

Aboriginal Title to the Beds of Water Bodies

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INTRODUCTION

In Aboriginal cultures, the land has a place almost beyond the comprehension of a European-trained mind, which, generally speaking, deals with land as an economic commodity. Although there are major differences among Aboriginal cultures, to Aboriginal peoples the land is not just about economics – it engages social organization, spirituality, governance, and community identity itself. The land is also understood as embracing territory in a general sense, and is not restricted to the surface of dry land. As stated by the Royal Commission on Aboriginal Peoples:

Land means not just the surface of the land, but the subsurface, as well as the rivers, lakes (and in winter, ice), shorelines, the marine environment and the air. To Aboriginal people, land is not simply the basis of livelihood but of life and must be treated as such.

The way people have related to and lived on the land (and in many cases continue to) also forms the basis of society, nationhood, governance and community. Land touches every aspect of life: conceptual and spiritual views; securing food, shelter and clothing; cycles of economic activities including the division of labour; forms of social organization such as recreational and ceremonial events; and systems of governance and management.¹

Thus, even the title and underlying conceptual basis for this paper – Aboriginal title to the **beds** of water bodies (as opposed to the water itself) – is somewhat Eurocentric. We practitioners of Aboriginal law, if we are to advance our clients' rights in Canadian Courts, however, will need to frame Aboriginal rights in concepts that are within “the borders of the Canadian legal imagination”² and which are “cognizable to the Canadian legal and constitutional structure”.³ This leads us, in my view, into attempting to translate Indigenous laws (or “customs”) into an approximate equivalent that a Canadian Court might be able to comprehend. For example, my clients root their rights in an entirely different culture and cosmology than that of the Common law⁴, and do not generally view the **beds** of water bodies as conceptually more important than the surface or the water itself. Nonetheless, some of the rights my clients assert in relation to water spaces include approximately the same rights that would flow from ownership of the bed of a water body in Common law. Since to the Common law of property, everything flows from ownership of the soil, when dealing with water bodies, it may be necessary to frame the claim in relation to the beds of water bodies. That does not mean that one needs to prove a specific ancestral use of **the bed** of the water body in order to prove title. As we will discuss below, control of the surface of the water should be sufficient.

WARRING THEORIES ABOUT TERRITORY

The above differences in the conceptual bases of philosophies of law are profound. However, they do not seem necessarily irreconcilable. The reconciliation of Indigenous and Common law perspectives is, in fact, supposed to be the guiding principle of interpreting and applying Aboriginal rights.

There are, however, at present two competing geographic pictures of what Aboriginal title looks like that indeed seem irreconcilable. On the one hand there is the picture of a land at the “assertion of sovereignty” by Europeans that sees Aboriginal nations (or local sub-groups of nations) occupying chunks of contiguous territory about which they move, usually in a seasonal round, to best harvest resources. There may be overlaps at the edges of territories, and at times disputes over territories, but vacant portions of territory were rare. On the other hand is a picture of an essentially vacant land, with occasional village sites or hunting camps which meet a standard of regular and intensive use. The land in between such pinpoints of Aboriginal title is at best “hunting territory”, subject to harvesting rights (if that), but not to Aboriginal title.

¹ Report of the Royal Commission on Aboriginal Peoples, Vol 2, Part 2, (Ottawa: Minister of Supply and Services Canada, 1996) p. 448.

² Cf. Patrick Macklem, “First Nations Self-Government and the Borders of Canadian Legal Imagination” (1992), 36 McGill L.J. 382.

³ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para 49.

⁴ In this paper I capitalize “Common” law to emphasize that it is a particular variety of law, in contrast, for example, to Anishinabe law, and not something “common” to all legal systems.

These are vastly different pictures. The first is consistent with viewing Aboriginal nations on a level with European nations. The second is based on ideas of Aboriginal peoples being “nomadic” and can be seen as in the same family as the theory of *terra nullius*. This second theory is sometimes called the “postage stamp” theory of Aboriginal title. These two warring pictures will come before the Supreme Court of Canada in the case *William v. British Columbia*.⁵

THE CANADIAN LAW OF ABORIGINAL TITLE

Background

Until the 1970s, the state of debate about Aboriginal title was about whether or not such a thing existed in Canadian law, and, if it did, whether or not it had been extinguished. Facts and evidence about ancestral occupation of territory were not seen as a major issue. In *Calder v. Attorney General of British Columbia*, for example, there was agreement between counsel about the extent of the ancient tribal territory, and there were no issues of credibility of witnesses!⁶ The decision of the Supreme Court in Canada in *Calder*⁷ was the turning point. Since then, Aboriginal rights and title litigation has become focussed on facts and evidence to the extent that trials and pre-trial procedures are of a record-breaking extent.

The seminal case for the nature and proof of Aboriginal title is *Delgamuukw v. British Columbia*.⁸ In *Delgamuukw*, the Supreme Court indicated that Aboriginal title is unique in the following aspects: (1) it cannot be transferred to anyone except the Crown, (2) its sources lie in the occupation of the land by Aboriginal peoples prior to British sovereignty and in the content of Aboriginal land law, and (3) it is a communal right. According to *Delgamuukw*, Aboriginal title includes the exclusive right to the use of land for a variety of purposes. These purposes need not be Aboriginal rights in themselves, but they must not be irreconcilable with the Aboriginal group’s attachment to the land. This limitation, roughly speaking, means Aboriginal title does not include the right to ruin the land. The Court also made it clear that Aboriginal title includes mineral rights.

Proof of Aboriginal Title

Delgamuukw also specified how Aboriginal title must be proved. An Aboriginal group must show that it exclusively occupied the land prior to the assertion of British sovereignty, and that their title has not been extinguished. Both physical occupation of the land and the content of Aboriginal land law can be used to prove occupancy. In proving occupation, Aboriginal oral history should be considered on an equal footing with written records. Oral histories have features which would count against them with respect to both admissibility and weight on a traditional approach to evidence law. However, in order that Aboriginal peoples not face an “impossible burden of proof”, the Court ruled that the laws of evidence are to be adapted, on a case by case basis.

⁵ Leave to appeal filed in S.C.C. September 24, 2012, S.C.C. docket 34986

⁶ *Calder v. Attorney General of British Columbia* (1969), 8 D.L.R. (3d) 59 (B.C.S.C.), 7 C.N.L.C. 17.

⁷ *Calder v. Attorney General of British Columbia*, [1973] S.C.R. 313.

⁸ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

The Supreme Court of Canada elaborated on this test in *R. v. Marshall; R. v. Bernard*.⁹ The Court specified that “exclusive occupation” meant the effective control of land so that the Aboriginal group could have excluded others had it chosen to do so. This requires showing an “intention and capacity” to control access to the land. The Court thought it might not be fair, however, to require actual evidence that others had actually been excluded if, for example, the historic practice had been to allow access to any friendly group that asked for it.

Delgamuukw noted that the degree of occupation required will vary with the context – regular use of specific territories for traditional harvesting can be sufficient occupation in some contexts. The Court also suggested that a nomadic group which “varied ‘the location of their settlements with the season and changing circumstances’” might be unable to establish Aboriginal title. The Court returned to this theme in *R. v. Marshall; R. v. Bernard*.

One might have thought that it was unlikely that there were many Aboriginal groups in North America whose movements were so random that they could not have Aboriginal title. Anthropological research indicates that most, if not all, North American Aboriginal peoples occupied definite tracts of land, within which they moved on a seasonal basis, returning to the same locations where they were familiar with the resources, and to which they may have had spiritual ties as well. It may have seemed to the seventeenth century European eyes that an Aboriginal group was wandering about aimlessly, but this was not Aboriginal reality. Unfortunately there are two meanings to the word “nomadic” - one referring to following a seasonal round and one referring to wandering about aimlessly. Modern anthropologists consistently reject the very concept of “nomadic” in the aimless wandering sense. However, it seems that that sense of the word is colouring the analysis to the prejudice of Aboriginal peoples.

R. v. Marshall; R. v. Bernard took a narrow view of the “regularity” of occupation that is required to prove Aboriginal title. The Court suggested that the regular seasonal use of particular tracts of land would typically give rise to Aboriginal rights, but not Aboriginal title. For this it relied on a line of Aboriginal rights cases, in which Aboriginal rights, but not title, had been in issue. The Court also took this view despite having noted, citing some English cases, that the degree of possession sufficient to ground Common law title depended on all the circumstances, and that, depending on the nature of the land and how it was commonly enjoyed, it could be sufficient to prove that one hunted on the land, and that one could choose to use the land only intermittently and sporadically without losing title.¹⁰ It is hard to reconcile these doctrines with what the Court ruled in *R. v. Marshall; R. v. Bernard*. It is also difficult to imagine that one would not be able to prove prescriptive Common law title to a cottage property even if one only used it in the summer months.

LeBel J. (writing for himself and Fish J.), parted with the majority’s reasoning in *R. v. Marshall; R. v. Bernard*, pointing out that the majority’s reasoning on this point might prove fundamentally incompatible with a “nomadic” or “semi-nomadic” lifestyle. Thus to ignore the Aboriginal relationship to the land amounts to adopting the view that Canada was not occupied prior to the assertion of British sovereignty, and as LeBel J. goes on to note, this is “clearly unacceptable and

⁹ *R. v. Marshall; R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220.

¹⁰ *R. v. Marshall; R. v. Bernard* at para 54.

incongruent with the Crown's recognition that Aboriginal peoples were in possession of the land when the Crown asserted sovereignty".¹¹

This pre-figures the current debate of warring theories of territory. However, we should remember that, even on the theory of the majority in *R. v. Marshall; R. v. Bernard*, it **depends on the evidence** whether or not "nomadic or semi-nomadic" people can establish Aboriginal title.¹²

The Supreme Court has consistently noted that "shared exclusive possession" is possible, that isolated acts of trespass do not affect title, and that the presence of others with permission is consistent with, and indeed supportive of, Aboriginal title.

Delgamuukw also specified that it was not necessary to show, on top of exclusive occupancy, that use of a particular tract of land was of central significance to the culture of the relevant Aboriginal people. While this is a theoretical requirement for Aboriginal rights (and therefore for Aboriginal title), in the Court's view, exclusive occupancy necessarily implied central significance to the culture. If past exclusive occupancy is to be proved via present occupancy, an Aboriginal group must show continuity of occupation at a level of a "substantial connection" with the land in order to meet the "central significance" aspect.¹³

Extinguishment of Aboriginal Title

Any extinguishment of Aboriginal title must be "clear and plain", and provincial laws cannot extinguish Aboriginal title, since any legislation which was sufficiently "clear and plain" would be exclusively within federal competence.¹⁴

Infringements of Aboriginal Title

However, it is possible that federal or provincial laws may infringe Aboriginal title, and this may be permitted if a justification test is passed. *Delgamuukw* made it clear that general economic development of a region is a sufficient purpose to justify infringing Aboriginal title. Even in this case, however, there must be some accommodation of the Aboriginal interest – at least good faith consultation is required, and often a greater involvement, sometimes even the consent, of the relevant Aboriginal group; the allocation of resources must "reflect" the prior Aboriginal interest; and compensation for infringements of Aboriginal title will normally be required.¹⁵ It would seem that in cases of past infringements of Aboriginal title, the test for justification has likely rarely been met, since these factors have not often even been in the minds of those responsible for infringements.

THE "POSTAGE STAMP" THEORY OF ABORIGINAL TITLE

In *William v. British Columbia*, the British Columbia Court of Appeal addressed, among other things, the test for Aboriginal title. The Court thought Aboriginal title required regular and intensive use, applied in a site-specific way. The examples given show that the size of site the Court was talking about, even when accepting that such sites could have been those used for

¹¹ *R. v. Marshall; R. v. Bernard* at para 126 and 134.

¹² *R. v. Marshall; R. v. Bernard* at para 66.

¹³ *Delgamuukw* at para 151-2. See also *R. v. Marshall; R. v. Bernard* at para 67.

¹⁴ *Delgamuukw* at para 180.

¹⁵ *Delgamuukw* at para 165-9.

hunting and fishing, was closer to square meters than to square kilometers (salt licks, narrow defiles between mountains and cliffs, particular rocks or promontories used for netting salmon, or, in other areas of the country, buffalo jumps)¹⁶. That is, *William* adopted the “postage stamp” theory, although it rejected that term as prejudicial, and referred to it as the “site-specific” theory.¹⁷

William did not discuss the “exclusive” part of the exclusive occupancy test, since it did not find sufficient occupancy *simpliciter*. The trial Court first had applied an occupancy test, and then applied an exclusivity test to those tracts of land for which it had found sufficient occupancy.

William came to the conclusion about micro-site-specificity based on a detailed reading of case law, and on the concept of reconciliation. With regard to reconciliation, the Court used it as an interpretive principle in elaborating on the test for Aboriginal title:

Finally, I see broad territorial claims to title as antithetical to the goal of reconciliation, which demands that, so far as possible, the traditional rights of First Nations be fully respected without placing unnecessary limitations on the sovereignty of the Crown or on the aspirations of all Canadians, Aboriginal and non-Aboriginal.¹⁸

The Court thought the approach best suited to reconciliation would be a test for Aboriginal title that was micro-site specific, reasoning that Aboriginal use of the land between such micro-sites could be protected by recognizing Aboriginal harvesting rights. (As an aside, if an Aboriginal group moved between the dates of first contact and the assertion of sovereignty, this will not work with the current time period test for Aboriginal rights. A further point is that there is an enormous irony in analyzing Aboriginal title on a micro-site basis, but accepting assertions of Crown sovereignty to vast territories, even without any realistic on-the-ground presence.)

It is suggested that *William* both misinterpreted existing case law, and employed the reconciliation concept at an inappropriate place in the analysis.

Although *William* discussed existing case law from the Supreme Court of Canada at length, and although the interpretation given of it has some foundation, *William* seems to have raised the hurdle higher for Aboriginal title claims than the Supreme Court of Canada has done.

As noted above, to date the Aboriginal title jurisprudence has required proof of exclusive occupation of the land, and has established that occupation means physical occupation, that the activities required vary with the type of land and the use to which it is put, that “regular use of

¹⁶ *William v. British Columbia*, 2012 BCCA. 285 at paragraph 221.

¹⁷ For clarity, I will refer to this as “micro-site-specific”, since in my view “site-specific” could entail sites of considerably larger size than the B.C.C.A. seemed to have in mind. The trial Court in *William* in fact had considered “postage stamp” to be a fair description of this theory. (*William v. British Columbia*, 2007 BCSC 1700 at para 610.)

¹⁸ *William* at paragraph 219.

definite tracts of land for hunting, fishing or otherwise exploiting its resources” is sufficient¹⁹, and that exclusivity requires showing the intention and capacity to retain exclusive control.

Where *William* has set a higher threshold for proof of Aboriginal title is by reading “definite” tracts of land as meaning micro-sites, and by requiring a high level of regularity and intensity. In *Bernard and Marshall*, for example, it was noted that:

Aboriginal societies were not strangers to the notions of exclusive physical possession equivalent to common law notions of title: *Delgamuukw*, at para. 156. They often exercised such control over their village sites **and larger areas of land** which they exploited for agriculture, hunting, fishing or gathering [emphasis added].

In addition, the *William* approach seems to reinforce a skewed concept of “nomadic”. Already in the jurisprudence is an adoption of the concept of “nomadic” to describe the seasonal round of activities. While this is one meaning of the word, it also can mean aimless wandering. As noted above, anthropologists now quite consistently reject aimless wandering as applicable to any peoples. Few, if any, Aboriginal people actually wandered around aimlessly as the concept “nomadic” can suggest. *Bernard and Marshall* had asked the question whether or not whether nomadic and semi-nomadic peoples can ever claim title to aboriginal land, and answered that it depends on the evidence.²⁰ *William* has added to this that it depends on the evidence, considered micro-site by micro-site.

It is suggested that *William* also should have considered exclusivity. *Bernard and Marshall* does not seem to add exclusivity as a requirement on top of regular occupation, but rather establishes a threshold of degree of occupation. *Bernard and Marshall* sums up the test as:

In summary, 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. [emphasis added]²¹

What this leaves open is that if one can prove directly that an Aboriginal group had historically actually excluded others, one should not also have to prove the intensity and regularity of some other kind of land use. Proven exclusion of others should be considered a regular and intensive land use itself in that sense. If a group is able and willing to go to war to protect their lands, what better evidence could there be of the group’s connection to the land being of central significance to their distinctive culture?²²

This is of course a key part of Aboriginal title arguments about the Anishinabe having excluded the Haudenosaunee from the Upper Great Lakes, and having so excluded the British as well until

¹⁹ *Delgamuukw* at para 149

²⁰ *Bernard and Marshall* at para 66.

²¹ *Bernard and Marshall* at para 70.

²² See *Bernard and Marshall* at para 67.

the British made appropriate arrangements with them.²³ By not even considering exclusivity unless land use activities are of sufficient intensity and regularity, *William* seems to have precluded this argument.

As mentioned above, *William*'s development of the test for Aboriginal title is animated by its concept of "reconciliation". "Reconciliation", as an established purpose of s. 35 of the *Constitution Act, 1982*, has many applications in the field of Aboriginal law. But *William* used this concept as a way to limit Aboriginal rights because their full recognition might cause hardship to non-Aboriginal people. It could be suggested that the appropriate place for this analysis is in the justification of an infringement, not in the definition or proof of rights themselves.

It may be that Canadian Courts will not recognize Aboriginal rights without some check on the effects of this on the rest of society. That is what the concept of justified infringement is about. But this should not reach into the definition of the right itself. For example, it is not open for someone to steal a car, start using it as a taxi in order to earn a living, and then say, when the true owner shows up, that the owner's rights must be attenuated in the name of reconciliation with the thief's interests because it would be a hardship to the thief otherwise. Why should this argument work when it comes to the Crown appropriating Aboriginal lands?

Secondly, if we were to keep the analysis of reconciliation in the justification stage, it would allow more flexibility than merely defining the underlying right in a curtailed way. For example, if the result of recognizing Aboriginal title were truly to shut down the resource economy of British Columbia, one could expect a Court would quickly find preventing this to be a purpose capable of justifying an infringement. But that is unlikely to be the result of recognizing Aboriginal title. Aboriginal rights should not be viewed as a black hole from which no benefits to anyone but Aboriginal people emerge. Aboriginal people would likely be interested in resource development as well, although perhaps in somewhat more sustainable ways, and would likely want to employ some non-Aboriginal people in such ventures. It is quite possible that the result of recognizing Aboriginal title would not be shutting down the economy, but would be the continuation of the economy, the continued employment of many persons now employed in it, perhaps with some different environmental management practices and with First Nations rather than large resource companies benefitting from the profits of it. It is not so clear that preventing this is a purpose capable of justifying an infringement of Aboriginal title. In addition, compensation for infringements is part of the justification analysis. If the right is attenuated, so will be the compensation required, removing this flexibility from the concept of reconciliation.

These are all matters for the Supreme Court of Canada to address when it considers *William*.

WATER TERRITORY

We can now turn to how the Aboriginal title jurisprudence applies to water territory. As noted above, the underlying Common law of property requires that the claim to Aboriginal title be framed as a claim to the **beds** of water bodies.

²³ The Chippewas of Nawash Unceded First Nation, the Saugeen First Nation, and the Walpole Island First Nation (which, I disclose, are all my clients) have commenced litigation asserting Aboriginal title to those portions of their traditional territories which were not subject to treaties, which mostly involves the beds of portions of Lake Erie, Lake Huron and Georgian Bay.

First, at Common law, title to the bed of a water body does not need to involve physical use of the bed. It can, for example, be established by proof of fishing rights.²⁴

Secondly, it should be sufficient to establish Aboriginal title if one can show the intent and capacity to exclude others from the territory, at or before the time of the assertion of British sovereignty. This puts Aboriginal plaintiffs such as the Upper Great Lakes Anishinabek in a strong position, since, (on the Anishinabe interpretation of history), the Anishinabek successfully excluded the Haudenosaunee from what is now Ontario (including water spaces) in the late 17th century.

In addition, at the time of assertion of British sovereignty the only practical way of moving around in much territory was on waterways. Control of waterways would mean control of the whole territory. Even on large lakes, there are a limited number of access points, and if all access points are controlled by an Aboriginal title holder, or several allied Aboriginal title holders, then the entire lake would be controlled.

The above picture, of course, is starkly different than one sometimes advanced that waterways were somehow exempt from territoriality and should be considered open to everyone, and thus not subject to Aboriginal title. This view would limit possible Aboriginal title claims to dry land. This is not, however, how Aboriginal cultures usually view water spaces. In many Aboriginal cultures water spaces are, if anything, **more** important than dry land to the economy, territorial sense and self-identity of the group.

The above picture of territorial control is also very different than the picture one would get from applying the postage stamp theory of Aboriginal title to water spaces.

NAVIGABILITY AND THE OPERATION OF THE COMMON LAW

The Crown resists Aboriginal title to the beds of navigable waterways on the basis that they say that this would be inconsistent with the Common law right of navigation. A motion to strike out a claim on this basis failed in *Walpole Island First Nation v. Canada (A.G.)*.²⁵ Canada moved to strike out the claim because it said that the Common law is unable to recognize Aboriginal title over the beds navigable waters since Aboriginal title (being exclusive) would then conflict with the Common law right of navigation. Ontario added the argument that the ownership of the beds of navigable waters is so important that Aboriginal title to such beds would be incompatible with Crown sovereignty. The plaintiffs responded to these arguments as follows:

1. It is not decided in Canadian law that if Aboriginal title applied to the beds of navigable waters, it would necessarily trump any right of public navigation. For example, one may have fee simple ownership of the bed of a navigable water body, and this is “exclusive”, yet the public right of navigation prevails over it. It is not settled if the “exclusiveness” of Aboriginal title means something more absolute than that or not.
2. Aboriginal title may be subject to “justified infringements”, whereby it can be reconciled with competing rights.

²⁴ *A.G. v. Emerson*, [1891] A.C. 649 at 655 and 662 (H.L.).

²⁵ *Walpole Island First Nation v. Canada (A.G.)*, [2004] O.J. 1970 (Sup. Ct.), leave to appeal dismissed (September 15, 2004), 279/04, 280/04, 288/04, 289/04 (Div. Ct.).

3. The purported doctrine of sovereign incompatibility has not been clearly established as a restriction on what Aboriginal rights can be recognized, nor is it clear that Aboriginal title, being solely a property interest, would conflict with Canadian sovereignty if applied to the beds of navigable waters. That argument appears to confuse sovereignty and ownership.

The Court refused to strike out the claims, so these issues will resurface at trial.

Issues of water law can become quite complex and there is a considerable literature that will come to bear when the Court has to deal with the question squarely on its merits, rather than just on a motion to strike. There are also some significant differences in water law from province to province, and between tidal and non-tidal waters. Some important resources are as follows:

1. Blair, Peggy J., "No Middle Ground: *Ad Medium Filum Aquae*, Aboriginal Fishing Rights, and the Supreme Court of Canada's Decisions in *Nikal and Lewis*" (2001), 31 R.G.D. 515
2. Blair, Peggy J., "Settling the Fisheries: Pre-Confederation Crown Policy in Upper Canada and the Supreme Court's decisions in *R. v. Nikal and Lewis*" (2001) 31 R.G.D. 87
3. Blair, Peggy J., "Solemn Promises and Solum Rights: The Saugeen Ojibway Fishing Grounds and *R. v. Jones and Nadjiwon*" (1996-7) 28 Ottawa L. Rev. 125
4. Blair, Peggy J., "Taken for 'Granted': Aboriginal Title and Public Fishing Rights in Upper Canada" (2000), 92 Ontario History 31
5. Brown, C. Rebecca, *Starboard or Port Tack? Navigating a Course to Recognition and Reconciliation of Aboriginal Title to Ocean Spaces* (LL.M. thesis, U.B.C., 1999)
6. Brown, C. Rebecca, and Reynolds, James I., "Aboriginal Title to Sea Spaces: A Comparative Study" (2004), 37 U.B.C. L. Rev. 449.
7. Garton, Billy, "The Character of Aboriginal Title to Canada's West Coast Territorial Sea" (1989), U.T. Fac. L.Rev. 571
8. Harris, Douglas C., "Indian Reserves, Aboriginal Fisheries, and Anglo-Canadian Law", from *Property Rights in the Colonial Imagination and Experience: A Colloquium in Comparative Legal History* (Victoria: University of Victoria Faculty of Law and New South Wales: University of Newcastle Centre for the Interdisciplinary Study of Property Rights, 2001), online: <<http://www.colonialpropertycolloq.law.uvic.ca/>> (date accessed: 23 March 2004)
9. Walters, M.D., "Aboriginal Rights, *Magna Carta* and the Exclusive Right to Fisheries in the Waters of Upper Canada" (1998), 23 Queen's L.J. 301
10. Wright, R., "The Public Right of Fishing, Government Fishing Policy, and Indian Fishing Rights in Upper Canada" (1994), 86 Ontario History 337

OTHER JURISDICTIONS

Since Canadian law is unsettled about Aboriginal title to water spaces, the approaches of other jurisdictions become important. In using case law from other jurisdictions, it is important to understand that while this can be helpful, there are some significant doctrinal differences, which must be accounted for if case law of other jurisdictions is to be dealt with in a way consistent with its context. When this is done it can become apparent whether a case from another jurisdiction is directly germane to the point in issue, is distinguishable as based on a doctrinal aspect of that jurisdiction which is incompatible with Canadian law, or is an example of a different, but arguably preferable approach.

In a paper such as this, one can only point to some of the highlights of doctrinal differences. If one is to use the law of another jurisdiction on a matter as complex as Aboriginal rights, one needs considerable study, and probably a consultation with an Aboriginal law lawyer from that jurisdiction.

With that qualification, it could be said that conceptually Canada is somewhat unique in viewing Aboriginal rights as the overall concept and Aboriginal title as a specific example of an Aboriginal right in the property law context. Other jurisdictions tend to view Aboriginal (or native, or customary) title as the over-arching concept, including property rights as well as harvesting rights, governance rights, etc. Canada is also unique in its constitutional protection of Aboriginal rights.

To turn first to U.S. law, the concepts go by similar names – Aboriginal title and Aboriginal rights. There is not as sharp a distinction between the tests for the proof of Aboriginal rights and Aboriginal title as there is in Canada. Aboriginal rights are usually thought to flow from Aboriginal title.²⁶ Although there have been many cases decided, the relevant time period to consider has not been narrowed down. Occupancy of land for a “long period” of time is required to establish Aboriginal title, but this long period could commence after the assertion of European sovereignty.²⁷

One point on which Canadian and U.S. Aboriginal law diverges sharply is that in the U.S. it is significant whether Aboriginal title was been “recognized” by the government or not. If not, title can be unilaterally extinguished by the federal government without compensation²⁸, but this is not so if the title had been “recognized”. The Supreme Court of Canada emphatically rejected the significance of “recognition” in *R. v. Côté*:

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 recognition and approval of European colonizers.

²⁶ This concept was rejected by the Supreme Court of Canada in *R.v. Adams*, which ruled that Aboriginal rights had been established despite it not being possible to establish Aboriginal title in that case.

²⁷ *Confederated Tribes of Warm Springs Res. v. United States*, 177 Ct.Cl. 184 (1966), and *Turtle Mountain Band of Chippewa Indians v. United States*, 490 F.2d 935 (Ct. Cl. 1974)

²⁸ *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955)

On the point of title to water spaces, although there is a strong presumption in U.S. law favour of state ownership of navigable waters, it is only a presumption, and it can be and has been rebutted, including in Aboriginal cases. Indeed, on the specific point of Aboriginal title, the Supreme Court of Michigan has concluded that a Chippewa Tribe originally had Aboriginal title to a portion of the bed of Lake Superior.²⁹ It is also noteworthy that the boundaries of U.S. Aboriginal treaties often include large chunks of the Great Lakes.³⁰

In both Australia and New Zealand there are statutes involved in the way Courts deal with Aboriginal title and rights (the corresponding concepts are “native title” in Australia and “customary land” in New Zealand), so caution must be used in understanding whether or not a particular result is determined by the statute or by Common law. In addition, in both these jurisdictions, the content of Aboriginal title (i.e. of native title in Australia or of the rights associated with customary lands in New Zealand) depends on the traditional customs of the Aboriginal group regarding land. If those customs speak of exclusivity, Aboriginal title will be exclusive, if not, it might be something less than exclusive.³¹ In Canada, Aboriginal custom would indeed define the content of Aboriginal rights, but the content of Aboriginal title seems to be fixed, and Aboriginal custom is relevant to proving its existence, but not to defining its content.

In addition to these differences, Australia has taken quite a different course from Canada in dealing with competing rights, perhaps because of its *Native Title Act*. Native title is conceived as a bundle of rights, including property and other rights. The way Australian Courts approach competing rights is to “unbundle” the bundle of rights and extinguish any that conflict with a Common law right.³² For that reason, when it came to native title to the beds of navigable waters, the Australian High Court recognized only a non-exclusive native title.³³ This kind of implicit partial extinguishment has been rejected by Canadian Courts. The Australian Courts only require an inconsistency with a Common law right in order to extinguish an Aboriginal right, and have rejected the need for a “clear and plain” intention to extinguish Aboriginal rights.³⁴ The Supreme Court of Canada took a very different approach in *Delgamuukw*, which mandates an inquiry about whether an infringement of an Aboriginal right was justified or not in the case of a competing right, even if the competing right was a grant of fee simple title.³⁵ Canadian Courts have also consistently affirmed the “clear and plain intention” standard for extinguishment.³⁶

²⁹ *People v. LeBlanc*, 399 Mich. 31, 248 N.W.2d 199 (1976) at 205-7 and 217(map).

³⁰ See Treaty with the Ottoway, Chippeway, Wyandotte and Pottawatamie Nations, Detroit, 17 November 1807, 7 Stat. 105; Treaty with the Chippewa Nation, Saginaw, 24 September 1819, 7 Stat. 203; Treaty with the Chippewa Nation, Sault Ste. Marie, 16 June 1820, 7 Stat. 206; Treaty with the Menomonee Nation, Washington, 8 February 1831, 7 Stat. 342; Treaty with the Ottawa and Chippewa Nations, Washington, 28 March 1836, 7 Stat. 491.

³¹ See for example, *Mabo v. Queensland (No. 2)* (1992), 107 A.L.R. 1 (H.C.A.)

³² *The Commonwealth of Australia v. Yarmirr*, [2001] H.C.A. 56, 184 A.L.R. 113 at para 42 (H.C.A.)

³³ *The Commonwealth of Australia v. Yarmirr*, [2001] H.C.A. 56, 184 A.L.R. 113 (H.C.A.)

³⁴ *Western Australia v. Ward* (2002), 191 A.L.R. 1 at para 78.

³⁵ *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010 at para 167. But see, for the narrower point about the effect of a fee simple grant on Aboriginal title, *Chippewas of Sarnia v. Canada (A.G.)* (2000), 51 O.R. (3d) 641 (C.A.).

³⁶ See, for example, *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010 at para 180-183.

In New Zealand, the comparable type of tenure to Aboriginal title is that in Maori customary land. There is little customary land left in New Zealand, due to the operation of statutes designed to transform customary land into other forms of tenure. A case which did involve a claim to customary land, indeed to the seabed, was *Ngati Apa*.³⁷ In that case the Court of Appeal of New Zealand (then the highest Court in New Zealand) refused to strike out a claim that portions of the seabed were customary land. The response of the New Zealand government was to introduce legislation in 2004 which extinguished Maori customary land title to the seabed.³⁸ However, after facing internal and international criticism, in 2011 New Zealand repealed the 2004 Act and restored the Maori interests that it had extinguished.³⁹

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³⁷ *Ngati Apa v. New Zealand (A.G.)*, [2003] 3 N.Z.L.R. 643 (CA) (appeal to P.C. abandoned)

³⁸ *Foreshore and Seabed Act 2004*. (NZ)

³⁹ *Marine and Coastal Area (Takutai Moana) Act 2011* (NZ)