no longer Crown lands.” *Tsilhqot'in Nation*, *supra* note 65 at para 115. The difficulty with the analysis is that the Court also held that lands remained Crown lands until such time as title is “confirmed” through negotiation or litigation. The relationship between Aboriginal title and Crown lands will be discussed further the section “How Were Aboriginal Lands Taken?”

<sup>85</sup> *Bernard*, NBCA, *supra* note 68 at para 185 (Robertson JA).

<sup>86</sup> Ibid. at para 187.

<sup>87</sup> *R v Gray*, 2004 NBCA 291 at 25; *Sappier; Gray*, *supra* note 53 at 56.

<sup>88</sup> *R v Sappier*, 2004 NBCA 295 at 3 [*Sappier* NBCA].

*Lands and Forests Act* and that such infringement could not be justified under the *Sparrow* and *Badger* tests.<sup>89</sup>

Despite having made this concession at the appellate level, the Crown brought the extinguishment issue again before the Supreme Court. As discussed above, Bastarache J., writing for a near unanimous court (with Binnie J. writing a concurring decision), agreed with the New Brunswick Court of Appeal's characterization of the legislation being relied on by the Crown as essentially regulatory in nature, relying on *Sparrow* to support the holding that the regulation of the exercise of a right does not extinguish the right.<sup>90</sup> The Court therefore held that the pre-Confederation legislation did not meet the clear and plain intent standard required to extinguish Aboriginal rights despite a *prima facie* circumscription of the exercise of those rights.<sup>91</sup>

In Nova Scotia, the extinguishment of a treaty right to harvest timber under the 1760-61 treaties and the extinguishment of Aboriginal title were addressed by the Court of Appeal in the *Marshall* decision.<sup>92</sup> Here, the Crown relied on two statutes, *An Act to Prevent Waste and Destruction of Pine or other Timber trees, on certain reserved and un-granted lands in this province, 1774, c. 3* and *An Act concerning Trespasses to Crown Property, 1859, c. 22*, to prove extinguishment of both the asserted treaty right and Aboriginal title. The Crown argued that because these Acts, which prohibited the removal of timber from Crown lands, did not explicitly exempt Aboriginal peoples, any rights enjoyed prior to enactment of the legislation were extinguished. Cromwell JA rejected this view and, like the New Brunswick Court of Appeal in *Bernard, Sappier, and Gray*, drew on a long line of Supreme Court decisions to support the position that regulating the exercise of a right did not demonstrate extinguishment.<sup>93</sup> As such, the legislation relied on by the Crown failed to meet the clear and plain intent standard.

It is evident that the clear and plain intent standard will be difficult for pre-confederation legislation to meet, as there is almost none that deals specifically with Aboriginal peoples. Various pre-confederation resource-based Acts, such as those regulating fishing or hunting, are unlikely to satisfy the clear and plain intent standard for extinguishment of Aboriginal title. Even if site-specific Aboriginal or treaty rights to hunt or fish were deemed to have been extinguished, this in itself does not necessarily equate to extinguishment of title. As has been discussed, the

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<sup>89</sup> *Ibid.* at 3.

<sup>90</sup> *R v Sappier; R v Gray, supra* note 53 at 58 – 60.

<sup>91</sup> *Ibid.* at 58. See also *Gladstone, supra* note 5 at 34.

<sup>92</sup> *R v Marshall*, 2003 NSCA 105 at paras 60-68, 237-248 [*Marshall*, NSCA].

<sup>93</sup> *Marshall NSCA, supra* note 92 at 67.

regulation of the exercise of a right does not necessarily extinguish that right. Aboriginal title is a right to use land. A regulatory framework that restricts that use does not in itself extinguish that right. Further, many of the resource-based rights are now recognized as both treaty and Aboriginal rights.<sup>94</sup> If a treaty right to hunt survived regulation of that right, it is difficult to see how that same regulation could then be relied on to extinguish title. Hunting, fishing, etc. are uses of the land, the regulation of which should have no effect on the underlying title.

### **C. Instances of Possible Legislative Extinguishment**

Having established the parameters of extinguishment particular to the Maritime Provinces and reviewed the instances where extinguishment of title in the region has been put before the courts, I will now look to certain Acts that have not yet been tested in court.

#### *I. Colonial Legislation*

Most colonial Acts that may have had the effect of extinguishing title on a large scale have been addressed by the courts and detailed above. I will not review those again here. As the analysis above illustrates, even if colonial legislatures are found to be competent to extinguish Aboriginal title, the clear and plain intent test ensures that extinguishment could not have occurred inferentially; the legislature in question must have clearly intended to extinguish title. As such, the analysis above can be brought to bear on a number of other acts which may have had the effect of taking an interest in Aboriginal lands while falling short of extinguishing title. This would include, for example, acts setting aside land for railroads, wharfs, and mines. I have yet to find colonial legislation of this character that is likely to satisfy the clear and plain intent standard applied in the cases discussed above. There were virtually no colonial Acts dealing directly with Aboriginal peoples until mid-century 19<sup>th</sup> century attempts to secure the title of squatters on Aboriginal lands, settle Aboriginal peoples in agricultural communities, and sell off reserve lands.<sup>95</sup> These Acts were: in New Brunswick, the 1844 “*Act for the Management and*

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<sup>94</sup> See for example: *R v Sappier and Polchies*, 2004 NBCA 56; *R v Walker*, 2005 NSPC 1.

<sup>95</sup> Upton, *supra* note 57 at 202.

*Disposal of Indian Reserves in This Province*<sup>96</sup>; in Nova Scotia, “*An Act to Provide for the Instruction and Permanent Settlement of the Indians*”<sup>97</sup>; and in Prince Edward Island, “*An Act relating to the Indians of Prince Edward Island.*”<sup>98</sup> I will address each of these in turn.

As the title of the New Brunswick Act suggests, its purpose was to dispose of “unused” Indian reserve lands.<sup>99</sup> The immediate aim of the 1844 Act was to open desirable lands to settlement, agriculture development, and resource exploitation. Like similar Acts passed in the other Maritime Provinces and the Canadas in this period, the Act was cast by proponents as a means of ameliorating the condition of the Indians by settling them in agricultural communities and “civilizing” them. The purpose of the Act is stated plainly enough in the preamble, which reads:

Whereas extensive Tracts of Valuable land reserved for the Indians in various parts of this Province tend greatly to retard the settlement of the country, while large portions of them are not, in their present neglected state, productive of any benefit to the people, for whose use they were reserved: And whereas it is desirable that these Lands should be put upon such a footing as to render them not only beneficial to the Indians but conducive to the settlement of the Country.<sup>100</sup>

The Act granted power to the Lieutenant-Governor, on the advice of the Council, to appoint individuals to survey Indian reserve lands, to “distinguish the improved from the unimproved lands,” and to determine which lands were fit for settlement. The lands so identified were then to be leased or sold pursuant to the procedures established under the Act, which required lands to be publicly auctioned to the highest bidder.<sup>101</sup> The Act included a suspending clause requiring it to receive royal approbation before it could be enacted; assent was given to the on the 3<sup>rd</sup> of September 1844.

The 1842 Nova Scotia Act did not authorize the sale of Indian reserve lands. Indeed, while permitting the surveying of reserve lands, it provided the Commissioner of Indian affairs (an office itself created under the auspices of the Act) with reasonably robust powers to deal with squatters on those lands. The Nova Scotia Act focused more explicitly than the New Brunswick

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<sup>96</sup> 7 Vict. Cap. XLVII (1844).

<sup>97</sup> 5 Vict. Cap. XVI (1842).

<sup>98</sup> 1856 *Revised Statutes* Cap. X

<sup>99</sup> It is important to note that the Act applies to *reserve* lands, not title lands more broadly, though it is likely that the locations of the original reserves correspond quite closely to areas where title would be most easily proven (e.g. village sites): Harald E.L. Prins, *The Mi'kmaq: Resistance, Accommodation, and Cultural Survival* (Orlando: Harcourt Brace, 1996) at 168.

<sup>100</sup> 7 Vict. Cap. XLVII.

<sup>101</sup> The Act further required that notice of the auction be given in the Royal Gazette sixty days prior to the auction and that handbills “be posted in three of the most public places in the county where such Reserves are situate.” *Ibid.*



Act on the settlement and education of the Mi'kmaq. Thus, while it did not authorize the sale of lands, it instructed the commissioner to divide the reserves among the heads of families and prohibited the alienation of those parcels by the Indians themselves. In the revised statutes of 1858, however, the Nova Scotia assembly brought the legislation more in line with its New Brunswick counterpart.<sup>102</sup> The revised Act authorized the survey of Indian reserves to determine where they may be fit for settlement and authorized the sale or lease of such lands on the same terms as New Brunswick's Act. The proceeds arising from sales and leases was to go to a support fund to provide relief to the "indigent and infirm Indians" and to purchase agricultural implements. Further, the Indian Commissioner was to set apart reserve lands into villages or townships, in which plots could be freely granted to Indians that "the Governor and Council may deem fit objects thereof", who would then be granted the lots free of encumbrances (except presumably a prohibition on alienation) if they resided upon and improved the lot for ten years.<sup>103</sup>

The assembly of Prince Edward Island passed *An Act Relating to the Indians of Prince Edward Island* in 1856.<sup>104</sup> This Act did not permit the sale or leasing of Indian reserve lands and, like the earlier Nova Scotia Act, tasked the Indian Commissioner with the protection of reserve lands, including the authority to take court action against intruders. The Act directed the Commissioner to communicate with chiefs regarding the settlement and education of the Indians and to apportion reserve lands to individual families, again subject to prohibitions on alienation. Importantly, this Act did not authorize the disposal of reserve lands.

These Acts, taken together, represent the whole of the colonial legislation pertaining to Indian lands in the Maritime Provinces. This statement must be qualified of course, as there is ample legislation pertaining to lands that may be subject to Aboriginal title (e.g. the legislation

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<sup>102</sup> The Act was titled "Of Indians": c.57 *The Revised Statutes of Nova Scotia*, 1859. Martin I. Wilkins, W.A. Henry, James R. Smith. *The Revised Statutes of Nova Scotia* (Halifax: J & W Compton, 1859) at 207-208.

<sup>103</sup> *Ibid.* s.10.

<sup>104</sup> 19 Vict. cap. X. Though this Act deals with Indian reserve lands, specifically "any lands now belonging to them, or which may hereafter be granted or given to them," there were in fact almost no such lands in the province at the time the Act was passed. The Lennox Island reserve, which comprises 1320 of the 1663.1 acres reserved in the province, was not formally reserved until 1870, while the 204 acre reserve along the Morrell River was not created until 1859. Small acreages in lots 15 and 55 were reserved for the Indians in 1852, though they were never occupied and were sold in 1866: Richard H. Bartlett, *Indian Reserves in the Atlantic Provinces of Canada* (Saskatoon: University of Saskatchewan Native Law Centre, 1986) at 7-8 [Bartlett, *Atlantic Provinces*]. It is not clear, then, precisely which lands the Act contemplated as currently belonging to the Indians, though it may have been no more than the small acreages in lots 15 and 55 that were later sold. The prospective aspect of the Act, then, is of greater importance, as it created the regime under which future reserves would be created.

that has previously been relied on as demonstrating extinguishment). Where tested in the courts, however, such legislation has been unable to satisfy the clear and plain intent requirement and, as discussed above, was likely *ultra vires* the colonial assemblies to the extent that it impacted Aboriginal title lands (and these deal with Indian reserve lands, not Aboriginal title lands writ large). The Acts just surveyed represent the only pre-confederation legislation from colonial assemblies that deal directly with Aboriginal lands. With the exception of the Prince Edward Island Act, then, these pieces of legislation seem to satisfy the clear and plain intent test.<sup>105</sup> Given this, the New Brunswick and Nova Scotia Acts must be assessed on the basis of competence and repugnance.

The alienation that took place under the auspices of these Acts, over 10, 000 acres in New Brunswick alone,<sup>106</sup> must be assessed with reference to procedural requirements established in the Royal Proclamation, 1763. That is, “a surrender required a voluntary, informed, communal decision to give up the land.”<sup>107</sup> These protections have been incorporated into the common law and apply regardless of the application of the Royal Proclamation to the territory in question.<sup>108</sup> The question of whether the decision to sell or lease lands under the colonial Indians Acts was voluntary, informed, and communal, is a question of fact that I cannot speak to conclusively here. There is clear evidence that in many cases the Aboriginal people resisted the sale of their reserve lands.<sup>109</sup> In any case where such resistance is evident the Royal Proclamation would serve to invalidate the alienation. There is also evidence that in some instances Indian Commissioners sought the approval of communities for the sale of lands.<sup>110</sup> Should it be demonstrated that the consent of a community, given voluntarily and on an informed basis, was conveyed to the government, the Proclamation would not stand in the way of an otherwise valid sale.

Even if consent for a sale were given, however, the procedural requirements of the Proclamation may pose further problems for land transactions conducted under these Acts. The

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<sup>105</sup> As discussed, the Prince Edward Island legislation did not permit the sale or leasing of land and a reorganization of Aboriginal settlement within the reserves themselves seems unlikely to meet the clear and plain intent standard.

<sup>106</sup> Upton, *supra* note 57 at 112.

<sup>107</sup> *The Chippewas of Sarnia Band v Attorney-General of Canada et al.*, 51 OR 3d; [2000] OJ 4804 at para 199.

<sup>108</sup> *Ibid.* at paras 199 – 202. Even if the provisions of the Royal Proclamation have been incorporated into the common law, it is important to note that colonial legislatures could change the common law through legislation, but could not alter the terms or application of the Proclamation.

<sup>109</sup> Upton, *supra* note 57 at 84, 88-89, 96, 115.

<sup>110</sup> *Ibid.* at 102, 105.

third clause of the Royal Proclamation mandates that no sales of lands reserved to the Indians may be made to private persons.<sup>111</sup> By the terms of the Proclamation, alienations could only be made to the Crown. Under the regime established by the New Brunswick and Nova Scotia Indian Acts, purchases were made directly by third parties. It is not clear whether the fact that the government was facilitating the sale would satisfy a court that the spirit of the Proclamation had been followed, but given the Supreme Court's numerous holdings that the Proclamation "must be interpreted liberally, and any matters of doubt resolved in favour of aboriginal peoples,"<sup>112</sup> there is a strong argument in favour of giving a strict interpretation to the prohibitions on alienations to parties other than the Crown. Indeed, such an interpretation would align with the overarching purpose of implementing procedural safeguards through the Royal Proclamation, which was to protect Aboriginal lands from being fraudulently and dishonestly taken. On this interpretation, even consent of the Aboriginal community could not save sales of land under the Acts.

A party seeking to rely on the sales made under these acts as evidence of extinguishment would have the burden of demonstrating that the colonial legislatures were competent to extinguish Aboriginal title. As has been discussed above, it seems that the authority to extinguish title could only have been delegated by the Imperial Parliament. If this is accurate, then the Acts at issue here, at least in so far as they deal with the sale or lease of Indian lands, would be *ultra vires* the colonial legislatures, the authority for such activity never having been delegated by the Imperial Parliament. If the authority to extinguish title could have been delegated by the Imperial Crown, the question becomes whether such a delegation occurred and, if so, whether it was made according to the proper legal form. Providing a definitive answer to these questions requires archival research that has unfortunately not been possible, though extensive research of secondary sources has revealed nothing that suggests such authority was delegated. Again, the burden of establishing a valid delegation rests with the party seeking to demonstrate extinguishment.

## II. *Imperial Legislation*

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<sup>111</sup> Bruce D. Clark, Micmac Grand Council, Lisa Patterson, *The Mi'kmaq Treaty Handbook* (Truro: Native Communications Society of Nova Scotia, 1987) at 11.

<sup>112</sup> *Marshall/Bernard*, *supra* note 66 at 86; *Nowegijick v The Queen* [1983] 1 SCR 29 at para 36.

There are two types of imperial legislation that have a bearing on the question of the extinguishment of Aboriginal title, Acts of the Imperial parliament (King/Queen-in-Parliament) and prerogative Acts of the Crown (King/Queen-in-Council). As has been seen, the authority to extinguish rights at common law rested with the Imperial Parliament. Extinguishment in the Maritime Provinces, then, would have required an Act from the Imperial Parliament that clearly extinguished title or delegated the authority to do so. The executive (King/Queen-in-Council) could only have extinguished title where unambiguously delegated the authority to do so by Parliament. The lone exception to this was when a conquered or ceded territory had not yet received instructions to establish an assembly, wherein the executive retained the authority to legislate for the colony. As has been seen, this authority existed in the Maritime Provinces only until 1749 at the latest. Any purported extinguishment of title after that date required an Act of the Imperial Parliament either extinguishing title or delegating the authority to do so.

There is very little legislation pertaining to the Maritime Provinces from the Imperial Parliament. Certain imperial legislation was of particular importance, such that ensuring it was obeyed was part of the governor's commissions. Imperial Acts of Navigation and Trade were cited specifically in royal commissions as Acts which colonial authorities were bound to ensure compliance with. While "the legislative authority of Parliament extends over the United Kingdom, and all its colonies and foreign possessions; and there are no other limits to its power of making laws for the whole empire than those which are incident to all sovereign authority – the willingness of the people to obey, or their power to resist,"<sup>113</sup> the imperial government was sensitive to the concerns of colonists that the imposition of imperial legislation in the colonies amounted to unrepresentative governance.<sup>114</sup> The Imperial Parliament dealt little with the local affairs of the Maritime colonies. Once the colonies were well established and the Indians ceased to be of strategic importance, the imperial officials, both executive and legislative, were largely content to put responsibility for dealing with the Indians on the colonial government.<sup>115</sup> This should not, however, be taken as a delegation of authority to extinguish Aboriginal rights and title.

The majority of imperial legislation directed specifically at New Brunswick and Prince

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<sup>113</sup> Thomas Erskine, *The Constitutional History of England Since the Ascension of George III Vol. 1* (London: Longman's, 1912), at 44.

<sup>114</sup> Jack P. Greene, *Periphery and Center: Constitutional Development in the Extended Politics of the British Empire and the United States 1607-1788* (New York: W.W. Norton, 1986) at 79-90.

<sup>115</sup> Upton, *supra* note 57 at 81.

Edward Island dealt with customs and duties, including the importation of rum for sale in the Canadas, opening ports to trade, governing trade between the Maritime Provinces, and establishing New Brunswick's border with the Canadas.<sup>116</sup> The lone exceptions appear to be two 1834 Acts creating land acquisition companies; “*An Act for granting certain Powers to the New Brunswick and Nova Scotia Land Company*”<sup>117</sup> and “*An Act for granting certain Powers to the British American Land Company*.”<sup>118</sup> As the names suggest, these companies were “established for the Purpose of purchasing, holding, improving, clearing, settling, and cultivating, letting, leasing, exchanging, selling, and disposing of waste Lands, and other Lands, Tenements, and Hereditaments.”<sup>119</sup> In short, the land companies functioned as a means of privatizing the settlement process, with companies being permitted to purchase Crown lands at discount rates on the condition that they build the infrastructure necessary to facilitate settlement.<sup>120</sup> The companies were then tasked with selling the lands to prospective settlers.

These are the only Acts from the Imperial Parliament which deal directly with the sale or disposal of lands in the Maritime Provinces. In assessing whether the Acts may have extinguished Aboriginal title, competence is not at issue. These Acts may, however, prove problematic where constitutional repugnancy is concerned. Should Aboriginal title be proven to lands to which the New Brunswick Company held the first Crown derived title, a party seeking

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<sup>116</sup> See for example: *New Brunswick Boundary Act*, 1851 (14 & 15 Vict. c.63); See also a follow up Act in 1857 explaining the 1851 Act: (20 & 21 Vict. c.24); *The Customs Act* 1843 allowed for produce from the Maine portion of the Saint John River watershed to be traded in as if produced in NB (1843 c. 84 s. XXIII); An 1811 Act allowed rum to be imported into the Canadas from the Maritime Provinces (51 Geo. 3) C A P. XLVIII.

<sup>117</sup> (4 & 5 Will. 4) c. xiv [NB & NS Land Company Act].

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.* The purposes of the Acts are identical and the legislation creating them passed on the same day. The British America Act applied to Upper and Lower Canada, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland, while the New Brunswick and Nova Scotia Act applied to New Brunswick, Nova Scotia, Prince Edward Island, and Cape Breton. The British American Land Company, though, focused primarily on Upper and Lower Canada. For a comparative analysis of the British American Land Company and the Canada Land Company, which provides an excellent overview of how settlement land companies functioned in Canada, see Anatole Browde, “Settling the Canadian Colonies: A Comparison of Two Nineteenth-Century Land Companies” (2002) 76:2 *Business Hist Rev* 299. Land settlement companies were also prevalent in the United States. For a discussion of the Susquehanna Company, formed in Connecticut, see Galloway, *The Scratch of a Pen*, *supra* note 56 at 53 – 55.

<sup>120</sup> The company was to “make, form, erect, and build Roads, Canals, Drains, Bridges, and other internal Communications, Houses, Schools, Chapels, Mills, Wharfs, and other Buildings and Works necessary or expedient for the Occupation, Planting, and profitable Cultivation or Improvement of any such Lands.” *NB & NS Land Company Act*, *supra* note 117. One clue as to why merchants and shipbuilders were among those pushing to establish the company is found in the further direction “to purchase, hold, hire, build, and charter Ships and other Vessels for the Purposes of conveying and transporting Persons willing and desirous to emigrate to His Majesty's said Provinces and their Dependencies, and also of exporting such Merchandize, Matters, and Things, and importing such Goods and Merchandize and Produce from or to His Majesty's said Provinces and their Dependencies to or from any other Place or Places”

to demonstrate that this acquisition extinguished title would be required to demonstrate that the acquisition was not repugnant to prevailing constitutional laws and principles. I have found no evidence that the 589,000 acre purchase made by the company in York County, which sits primarily in the traditional territory of the Maliseet though extends into traditional Mi'kmaw territory as well, was preceded by an Aboriginal surrender of land pursuant to the procedural terms of the Royal Proclamation.<sup>121</sup> It is important to recall that even surveying the land itself without Aboriginal consent is a violation of the Royal Proclamation. Further, the interpretation of the Peace and Friendship Treaties articulated in Chapter 1 would require that the Aboriginal interest be purchased or ceded to any areas outside those already settled by the British in 1726.

If the land in question was not purchased or ceded, the Act enabling the company's activities must satisfy the clear and plain intent test if it is to be relied on as evidence of extinguishment. The Imperial Parliament could, if it wished, legislate contrary to the Royal Proclamation (e.g. the Quebec Act 1774), though extinguishment must still be assessed on the basis of the clear and plain intent standard. The *New Brunswick and Nova Scotia Land Company Act* granted the power to purchase and re-sell or otherwise dispose of "waste Lands, and other Lands, Tenements, and Hereditaments."<sup>122</sup> It also grants subsurface rights in lands acquired under the Act. Though the Act stops short of an explicit extinguishment of title, the standard the courts have applied falls somewhat short of requiring an explicit statement. In *Calder* Hall J rejected the view that "general land" legislation could extinguish title, holding that extinguishment requires "specific legislation."<sup>123</sup> The first question, then, is whether the terminology in the act ("waste Lands, and other Lands, Tenements, and Hereditaments") contemplates Aboriginal lands. As seen in the analysis of the 1844 Act, "waste lands" was a term that indicated that lands were unused or uncultivated and was used in the context of that Act to describe Aboriginal reserve lands that had not been cultivated or improved. The phrase "other Lands, Tenements, and Hereditaments" is certainly broad enough to include Aboriginal land rights. The question here is indeed whether the phrase is too broad and falls into the category of "general land" legislation. Lamer CJ's statement in *Gladstone* is instructive here; he stated:

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<sup>121</sup> For detailed information on the lands disposed of through the New Brunswick land Company, See Professor Bruce Elliot's work "Emigrant Recruitment by the New Brunswick Land Company: The Pioneer Settlers of Stanley and Harvey" published in four parts in (2004) 26:4 *Generations: The Journal of the New Brunswick Genealogical Society* 50; (2005) 27:1 *Gen* 34; (2005) 27:2 *Gen* 34 and extensive information available online at <<http://history.earthsci.carleton.ca/company/history/elliott1.htm>>.

<sup>122</sup> *NB & NS Land Company Act*, *supra* note 117.

<sup>123</sup> *Calder*, *supra* note 2 at 404.

While to extinguish an aboriginal right the Crown does not, perhaps, have to use language which refers expressly to its extinguishment of aboriginal rights, it must demonstrate more than that, in the past, the exercise of an aboriginal right has been subject to a regulatory scheme.<sup>124</sup>

The distinction drawn here is between a general regulatory scheme on the one hand and an explicit statement of extinguishment on the other. This distinction is reflected in Daigle JA's reasoning in *Bernard* where he held that creating regulatory regimes governing the use of Crown land and licensing regimes regarding the timber on those lands was insufficient to extinguish Aboriginal rights.<sup>125</sup> The facts here are somewhat different. This is not a case of imposing a regulatory scheme which has the effect of limiting the full exercise of a right; rather, it is a grant of land so complete that it seems inimical to the existence of any other interest. While it is clear that as a general proposition a grant cannot extinguish rights, in this instance we are dealing not with a grant, but a right to purchase enabled by imperial legislation. In this light, it seems the interest of the New Brunswick Company sits between the two poles identified by Lamer CJ in *Gladstone*. While there is no explicit extinguishment of rights or title, nor is it merely general or regulatory legislation. Adoption of a somewhat different articulation of the clear and plain intent test may yield a clearer result in this case. In *Van der Peet*, McLachlin J, as she then was, writing in dissent, articulated a clear and plain standard that would require an "indication that the government of the day considered the aboriginal right on the one hand, and the effect of its proposed action on that right on the other."<sup>126</sup> In other words, McLachlin would have required evidence that the government of the day had the Aboriginal right in question in mind and made a deliberate decision to legislate in a manner incommensurate with the existence of that right, even if extinguishment did not need to be expressly stated in the legislation. The widely held belief in the 19<sup>th</sup> century that Aboriginal peoples in the Maritimes possessed no land rights whatsoever would, on this reading, seem to preclude satisfaction of the clear and plain intent standard.<sup>127</sup> Further, the term "waste lands" as used in the legislation was likely intended to refer only to Crown lands. It seems highly unlikely, for example, that the Act was intended to apply to privately owned lands that were going unused. While some early grants were allowed to escheat if they went unused, this is much different from permitting the taking of privately held lands. It

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<sup>124</sup> *R. v. Gladstone*, [1996] 2 S.C.R. 723, at para 34.

<sup>125</sup> *Bernard* NBCA, *supra* note 68 at para 187 (Daigle JA).

<sup>126</sup> *R v Van der Peet* [1996] 2 SCR 507 at para 289.

<sup>127</sup> For an account of the views held by 19<sup>th</sup> century Maritime Intellectuals concerning the land rights of Aboriginal peoples, see Bell, "Amerindian Dispossession" *supra* note 40.

seems likely, then, that the Act was only intended to apply to lands held by the Crown that were unburdened by any other interest, which would exclude Aboriginal title lands.

The legislative history of the Imperial parliament in respect of Nova Scotia is much the same, with trade dominating the agenda, with one important exception. Every year from 1748 – 1779, the Imperial Parliament approved money for the settlement of Nova Scotia, specifically, “for supporting, maintaining and enlarging the Settlement of his Majesty's Colony of Nova Scotia.”<sup>128</sup> Thus, the governor’s commission to Cornwallis seems to have had enabling legislation from the Imperial Parliament. This would have allowed the governor to settle lands in Nova Scotia while the enabling legislation continued to be passed annually and would have extended to present day New Brunswick and PEI, after those colonies became part of Nova Scotia (Prince Edward Island until only 1769)

The authority to settle lands, however, should not necessarily be equated with the authority to extinguish rights. It is well established that the Crown possessed the authority to create interests in land by granting Crown land.<sup>129</sup> Rather than delegating authority to the Crown to settle lands, the Supply Acts simply authorized the money required by the Crown to carry out its prerogative activity of granting Crown lands. As discussed in Chapter 1, it should be presumed that the Imperial Parliament intended to act in accordance with the treaties of peace and friendship (which, as discussed there, required that Indian land be purchased or ceded before being settled). Far from authorizing the Crown to extinguish Aboriginal title, the Imperial Parliament’s funding for settlement merely authorized the Crown expenditures required to effectuate settlement by means of grants of Crown lands. How the “Crown lands” came to be acquired is another question, but we should recall that no Crown lands legislation has yet been before the courts which was found to satisfy the clear and plain intent test. Further evidence that the grants of lands for settlement were intended to be grants of Crown land can be found in the royal commissions themselves, where governors were instructed to “settle and agree with our inhabitants [Indians] for such lands as now or hereafter shall be in our power to dispose of.”<sup>130</sup>

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<sup>128</sup> *Supply, etc. Act*, 1749 (Geo. 2 c.21 XVIII).

<sup>129</sup> See Chitty, Joseph. *A Treatise on the Law of the Prerogatives of the Crown and the Relative Rights and Duties of the Subject* (London: Butterworth and Son, 1820) at 387.

<sup>130</sup> G.P. Gould and A.J. Semple. *Our Land: The Maritimes* (Fredericton: Saint Annes Point Press, 1980) at 12.



## II. *Federal Legislation*

Federal legislation has yet to be relied on to demonstrate extinguishment of title. There is little federal legislation that, on its face, extinguishes or could be read as extinguishing title. The federal government clearly had the authority to extinguish title from 1867 – 1982. However, any legislation relied on to demonstrate extinguishment would be subject to the clear and plain intent test. The lone exception to this is the view that statutes of limitation that operate as federal legislation may have the effect of extinguishing title.<sup>131</sup> This issue will be discussed in detail below.

### **D. How Were Aboriginal Lands Taken?**

The analysis and research presented above suggest that Aboriginal title has not been extinguished by voluntary surrender or by legislation in the Maritime Provinces. As Binnie J. stated in *Marshall #1*, however, the Aboriginal peoples of the region were “largely dispossessed of their lands in any event.”<sup>132</sup> The question we must ask, then, is how this dispossession took place. Given that we have seen that Aboriginal title could *only* have been extinguished by voluntary surrender or clear and plain legislation passed by a competent legislative body, any loss of land that occurred by other means could not have legally extinguished title.

Overwhelmingly, Aboriginal peoples in the Maritime Provinces were dispossessed of their lands by settlement and by the Crown assertion that all lands in the region were Crown lands over which the Crown held the authority to regulate the use of the land and resources. The process of claiming lands as Crown lands was fundamentally intertwined with the process of creating Indian reserve lands. These three interrelated matters, Crown lands, settlement, and the creation of Indian reserves, must be considered in assessing the dispossession of Aboriginal lands. Moses Perley, an Indian Commissioner in New Brunswick from roughly 1837 – 1848, put the matter clearly when he stated:

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<sup>131</sup> McNeil, Kent. “Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, Jurisprudence” (2002) 33 Ottawa LR 301 (QL) at 13 [McNeil, “Extinguishment of Aboriginal Title”].

<sup>132</sup> *Marshall #1*, *supra* note 5 at 21. Binnie J was speaking specifically of the Mi’kmaq, but his statement applies equally to the Maliseet and Passamaquoddy.

[t]he first step was a joint occupation of the country by the Indians and British settlers: the second was assigning to the Indians certain districts of counties, within which they were not to be disturbed, the next, confining each Tribe to a certain tract or portion of land called a reserve and finally, reducing those reserves by degrees until in 1842 only one half remained ... and to conclude by selling all that remains ... without any provision for their [the Indians] future welfare.<sup>133</sup>

Perley's comment was prompted by the passage of the 1844 Act discussed above, which aimed to sell "unused" portions of Indian reserves and validate the title of illegal squatters on those lands. As this Act and its counterparts in Nova Scotia and Prince Edward Island were analyzed above, it is the earlier stages that Perley identified that are of most interest here. In particular, the transition from a period of joint occupation negotiated through the treaty process, to a period in which Aboriginal peoples were pushed to certain districts and then confined to reserves, is crucial to understanding the ways in which Aboriginal peoples were dispossessed of their lands in the Maritime Provinces. It is not possible to provide a full accounting of this historical transition here; the pioneering work of LFS Upton and excellent subsequent work by Professors John Reid, William Wicken, and Richard Bartlett, among others, should be consulted for a detailed historical analysis. Nonetheless, an identification of the broader trends underlying the taking of Aboriginal lands can provide sufficient material to identify the relevant legal framework that should be employed in analyzing the means, other than voluntary cession and unilateral legislation, through which Aboriginal peoples were pushed off their traditional lands, and to provide a range of legal conclusions.

The correlative forces of non-Aboriginal settlement and the establishment of Indian reserves were surface manifestations of the imperial and colonial pretension that the radical title arising from the assertion of Crown sovereignty was not burdened by Aboriginal land rights and that all of the land in the region could be treated as Crown land and regulated and disposed of accordingly. In other words, the assumption that all lands in the Maritime Provinces were Crown lands was a condition precedent to the grants of settlement and the creation of Indian reserves which effected the actual change in physical possession of lands. I will address each of these processes before turning to an analysis of their legality.

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<sup>133</sup> Upton, *supra* note 57 at 112. For another account of the process of dispossession of Aboriginal lands see Gould and Semple, *supra* note 130 at 29 – 70.

## I. Crown Lands

Though the Supreme Court of Canada has determined that “the doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada,”<sup>134</sup> it is evident that, from a practical standpoint, much of the settlement and extension of imperial control in the Maritime Provinces proceeded as if the territory was in fact *terra nullius*.<sup>135</sup> Put otherwise, the imperial and colonial authorities took a *de facto terra nullius* approach in respect of lands in the region. One justification that has been employed both historically and in relatively contemporary times for this approach suggests that Aboriginal title in the region had been extinguished by French colonization and, therefore, had already been extinguished when the British acquired sovereignty.<sup>136</sup> The British, in other words, at least purported to believe that the French cession of Acadia transferred to them an absolute title to the region as a whole, unburdened by any Aboriginal interest.<sup>137</sup> Whether the British fully believed this or not, Aboriginal peoples certainly did not. Thus, “English pioneers who mocked the savages with the assertion that the King of France had surrendered their country were met by dignified declarations of Abenaki sovereignty and independence.”<sup>138</sup> The Aboriginal perspective on this issue has gained favour with legal academics and the courts. Professor Slattery has argued that Aboriginal land rights were not extinguished under the French regime and remained extant through the French cession of Acadia to the British. Slattery stated that

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<sup>134</sup> *Tsilhqot'in Nation*, *supra* note 65 at para 69.

<sup>135</sup> It is important to recall that *terra nullius* does not mean that the land was literally empty; rather, as the Supreme Court noted in *Tsilhqot'in*, it is a legal designation that means that “no one owned the land prior to European assertion of sovereignty”: *Tsilhqot'in Nation*, *Ibid*. The Supreme Court’s statement should be taken to mean that Canadian law does not accept *terra nullius* as a legal basis for the colonization of Aboriginal lands. Thus, the Court’s statement should be taken as a statement of law rather than historical fact and the assertion that settlement in the Maritime Provinces proceeded largely on a *terra nullius* basis should not be taken to contradict the Supreme Court’s statement.

<sup>136</sup> See for example the argument put forward at the Supreme Court in the *Côté* decision by the Attorney-General for Quebec, who argued that “the French Crown assumed full ownership of all discovered lands upon symbolic possession and conquest” and thereby extinguished the Aboriginal interest before ceding the lands to the British Crown. *R v Côté*, [1996] 3 SCR 139; 138 DLR (4th) 385 at paras 42, 44.

<sup>137</sup> Prins, *supra* note 99 at 154. As Prins put it, “The king’s officials in Nova Scotia... conveniently presumed that all Mi’kmaq territory (as former French colonial domain) was legitimate Crown land.”

<sup>138</sup> W.S. MacNutt, *The Atlantic Provinces: The Emergence of Colonial Society, 1712-1857* (Toronto: McClelland Stewart, 1965) at 29 – 30 [MacNutt, *Atlantic Provinces*]. It is difficult to reconcile the repeated attempts to develop a shared understanding concerning future settlement in the treaty period, a relationship which required Aboriginal consent for new settlements, with the view that the British believed in the early to mid-eighteenth century that the Aboriginal interest in land had been extinguished by the French.

[w]e may conclude that the rights of indigenous peoples to Nova Scotian lands in their possession presumptively survived the cession of 1713, not having been abrogated in any extensive manner by the French Crown prior to transfer, nor by the incoming sovereign in the process of acquisition.<sup>139</sup>

Professor Slattery elaborated in a passage cited authoritatively by the Supreme Court:

[t]he doctrine of aboriginal rights, like other doctrines of colonial law, applied automatically to a new colony when the colony was acquired. In the same way that colonial law determined whether a colony was deemed to be “settled” or “conquered”, and whether English law was automatically introduced or local laws retained, it also supplied the presumptive legal structure governing the position of native peoples. The doctrine of aboriginal rights applied, then, to every British colony that now forms part of Canada, from Newfoundland to British Columbia. Although the doctrine was a species of unwritten British law, it was not part of English common law in the narrow sense, and its application to a colony did not depend on whether or not English common law was introduced there. Rather the doctrine was part of a body of fundamental constitutional law that was logically prior to the introduction of English common law and governed its application in the colony.<sup>140</sup>

This view, what might be called the historical constitutional argument, was one of two arguments relied on by the Supreme Court in *R v Côté*<sup>141</sup> in dismissing the proposition that French colonization abrogated Aboriginal land rights. Accordingly, Lamer CJ held that, even if Aboriginal title were to have been extinguished under French law (a proposition he saw as dubious), it “is not at all clear that French colonial law governing relations with aboriginal peoples was mechanically received by the common law upon the commencement of British sovereignty.”<sup>142</sup> Lamer CJ thus concluded that “the common law recognizing aboriginal title was arguably a necessary incident of British sovereignty which displaced the pre-existing colonial law governing New France.”<sup>143</sup> On the basis of what I have called the historical constitutional argument, then, the Supreme Court rejected the argument that Aboriginal title could not have survived French colonization.

The Supreme Court in *Côté* also rejected this argument on other grounds. On the basis of what I will call the modern constitutional argument, the Court held that a finding that French

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<sup>139</sup> Slattery, *The Land Rights of Indigenous Canadian Peoples*, *supra* note 12 at 134.

<sup>140</sup> Slattery, “Understanding Aboriginal Rights” (1986) 66 Can B Rev 727 at 737-38 as quoted in *R v Côté*, [1996] 3 SCR 139; 138 DLR (4th) 385 at para 49.

<sup>141</sup> *Côté*, *supra* note 142.

<sup>142</sup> *Ibid.* at para 49. This doubt was shared by LaForest J., who stated in his concurring opinion that it “was not established - - and certainly not in clear and plain terms - - that this aboriginal right was extinguished either during the French regime or later”: *Ibid.* at para 97.

<sup>143</sup> *Ibid.*

colonization extinguished Aboriginal rights would be inimical to the “terms and purpose” of s.35(1) of the *Constitution Act, 1982*.<sup>144</sup> In relying on s.35(1), Lamer CJ underscored the fact that, once given constitutional protection in 1982, Aboriginal rights could not have been extinguished “in the absence of specific extinguishment” and that “the French Regime’s failure to recognize legally a specific aboriginal practice, custom or tradition... clearly cannot be equated with a “clear and plain” intention to extinguish such practices under the extinguishment test of s. 35(1).”<sup>145</sup> In taking this approach, Lamer CJ established that the extinguishment of rights during the French colonial period would be adjudicated on the standards established by the Court in the post-1982 era. As a result, the argument that Aboriginal title in the Maritime Provinces did not survive French colonization is not tenable.

Nonetheless, by the 19<sup>th</sup> century, *terra nullius* had clearly become engrained as the basis for both imperial and colonial policy in the Maritime Provinces. This was made clear by the approach taken to Crown lands and the manner in which the executive authority to dispose of lands in the colonies was exercised. The Crown appropriated wholesale the lands in the Maritime Provinces as *Crown lands*, and, once having done so, saw fit to grant those lands for settlement at its pleasure and to limit the scope of the use and occupation of land by Aboriginal peoples. As Professor Harald Prins stated, “Mi’kmaq country was thus ‘magically’ transformed into Crown land.”<sup>146</sup> Though colonial and imperial authorities recognized limited Aboriginal rights to land, they considered the limitations on their authority in respect of those lands (whether from the treaties, Royal Proclamation, or common law) to apply only to *Indian reserve lands*, believing there to be no Aboriginal land rights in existence beyond the boundaries to those reserves.

Control of Crown lands was vested in the executive branch and was considered a prerogative power.<sup>147</sup> Within the overarching category of Crown lands there was often a distinction made between *Crown lands* and *Crown forests*, the latter sometimes referred to as “royal reserves.” Crown lands were all those lands which were part of the domain of the Crown

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<sup>144</sup> Ibid. at paras 50-53.

<sup>145</sup> Ibid. at 51-52. This view was repeated in the *Adams* decision, where Lamer CJ stated: “[t]he fact that a particular practice, custom or tradition continued following the arrival of Europeans, but in the absence of the formal gloss of legal recognition from the European colonizers, should not undermine the protection accorded to aboriginal peoples. Section 35(1) would fail to achieve its noble purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features which were fortunate enough to have received the legal approval of British and French colonizers.” *R v Adams*, 1996 SCR 3 at 32-33.

<sup>146</sup> Prins, *supra* note 99 at 154.

<sup>147</sup> MacNutt, W.S. *New Brunswick, A History: 1784-1867* (Toronto: Macmillan, 1963) at 208 [MacNutt, *New Brunswick*]

which had not already been granted to private parties. Royal reserves were broad tracts of land which were surveyed and set aside to supply the needs of the Imperial Crown (e.g. the Royal Navy).<sup>148</sup> Crown lands were granted for the purposes of settlement, sold to timber companies and financiers, and leased to the same. Forestry was a crucial industry in the early development of the colonies and the control and management of Crown lands and forests became a contentious political issue. As early as 1728, the Surveyor-General of the Woods in North America was commissioned to “colonize” Nova Scotia in the hopes of securing white pine masts for the Royal Navy when they could no longer be procured from New Hampshire.<sup>149</sup> Control of the forests in New Brunswick and Nova Scotia was later under the auspices of the Surveyor-General of the King’s Woods in Halifax who oversaw a chief deputy in New Brunswick. The deputies of the Crown forests “functioned altogether apart from the lieutenant-governor and his council.”<sup>150</sup> The Surveyor-General of the King’s Woods and his deputies, in other words, were offices delegated directly by the imperial administration. As late as 1808, however, “[t]he legal basis of the surveyor-general’s authority was still subject to clarification.”<sup>151</sup> Colonial authorities in New Brunswick contended, rightly it seems, that the forests were being mismanaged and, in 1816, after a second appeal from the colonial government, the Colonial Office declared that the Surveyor-General had no authority to grant licenses to cut timber on Crown lands.<sup>152</sup> The dozen years preceding this decision were characterized by poor policy and a lack of enforcement that, as W.S. MacNutt has argued, led to there being effectively no law governing the timber trade in the province.<sup>153</sup> As such, “[t]he fourteen million acres of Crown lands, still ungranted, were open to the forays of those whose business it was to get out timber almost without restraint.” It is clear that the Aboriginal title lands which fell within what were considered Crown lands could have been subject to intrusion from often avaricious lumbermen operating largely outside the scope of colonial or imperial law.

Control of the Crown lands in New Brunswick would remain a highly contentious issue.

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<sup>148</sup> In New Brunswick and Nova Scotia many of these reserves appear to have been created by Surveyor-General John Wentworth. In New Brunswick many had become “ordinary” Crown land, controlled by the province and open to sale or lease, by Wentworth’s death in 1820. Following his death the pace of these transfers quickened until no such reserves remained. MacNutt, *New Brunswick*, *supra* note 146 at 184 – 185.

<sup>149</sup> MacNutt, *Atlantic Canada*, *supra* note 138 at 31.

<sup>150</sup> MacNutt, *New Brunswick*, *supra* note 147 at 153.

<sup>151</sup> *Ibid.* at 152.

<sup>152</sup> *Ibid.* at 181.

<sup>153</sup> *Ibid.* at 152, 181.

Authority to manage Crown lands, which had rested with the colonial executive since 1816, was transferred to a newly formed office of the Commissioner of Crown Lands in 1824. Thomas Baillie, a highly divisive figure in the province, was appointed commissioner.<sup>154</sup> Baillie intended to sell off the entirety of the Crown lands in the province and “[i]n both public and private capacities he opened negotiations with British capitalists for the sale of land.”<sup>155</sup> Baillie made clear that “[r]ather than deal with a hundred timber merchants within the province on a year-to-year basis, he preferred to open the county to the endeavours of a half dozen great corporations originating abroad.”<sup>156</sup> This inclination coincided closely enough with the imperial desire to employ Crown lands in the service of defraying the costs of the administration of colonial governance that Baillie gained favour with imperial authorities.<sup>157</sup> The sale of Crown lands began in earnest in 1827.<sup>158</sup>

If the Colonial Office approved of Baillie’s plans, however, much of the public, and the colonial assembly, did not. As MacNutt put it, “[t]he people of New Brunswick possessed the general belief that the Crown lands were their own inheritance, not that of the Empire at large.”<sup>159</sup> Large grants to wealthy capitalists, such as those of 500 square miles to Joseph Cunard and Alexander Rankin on the northwest Miramichi and Restigouche Rivers respectively, were not well received in the province. Such was the imperial approval of Baillie’s plans, though, that he quickly became the most influential man in the province.<sup>160</sup> Baillie’s influence points to the importance of Crown lands in the minds of Colonial Office officials. Control of Crown lands was an exercise of the royal prerogative.<sup>161</sup> Thus, the executive branch of the imperial government, whether by instructing a colonial governor or establishing another delegated office (e.g. Commissioner of Crown Lands), could exercise control over any lands deemed to be Crown lands. This included the authority to grant, sell, or lease those lands. The battle over Crown lands in New Brunswick in the 1830’s, then, was not only a battle over control of the lands themselves; it was also a flashpoint in the conflict between proponents of a greater degree of self-government

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<sup>154</sup> Ibid. at 204.

<sup>155</sup> Ibid. at 207.

<sup>156</sup> Ibid. at 208, 230.

<sup>157</sup> As W.S. MacNutt put it, the imperial policy was “to unload the complete costs of government on the province and to create from the Crown lands a fund that would suffice to settle the emigrant poor of Britain on New Brunswick soil”: Ibid. at 206.

<sup>158</sup> Ibid. at 207.

<sup>159</sup> Ibid. at 205.

<sup>160</sup> Ibid. at 208.

<sup>161</sup> Ibid. at 185; Chitty, *supra* note 129 at 387.

in the province and those seeking to maintain the power of the Imperial Crown in the colonies.<sup>162</sup>

The Imperial Crown wanted to retain control over Crown lands in order to profit from their sales, to ensure a steady supply of wood for the royal navy, and as a means of facilitating settlement. As Professor MacNutt stated, many in Britain had “acquired the imaginative conviction that the wilderness lands of the Empire were the heritage of the unwanted surplus of British population. The millions of acres of untilled land in North America seemed the logical repository for the hundreds of thousands of persons who looked beyond the seas for the means of a new life.”<sup>163</sup> Nonetheless, the Colonial Office’s primary objective was to pass the cost of the administration of government in the province on to the provincial assembly. Thus, control over Crown lands was passed to the province in 1837 in exchange for a commitment from the province to assume responsibility for the costs of government (by way of a permanent civil list).<sup>164</sup> The policy of making large grants of land to capitalists was abandoned; thereafter it could only be sold for settlement in 100 acre parcels.<sup>165</sup>

It has often been asserted that jurisdiction over Indians was also passed to the province in 1837.<sup>166</sup> This assertion seems to be based on the assumption that Indian lands were Crown lands. As will be discussed in more detail below in the sections on the creation of Indian reserves and on the legality of the processes of dispossession described here, colonial officials were of the view that the Aboriginal peoples held no land rights save for a limited range of rights on Indian reserve lands. Those reserves, in turn, were created by the executive on “Crown lands” and, as such, were thought to pass to the province with control of the Crown lands. By the 19<sup>th</sup> century, the dominant view held that Aboriginal peoples possessed no land rights beyond the limited right to occupy reserve land. The failure to distinguish between *Aboriginal title* lands and *Indian reserve* lands seems to have led to the conclusion that jurisdiction over Indian affairs passed with jurisdiction over Crown lands. In *CP v Paul*<sup>167</sup>, the Supreme Court seemed to accept the finding of the lower courts that jurisdiction to manage Indian reserves rested with the provinces by the

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<sup>162</sup> This was reflected clearly in the lengthy uncertainty over quitrents. The first grants in the province had all required the payment of quitrents after 10 years, but they were never collected. Subsequent attempts to collect them were seen as an unjustified imperial tax and widely opposed in the province, with many specifically referencing the Stamp Act crises in their opposition: *Ibid.* at 236 -37, 252.

<sup>163</sup> *Ibid.* at 204.

<sup>164</sup> *Ibid.* at 255-56.

<sup>165</sup> *Ibid.* at 255. This policy was often evaded and lumbering interests still managed to gain access to relatively larger tracts of land: See *Ibid.* at 386.

<sup>166</sup> See for example, Hamilton, *supra* note 9 at 4; Upton, *supra* note 57 at 108-109.

<sup>167</sup> *Canadian Pacific Limited v Paul* [1988] 2 SCR 654; [1988] SCJ No. 98.



mid-19<sup>th</sup> century pursuant, presumably, to the provincial authority to manage Crown lands.<sup>168</sup> While this may have been true of Indian reserve lands, insofar as the provincial Crown held radical title to those lands, this does not extend to the authority to extinguish Aboriginal title in those or other lands.

If contemporary commentators have missed the mark on this point, however, it is tied to the misapprehensions of those individuals involved at the time. So intertwined were Crown lands and Indian lands in the minds of colonial officials that jurisdiction for Indian affairs often fell to the Crown Lands Office. Due to the inattention of the provincial assembly and the Indian commissioner, who focused only on relief funds, “concern for the Indian reserves passed almost by default to the office of the commissioner of crown lands.”<sup>169</sup> In Nova Scotia, the offices of the Indian Commissioner and the Commissioner of Crown Lands were merged in 1862. Further, the provincial assembly, in attempting to procure reliable surveys of Indian reserves, mandated that where surveys had not been completed, the Crown lands commissioner be “vested with title to all Indian [reserve] lands.”<sup>170</sup> Again, the distinction between title lands and reserve lands is crucial to this analysis and will be revisited below.

In Nova Scotia, the circumstances surrounding Crown land differed in many respects from those in New Brunswick. By the 19<sup>th</sup> century the majority of the land in the province had been sold to settlers and lumbermen. All that remained were “1,500,000 acres of relatively poor-quality and difficult-to-access crown forest.”<sup>171</sup> Nonetheless, Nova Scotia hoped to reap some of the profits from Crown lands seen in New Brunswick and, in 1899, passed an Act that permitted the government to lease Crown lands. The primary goal of the Act was to “allow the lease of the only extensive, contiguous block of crown land left in the province, the so-called “Big Lease”, covering about 620,000 acres”<sup>172</sup> in Cape Breton. Thus, while on a much smaller scale than in New Brunswick, Nova Scotia saw a similar pattern of sales and leases play out on its Crown lands.<sup>173</sup> Despite this smaller scale, the salient legal features of Crown land in Nova Scotia, particularly the *terra nullius* approach and failure to distinguish between Crown and Aboriginal lands, mirrored the situation in New Brunswick.

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<sup>168</sup> Ibid. at 675.

<sup>169</sup> Upton, *supra* note 57 at 95.

<sup>170</sup> Ibid. at 95 – 96.

<sup>171</sup> L. Anders Sandberg, “Forest Policy in Nova Scotia: The Big Lease, Cape Breton Island, 1899-1960” (1991) 20:2 *Acadiensis* 105 at 105.

<sup>172</sup> Ibid. at 106.

<sup>173</sup> For a detailed account see Ibid; Upton, *supra* note 57 at 81-97.

The pattern of Crown land use in the Maritime Provinces was dependent on a *de facto terra nullius* approach which ignored existing land rights of Aboriginal peoples, assuming that any lands over which sovereignty had been asserted were Crown lands to be managed by the executive pursuant to the royal prerogative.<sup>174</sup> The language employed by W.S. MacNutt in his recounting of the elimination of royal timber reserves is telling; MacNutt argued that the royal reserves became part of the “ordinary domain of the Crown,” and therefore became “Crown lands”, once they were released to the provinces.<sup>175</sup> This is a reflection of the belief that any lands within the Crown’s domain (i.e. over which it had acquired sovereignty) were Crown lands. This is not a tenable assumption. Further, it is important to note that this is an assumption which only developed in the 19<sup>th</sup> century. As discussed in chapter one, the British recognized throughout the 18<sup>th</sup> century that the Aboriginal inhabitants of the region held rights to their traditional territories. It was only once the influx of Loyalist settlers and the conclusion of the war of 1812 solidified British hegemony that the dominant legal and political discourse could exclude Aboriginal peoples from consideration. As L.F.S. Upton has pointed out, “there was no attempt at an orderly transfer of Indian lands to the whites; everything belonged outright to the Crown.”<sup>176</sup> As illustrated above, once the Crown assumed ownership of “everything,” one of the primary uses of Crown lands was forestry. The other was settlement.

## II. Settlement

British settlement in the Maritime Provinces remained scant throughout most of the 18<sup>th</sup> century. Until the founding of Halifax in 1749, there was no British sustained presence outside the fort at Annapolis.<sup>177</sup> The British government sought to extend its imperial control over the parts of the region it had acquired at the Treaty of Utrecht through the extension of Protestant settlement,

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<sup>174</sup> As Harald Prins said of colonial authorities, “[p]retending that the Mi’kmaq and Maliseet inhabiting this area possessed no aboriginal rights to their ancestral domains, the administration applied the legal fiction that the Crown possessed full title.” Prins, *supra* note 99 at 163.

<sup>175</sup> MacNutt, *New Brunswick*, *supra* note 147 at 185.

<sup>176</sup> Upton, *supra* note 57 at 99.

<sup>177</sup> John G. Reid, “Pax Britannica or Pax Indigena? Planter Nova Scotia (1760 – 1782) and Competing Strategies for Pacification” (2004) 85:4 *Can Hist Rev* at 674 [Reid, “Pax Britannica”]; Originally the plan was to send Cornwallis and the settlers to Annapolis, but the prevailing winds dictated that the convoy of ships carrying the settlers stop at Chebucto, the future site of Halifax, instead: MacNutt, *Atlantic Provinces*, *supra* note 138 at 37.

with Halifax being the first major attempt to counterbalance the French influence at Louisbourg.<sup>178</sup> The founding of Halifax also indicated that the Board of Trade intended to pursue settlement without the approval of the Mi'kmaq.<sup>179</sup> The British plan to gain control through Protestant settlement was complicated by the presence of the Acadians and the Mi'kmaq, and they devised plans to deal with each. In addition to assimilation through force of numbers, the expulsion of the Acadians, which was finally executed in 1755, had been periodically considered since 1713.<sup>180</sup> The Mi'kmaq were treated differently. Though in 1749 Governor Cornwallis was of a mind to forcibly remove them from peninsular Nova Scotia, the Colonial Office rejected the idea.<sup>181</sup> While settlement of Halifax proceeded without Aboriginal consent, a negotiated framework for settlement continued to be sought through the treaty process. As Professor John Reid has argued, "this strategy for pacification of Nova Scotia [through settlement and assimilation] would have to compete with a treaty-based Aboriginal strategy for a different form of pacification in which colonial settlement would be rigorously confined."<sup>182</sup>

Thus, the British not only took different approaches to the Acadian and the Mi'kmaq, their strategy respecting the Mi'kmaq was itself two-sided. While the treaty process represented one pole of the imperial policy, one that was grounded in engaging Aboriginal peoples on the basis of their own legal frameworks, the founding of Halifax represented the other. That the establishment of Halifax represented an attempt to exert imperial control through settlement is clear from the royal instructions given to Governor Cornwallis. As Professor Reid has noted, the instructions to Cornwallis "included a series of instructions relating to settlement that had not been issued to previous governors, in Nova Scotia or elsewhere."<sup>183</sup> These included directives

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<sup>178</sup> Reid, "Pax Britannica," *supra* note 177 at 676-677. Nova Scotia was seen as a barrier between New England and the French and settling it with "subjects loyal to the Crown would be necessary to effect this purpose." MacNutt, *Atlantic Provinces*, *supra* note 138 at 37.

<sup>179</sup> Wicken, *Mi'kmaq Treaties on Trial*, *supra* note 32 at 180.

<sup>180</sup> For a detailed account of the varying approaches the British considered to managing the Acadian population from their conquest of Annapolis until the eventual expulsion, see Geoffrey Plank, *An Unsettled Conquest: The British Campaign Against the Peoples of Acadia* (Philadelphia: University of Pennsylvania, 2001) at 40-68. See also MacNutt, *Atlantic Provinces*, *supra* note 137 at 43. In respect of the Acadians, it was first hoped that "English and Protestant settlers should be intermingled with them in order that they may be made obedient to the royal authority." This was later replaced with the preference for expelling them entirely and replacing them with large numbers of English settlers: *Ibid.* at 37, 60.

<sup>181</sup> A reproduction of archival material that was not possible to obtain directly for this project, including communications between Governor Cornwallis and the Colonial Office in London, can be found online at <<http://www.governorcornwallis.com/cornwallis-governorship/>>.

<sup>182</sup> Reid, "Pax Britannica," *supra* note 177 at 676. See Chapter 1 for discussion of the treaty relationship.

<sup>183</sup> Reid, "Pax Britannica," *supra* note 177 at 676-677. See also MacNutt, *Atlantic Provinces*, *supra* note 137 at 53, where he states that "Nova Scotia was settled as a conscious act of Imperial policy."

not only to lay out townships, but to do so as a means of securing settlers against the incursions of Indians.<sup>184</sup> Nonetheless, the treaty relationship continued to be emphasized and later governors continued to be instructed to treat with the Mi'kmaq and Maliseet.<sup>185</sup>

Though another Protestant settlement was formed at Lunenburg in 1753, by 1758 there was still virtually no non-Acadian or Mi'kmaq settlement outside Annapolis, Halifax, and Lunenburg.<sup>186</sup> On 12 October of that year Governor Lawrence issued the first of two proclamations, the second coming in early 1759, promoting and inviting settlement in the province.<sup>187</sup> These proclamations not only invited settlement, but also presented a comprehensive description of the form of government that was to prevail in Nova Scotia. The ambitious scope of settlement conceived by Governor Lawrence, which was not limited to former Acadian settlements, was made clear in the wording of the proclamations, the earlier of which stated:

townships are to consist of one hundred thousand acres of land, that they do include the best and most profitable land, and also that they do comprehend such rivers as may be at or near such settlement, and do extend as far up into the country as conveniently may be, taking in a necessary part of the sea coast.<sup>188</sup>

It seems clear that one hundred thousand acre tracts of “the best and most profitable land,” including rivers and sea coast, would certainly have overlapped with Aboriginal territory in many places.<sup>189</sup>

Nonetheless, the settlement in the decade following Governor Lawrence's proclamations did not radically alter the power dynamics in the region. In the 1760's, the arrival of New England Planters caused tensions to rise with the Mi'kmaq and Maliseet. At the same time, a small number of British entrepreneurs began to settle on New Brunswick's main river systems.

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<sup>184</sup> Ibid.

<sup>185</sup> See, for example, the 1784 Royal Instructions to Thomas Carleton: *Carleton's Instructions*, *supra* note 59 at clause 63.

<sup>186</sup> For discussion of the challenges faced in settling Lunenburg: MacNutt, *Atlantic Provinces*, *supra* note 137 at 55-56.

<sup>187</sup> Reid, “Pax Britannica,” *supra* note 177 at 679-680. For full text of Proclamation of 1758 see John Bourinot *Builders of Nova Scotia*, *supra* note 12 at 136-137 (Appendix E).

<sup>188</sup> Bourinot, *Builders of Nova Scotia*, *supra* note 12 at 136. The laying off of township grants can also be considered in light of the argument that the decade preceding Lawrence's proclamation increasingly saw geography employed as an imperial tool. As Jeffers Lennox stated, “geographic knowledge – including maps, geographic tracts, surveys, and discussions of limits and boundaries – was a diplomatic tool used to negotiate territorial sovereignty given weak political authority and limited military power.” Lennox argues that the years 1750 -55, in particular, saw the importance of such geographical tools increase in the context of the Acadian boundary disputes. Jeffers Lennox, “Nova Scotia Lost and Found: The Acadian Boundary Negotiation and Imperial Envisioning, 1750-1755” (2011) 15:2 *Acadiensis* 3 at 4.

<sup>189</sup> The 1765 grant to William Davidson and John Cort, for example, encompassed existing Mi'kmaq village sites. See Hamilton, *supra* note 9 at 3-8; Upton, *supra* note 57 at 82 – 83.

William Davidson and John Cort were granted 100,000 acre township grant along the Miramichi River in 1765.<sup>190</sup> Despite this, the arrival of the Planters did not shift the balance of power to the extent that was intended. As Professor Reid wrote, “insofar as the Planter migration had represented a coordinated, military-inspired intervention into Aboriginal territory, and one that had intended substantial environmental change in selected locations, it had met with no greater success than had the British efforts of the 1750s.”<sup>191</sup> What is notable in this analysis is that, despite Planter success at establishing agricultural communities, the balance of power in the region continued to be shared. As Reid put it, during this period “Pax Britannica and Pax Indigena hung in the balance.”<sup>192</sup> Put otherwise, even following the first substantial attempts at British settlement, the British had failed to conclusively alter the balance of power in the region. The number of non-Aboriginal settlers at the end of the 1760’s was fewer than the number at the beginning of the expulsion of the Acadians.<sup>193</sup> Thus, “the Halifax regime had settled into a pattern that made it only the latest of the many imperial intrusions that the Aboriginal nations had been able to domesticate since the early seventeenth century.”<sup>194</sup> The other notable point in Reid’s analysis is that settlement itself was used, at least since the founding of Halifax, as a “military-inspired intervention into Aboriginal territory.” Despite the limited success this tactic initially enjoyed, the use of settlement as a means of extending imperial control seems on its face difficult to reconcile with the treaty relationship described in Chapter 1.

The limited success of settlement in the half-century following the Treaty of Utrecht reversed quickly following the American War of Independence. With the arrival of no fewer than 30,000 Loyalist settlers beginning in 1782, the pace of the dispossession of the Mi’kmaq, Maliseet, and Passamaquoddy accelerated and the balance of power shifted conclusively to the imperial and colonial governments.<sup>195</sup> Loyalist settlement was characterized by rapacity for land and a deep sense of entitlement.<sup>196</sup> The impact of the Loyalist settlers was felt immediately, as

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<sup>190</sup> Hamilton, *supra* note 9, at 3.

<sup>191</sup> Reid, “Pax Britannica,” *supra* note 177 at 688.

<sup>192</sup> *Ibid.* at 692.

<sup>193</sup> *Ibid.* at 687. By 1780 there were about 1250 English settlers in the Saint John River Valley. Graeme Wynne, “Population Patterns in Pre-Confederation New Brunswick” (1980-81) 10:2 *Acadiensis* 124 at 126 [Wynne, “Population Patterns”].

<sup>194</sup> *Ibid.*

<sup>195</sup> See Upton, *supra* note 57 at 82; Gould and Semple, *supra* note 129 at 39.

<sup>196</sup> Reid, John G. “Empire, the Maritime Colonies, and the Supplanting of Mi’kma’ki/Wulstukwik, 1780-1820,” (2009) 38:2 *Acadiensis* 78 at 4 [Reid, “Empire”]. As MacNutt stated: “the long months of confinement at New York produced within Loyalist leaders a determination to gain reward for their sufferings and losses on behalf of the

they valued the same land as the Aboriginal inhabitants. Due to the small size of peninsular Nova Scotia, the Mi'kmaq quickly found that there were no lands left for them to occupy. The Mi'kmaq of Nova Scotia petitioned Governor Wentworth for redress as early as 1794, complaining that the settlers had occupied the valleys and harvested the lumber and left nowhere for them to reside.<sup>197</sup> In New Brunswick, the Saint John River was the first target of Loyalist settlement.<sup>198</sup> The arrival of Loyalist settlers, then, marked the period in which settlement as a tool of imperial expansion began to meet with considerable success; the social, political, legal, and economic milieus of the region came to be dominated by the settler society.<sup>199</sup>

Once the initial wave of Loyalist settlement was complete, both sanctioned and unsanctioned settlement grew quickly, if in uneven bursts. While the impact of Loyalist settlement is clear, the extent of the land granted to the Loyalists should not be overstated. In New Brunswick, by 1790 “all claims to land brought forward by the Loyalists had been honoured. Yet these grants totaled less than 1, 300, 000 acres. Nine-tenths of the province

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Crown.” MacNutt, *Atlantic Provinces*, *supra* note 137 at 95. For an 18<sup>th</sup> century account of the grievances of the Loyalists see the account of Joseph Galloway. Galloway published a pamphlet in 1778, making a substantial legal argument that the Loyalists were owed compensation for their losses in America. As he stated, “[t]heir pleas of *right* are *unchangeable* principles of reason and justice – the *fundamental* laws of the British constitution – the *sacred obligations*, by which Sovereign Authority is bound to indemnify its faithful subjects”: Joseph Galloway, *The Claim of the American Loyalists* (Boston: Greg Press, 1972) at v-vi. Many Loyalists came arrived with the hope of establishing great estates of the type they had left behind, a model of proprietorship that was not to flourish in the Maritime Provinces: MacNutt, *New Brunswick History*, *supra* note 147 at 70. For demographic make-up up of the Loyalists see MacNutt, *Atlantic Provinces*, *supra* note 138 at 94.

<sup>197</sup> Reid, “Empire,” *supra* note 196 at 5. As Reid argued, “The stresses imposed by colonization during this crucial transitional era were unprecedented, with the settlement of non-Native populations characterized by land hunger and a profound sense of entitlement. The results were intensely destructive, and yet there was no military defeat, no formal land surrender, and the principle of a treaty relationship that enshrined Native-imperial peace and friendship was one that – far from weakening – continued in Native political cultures to evolve and gain strength.” See also MacNutt, *Atlantic Provinces*, *supra* note 138 at 94.

<sup>198</sup> Upton, *supra* note 57 at 98. The initial Loyalist influx in New Brunswick was confined to the lower reaches of the St. John River watershed and near the coasts of Passamaquoddy Bay: (Wynne, “Population patterns,” *supra* note 192 at 126). As Professor Reid has noted, however, the land that was physically occupied by settlers only accounted for part of the impact on Aboriginal ways of life; the environmental impacts (e.g. reduced numbers of game animals and fish, the development of the forestry industry, etc.) were equally as destructive: Reid, “Empire,” *supra* note 196 at 4 – 5.

<sup>199</sup> In other words, the arrival of the Loyalists marked the beginning of British hegemony in the region. For a thoughtful discussion of the role of law and the legal apparatus of the state in creating and reproducing hegemony, see Douglas Litowitz, “Gramsci, Hegemony, and the Law” (2000) *BYU L Rev* 515. Professor Reid has argued, however, that the Mi'kmaq and Maliseet continued to exert a political pressure that belied their reduced visibility and power following Loyalist settlement. Until the conclusion of the War of 1812, he argues, the desire on the part of the imperial and colonial governments to maintain the Mi'kmaq and Maliseet as allies allowed the Aboriginal parties to exert influence and extract concessions long for decades after the balance of power had definitively shifted to the British. With the conclusion of the war, Aboriginal peoples became largely ignored. See Reid, “Empire,” *supra* note 196.

remained ungranted.”<sup>200</sup> Settlement occasioned by later population growth continued to claim more land following the initial Loyalist settlement. The population in New Brunswick, for example, still less than 25,000 as of 1803, had grown to 74,176 by 1824 and to 119,457 by 1834.<sup>201</sup> The slow population growth in New Brunswick in the first two decades after the arrival of Loyalist settlers was caused in part by instructions issued by the Privy Council in 1790 to the governors in North America to cease the granting of Crown lands.<sup>202</sup> In New Brunswick the prohibition on granting Crown lands would remain in place until 1807.<sup>203</sup> The result was that many settlers were permitted to occupy lands to which they could not receive full title. Thus, “[b]y 1803, a million acres of Crown Land [in New Brunswick] were under grant, and perhaps a thousand families occupied land without title to it.”<sup>204</sup> While many settlers occupied land despite the 1790 orders, the more pronounced effect was to limit new settlement and even to cause an outflow of settlers frustrated by their inability to secure grants. Thus, sanctioned settlement did not increase dramatically until after the ban on grants was lifted. The impact of the 1790 instructions was more muted in Nova Scotia where a much greater percentage of lands had already been granted and on Prince Edward Island where all of the land on the island had been granted in 1767.<sup>205</sup> Cape Breton was settled extensively in the 1820’s and 30’s with many grants that overlapped Indian reserves despite many pleas from the Mi’kmaq there to the colonial government.<sup>206</sup> By 1821 the Surveyor-General of Nova Scotia, Thomas Crawley, was already taking aim specifically at Highland settlers, referring to them as “those who regardless of every principle of Justice, would deprive these inoffensive Savages of their Property.”<sup>207</sup>

The starkest example of the use of grants of settlement to displace Aboriginal peoples occurred on Prince Edward Island. There, the entire island was divided into 66 lots of about

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<sup>200</sup> MacNutt, *New Brunswick*, *supra* note 147 at 70 – 71. By the same token, this should not be understated as the Loyalists targeted the most desirable lands for settlement. While they may have been granted “only” a tenth of the province, the proportion of riverine and coastal lands was much higher.

<sup>201</sup> Wynne, Wynne, “Population patterns,” *supra* note 196 at 128; *History of New Brunswick*, *supra* note 146 at 119.

<sup>202</sup> MacNutt *History of New Brunswick*, *supra* note 147 at 71.

<sup>203</sup> For an account of some the problems the inability to get clear title to the land caused the settlers, see *Ibid.* at 119 – 122.

<sup>204</sup> Wynne, “Population Patterns,” *supra* note 196 at 127.

<sup>205</sup> Upton, *supra* note 57 at 113. The granting of land in Prince Edward Island will be discussed in further detail below.

<sup>206</sup> *Ibid.* at 95.

<sup>207</sup> Reid, “Empire,” *supra* note 196 at 7

20,000 acres each and allocated to absentee British proprietors on 23 July 1767.<sup>208</sup> In other words, “[t]he land had been transferred to private ownership at one stroke.”<sup>209</sup> The Mi’kmaq made numerous appeals for land and access to the water without success.<sup>210</sup> Though the British government was petitioned as early as 1806 to purchase Lennox Island (a 1,400 acre Island off the north west coast that was granted as part of lot 12) and set it apart for the Mi’kmaq, the Island was not purchased until 1870 when the Aborigines Protection Society purchased it with funds raised in Britain.<sup>211</sup>

To varying degrees, then, the land in the Maritime Provinces was brought under private ownership by sale, grant, or otherwise. Once held privately, the exclusive nature of common law property rights served to limit Aboriginal access to much of their traditional territory.<sup>212</sup> Even in New Brunswick, where a considerable extent of the province remained Crown land, the most desirable and fertile lands – those along the rivers and coasts – were transferred to private owners. Much of this settlement took place either in the belief that there were no Aboriginal land rights where the grants were made (i.e. the *terra nullius* approach), or with a stubborn disregard for those rights. Even where unsanctioned settlement (squatting) took place on lands explicitly reserved or granted to Aboriginal peoples, colonial governments offered little by way of protection. Indeed, at confederation it is estimated that there were more than 10,000 acres of Indian reserve land in New Brunswick occupied by squatters.<sup>213</sup> Beginning with the founding of

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<sup>208</sup> Margaret McCallum, “Problems in Determining the Date of Reception in Prince Edward Island” (2006) 55 UNB LJ 3 at 4 [McCallum, “Date of Reception in PEI”]; McCallum in fact says that the Island was divided into 67 lots. This was also expressed by J.M. Bumsted: J.M. Bumsted, “The Origins of the Land Question on Prince Edward Island: 1767 – 1805” (1981) 11:1 *Acadiensis* 43 at 43. L.F.S. Upton, Richard Bartlett, Gould and Semple, and Harald Prins put the number at 66. See Upton, *supra* note 57 at 113; Richard H. Bartlett, *Atlantic Provinces*, *supra* note 104 at 6 [Bartlett, *Atlantic Provinces*]; Gould and Semple, *supra* note 130 at 30; Prins, *supra* note 99 at 155.

<sup>209</sup> Upton, *supra* note 57 at 113.

<sup>210</sup> Some lands on Prince Edward Island were “lent” to the Mi’kmaq, where they grew potatoes for a “few seasons” until the site was taken by the government in order to build a hospital. Other lands were donated by one of the landholding proprietors, though those were taken by Irish settlers once the Mi’kmaq had improved them. They had been allowed to use parts of lots 15 and 55, but these were eventually sold. The only successful transfer of lands to the Mi’kmaq was at Morell River. Upton, *supra* note 57 at 114 – 119;

<sup>211</sup> Bartlett, *Atlantic Provinces*, *supra* note 104 at 6 - 7. For a discussion of the state of the land on Lennox Island and conflicts between Aboriginal inhabitants and white settlers see Gould and Semple, *supra* note 129 at 31. On repeated attempts to secure the purchase of the Island see *Ibid.* at 32 – 35.

<sup>212</sup> As Harald Prins put it, “[h]aving usurped Mi’kmaq country, the British Crown hired surveyors to measure out the newly won tribal territory. The lands were then divided into sections to be auctioned off in London. As such, the sale of Mi’kmaq lands helped raise the revenues required to carry out British imperial policy.” Prins, *supra* note 99 at 155.

<sup>213</sup> Moses Perley provided several accounts of conflicts with squatters on reserve lands and the difficulty of removing them. In his own words: “[i]n passing up the River, I found the front of the Indian Reserve, for about three miles above the Tobique Rock, cleared and cultivated by squatters, who have built houses and barns, and appear to



Halifax in 1749, settlement was consistently employed as a means of extending and consolidating imperial claims and power. The assumption that all lands in the Crown's "domain" were Crown lands allowed this settlement to occur with a veneer of legality. In concert with the granting and leasing of Crown lands for forestry purposes discussed above, the Crown control of ostensibly Crown land was responsible for much of the dispossession of Aboriginal peoples in the Maritime Provinces. The final stage in stabilizing British and colonial control in the region was to confine Aboriginal peoples to Indian reserves.

### III. *Indian Reserves*

No land was set aside as reserves for Aboriginal peoples in the Maritime Provinces following the initial wave of dispossession wrought by Loyalist settlement. Instead, they were left to petition for "licences of occupation" or personal grants on which the individual or group could settle.<sup>214</sup> Licences of occupation first appeared in Nova Scotia in the 1770's and continued in New Brunswick once it became a separate province. Licences of occupation were distinct from other forms of grant, they were "not a grant in fee simple but a licence to occupy and possess during the pleasure of the crown; the land remained crown land and was not to be sold or otherwise alienated by the Indians."<sup>215</sup> As a legal instrument, the licence of occupation reflected the *terra nullius* approach of colonial officials insofar as the Aboriginal occupation was at the pleasure of the Crown and, again, that all lands over which sovereignty had been asserted were Crown lands; by their very nature licences of occupation rejected the premise that Aboriginal peoples held any existing interest in the lands that were licenced.

In 1782 the Mi'kmaq at La Hève acquired a 550 acre tract at St. Margaret's Bay and 11, 500 acres nearby.<sup>216</sup> In 1783 nine other licences of occupation were granted in Nova Scotia.<sup>217</sup>

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make themselves quite at ease. They pay no rent, acknowledge no title, and from long impunity, have become very insolent and overbearing. Besides occupying the land, they openly plunder the forest in the vicinity of the most valuable Timber, and dispose of it in the face of the Indians, whom they will scarcely allow to set foot upon the land, and invariably hunt like wild beasts, if they attempt to look after or prevent the trespasses which are constantly committed." Moses Perley, *Reports on Indian Settlements, &c.* (Fredericton?: J. Simpson, 1842) at 2. (It is not clear where this was published. The *Early Canadiana* database suggests Fredericton, though the noted question mark is theirs.)

<sup>214</sup> Upton, *supra* note 57 at 70, 82, 99; Prins, *supra* note 99 at 168. For a detailed account of the development of Indian Reserves in the Atlantic Provinces see Bartlett, *Atlantic Provinces*, *supra* note 104

<sup>215</sup> Hamilton, *supra* note 9 at 1; Upton, *supra* note 57 at 82.

<sup>216</sup> Prins, *supra* note 99 at 168; Gould and Semple, *supra* note 130 at 40.

More formal reserves were created in 1820 when the reserves, not exceeding 1,000 acres were set apart in each of the ten districts of the province. These lands, which were set apart by order-in-council, were distinct from the earlier licences of occupation, though they often overlapped.<sup>218</sup> Six reserves, totaling 12,205 acres, were surveyed in Cape Breton in 1821.<sup>219</sup> The 1842 report of the Indian Commissioner in Nova Scotia identified 22,050 acres of reserve, a number that went largely unchanged at confederation.<sup>220</sup>

Most licences in the New Brunswick were issued between 1783 – 1810 and varied in size considerably. Only two New Brunswick grants pre-dated the partitioning of Nova Scotia. The first was a 20,000 acre grant to John Julian on the Miramichi River in 1765.<sup>221</sup> The only other pre-Loyalist New Brunswick grant to Aboriginal peoples was a grant of 704 acres to a group of Maliseet along the St. John River at St. Anne's Point in present-day Fredericton. The grant was confirmed in 1779 to the Superintendent of Indian Affairs and the Indian Chiefs "in trust, for and in behalf of the said Malecite Indians, inhabiting as aforesaid, their heirs forever."<sup>222</sup> The first schedule of reserves for New Brunswick, produced in 1838, listed 61,293 acres throughout the province.<sup>223</sup> The situation in Prince Edward Island was even more unfavourable for the Mi'kmaq. The circumstances there were discussed previously, so I will not revisit them in detail here. It will suffice to point out that virtually no land, less than 0.1% of the province's land base, was reserved to the Mi'kmaq.<sup>224</sup> This figure includes the lands reserved at Lennox Island, which account for 1320 of the 1663.1 acres reserved.<sup>225</sup>

Under the system of licences of occupation, which preceded the more formal Indian reserve system, Aboriginal peoples "were told to apply for parcels of the rapidly shrinking amount of available 'Crown land.' Without an official permit, they could not reside on the lands

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<sup>217</sup> Bartlett, *Atlantic Provinces*, *supra* note 104 at 9. The licences were located at "St. Margaret's Bay, Sheet Harbour, St. David's Bay, and along the Stewiacke, Remsheg, Antigonish, Philip, Merigomish, Macan and Shubenacadie rivers."

<sup>218</sup> *Ibid.* at 9 – 10; Gould and Semple, *supra* note 130 at 43 – 47.

<sup>219</sup> *Ibid.* at 12.

<sup>220</sup> *Ibid.* at 11 - 12. In the 1940's about 6,000 acres were added to the reserves at Eskasoni and Subenacadie as part of a government "centralization policy" ostensibly designed to facilitate economic self-sufficiency.

<sup>221</sup> For a detailed history of this grant see Hamilton, *supra* note 9.

<sup>222</sup> Bartlett, *Atlantic Provinces*, *supra* note 104 at 15.

<sup>223</sup> Upton, *supra* note 57 at 100. There were thought to upwards of 100,000 acres under licence of occupation in 1810 in New Brunswick.

<sup>224</sup> Bartlett, *Atlantic Provinces*, *supra* note 104 at 7.

<sup>225</sup> *Ibid.*

that they had occupied since time immemorial.”<sup>226</sup> In the result, the Aboriginal peoples of the Maritime Provinces were “coerced into a political system of internal colonialism.”<sup>227</sup> Under this system the land reserved to Aboriginal peoples in the Maritime Provinces was less than 0.5% of the total land base in the region.<sup>228</sup> The reserve system was made possible in large part by the *terra nullius* approach taken to lands in the region.<sup>229</sup> As will be discussed below, colonial governments interpreted any restrictions on their authority to manage Aboriginal lands as applying only to Indian reserve lands. This allowed the leasing, sale, and granting of ostensibly Crown lands to proceed as if those lands were not burdened by any Aboriginal interest. As will be seen, the fact that those lands had never been ceded or purchased makes this process highly problematic from a legal perspective.

#### IV. Legality

Having provided a brief overview of the manner in which the Aboriginal peoples of the Maritime Provinces were dispossessed of the lands they traditionally occupied, a few words can be said about the legality of these acts. It is important to note, though, that while there may be a number of different grounds on which the legality of these processes of colonization may be assessed, the concern here is only with the question of whether any of these modes of dispossession could have legally extinguished Aboriginal title. As a consequence, the question of primary importance is not whether the incidents of colonization described above are legal *per se*. As has been seen, Aboriginal title could *only* have been extinguished by voluntary surrender or clear and plain legislation. The first question that must be addressed, then, is whether the dispossession of Aboriginal peoples in the Maritime Provinces by means of the wholesale appropriation of all of the lands in the region as Crown lands, the granting by the Crown of lands in fee simple, or the process of confining Aboriginal peoples to Indian reserves, was accomplished through one of the

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<sup>226</sup> Prins, *supra* note 99 at 166.

<sup>227</sup> *Ibid.* at 167.

<sup>228</sup> Bartlett, *Atlantic Provinces*, *supra* note 104 at 19.

<sup>229</sup> The reserve system was also accompanied by attempts to induce the Aboriginal population to adopt an agricultural lifestyle. This push, in turn, was spurred on by European notions of racial superiority, a desire to alleviate imperial and colonial governments of relief funds for the Indians, and, perhaps most importantly, a desire to compel the Indians to adopt a mode of subsistence not reliant on their use of broad tracts of land for hunting and fishing. Agriculture as a mode of subsistence makes much more efficient use of land than hunting. See Upton, *supra* note 57 at 89-97, 107-112.

two means of extinguishing title identified by the Supreme Court. The second question, whether the acts in question were *legal*, is subject to a different range of considerations, only the broad outlines of which will be addressed here. In addressing this latter question, the issue is identifying whether any identifiable laws were breached.<sup>230</sup>

The assumption that all lands over which the Crown asserted sovereignty were Crown lands that could be managed and disposed of by the executive pursuant to the royal prerogative was not supported by any imperial legislative Act. It is clear that the power to grant or otherwise dispose of Crown lands was a long standing prerogative power.<sup>231</sup> This power, however, was based on the prior acknowledgement that Crown lands excluded privately held property. Though the Crown held radical title to all lands within the Crown's dominions, the prerogative powers in respect of Crown *lands* applied only to this narrower range of lands that were not burdened by another interest. As discussed at length in Chapter 2, common law and statutory protections of legal rights, including proprietary rights, limited the scope of authority of the executive branch and, *inter alia*, limited the prerogative power of the Crown to manage Crown lands to those lands not burdened by other legal interests. In the Maritime Provinces, this distinction was recognized in respect of privately held lands but not, it appears, in respect of Aboriginal lands.

The taking of all lands in the region as Crown lands as an incident of the assertion of sovereignty, that is, the *terra nullius* approach, runs contrary to the fundamental principles of colonial law. As Lamer CJ stated in *Côté*,

[u]nder the British law of discovery, the British Crown assumed ownership of newly discovered territories subject to an underlying interest of indigenous peoples in the occupation and use of such territories. Accordingly, the Crown was only able to acquire full ownership of the lands in the New World through the slow process of negotiations with aboriginal groups leading to purchase or surrender.<sup>232</sup>

In the Maritime Provinces, though, the imperial and colonial governments abandoned the process of negotiated settlement before ever acquiring a surrender of Aboriginal title. As stated above, by

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<sup>230</sup> As discussed previously, assessing legality requires an inquiry into which laws were applicable at a given time. In particular, whether the legality of the incidents of colonization should be assessed on the basis of indigenous, settler law, or international law and, in the case of the latter, which body of international law. It is beyond the scope of this paper to address this in detail here. For a discussion of these issues in the context of the legality of assertions of European sovereignty in North America, see Kent McNeil, "Factual and Legal Sovereignty in North America: Indigenous Realities and Euro-American Pretensions" in Julie Evans, Ann Genovese, Alexander Reilly, Patrick Wolfe, eds., *Sovereignty: Frontiers of Possibility* (Honolulu: University of Hawai'i Press, 2013) at 37-50.

<sup>231</sup> Chitty, *supra* note 129 at 385

<sup>232</sup> *Côté*, *supra* note 143 at para 43.

the turn of the 19<sup>th</sup> century at the latest the Crown had instead embraced a *terra nullius* approach. As the Supreme Court stated in *Tsilhqot'in*, however, speaking of British Columbia but in terms equally applicable to the Maritime Provinces,

At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada.<sup>233</sup>

Thus, it was not open to the imperial and colonial governments to assume that Aboriginal land rights had been abrogated by the assertion or acquisition of sovereignty.

As discussed earlier, there were no legislative provisions empowering the taking of Aboriginal lands by mere assertion. It is clear, then, that the acquisition of sovereignty and the disregard for Aboriginal land rights could not have, in themselves, extinguished Aboriginal title. The acquisition of sovereignty did not affect the property rights of prior inhabitants at British law. Nonetheless, on the basis of the *terra nullius* approach, Aboriginal lands that were never ceded or purchased were leased or sold to industry or granted for the purposes of settlement and Aboriginal peoples were confined to a fraction of their traditional lands through the establishment of reserves. It is worth considering the possibility that the fact that these later incidents of colonization flow from the *terra nullius* approach, which was explicitly repudiated by the Supreme Court in *Tsilhqot'in*, may delegitimize any later legislative extinguishment of title, regardless of whether the purported extinguishment meets the extinguishment test established by the courts. If the means by which imperial and colonial jurisdiction were extended over Aboriginal lands was contrary to Anglo-Canadian law, how could that jurisdiction then be exercised so as to extinguish the Aboriginal interest in those lands? Nonetheless, the remainder of my comments here will focus on the narrower question of whether the regulation of Crown lands, the settlement process, and the creation of Indian reserves meet the requirements for extinguishing title as established by the Supreme Court. As discussed at length above, this would require clear legislation from a competent legislature or an executive action supported by a clear delegation of authority from such a legislature.

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<sup>233</sup> *Tsilhqot'in Nation*, *supra* note 65 at para 69. The doctrine of *terra nullius* was also rejected by the Australian High Court in *Mabo v Queensland [No.2]* (1992), 175 CLR 1 (HC).

There was no legislation pertaining to Crown lands in the colonies until the colonial assemblies passed such legislation in the mid-nineteenth century. As has been seen above, it appears that the colonial legislatures did not possess the jurisdiction to extinguish aboriginal title. Even if the colonies did have jurisdiction, the Courts of Appeal in New Brunswick and Nova Scotia held in the *Marshall* and *Bernard* decisions that the sections of colonial Crown lands legislation relied on to demonstrate extinguishment in those cases did not possess the requisite clear and plain intent to extinguish title. As discussed above, another problem with this legislation is that, by definition, it applies only to Crown land. As Aboriginal title land is not Crown land, it is difficult to see how Crown lands legislation could extinguish title.

When speaking of the extinguishment of title through settlement, the question is whether title could have been extinguished by pre-confederation grant. This question has not been addressed by the Supreme Court of Canada and remains an open question. As Cromwell JA stated in *Marshall*,

The issue of extinguishment by pre-Confederation Crown grant has a number of aspects of considerable and broad importance which have not been fully argued in this case. I will give two examples. If granted land reverts to the Crown, does any pre-existing aboriginal title that was extinguished by the grant revive when the Crown reacquires it? Did grants require legislative authority before they could extinguish aboriginal title and, if so, was there such authority for the grants in issue in this case?<sup>234</sup>

For reasons I will make clear, the first of these questions does not require an answer, as it would only become pertinent if grants of settlement were found to have extinguished title. The latter two questions are of the utmost importance. As has been detailed at length above, Crown grants of land, be it for settlement or otherwise, did require legislative authority before they could extinguish title. As Professor McNeil stated, “for the executive to be able to take away the legal rights of subjects, whatever their nature, it must have either unambiguous statutory authority or prerogative power to do so.”<sup>235</sup> There are longstanding prohibitions against the use of the prerogative power to seize or otherwise extinguish property rights.<sup>236</sup> The executive could have extinguished title legislatively while the prerogative legislative power remained intact, though this authority ceased in the Maritime Provinces in either 1719 or 1749. The question of whether

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<sup>234</sup> *Marshall* NSCA, *supra* note 92 at para 245.

<sup>235</sup> Kent McNeil, “Racial Discrimination and Unilateral Extinguishment of Native Title” in Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) at 365.

<sup>236</sup> *Infra* at pp. 60-63.

grants required legislative authority to extinguish title, then, should be answered in the affirmative.

As Cromwell JA pointed out, the necessary corollary to this conclusion is the question of whether the required legislative authority existed. The question of whether a given executive action was supported by legislation requires an examination of which legislative body had the jurisdiction to delegate such authority. As detailed above, when assessing pre-confederation grants, the only body with the authority to extinguish title appears to have been the Imperial Parliament; the colonial assemblies do not appear to have been delegated authority to extinguish Aboriginal rights. Any party seeking to establish that Aboriginal title was extinguished by grant would have to produce evidence demonstrating that the authority to do so was either delegated directly from the Imperial Parliament or delegated to the colonial assembly in question and then to another party. I have been unable to uncover any evidence to this effect.<sup>237</sup>

There were two sources of authority to grant Crown land. The first were royal instructions provided to colonial governors. The second was Crown lands legislation. The royal instructions to Sir Thomas Carleton establishing government in New Brunswick included several lengthy clauses pertaining to settlement. Notably, Carleton was instructed to grant “such Lands as are Our Property,” indicating that grants were to be made of *Crown* lands. A clear distinction is drawn between lands the Crown had the authority to grant and ones they did not. While this phrase may be construed as extending protection only to land under non-Aboriginal settlement, such a view would run contrary to other provisions in the instructions referencing the Indians as “neighbours.”<sup>238</sup> More importantly, it is a view that would contradict the British policy of acquiring land prior to settlement, as confirmed in the treaty relationship, a relationship which the colonial governors in the Maritime Provinces were explicitly instructed to renew.<sup>239</sup> In any event, this may be beside the point. The Imperial Crown did not have the authority to extinguish property rights absent a clear delegation from the Imperial Parliament. As there is no evidence of any such delegation having occurred, it seems clear that the Imperial Crown could not delegate to its representatives an authority which it did not itself possess. Further, it is only nominally important whether the imperial executive *believed* itself to possess the relevant authority. As Professor McNeil has pointed out “the fact that the government officials seem to have thought

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<sup>237</sup> This was all covered in considerable detail in Chapter 2.

<sup>238</sup> Carleton’s instructions, *supra* note 59 at clause #82.

<sup>239</sup> *Ibid.* at clause #63

they had discretion that was unfettered by law (the Crown argued this in *Guerin*) [is] irrelevant, as it must be in a constitutional monarchy governed by the rule of law where it is up to the courts, not the executive branch of government, to determine what the law is.”<sup>240</sup> It should not be presumed that the executive acted in accordance with the law, nor should it be presumed that the executive’s understanding of the law was accurate.

The second source of authority to grant Crown lands came from statute. While Crown lands legislation which had the effect of excluding unlicensed individuals from accessing Crown land was held not to have evidenced the requisite clear and plain intent to extinguish title in the *Marshall* and *Bernard* cases, there was an important provision in the *Crown Lands Act* that was not put before the Court. The 1859 Nova Scotia *Crown Lands Act* provided that:

The governor in council may, from time to time, sell or lease any lands, at such price, and for such tenure, time or use, either as regards the land, or timber, quarries, or mines thereon or other benefit to be derived therefrom, as may be deemed expedient.<sup>241</sup>

Thus, from 1859 on in Nova Scotia, the executive’s authority to grant land was statutory rather than prerogative. The colonial assemblies do not appear to have been delegated the authority to extinguish Aboriginal rights. They unquestionably gained control over Crown lands and, in *CP v Paul* the Supreme Court seemed to accept the argument that this include the right to manage Indian reserve lands. Though, as noted above, the colonial assembly of New Brunswick itself still believed more than a decade after it acquired control of Crown lands that it required the permission of the Colonial Office to sell Indian reserve lands.<sup>242</sup>

Should evidence be uncovered confirming that the authority to extinguish aboriginal title by grant was delegated to a colonial assembly in the Maritime Provinces, any colonial legislation delegating the authority to grant land would be assessed on the clear and plain intent standard. The question in respect of the passage above is whether the phrase “sell or lease any lands” should be interpreted as including lands subject to Aboriginal title and, further, as a clear statement of the intent of the legislature to delegate the authority to extinguish Aboriginal title. In this instance, the phrase “all lands” should be read to exclude lands on which there is an interest burdening the radical Crown title. To assume that this clause was meant to impart the

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<sup>240</sup> Kent McNeil, “Indigenous Rights Litigation, Legal History, and the Role of Experts” (2014) 77 Sask L Rev 173 (QL) at para 12 [McNeil, “Indigenous Rights Litigation”].

<sup>241</sup> *Crown Lands Act* NS, *Revised Statutes* 1859, *supra* note 103 at s.11.

<sup>242</sup> Upton, *supra* note 57 at 108 – 112.



extraordinary authority to lease or sell lands already held by private individuals would stretch the terms of the legislation beyond their breaking point. The same reasoning applies to Aboriginal lands. If the assembly had intended to authorize the sale of lands already burdened by an existing interest, it would have made so much clear. The fact that a later clause deals specifically with “lands for the use of the Indians” further substantiates this view. The clause of the *Crown Lands Act*, 1859 dealing explicitly with Indian reserve lands reads:

12. The governor in council may, reserve lands for the use of the Indians; may divide existing reservations, and vest in the commissioner of crown lands the title to such lands and the duty of protecting the rights of the aborigines who are disposed to settle thereupon.<sup>243</sup>

This clause delegates the authority to the executive to vest the title to Indian reserve lands in the commissioner of Crown lands. Three things should be kept in mind in considering this clause. First, this clause deals with Indian reserve lands, not Indian lands writ large. Second, any party seeking to rely on this clause would have to demonstrate that the colonial assembly in Nova Scotia had been delegated the authority to extinguish Aboriginal rights by the Imperial Parliament. Third, and perhaps most importantly, this clause could not have had the effect of extinguishing title if what was being vested in the Indian Commissioner was an interest no greater than that held by the Crown. Further, given that the duty of “protecting the rights of the aborigines” was also imposed on the commissioner, it seems unlikely that the intention of the legislature was to diminish the rights of Aboriginal peoples to their reserve lands.<sup>244</sup>

The third prominent mode of dispossession was the creation of Indian reserves. The problematic legal aspects of this process have, for the most part, been covered above. It has sometimes been argued that by accepting Indian reserves Aboriginal peoples relinquished their claims to title outside those reserves. This view was rejected by Cromwell JA in the *Marshall* decision where he held:

The Crown argues that as lands were reserved for the Mi’kmaq, it was “necessarily implicit” that their claims outside the lands so reserved were relinquished. The Crown, however, does not point to evidence apart from the creation of reservations themselves showing a clear and plain intent to extinguish aboriginal title. Assuming that such intent may be established by necessary

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<sup>243</sup> *Crown Lands Act* NS, 1859, *supra* note 103.

<sup>244</sup> This interpretation is supported by the historical context in which the Act was passed. The Act was partly the result of the 1834 inquiry into the status of Aboriginal peoples in the British Empire spearheaded by the Imperial Parliament and the explicit aim of the Act was to ensure Aboriginal settlement on reserve lands, not to deprive them of those lands: see Upton, *supra* note 57 at 89-94.

implication, the record here does not meet that standard. I agree with the appellants' submission that licences of occupation and land reserves provided some protection for the Mi'kmaq, but that there is no evidence these were accepted in lieu of any treaty or land rights they held.<sup>245</sup>

As Cromwell JA held, the acceptance of reserved lands cannot, in itself, be taken as evidence of the extinguishment of Aboriginal title. In order for the creation of an Indian reserve to extinguish title, the party seeking to establish extinguishment would be required to adduce evidence demonstrating that the land purportedly exchanged for the reserve lands were surrendered according to the procedural requirements of the common law and the Royal Proclamation.

There were also important legal protections which existed precisely to ward off discretionary taking of Aboriginal lands, notably the treaties of peace and friendship and the Royal Proclamation. While I have argued above that the treaties protect Aboriginal land by limiting the scope of British settlement to negotiated areas, this argument can be reconfigured to make a more modest claim. Simply put, to accept that the treaties permitted the wholesale dispossession of Aboriginal lands would be to embrace an interpretation of the treaties which their terms simply cannot bear. Regardless of what the treaties meant, they could not have meant that Aboriginal peoples would be excluded from the entirety of the land and resource base of the region. As Justice Turnbull stated in the *Peter Paul* decision,

[t]here was no further discussion of what was meant by the terms - they will not be "molested" and the settlements "to be lawfully made." To say the English Monarch could make fee simple Crown grants ignoring Indians' land rights on the basis of these words is wrong. The Crown must not say one thing, but mean another. Such a course of conduct between individuals would today be considered a fraud. I would report the matter to the Attorney-General. I am dealing with history and must not go too far. No matter what arguments are advanced on traditional Micmac lands, I can only conclude there was "sharp practice" if this is the wording whereby the Micmac and particularly the St. Johns and Passamaquoddy Indians lost their lands.<sup>246</sup>

Though Turnbull J. was overturned on appeal, the appellate decision should not be taken as conclusive for several reasons. First, the appellate court was most concerned not with the content of Turnbull J.'s decision, but on how he arrived at it. Turnbull J. based his decision on his own personal research and a number of contestable facts that he chose to take judicial notice of. Further, the matters he decided were not pleaded before the court, nor was evidence adduced in

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<sup>245</sup> *Marshall* NSCA, *supra* note 92 at para 241.

<sup>246</sup> *R v Peter Paul* [1997] NBJ 439, 153 DLR (4<sup>th</sup>) 131 at para 46.

support of them, and the parties to the litigation were not provided the opportunity to present arguments in respect of the matters Turnbull J. decided. The Court of Appeal was likely right to overturn the decision on those grounds. The Court of Appeal went further, though, also forcefully dismissing Turnbull J.'s findings on Aboriginal title. It is here that the case should be approached with some caution. Because the Court of Appeal rejected the "evidence" which Turnbull J. researched himself, it confined itself to assessing the merits of the conclusions he came to about Aboriginal title on the basis of the evidence provided to the courts by the parties to the litigation. As, by the Court of Appeal's own admission, the parties did not submit evidence relevant to a title claim, the Court's decision to make findings regarding title on the basis of a suspect evidentiary record is seemingly more careless than the improprieties for which they reprimanded Turnbull J. Further, the Court of Appeal's title analysis was not persuasive in its own right. As Professor Slattery stated,

I suggest that we should take the Court of Appeal's remarks on aboriginal title in the *Peter Paul* case with a grain of salt. New Brunswick and Nova Scotia cannot claim immunity from the general principles laid down more than a quarter-century ago in the *Calder* case, principles that have been reiterated and clarified by the Supreme Court in a series of authoritative cases culminating in the recent decision in *Delgamuukw*.<sup>247</sup>

As has been argued at length in Chapter 1, it is my view that Turnbull J.'s interpretation of the treaties of peace and friendship is the correct one and that they do in fact provide a measure of protection against Aboriginal lands being taken by executive act.

The Royal Proclamation, 1763 also provided protection to Aboriginal lands.<sup>248</sup> As with the treaties of peace and friendship, the Proclamation requires that lands be purchased or ceded before they could be settled by the British.<sup>249</sup> What is notable in this context is that the Proclamation explicitly required lands to be ceded in order for the Aboriginal interest in land to be extinguished. Though the governors of the Maritime Provinces confirmed receipt of the Royal Proclamation, it appears that they did not believe that it applied to them.<sup>250</sup> Again, we should recall the distinction between what the law is, as pronounced by the legislatures and courts, and statements from the executive branch about what it believes the law to be. The latter, while providing valuable context, should not be taken as statements of the law. Thus, the statement

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<sup>247</sup> Slattery, "Some Thoughts on Aboriginal Title," *supra* note 1 at 40.

<sup>248</sup> The Proclamation was held to apply to the Maritime Provinces in *Marshall/Bernard*, *supra* note 66 at para 87.

<sup>249</sup> *The Mi'kmaq Treaty Handbook*, *supra* note 111 at 11.

<sup>250</sup> Gould and Semple, *supra* note 130 at 39.

confirming the application of the Royal Proclamation in *Marshall/Bernard* should be taken at face value and the terms of the Royal Proclamation should be considered in assessing the dispossession of Aboriginal lands.

To accept that the presumptive arrogation of all lands over which sovereignty had been asserted as “Crown” lands and the subsequent process of settlement and reserve creation has extinguished title would be to accept a line of cases that has been roundly dismissed. This since clearly overturned view of extinguishment was aptly expressed at the Nova Scotia Court of Appeal in the *Isaac* decision. The Court stated:

[i]t will be noted that the Indian title or right could be extinguished by the sovereign power. Statements are found in some of the cases (notably in *Worcester v. Georgia* and see *Hall, J., in Calder* at p. 389) implying that the extinction of the right could only occur with the consent of the Indians, by purchase, treaty or otherwise. Bearing in mind the scant evidence in Nova Scotia, or indeed in New England, Quebec or New Brunswick, of any recorded transaction or explicit consent, I must prefer Mr. Justice Judson's view (p. 329) that extinction may occur by prerogative acts, e.g., by setting apart reserves and opening the rest of the land for homestead grants and settlement, however unfair that may sometimes have been.<sup>251</sup>

This view is problematic for two reasons. First, it overlooks one mode of acceptable extinguishment, by legislation. That is, the choice is not between extinguishment by consent or extinguishment by “the sovereign power.” This latter term is, as has been discussed at length, divided into the executive and legislative branches, each of which possess their own range of authority, only one of which possessed the authority to extinguish title. Perhaps more problematically, the decision justifies the need to accept extinguishment by the “sovereign” on the basis that, otherwise, title would not have been extinguished. In other words, the court assumed that extinguishment must have occurred and explicitly contorted its extinguishment analysis to meet that end. The creation of private interests could only have extinguished title in the pre-confederation period if support by unambiguous imperial legislation. Similarly, private interests created by a provincial government post-confederation could not have had the effect of extinguishing title. As Vickers J. held at the trial level in *Tsilhqot'in*, “[g]iven that the jurisdiction to extinguish has only ever been held by the federal government, the Province cannot and has not extinguished these rights by a conveyance of fee simple title to lands.”<sup>252</sup>

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<sup>251</sup> *Isaac*, *supra* note 4 at para 44.

<sup>252</sup> *Tsilhqot'in Nation v British Columbia*, 2007 BCSC 1700 at para 997 [*Tsilhqot'in Trial*]. As Professor McNeil said of the decision: “[Vickers’] judgment shows that, as a matter of law, Aboriginal title ought to prevail over

If Aboriginal title was not extinguished by imperial or colonial legislation, nor by executive act such as grants of settlement or the creation of reserves, the question that remains is whether there is some other way that extinguishment may have occurred. A method of possible extinguishment that has sometimes been advanced argues that statutes of limitation and/or the doctrine of laches may effectively extinguish title by barring an Aboriginal plaintiff from bringing an action. As Professor McNeil has pointed out, two categories of statute have been relied on to demonstrate extinguishment in this manner: those enacted by colonial assemblies or the British Parliament which continued to apply in Canada following confederation, and provincial limitations statutes that have been incorporated by federal statute.<sup>253</sup> As with any other legislation purporting to extinguish Aboriginal title, statutes of limitation must be assessed on the basis of competence and the clear and plain intent test.

In assessing statutes of limitation, there are three matters that must be considered. The first, matters of statutory interpretation, concern whether the statute in question applies to the parties and actions in the case at bar. The second issue is whether the statute was passed by a competent legislative body. As has been seen, the only bodies competent to extinguish Aboriginal title absent a specific delegation were the Imperial Parliament until 1931 and the Federal Parliament from 1867 – 1982. The third issue is whether statutes of limitation should apply in the specific context of Aboriginal rights. I will address each in turn.

Limitations statutes must be assessed in both the pre- and post-confederation eras; I will begin post-confederation. In *Chippewas of Sarnia*, the owners of the privately held land within the claim area sought to bar the Chippewas' claim by invoking the federal *Crown Liabilities and Proceedings Act*, which incorporated any Ontario limitations statutes into federal law.<sup>254</sup> Again, it was necessary to demonstrate that the Ontario statutes had been incorporated federally, as only federal legislation could extinguish Aboriginal rights. On its face, the *Crown Liabilities and Proceedings Act* extended only to claims brought by or against the Crown. As such, the Court of Appeal held that the Act could only bar the Aboriginal claimants if their action was considered a "proceeding by the Crown."<sup>255</sup> Thus, on a technical construction, the Act was held not to bar the

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provincially created interests that are inconsistent with it." Kent McNeil, "Reconciliation and Third-Party Interests: Tsilhqot'in Nation v. British Columbia" (2010) 8:1 Indigenous LJ 7 (QL) at para 25.

<sup>253</sup> McNeil, "Extinguishment of Aboriginal Title," *supra* note 131 at 13. These two categories were also identified by the Supreme Court: *Manitoba Métis Federation Inc. v Canada*, 2013 SCC 14; [2013] 1 SCR 623 at para 8.

<sup>254</sup> *Chippewas*, *supra* note 107 at para 228.

<sup>255</sup> *Ibid.* at para 229.

Aboriginal claimants from bringing an action.

Pre-confederation, only imperial statutes could extinguish Aboriginal rights. In *Chippewas of Sarnia* the landowners sought to rely on the *Nullum Tempus Act, 1769* to exclude the Chippewas' claim. As with the *Crown Liabilities and Proceedings Act*, however, application of the *Nullum Tempus Act* was contingent on construing the Chippewas claim as being "brought by or on behalf of the Crown."<sup>256</sup> In both the pre- and post-confederation periods, then, it is evident that the limitations statute being relied on must, on a reasonable construction, be applicable to Aboriginal peoples. As was held to be the case in *Chippewas*, this would seem to rule out any limitations periods concerning actions brought by the Crown. Should a limitations statute be brought forward which *prima facie* extends to the action brought by an Aboriginal claimant, such legislation would be required to satisfy the clear and plain intent test before it could be held to have extinguished title.<sup>257</sup>

In addition to these barriers to relying on statutes of limitation to extinguish Aboriginal title, in many circumstances statutes of limitation may be held not to apply to Aboriginal litigants. In *Manitoba Métis Federation*, the Supreme Court followed the precedent it articulated in *Wewaykum*<sup>258</sup> in holding that limitations periods are applicable to "Aboriginal claims for breach of fiduciary duty with respect to the administration of Aboriginal property."<sup>259</sup> The majority of the Court, however, characterized the issue before it not as an action for breach of fiduciary duty, but as "a claim for a declaration that the Crown did not act honourably in implementing the constitutional obligation in s. 31 of the *Manitoba Act*."<sup>260</sup> Put otherwise, while the majority recognized that claims for breach of a fiduciary duty may be subject to limitations periods, it held that the courts "cannot be barred by mere statutes from issuing a declaration on a fundamental constitutional matter."<sup>261</sup> The majority construed s.31 of the *Manitoba Act* as

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<sup>256</sup> Ibid. at paras 234-235.

<sup>257</sup> As the Court of Appeal stated in *Chippewas*: "there is no dispute that, if Parliament had the power to unilaterally extinguish treaty rights, the legislation would also have to meet the "clear and plain" language test." Ibid. at para 238.

<sup>258</sup> *Wewaykum Indian Band v Canada*, 2002 SCC 79; [2004] 4 SCR 245.

<sup>259</sup> *Manitoba Métis Federation*, *supra* note 253 at para 138. It should be noted that the decision in *Wewaykum* which held that limitations periods were applicable in respect of claims of breach of fiduciary duty in respect of the management of Aboriginal lands was based on s. 38(1) of the *Federal Court Act*, S.C. 1970-71-72, c. 1, which rendered provincial limitations periods applicable in Federal Court actions, thereby limiting the applicability of the provincial limitations periods at the federal level to actions begun in that court: *Wewaykum*, *supra* note 258 at para 126. See also *Canada (Attorney General) v Lameman*, 2008 SCC 14; [2008] 1 S.C.R. 372 at para 13.

<sup>260</sup> Ibid. at para 139.

<sup>261</sup> Ibid. at para 140.

creating a “solemn” constitutional obligation that engaged the doctrine of the honour of the Crown. So characterized, the majority reasoned not only that the courts may not be barred by statutory limitations from assessing the constitutionality of legislation, but that they may also make declarations concerning the constitutionality of the Crown’s conduct despite the presences of such limitations.<sup>262</sup>

This reasoning may be especially pertinent in the Maritime Provinces, particularly if the treaties of peace and friendship are understood as recognizing and protecting Aboriginal rights to land. As in the case of s.31 of the Manitoba Act, the treaties of peace and friendship place a constitutional obligation on the Crown, invoking the honour of the Crown. As McLachlin CJ stated in *Haida Nation*, “[i]n all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably.”<sup>263</sup> The Supreme Court cited this statement authoritatively in *Little Salmon/Carmacks*, where the majority explicitly stated that the principle of the honour of the Crown applies to pre-confederation treaties.<sup>264</sup> The majority in *Little Salmon/Carmacks* held that there are not distinct legal rules applicable to various types of treaty and that the Court will not develop “rules specific to each category of treaty identified in the legal literature or by the government (e.g., “peace and friendship” treaties, “pre-Confederation” treaties, “numbered” treaties and “modern” treaties).<sup>265</sup> Thus, the constitutional principle of the honour of the Crown applies in respect of the Maritime treaties and mandates that the Crown seek to implement its treaty promises in a manner which furthers the goals of reconciliation.

The honour of the Crown and principles of reconciliation require “the government to act with diligence in pursuit of the fulfillment of the promise[s]” made in the constitutional context.<sup>266</sup> As such, an Aboriginal party seeking a declaration that the Crown has been insufficiently diligent in fulfilling its treaty promises (the promise that all future settlements would be made “lawfully,” for example) should not be barred from applying for such a declaration by statutes of limitation. Again, “limitations acts cannot prevent the courts from issuing a declaration on the constitutionality of the Crown's conduct.”<sup>267</sup> Importantly, this applies

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<sup>262</sup> Ibid. at para 135.

<sup>263</sup> *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73; [2004] 3 SCR 511 at para 17.

<sup>264</sup> *Beckman v Little Salmon/Carmacks*, 2010 SCC 53; 2010 3 SCR 103 at para 62.

<sup>265</sup> Ibid. at para 114.

<sup>266</sup> *Manitoba Métis Federation*, *supra* note 253 at para at 9.

<sup>267</sup> Ibid. at para 135. The majority forcefully repeated the point, stating that “[t]he principle of reconciliation

not only to treaty rights, but also to Aboriginal rights.<sup>268</sup> A party seeking a declaration that the Crown had failed to uphold the honour of the Crown by negotiating a resolution to outstanding Aboriginal rights and title issues, for example, could not be barred by statutory limits. The remedy sought is an important component of this analysis. The majority in the *Manitoba Métis* case held that the reasoning they applied prevailed only so far as the remedy sought was narrow in scope – while declarations pertaining to the constitutionality of the Crown’s conduct were said to meet this requirement, personal remedies would not.<sup>269</sup>

Like statutes of limitation, the doctrines of laches and acquiescence have been relied on in attempts to bar Aboriginal claimants’ actions. Laches is an equitable defence that allows a defendant to resist an equitable claim against them on the basis that the claimant unduly delayed asserting their claim.<sup>270</sup> Where the doctrine would be most likely to arise in the Maritime Provinces is where a title claim had the potential to negatively affect a private party, though it may also be employed by the Crown. In order to avail themselves of the equitable defence of laches, a plaintiff must demonstrate that, through the delay in prosecution, the plaintiff either: 1) acquiesced to the behavior of the defendant or, 2) caused the defendant, in reasonable reliance on the plaintiff’s acceptance of the circumstances, to modify their situation or allow circumstances to develop that it would not be just to disturb.<sup>271</sup> The issues to be taken into account where laches is relied on are “the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.”<sup>272</sup> In *Chippewas of Sarnia* the Ontario Court of Appeal held that the doctrine of laches could apply to bar the Chippewas’ claim.<sup>273</sup> The Court of Appeal also invoked the “good faith purchaser for value” rule, another equitable principle, in dismissing the Chippewas’ claim.<sup>274</sup> The Court held that all of the purchases made from the first individual to own the land after the Chippewas had surrendered it had been made by innocent parties. As

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demands that such declarations not be barred.” *Ibid.* at para 143.

<sup>268</sup> *Ibid.* at para 141.

<sup>269</sup> *Ibid.* at para 143. The importance of declarations should perhaps not be understated: in *Calder* a declaration from a split court that the title of the Nisga’a had not been extinguished prompted the government to adopt the comprehensive land claims process and contributed in no small way to the declaration of title made in favour of the *Tsilhqot’in* in 2014.

<sup>270</sup> *M (K) v M (H)*, [1992] 3 SCR 6; 96 CLR (4th) 298 at 77-78; *Chippewas*, *supra* note 107 at 297; *Manitoba Métis Federation*, *supra* note 253 at para 145.

<sup>271</sup> *M (K)*, *supra* note 270 at 77-78, cited in *Chippewas*, *supra* note 107 at 297.

<sup>272</sup> *Ibid.* at 76-77, cited in *Manitoba Métis Federation*, *supra* note 253 at para 146.

<sup>273</sup> *Chippewas*, *supra* note 107 at paras 302, 310.

<sup>274</sup> *Ibid.* at paras 303-309.



the Court succinctly stated, “[o]n the facts of this case, it is our view that the Chippewas' delay, combined with the reliance of the landowners, is fatal to the claims asserted by the Chippewas.”<sup>275</sup>

In the context of Aboriginal title in the Maritime Provinces, one important question is whether the analysis in the *Chippewas* decision is likely to prevail to bar a title claim on the basis of statutory limitations, the doctrine of laches, and/or the bona fide purchaser for good value rule. The difficulty the Crown faces in relying on limitations periods where a plaintiff seeks a declaration that the Crown acted unconstitutionally was addressed above; the Supreme Court held unambiguously in *Manitoba Métis Federation* that courts will not be barred by statute from making declarations on constitutional matters. Further, should this reasoning not apply in specific factual circumstances, any purported extinguishment by statutory instrument is subject to the principle of legislative competence and the clear and plain intent test. That is, in the pre-confederation period only imperial statutes of limitation could bar a claim, while in the post-confederation period only federal legislation, provincial statutes which had been incorporated federally, or pre-confederation legislation that survived confederation could be relied on to extinguish title. This is a narrow body of legislation and, when taken together with the clear and plain intent test, provides only limited applicability for statutes of limitation.

In respect of the doctrines of laches and the bona fide purchaser for good value rule, there are three reasons to believe that the reasoning in the *Chippewas* case would not be considered persuasive in the context of the Maritime Provinces. First, the factual basis of the *Chippewas* decision was unique and the legal reasoning crafted in response to those facts is not necessarily applicable where different circumstances prevail. As I will argue, the principles articulated in the *Chippewas* decision are factually contingent and should not be taken as universalizable even if they are legally sound. In *Guerin*, Dickson J. rejected the Crown’s attempt to have the plaintiff’s claim barred by the doctrine of laches on the basis that “the conduct of the Indian Affairs Branch personnel amounted to equitable fraud,” that “the Band did not have actual or constructive knowledge” of the terms of the transaction in question for several years, and that “the Crown was not prejudiced by reason of the delay” in bringing the action forward.<sup>276</sup> In *Chippewas*, the Court distinguished *Guerin*, holding that the facts in that case differed materially from those in the case

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<sup>275</sup> *Chippewas*, *supra* note 107 at para 310. For a thorough critique of this decision, see McNeil, “Extinguishing Aboriginal Title” *supra* note 130 at paras 43-66.

<sup>276</sup> *Guerin v. The Queen* [1984] 2 SCR 335 at 390.

before them. In particular, the Court noted that the Chippewas were fully aware of the settlement of their unsurrendered lands and, indeed, acquiesced in their transfer by accepting payments in return for the land.<sup>277</sup> Further, the Chippewas appear to have been willing to surrender the land, but the surrender itself failed to comply with common law procedural requirements governing such surrenders.<sup>278</sup>

Regardless of whether the *Chippewas* decision was decided correctly, it is clear that the circumstances surrounding the dispossession of Aboriginal peoples in the Maritime Provinces differ in important respects from the improper surrender at issue in that decision. In particular, Dickson J.'s reasons for rejecting the application of the doctrine of laches in *Guerin* apply more readily to the circumstances in much of the Maritime Provinces than the reasoning developed in *Chippewas* in response to the specific facts of that case. Further, land rights in the Maritime Provinces were protected by treaty, a fact which further impugns the Crown's callous disregard for those rights. This is not to say that circumstances similar to those in *Chippewas* may not have occurred in the Maritimes - they likely did in localized areas; rather, it is my view that the significant balance of the dispossession occurred in ways, such as those discussed at length above, which do not comport with the reasoning in the *Chippewas* decision. The factual contingency of the outcome in *Chippewas* was recognized by the Court of Appeal itself. As the Court noted, "the need to reconcile aboriginal title and treaty claims with the rights of innocent purchasers, are factors that should be considered on a case-by-case basis."<sup>279</sup> The Court also qualified its decision, prefacing it by stating "[o]n the facts of this case."<sup>280</sup> Further, the Court did not purport to be departing from the principles articulated in *Guerin*. Rather, it took pains to distinguish the cases on a factual basis.<sup>281</sup> Of particular importance is the fact that the *Chippewas* decision dealt specifically with a situation where the land that was subject to the title claim was currently owned by third parties. In the Maritime Provinces the reasoning in *Chippewas*, if it applied at all, would only apply where the land is currently held by third parties and not on "Crown land."

The second and third reasons why it is doubtful that the reasoning in the *Chippewas* decision is applicable in the Maritime Provinces relate to the precedential value of the case quite

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<sup>277</sup> *Chippewas*, *supra* note 107 at para 302.

<sup>278</sup> *Ibid.* at paras 106 – 114.

<sup>279</sup> *Ibid.* at para 309.

<sup>280</sup> *Ibid.* at 310.

<sup>281</sup> *Ibid.* 301-302.

apart from its unique factual circumstances. The Court of Appeal's reliance on the laches and innocent purchaser defences was contingent on the Court's holding that equitable defences were applicable in the case because the remedy sought by the Chippewas, a return of the land, was equitable in nature.<sup>282</sup> Put otherwise, the Court of Appeal held that in seeking a declaration of their unextinguished Aboriginal title, the Chippewas invoked the equitable jurisdiction of the Court. As Professor McNeil has pointed out, however, this conclusion is problematic on a number of grounds.<sup>283</sup> In particular, this holding conflicts with judicial precedent confirming that Aboriginal title is a proprietary right due all the protections afforded other common law proprietary interests.<sup>284</sup> Further, as Professor McNeil notes, the Supreme Court in *Calder* explicitly rejected the claim that seeking a declaration of title invoked the equitable jurisdiction of the courts.<sup>285</sup> Thus, it appears that the Court of Appeal misapplied the principles of equity, improperly assuming equitable jurisdiction where none existed.

The Supreme Court provided a third reason to question the applicability of the *Chippewas* decision in the *Manitoba Métis Federation* case. As discussed above, the majority of the Court held that declarations respecting Aboriginal rights invoke the honour of the Crown, thereby displacing any statutes of limitation. The Court also addressed the issue of laches, providing an analysis which is likely to prevail in the context of the Maritime Provinces. While the Court did not question its equitable jurisdiction in the case, it stated that the acquiescence branch of the laches defence “depends on knowledge, capacity and freedom”<sup>286</sup> of the plaintiff who is supposed to have acquiesced in the impugned conduct. As such, the Court held that the imbalance of power following the acquisition of Crown sovereignty precluded the Métis delay in bringing an action from being interpreted as acquiescence. The same reasoning should apply wherever Aboriginal peoples were dispossessed of their lands as the alternative would fail to live up to the obligations created by s.35(1). Further, as the Court stated, “a court exercising equitable jurisdiction must always consider the conscionability of the behaviour of both parties.”<sup>287</sup> In the context of the Maritime Provinces, the failure of the Crown to live up to its treaty obligations and

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<sup>282</sup> Ibid. at 306

<sup>283</sup> McNeil, “Extinguishment of Aboriginal Title,” *supra* note 130 at 15-22.

<sup>284</sup> Ibid. at 20 citing *Delgamuukw*, *supra* note 4 at para 113.

<sup>285</sup> Ibid. at 19 citing *Calder*, *supra* note 2 at 422, 424-25.

<sup>286</sup> *Manitoba Métis*, *supra* note 253 at para 147.

<sup>287</sup> Ibid. at 150. To rely on an equitable defence, the party seeking to do so must come to the table with “clean hands.” For the reasons outlined at length above, it seems clear that in the context of the Maritime Provinces the Crown's hands are far from clean.

the 19<sup>th</sup> century embrace of a *terra nullius* approach clearly call into question the conscionability of the Crown's conduct. Indeed, the very notion that equity may be relied on to legitimize the dispossession of Aboriginal peoples of their lands carries with it an air of absurdity. For the three reasons outlined above, then, the reasoning in the *Chippewas* decision should not apply in the context of the Maritime Provinces.

### **E. Summary**

Aboriginal title can no longer be presumed to have been extinguished in the Maritime Provinces. Determining whether it has been extinguished requires that two questions be asked: (1) was title voluntarily surrendered? and (2) was title extinguished by clear and plain legislation passed by a competent legislative body? It is clear that title has not been voluntarily surrendered, by treaty or otherwise. This is evident on a reading of the treaties and the historical context surrounding their signing and has been confirmed by the Supreme Court on multiple occasions. In fact, there is a strong argument suggesting that the treaties both recognize and protect Aboriginal title. Certainly this is the view of the Aboriginal peoples themselves, who have routinely asserted a treaty protected right to the land for well over two centuries.

Given that title was not extinguished by voluntary surrender, it could only have been extinguished by or pursuant to legislation. Legislation based on the royal prerogative could have extinguished title in the region until either 1719, or 1749. I favour the earlier date, as this is when the governor of Nova Scotia was first instructed to form a legislative assembly in the colony. Whichever date is chosen, from that date onwards the prerogative power to legislate was limited and only the Imperial Parliament could have extinguished title unless such authority was unambiguously delegated to a colonial assembly or the colonial or imperial executive. Such a delegation does not appear to have occurred in the Maritime Provinces. As such, in the pre-confederation period, it appears that Aboriginal title could only have been extinguished by imperial legislation. In the post-confederation period, the exclusive authority to extinguish title rested with the Federal Parliament. As in the case of the Imperial Parliament, there does not appear to be federal legislation that extinguishes Aboriginal title. Given that there is no imperial or federal legislation which appears to extinguish title, we must conclude that Aboriginal title has not been extinguished. Any party seeking to establish that title has been extinguished must

adduce evidence of imperial or federal legislation that has the effect of extinguishing title or of a clear and unambiguous delegation of the authority to do so.

Despite the fact that title does not appear to have been extinguished in the Maritime Provinces, the Aboriginal peoples of the region were largely dispossessed of their traditional territories. A close examination of this process of dispossession, however, reveals it was enabled by a *terra nullius* approach that has been explicitly rejected by the Supreme Court of Canada. In particular, the assumption that all lands within the Maritime dominions could be managed as if they were not burdened by any Aboriginal interest was contrary to British common and constitutional law and the terms of treaties entered into with Aboriginal peoples. The subsequent lease, granting, and sale of Crown lands and the creation of Indian reserves could not have extinguished title unless they were supported by legislative authority. The fact that they were not raises a number of difficult questions for the region, not least of which is what the procedure should be for dealing with Aboriginal title lands occupied by “innocent” third parties.

## CONCLUSION

In 1749, Governor Cornwallis sailed into Chebucto Harbour with a convoy of ships carrying some 2,547 people intent on settling there.<sup>1</sup> That year, Halifax, the first British settlement in Acadia outside the fort at Annapolis, was founded. The Mi'kmaq had long considered Chebucto Harbour an important part of their territory. On 18 October, 1749, Mi'kmaw elders and chiefs addressed Governor Cornwallis, stating:

The place where you are, where you are building dwellings, where you are now building a fort, where you want, as it were, to enthrone yourself, this land of which you wish to make yourself now absolute master, this land belongs to me. I have come from it as certainly as the grass, it is the place of my birth and of my dwelling, this land belongs to me, the Indian, yes I swear, it is God who has given it to me to be my country forever... Your residence at Port Royal does not cause me great anger because you see that I have left you there at peace for a long time, but now you force me to speak out by the great theft you have perpetrated against me.<sup>2</sup>

In 1794, Mi'kmaw Chiefs petitioned Governor John Wentworth complaining that, whereas there had once been enough room for the British, French, and Indians to live, land had since become scarce and there was nowhere left to hunt.<sup>3</sup> In 1825, a Mi'kmaw Chief from Nova Scotia, Chief Adelah (Andrew Meuse) travelled to London to speak out about lands that had been taken by settlers.<sup>4</sup> Chief Louis Francis Algimou (L'kimu), along with four other Mi'kmaw chiefs, appeared at the colonial assembly of Prince Edward Island in 1831 to plead for land, saying that “[t]hey promised to leave us some of our land – but they did not – they drove us from place to place like wild beasts – that was not just.”<sup>5</sup> In 1841, Chief Pemmeenauweet wrote a letter addressed to Queen Victoria asking for assistance for his people and noting that the “white man has taken all that was ours.”<sup>6</sup> In 1853, another petition to the Queen was penned, this one by Baptist Missionary Silas Rand on behalf of the Mi'kmaq. As Rand wrote:

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<sup>1</sup> Wicken, William C. *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Jr.* (Toronto: University of Toronto Press, 2002) at 173.

<sup>2</sup> As reprinted in Ruth Holmes Whitehead, *The Old Man Told Us: Excerpts From Micmac History 1500 – 1950* (Halifax: Nimbus, 1991) at 114.

<sup>3</sup> Wicken, *Mi'kmaq Treaties on Trial*, *supra* note 1 at 222.

<sup>4</sup> Harald E.L. Prins *The Mi'kmaq: Resistance, Accommodation, and Cultural Survival* (Orlando: Harcourt Brace, 1996) at 169.

<sup>5</sup> *Ibid.*

<sup>6</sup> Upton, L.F.S. *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713 – 1867* (Vancouver: UBC Press, 1979) at 191.

We can neither disbelieve nor forget what we have heard from our fathers, that when peace was made between the Micmacs and the British, and the sword and the tomahawk were buried by mutual consent, by the terms of the treaty then entered into which was ratified by all the solemnities of an oath, it was stipulated that we should be left in the quiet and peaceable possession of the far greater portion of this Peninsula. May it please Her Majesty. The terms of that treaty have never been violated by the Indians, but the white man has not fulfilled his engagements.<sup>7</sup>

These views have continued to be expressed up to the present day. On Treaty Day, 1987, Dr. Albert Levi, former Chief of the Mi'kmaw First Nation at Elsipogtog, stated in his address:

I am filled with pride to be able to speak with you on this important day. Today we celebrate our Eastern Treaties: they are our deeds to the land of the Micmacs and our Charter of Rights. Non-Indian governments try to explain our treaties away, but they cannot. The Treaties say that no land can be held by non-Indians until it is sold by the Indians. And I say, when was this ground that I am standing on ever sold by the Micmac Nations? The answer is, "never."<sup>8</sup>

This was echoed by the current Chief and Council of Elsipogtog, who proclaimed in 2013 that they were "reclaiming all unoccupied reserved Native lands back and put in the trust of our people."<sup>9</sup>

In short, the Aboriginal peoples of the Maritime Provinces have been continuously asserting their rights to the land since Europeans arrived on the region's shores. Though these rights were recognized and respected in the first centuries following contact, they were forgotten as soon as the balance of power in the region shifted decisively to the British colonizers. Secure in their claims and no longer fearful of Aboriginal military power, the colonial and imperial authorities slowly came to more brazenly ignore Aboriginal claims and confine Aboriginal peoples to the periphery of colonial life. But for the desire to usurp their lands, Aboriginal peoples may not have been acknowledged at all in the middle 19<sup>th</sup> century. Slowly, however, the land rights of Aboriginal peoples have re-emerged in the Canadian legal consciousness. Though the legal, political, and economic structures of the Canadian state continue to reinforce barriers to the recognition of Aboriginal land rights, the centuries' old demands for recognition of rights to their ancestral territories, repeated with each subsequent generation, have proven more accurate than not.

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<sup>7</sup> PRO, CO 217/213:20 as cited in Wicken, *Mi'kmaq Treaties on Trial*, *supra* note 1 at 222.

<sup>8</sup> Albert Levi, *A Life of Service; A Lesson in Dignity* (Self-published collection of speeches delivered by Chief Levi, 2001).

<sup>9</sup> Miles Howe, *Elsipogtog Chief Issues Eviction Notice to Texas Based Frackers*, "online", Halifax Media Coop <<http://halifax.mediacoop.ca/story/elsipogtog-chief-issues-eviction-notice-texas-base/19097>>

An analysis of the relevant case law, legal scholarship, and historical material demonstrates that Aboriginal title can be proven to have existed in the Maritime Provinces at the date of the assertion of British sovereignty. The clear embrace of the “territorial” conception of Aboriginal title in the *Tsilhqot’in* decision reinforces the view that properly pleaded title litigation supported by a reasonably complete evidentiary record is likely to find that title can be proven to have existed in the region. In the Maritime Provinces title is recognized and protected not only at common law, but also in the Treaties of Peace and Friendship. Once title has been proven, the question becomes whether or not it has been extinguished.

On this point, the protestations of Aboriginal peoples once again seem to align with the dictates of the law. It is clear that Aboriginal title was not ceded by treaty. It also appears that it was not extinguished by legislation in either the pre- or post-confederation periods. The manner in which Aboriginal peoples were dispossessed of their lands – by assuming all land under British sovereignty could be leased, granted, and sold at the pleasure of the Crown – violated the common law, the Royal Proclamation of 1763, and the treaties of peace and friendship. This process was not supported by legislation and, as such, could not have extinguished title. In point of fact, this approach was made possible only by the adoption of a *terra nullius* approach which denied the existence of Aboriginal rights contrary to both British law of the 18<sup>th</sup> and 19<sup>th</sup> centuries and contemporary Canadian law. This approach was identified as problematic in 1837 by the British Select Committee on Aborigines, which stated in their report of that year:

“[i]t might be presumed that the native inhabitants of any land have an incontrovertible right to their own soil: a plain and sacred right, however, which seems not to have been understood. Europeans have entered their borders uninvited, and, when there, have not only acted as if they were undoubted lords of the soil, but have punished the natives as aggressors if they have evinced a disposition to live in their own country”<sup>10</sup>

While the Select Committee’s views are undoubtedly accurate, what they overlook is the fact that this approach came to be taken only once the colonizing powers acquired the power required to maintain a system built upon such profound injustice – it followed centuries in which European settlers were dependent upon Aboriginal peoples not only as trading partners and allies, but often for their very survival. This period was characterized by the existence of a robust body of inter-societal law, developed in part through the treaty process, which came to be cast aside only as British hegemony and military strength allowed it. Again, in recent decades the law

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<sup>10</sup> 1837 Report on the Select Committee on Aborigines (British Settlement) at 5.



has begun to return, however haltingly, to a relationship with Aboriginal peoples based on mutual respect and the rule of law as opposed to the wanton and capricious abuse of power. As the Supreme Court stated in *Haida Nation*, “the Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests.”<sup>11</sup> Despite the fact that this is precisely the approach the Crown has taken for two centuries in the Maritime Provinces, the possibility of having their land rights recognized now exists owing to the persistent resistance of the Aboriginal peoples of the region. When Professor Slattery spoke about Aboriginal title at the University of New Brunswick in 1999, he closed by saying: “[t]o my mind, then, the question of aboriginal title in New Brunswick and Nova Scotia is very much alive and will continue to preoccupy the courts of those provinces for some years to come.”<sup>12</sup> This is as true today as it was then, and the *Tsilhqot’in* decision, coupled with the limited success of negotiations, suggests that the courts will continue to be occupied for many years yet.

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<sup>11</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 at para 27.

<sup>12</sup> Brian Slattery, “Some Thoughts on Aboriginal Title” (1999) 48 UNB LJ 19 40

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