RESOURCE DEVELOPMENT AND THE EXTINGUISHMENT OF ABORIGINAL TITLE IN CANADA AND AUSTRALIA

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I. ABORIGINAL TITLE & RESOURCE DEVELOPMENT

The determination of the existence and extinguishment of aboriginal title often arises in the context of a proposed resource development project. In the leading case in Australia, *Milirrpum v Nabalco Pty Ltd*[1] ("*Milirrpum*") aboriginal people sought to halt bauxite mining on their traditional lands. In recent years in Canada aboriginal title has been asserted in litigation as a bar to mining, exploration and production of oil and gas, construction of multi-billion oil and gas pipelines and hydro-electric dams and diversions, and forestry cutting regimes. Resource development in most parts of Australia and Canada is undertaken pursuant to grants issued by the Crown. The assertion of aboriginal title is a challenge to the power of the Crown to issue a grant and to its validity. It is a fundamental issue in resource development in both countries.

For the purposes of this article the concept of aboriginal title is assumed to be part of the common law of Australia. The assumption is made merely so as to allow a focus upon the criteria and circumstances which govern the extinguishment of aboriginal title. It is an assumption

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1. (1971) 17 FLR 141.

which is no longer far-fetched in Australia. The High Court of Australia suggested in 1979 that the matter was an "arguable question if properly raised".[2] In 1987 the Court termed it "a question of fundamental importance"[3] and members of the Court repeated such sentiments in December 1988 in *Mabo v State of Queensland* [4] ("*Mabo*"). Indeed in *Mabo* three members of the Court did not emphasize a concern with the place of the concept of aboriginal title in the common law, but rather asserted that the matter of the greatest importance was the "question whether traditional native title was extinguished".[5]

This article will seek to answer that question and consider the implications for resource development. In order to do so an examination will first be made of the principles and rationale respecting the extinguishment of aboriginal title, with particular regard to the effect of public lands and resources legislation and to the validity of grants issued thereunder. Secondly, the application of those principles will be considered in the different constitutional settings of Canada and Australia. Finally, the article will examine the manner in which assertions of aboriginal title and resource development have been dealt with by the courts and the implications of those decisions.

II. THE EXTINGUISHMENT OF ABORIGINAL TITLE

In *Milirrpum* Justice Blackburn observed:

> The question whether English law, as applied to a settled colony, included, or now includes, a rule that communal native title where proved to exist must be recognized, is one which can be answered only by an examination of what has happened in the laws of the various places where English law has been applied.[6]

2. *Coe v Commonwealth of Australia* (1979) 53 ALJR 403 ("*Coe*").
3. *Northern Land Council v Commonwealth of Australia* [*No 2*] (1987) 61 ALJR 616 ("*Northern Land Council*").
4. (1988) 166 CLR 186 Wilson J, 200; Brennan, Toohey and Gaudron JJ, 218-219. See also R Cullen "Mabo v Queensland" (1990) 20 UWAL Rev 190.
5. Supra n 4 Brennan, Toohey and Gaudron JJ, 219.
6. Supra n 1, 244.

The learned judge considered the decisions of the courts of the United States and Canada as particularly pertinent, as they were reached upon the understanding that the territory in question was acquired by settlement rather than conquest or cession.[7] The High Court of Australia has followed that approach drawing upon Canadian decisions for especial guidance. The leading Canadian cases of *Calder v Attorney-General of British Columbia*[8] ("*Calder*") and *Guerin v The Queen*[9] ("*Guerin*") were cited in *Northern Land Council* and *Mabo*. In turn the Supreme Court of Canada has emphasized the usefulness of the United States jurisprudence.

The landmark case on aboriginal title at common law is *Johnson v McIntosh*.[10] In that decision in 1823 Chief Justice Marshall in the United States Supreme Court upheld a grant by the United States over the claims of a purchaser from the Indian tribes of the same lands. Chief Justice Marshall declared that "discovery gave title" to the discovering nation.[11] The Court fully recognized that the country was inhabited but yet had no compunction as to using the term "discovery". The Court expressly rejected the application of the "law which regulates ... the relations between the conqueror and the conquered" and declared that the circumstances required resort to some "new and different rule, better adapted to the actual state of things".[12] The Indians were recognized as the "rightful occupants of the soil" but the Crown had an "absolute title ... to extinguish that right",[13] and indeed might "grant the soil, while yet in possession of the natives".[14]

The Court at no point suggested that such a rule was just. Rather the Court explained that it was the only possible accommodation of the

7. Ibid, 202, 223.
8. (1973) 34 DLR (3d) 145.
9. (1985) 13 DLR (4d) 321.
10. 8 Wheat 543 (1823). Also reported at 21 US 240 (1823). All references in this note are to Wheat.
11. Ibid, 573.
12. Ibid, 591. Chief Justice Marshall expressly declared that the principles applied in East India were inapplicable and rejected the relevance of practise there and a legal opinion based thereon: ibid, 599.
13. Ibid, 588.
14. Ibid, 579.

interests of the settler and of the aboriginal people. Chief Justice Marshall explained the need to recognize the rights of the settlers:

> However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.[15]

The aboriginal people were considered "as occupants to be protected ... in the possession of their lands" subject to the "absolute title of the Crown to extinguish that right".[16] The Court would deny the interest of the aboriginal people but only insofar as necessary to give effect to the claims of settlers.

In 1941 the United States Supreme Court elaborated on the criteria as to the extinguishment of aboriginal title. In *United States v Sante Fe Pacific Railroad Co*[17] ("*Santa Fe Pacific*") an injunction was sought to restrain a railroad company from using the traditional lands of the Haalpai Tribe. The Court reviewed the line of cases derived from *Johnson v McIntosh* and stressed that the power of Congress to extinguish aboriginal title was supreme.

> The manner, method and time of such extinguishment raise political not justiciable issues ... [A]nd whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts.[18]

In examining the "public records" the Court sought a "clear and plain indication"[19] that Congress intended to extinguish aboriginal title because "extinguishment cannot be lightly implied in view of the allowed solicitude of the Federal Government for the welfare of its Indian wards."[20] The Court explained that the "rule of construction recognized without exception for over a century has been that 'doubtful expressions,

15. Ibid, 591. The Chief Justice observed that the Indian title was not incompatible with a seisin in fee: ibid, 596.
16. Ibid, 588.
17. 314 US 339 (1941). The railroad company claimed title under a statutory grant which had provided that the United States would extinguish the Indian title. The grant itself was not considered to have extinguished that title.
18. Ibid, 347.
19. Ibid, 353.
20. Ibid, 354.

instead of being resolved in favour of the United States are to be resolved in favour of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith'".[21] The Court concluded that neither the grant of a reservation in 1865 nor the temporary forced confinement of the tribe on the reservation in 1874 was sufficient to extinguish aboriginal title. But the creation of a reservation in 1881, at the request of the tribe, and the settlement thereon of members of the tribe, was considered tantamount to an extinguishment by voluntary cession:[22]

> They were in substance acquiescing in the penetration of white settlers on condition that permanent provision was made for them too.[23]

The Court considered, but refused to decide, if the application of public land pre-emption (homestead) statutes should be "construed as extinguishing any Indian title to land taken under it".[24]

Subsequent United States courts have refused to find extinguishment of aboriginal title merely because lands have been opened up for settlement and made subject to disposition under public lands legislation.[25] In *United States v Dann*[26] ("*Dann*") the Court refused to find that homesteading legislation which purported to apply to all "unappropriated public lands" extinguished aboriginal title.

> We do not find in these provisions the clear expression of intent that would be required for us to hold that the homestead laws alone extinguished aboriginal Indian title in every state and territory where they were generally applicable.[27]

The court cited the language of *Sante Fe Pacific* that an "extinguishment cannot lightly be implied".[28] The Court concluded:

> Congress in passing the homestead laws evinced no clear intent to extinguish aboriginal title to Indian-occupied lands not actually subjected to a homestead

21. Ibid citing *Choate v Trapp* 224 US 665, 675 (1912).
22. Supra n 17, 358.
23. Ibid.
24. Ibid, 349. The Court noted Felix Cohen's comment that "only where it was necessary to give emigrants possessory rights to parts of the public domain, has Congress ever granted tribal lands in disregard of tribal possessory rights." : F Cohen *Handbook of Federal Indian Law* (Alberquerque: University of New Mexico Press, 1971) (rep 1942) 308.
25. *Gila River v United States* (1974) 204 Ct Cl 137, 494 F 2d 1386, Cert Denied 419 US 1021 (1974); *United States v Peublo of San Ildefonso* 513 F 2d 1383 ("*San Ildefonso*").
26. 706 F 2d 919 (1983).
27. Ibid, 929.
28. Supra n 17, 354.

> grant, and that the granting of *some* homesteads within the Indian's aboriginal holdings did not represent a sufficient exercise of dominion over the ungranted lands to effect an extinguishment.[29]

In *San Ildefonso* the Court of Claims held that aboriginal title was extinguished on a piecemeal basis as third persons entered the lands conveyed to them under homestead legislation or on the date licences issued for mineral claims. It was observed:

> [T]he process of surveying lands and performing other deeds [under public lands legislation] in anticipation of future white settlement does not itself affect Indian title ... Nor is the bare expectation that lands will be settled sometime in the future sufficient to deprive Indian dwellers of their aboriginal rights.[30]

The Court explained:

> [T]here are no finespun or precise formulas for determining the end of aboriginal ownership. Unquestionably the impact of authorised white settlement upon the Indian way of life in aboriginal areas may serve as an important indicator of when aboriginal title was lost. But such authorised settlement is only one of various factors to be considered in determining when specific lands were taken.[31]

Grants of title and issuance of mineral licences may extinguish aboriginal title to the lands encompassed by the grants.[32] The Court explained in *United States v Atlantic Richfield*, when rejecting an action in trespass by the Inuit inhabitants of the State of Alaska against those holding mining and other dispositions issued by the United States:

> [A]boriginal title ... is legally extinguishable when the United States makes an otherwise lawful conveyance of land pursuant to federal statute. Congressionally authorised conveyance of lands from the public domain demonstrates the requisite intent to extinguish the Indian right of exclusive use and occupancy to those lands. Thus, as the United States acknowledges, when the Secretary of the Interior issued a patent to a homesteader in Alaska, aboriginal title was extinguished with respect to the patented land.[33]

29. Supra n 26, 929.
30. Supra n 25, 1389.
31. Ibid, 1390.
32. Homestead grants in *Marsh v Brooks* 55 US 513 (1853).
33. 435 F Supp 1009, 1020 (1977).

The placement of lands in a forest reserve or a grazing district is more problematic.[34] Extinguishment of aboriginal title has been found where Indians were forcibly expelled or compensation paid, but otherwise the placement of lands in a forest reserve or grazing district has been held only to determine the *time* of the extinguishment of aboriginal title when the *fact* of extinguishment was not in dispute.[35] But in *Dann*[36] placement of lands in a grazing district was described as "equivocal" and held not to extinguish aboriginal title. The Act authorising the placement declared its application to all "vacant, unappropriated, and unreserved lands from any part of the public domain of the United States ... which are not in ... Indian reservations".[37] The Court declared that it could not find "any clear expression of congressional intent to extinguish aboriginal title to all Indian lands that might be brought within its scope" even by "implication in the Act's specific exclusion of Indian reservations".[38]

A. Canada

Canadian courts have adopted the criteria developed in the United States jurisprudence. In *Calder*[39] Justice Judson, with Justices Martland and Ritchie concurring, concluded:

> In my opinion, in the present case, the sovereign authority elected to exercise *complete dominion over the lands in question, adverse to any right of occupancy* which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation.[40] (Emphasis added)

Justice Judson adopted the trial judge's opinion that nineteenth century public lands ordinances

> reveal a unity of intention to exercise and the legislative exercising, of absolute sovereignty over all lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to "aboriginal title, otherwise known as the Indian title"....[41]

34. See *United States v Gemmill* 535 F 2d 1145, 1149 (1975); *Ute Indian Tribe v State of Utah* 716 F 2d 1298 (1983).
35. *San Ildefonso* supra n 25.
36. Supra n 26.
37. (US) Taylor Grazing Act 43 USC ¶ 315 (1976).
38. Supra n 26, 932.
39. Supra n 8.
40. Ibid, 167.
41. Ibid, 160.

Justice Judson supported his analysis by reference to contemporary government correspondence that observed that the Indian "claims have been held to have been fully satisfied by securing to each tribe, as the progress of settlement of the country seemed to required, the use of sufficient tracts of land for their wants for agricultural and pastoral purposes."[42]

Three other judges of the Supreme Court of Canada emphasised a different aspect of the reasoning in *Sante Fe Pacific*: the necessity for there to be a "clear and plain indication" of an intention to extinguish aboriginal title.[43] Justice Hall, with Justices Spence and Laskin concurring, concluded that the title of the Nishga was not extinguished by the public lands ordinances. Amongst other things Justice Hall observed that insofar as the ordinances declared the fee of the Crown they merely stated "what was the actual situation under the common law and add nothing new or additional to the Crown's paramount title".[44] Justice Hall also noted that no legislation providing specifically that "Indian title to public lands in the Colony is hereby extinguished" was ever passed.[45]

Both Justices Judson[46] and Hall[47] relied upon decisions of the Privy Council which emphasised a presumption of non-interference with existing rights of aboriginal peoples in circumstances where territory was acquired by conquest and cession[48]. The presumption limits the degree to which general assumptions of authority to dispose of land, such as in public lands legislation, will be considered to effect a general extinguishment. Justice Judson cited *Re Southern Rhodesia* as being in accord with *Sante Fe Pacific*. The reliance upon the Privy Council decisions emphasises the pragmatic accommodation of the rights of the resource developer and the aboriginal people developed by Chief Justice Marshall in

42. Ibid.
43. Ibid, 210.
44. Ibid, 215.
45. Ibid, 216.
46. Ibid, 161.
47. Ibid, 208.
48. *Re Southern Rhodesia* [1918] AC 211, 233-234; *Amodu Tijani v The Secretary, Southern Nigeria* [1921] 2 AC 399, 409-410.

Johnson v McIntosh and maintained by the Supreme Court of Canada in *Calder*.[49]

Although the Court split in *Calder* upon the question of whether aboriginal title had been extinguished in that case, the Court was in agreement upon the criteria to be employed to determine the question. The criteria to be applied was that declared in *Sante Fe Pacific*. As Justice Mahoney declared in 1979 in the Federal Court in *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* ("*Baker Lake*"): "Justices Hall and Judson were ... in agreement on the law if not its application."[50]

Justice Hall had implied that specific provision might be necessary to extinguish aboriginal title. The requirement appeared inconsistent with the Canadian cases[51] where legislation restricting aboriginal hunting and fishing rights had been held to be effective without such provision.

49. The presumption was also cited by Dickson J, obiter, in *Guerin* supra n 9, 335-336. In *Calder* the Court split 3-3 upon whether the aboriginal title had been extinguished. The result in *Calder* was determined by the seventh member of the court, Pigeon J, who did not consider the question of Indian title. Pigeon, Judson, Martland and Ritchie JJ concurred in dismissing the appeal of the plaintiffs, thereby upholding the dismissal of the action, on the ground that the court lacked jurisdiction in the absence of a fiat of the Lieutenant-Governor of the Province.

50. (1979) 107 DLR (3d) 513, 552.

51. *Sikyea v The Queen* (1964) 50 DLR (2d) 80 (Supreme Court of Canada); *R v Sikyea* (1964) 43 DLR (2d) 150 (North West Territories Court of Appeal); *R v George* (1966) 55 DLR (2d) 386 (Supreme Court of Canada).

In *Sikyea v The Queen* and in *R v George*, the Supreme Court of Canada held the general legislation in the form of the (Can) Migratory Birds Convention Act 1952 effective to regulate Indian hunting rights. The Act made express provision for limited aboriginal hunting and it was upon such element which the Court relied. A similar analysis was also relied on in *Kruger and Manuel v The Queen* (1977) 75 DLR (3d) 434, 440 ("*Kruger and Manuel*"). The Court upheld the application of provincial game laws to Indians, but Dickson J (as he then was), quoting Davey J in *R v White* (1965) 50 DLR (2d) 613, 618 emphasised the special provision that was made in the legislation for Indian hunting rights, and made the observation "from that I think it clear that the *other* provisions are intended to be of general application and to include Indians".

In *Sikyea v The Queen* the Supreme Court of Canada followed the reasoning of Johnson JA of the North West Territories Court of Appeal in *R v Sikyea*:

> When, however, we find that reference in both the convention and in the Regulations to what kind of birds an Indian and Eskimo may "take" at any time for food, it is impossible for me to say that the hunting rights of the Indians as these migratory birds, have not been abrogated, abridged or infringed upon.

Indeed the argument that such provision was necessary in order to regulate aboriginal hunting rights was rejected in *Kruger and Manuel.*[52] But Justice Dickson expressly distinguished the regulation of an aboriginal right and the extinguishment of aboriginal property rights. The Court considered that general legislation could regulate Indian hunting rights but yet might not demonstrate "complete dominion adverse to the right of occupancy" so as to extinguish aboriginal title.[53]

The matter of the need for specific provision in order to extinguish aboriginal title arose for decision in *Baker Lake.*[54] The Court rejected the requirement "that Parliament's intention to extinguish an aboriginal title must be set forth explicitly in the pertinent legislation".[55] Justice Mahoney emphasised that the ultimate test is the intention of Parliament:

> Once a statute has been validly enacted, it must be given effect. If its *necessary effect* is to abridge or entirely abrogate a common law right, then that is the effect that the Court must give it. That is as true of an aboriginal title as of any other common law right.[56] (emphasis added)

But the Court applied the criteria set down in *Sante Fe Pacific* and *Calder* and concluded that the intention of Parliament to extinguish aboriginal title was absent from the public lands legislation enacted by Parliament. The legislation provided for the disposition of all public lands in the Northwest Territories, including timber rights, mineral rights and the setting aside of lands as Indian reserves. Justice Mahoney declared that general extinguishment of aboriginal title was not a "necessary result" of the legislation.[57] The learned judge refused to find that the "broad"[58] power to dispose of public lands contained in the general language of the legislation entailed the extinguishment of aboriginal title,

In *R v George* supra, 398 Martland J observed that he could "see no valid distinction between the present case and that of *Sikyea*".

Similarly, the Supreme Court upheld the application of the Fisheries Act to Indian fishing rights in *Regina v Derriksan* (1976) 71 DLR (3d) 159. For a comparison with the New Zealand position on Maori fishing rights see G Austin "Maori Fishing Rights in the New Zealand Courts: *Ministry of Agriculture and Fisheries v Pono Hakaria and Tony Scott*" (1989) 19 UWAL Rev 401.

52. Supra n 51, 437.
53. Ibid.
54. Supra n 50, 551.
55. Ibid.
56. Ibid.
57. Ibid, 557.
58. Ibid.

even though special provision was made for Indian reserves. He referred to the "historic fact" that, in enacting the legislation, "Parliament did not expressly direct its attention to the extinguishment of aboriginal title".[59] He recognised the harsh physical and climatic nature of the area.

> [D]ispositions of the sort and for the purposes that Parliament might reasonably have contemplated in the barren lands are not necessarily adverse to the Inuit's aboriginal right of occupancy. Those which might prove adverse cannot reasonably be expected to involve any but an insignificant fraction of the entire territory.[60]

Justice Judson's analysis of public land legislation in British Columbia in *Calder* was distinguished on the basis that the extinguishment of Indian title was "very much in mind" upon the issuance of such legislation and that it was "explicit in its purpose to open up the territory to settlement".[61] Justice Mahoney observed that "[t]he barren lands were not, for obvious [physical and climatic] reasons, being opened for settlement".[62]

While recognising that aboriginal title had not been extinguished the Court did recognise that the actual disposition of lands in the area under the Territorial Lands Act and regulations would operate to abridge and infringe on that aboriginal title.[63] In particular the Court observed that the issuance of mining tenements under the authority was "no doubt" valid and "that, to the extent it does diminish the rights comprised in an aboriginal title, it prevails".[64] Justice Mahoney cited aboriginal hunting and fishing cases in support of that conclusion, and clearly considered that abrogation in part was a "necessary" result of the legislation.[65]

In the result the Court issued a declaration that the lands "are subject to the aboriginal right and title of the Inuit to hunt and fish thereon".[66]

59. Ibid, 554.
60. Ibid, 557.
61. Ibid, 556.
62. Ibid, 557.
63. Ibid, 556-557.
64. Ibid, 557.
65. Ibid, 557.
66. Ibid, 560. The action was otherwise dismissed and, an interim injunction issued in 1978 at the instance of the plaintiffs, was dissolved.

The need for a "clear and plain indication" of legislative intent was an aspect of the United States rule that "doubtful expressions" were to be resolved in favour of the Indians. The Canadian conformity with the United States jurisprudence was affirmed in 1983 in *Nowegijick v The Queen*[67] ("*Nowegijick*") when the Supreme Court of Canada expressly adopted the United States rule. Justice Dickson (as he then was) declared for the Court, "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."[68]

In *Attorney General for Ontario v Bear Island Foundation*[69] ("*Bear Island*") the Province of Ontario brought an application for a declaration that the defendants, the Temgami Band of Indians had no right, title or interest in a land claim area of 4000 square miles. The Band had filed caveats with respect to the lands. In 1984 the Ontario Supreme Court granted the declaration on the ground, amongst others, that public lands legislation and surveys and the issuance of dispositions thereunder had "fostered settlement and development ... which has severely interfered with the hunting and fishing rights of the Indians ... and ... indicated an intention to exercise complete dominion over the Land Claim Area".[70] The Court purported to apply[71] the criteria from *Baker Lake* and *Calder*. The result was distinguished from *Baker Lake* because it was considered that in *Bear Island* there was shown "a clear intent for the Crown to open up the lands for settlement".[72]

67. (1983) 144 DLR (3d) 193.
68. Ibid, 94.
69. (1984) 15 DLR (4th) 321.
70. Ibid, 434.
71. Ibid, 407-408.
72. Ibid, 408. The legislation provided for surveys and the issuance of patents (28 square miles), land use permits for reports, timber licenses (750 square miles) and mineral dispositions (195 square miles). Most of the area was subject to commercial logging under volume agreements. The area was crossed by 98 miles of railway, 620 miles of highway and main roads and 178 miles of hydro-electric transmission ties. There were 3 hydro-electric generating dams and 14 water control dams in the area. There were 3 provincial parks totalling 7,214 acres. Disposition and provincial parks totalled approximately 25 percent of the land claim area. The area is located in the Canadian Shield, is wholly unsuitable for agriculture, and is heavily forested.

Despite the basis of distinction suggested by the Ontario Supreme Court in *Bear Island* there was some doubt as to the consistency of the decision with *Baker Lake*. Both areas after all were unsuitable for settlement and the only permanent residents were the aboriginal people and those engaged in resource development. Yet in *Bear Island* aboriginal title throughout the entire region was considered extinguished, whilst in *Baker Lake* it was considered that aboriginal title was diminished or extinguished only to the extent that dispositions had issued. Moreover the Court had nowhere referred to the requirement of a "clear and plain indication" of the intention to extinguish developed in response to the rule that "doubtful expressions" were to be resolved in favour of the Indians.

The Supreme Court of Canada had a further opportunity to consider the question in *Simon v R*[73] ("*Simon*") in 1985. The accused Indian was charged with a violation of provincial hunting legislation in an area of Nova Scotia outside reserve lands.[74] He asserted the defence that he had a treaty right to hunt in that area and that the treaty right afforded a defence. The Supreme Court of Canada agreed and quashed the conviction. One of the arguments of the Crown was that any aboriginal rights of the accused had been extinguished. The Nova Scotia Provincial Court agreed. Judge Kimball observed:

> I am satisfied that the area in question is an area which has been occupied extensively by the white man for farming as a rural mixed-farming and dairy-farming area. I am prepared to take judicial notice of the fact that the area is made up of land where the right to hunt no longer exists because the land has been settled and occupied by the white man for purposes of farming and that the Crown grants have been extended to farmers for some considerable length of time so that any right which might at one time have existed to the defendant or his ancestors, to use or occupy the said lands for purposes of hunting, has long since been extinguished.[75]

73. (1985) 24 DLR (4th) 390.
74. In *R v Isaac* (1975) 13 NSR (2d) 460, 478 MacKeigan CJ had commented: "It would appear that in Nova Scotia only a few thousand widely scattered acres have never been granted, placed under mining or timber licenses or leases, set aside as game preserves or parks, or occupied perseptively". The Chief Justice was considering the question of extinguishment on Indian reserves in Nova Scotia.
75. Cited by the Supreme Court of Canada in *Simon v R* supra n 73, 397.

The Supreme Court of Canada unanimously rejected that conclusion. The Court cited the criteria developed in *Sante Fe Pacific* and stressed that extinguishment was not to be lightly implied. The Court affirmed the principle of interpretation declared in *Nowegijick* that "doubtful expressions" were to be resolved in favour of the Indians.[76] The Court explained that in order for the Crown to succeed:

> [I]t is absolutely essential that the respondent [the Crown] lead evidence as to where the appellant hunted and what use has been and is currently made of those lands. It is impossible for this Court to consider the doctrine of extinguishment 'in the air'; the respondent must consider that argument in the bedrock of specific lands.[77]

The Crown did not present evidence as to the use or disposition of the specific land. The comments of the Court suggest that evidence of widespread settlement and development in an area is not of itself sufficient to support a finding of the extinguishment of aboriginal title. Regard must be had to the use and disposition of the specific area of land where extinguishment is asserted. The approach of the Court is more in accord with that of *Baker Lake* and the United States jurisprudence than that of *Bear Island.*

The *Bear Island* decision was appealed but the Ontario Court of Appeal declined to express any opinion on the question of the extinguishment of aboriginal title by legislation opening up lands for settlement. The Court held that aboriginal title had been extinguished by treaty.[78]

The foregoing cases suggest the following principles may be applied to determine if aboriginal title has been extinguished:

1. An intention to exercise complete dominion adverse to the right of occupancy must be shown: *Sante Fe Pacific*, *Calder*, *Simon*, *Baker Lake*, *Bear Island*.
2. There must be a "clear and plain indication" of that intention because "doubtful expressions" must be resolved in favour of the aboriginal people. The intention "will not be lightly implied": *Sante Fe Pacific*, *Calder*, *Simon*, *Baker Lake*.

76. Ibid, 402, 405.
77. Ibid, 406.
78. *Attorney-General of Ontario v Bear Island Foundation* (1989) 58 DLR (4th) 117.

3. An intention to regulate aboriginal rights does not demonstrate complete dominion adverse to the right of occupancy so as to extinguish aboriginal title.
4. Aboriginal rights or title will be considered to be abrogated only to the extent of disposition: *Kruger and Manuel*, *Baker Lake*, *Simon*; compare *Bear Island*.
5. The presence or absence of consideration by the legislature of aboriginal rights in enacting the legislation is properly to be considered: *Baker Lake*.

B. Australia

Justice Blackburn in *Milirrpum* considered *Calder* to be a "weighty authority".[79] He cited the British Columbia Court of Appeal decision in *Calder*[80] for the proposition that "in a settled colony a legislative and executive policy of treating the land of the colony as open to grant by the Crown, together with the establishment of native reserves, operates as an extinguishment of aboriginal title, if that ever existed"[81] irrespective of whether or not there was an "express mention" of aboriginal title. He agreed with that Court that no express mention of aboriginal title was necessary to bring about its extinguishment.[82] The criteria adopted by all members of the British Columbia Court of Appeal[83] was that enunciated by the United States Supreme Court in *Santa Fe Pacific*. The Supreme Court of Canada, of course, affirmed that criteria on appeal.[84]

Justice Blackburn applied the criteria and concluded that "the entire history of land policy and legislation in New South Wales and in South Australia, and the corresponding history in the Northern Territory under the Commonwealth, is similar in kind to the history which the judges found so cogent in *Calder's* case".[85] He determined that the public lands legislation extinguished aboriginal title. The United States decisions have rejected such analysis, as did Justice Hall in *Calder* and the courts

79. Supra n 1, 223.
80. (1970) 13 DLR 64.
81. Supra n 1, 253.
82. Ibid, 292.
83. Supra n 80 Davey CJ, 69; Tysoe JA, 79; Maclean JA, 109-110.
84. *Calder*, supra n 8.
85. Supra n 1, 254.

in *Baker Lake* and *Simon*. Even Justice Judson in *Calder* only found such extinguishment upon reference to contemporary correspondence which explicitly declared the intent to extinguish. Recently the British Columbia Court of Appeal has disowned its decision on that point.[86]

Milirrpum provides authority for the adoption of the criteria suggested in *Sante Fe Pacific* but must be considered an uncertain authority with respect to the significance accorded public lands legislation. It may be less doubtful an authority as to mining ordinances. Justice Blackburn declared that the Northern Territory Mining (Gove Peninsual Nabalco Agreement) Ordinance 1968 operated "as an abrogation pro tanto of whatever rights" the aboriginal people had.[87] The Ordinance provided for the grant of a special mineral lease, and special purpose leases for the establishment of a township and for purposes ancillary to mining. The conclusion that aboriginal title may only be extinguished to the extent of inconsistent resource dispositions is much more in accord with the jurisprudence established in the United States and Canada.

The only other case in Australia that has considered the criteria to be applied in determining if aboriginal title has been extinguished is *Mabo*.[88] In *Mabo* the plaintiffs were Murray Islanders who sought a declaration that they were the owners by custom and were holders of "traditional native title" and usufructuary rights. In 1985, three years after the action was commenced, the State of Queensland enacted the Queensland Coast Islands Declaratory Act 1985 ("the Coast Islands Act"). Section 3 of the Coast Islands Act declared that upon annexation "for the purpose of removing any doubt that may exist as to the application to the Islands of certain legislation":

(a) the islands were vested in the Crown in right of Queensland freed from all other rights, interests and claims of any kind whatsoever and became waste lands of the Crown in Queensland ...;

(b) the laws to which the islands became subject included the Crown lands legislation then and from time to time in force;

86. *R v Sparrow* (1986) 36 DLR (4th) 246, 261-265 ("*Sparrow*").
87. Supra n 1, 292.
88. Supra n 4.

(c) the islands could thereafter be dealt with as Crown lands for the purposes of Crown lands legislation then and from time to time in force in Queensland.

Section 4 declared that every disposition of the islands or part thereof purporting to have been made under the Crown lands legislation shall be taken to have been validly made. Section 5 declared that no compensation was payable in respect of any right that existed prior to annexation. The Minister declared in his second reading speech that the object of the Act was the extinguishment of any aboriginal title upon annexation.[89] The State of Queensland sought to rely on the Coast Islands Act as a defence to the statement of claim, and the plaintiffs demurred to that defence.

Chief Justice Mason,[90] and Justices Wilson[91] and Dawson,[92] agreed with the reasons delivered by Justices Brennan, Toohey and Gaudron as to the proper construction of the Coast Islands Act.[93] Justice Deane delivered separate reasons on that question.[94] Six of the seven judges of the High Court were accordingly of one mind. The State of Queensland argued that the effect of the Act was "to extinguish the rights which the plaintiffs claim in their traditional homeland and to deny any right to compensation in respect of that extinction".[95] The plaintiffs argued that "specific legislation dealing in terms with the precise interests of specific persons" was required to extinguish aboriginal title and cited the judgment of Justice Hall in *Calder* in support.[96] The judgment of Justices Brennan, Toohey and Gaudron acknowledged that "so Draconian an effect can be attributed to the 1985 Act only if its terms do not reasonably admit of another", but declared that "if a statute expresses *clearly and plainly an intention* that all native title is to be extinguished, there is no principle of construction by which the court can refuse to give effect to

89. Supra n 4, 214.
90. Ibid, 195.
91. Ibid, 201.
92. Ibid, 241, agreeing with the judgment of Wilson J supra n 91.
93. Ibid, 210-215, 217-218.
94. Ibid, 222-228.
95. Ibid, 213. See also the argument of Counsel for the State of Queensland, Davies QC: ibid, 193.
96. Ibid, 213.

that intention and can disregard the general scope of the legislation".[97] The Justices suggested that if an ambiguity exists the interpretation will be adopted that does not bring about such a "Draconian" result as the extinguishment of aboriginal title.[98] Such reasoning represents an adoption of the rationale and criteria declared in *Sante Fe Pacific*, *Calder* and *Simon*.

The Justices referred to the object of the Coast Islands Act as declared by the Minister in the legislature.[99] Such regard to the consideration of the question by the legislature is also in accord with the United States and Canadian jurisprudence.

The argument of the plaintiff did not allow for the Coast Islands Act to in any way extinguish aboriginal title. According to Justice Deane this failure to deal in detail with the relationship between the various provisions of the Act precluded any real examination in the course of argument of the effect of a construction where a limited effect was given to the Act.[100] In the result the six Justices, other than Justice Deane, gave full effect (apart from the Commonwealth Racial Discrimination Act 1975 on the basis of which the Coast Islands Act was ultimately held to be invalid to the extent of inconsistency with the Racial Discrimination Act pursuant to section 109 of the Australian Constitution) to the provisions of the Coast Islands Act, and concluded that it provided a clear and plain indication of an intention to extinguish aboriginal title throughout the Islands. The Justices considered a construction that the Coast Islands Act extinguished aboriginal title only with respect to those areas disposed of under the Crown lands legislation but rejected it. The Justices cited the language of section 3(a) of the Coast Islands Act and concluded that no other construction was reasonable other than that aboriginal title throughout the Islands was intended to be extinguished.

Justice Deane did not allude to *Calder* or the criteria suggested in *Sante Fe Pacific*. He cited traditional authority that "[t]he general provisions of the Act should not, as a matter of settled principles of construction, be construed as intended to bring about such a compulsory deprivation of proprietary rights and interests without compensation if they are

97. Ibid (emphasis added).
98. Ibid, 214.
99. Ibid.
100. Ibid, 224.

susceptible of some other less burdensome construction".[101] This "strong presumption"[102] against finding such an intention seems little different from the criteria of *Sante Fe Pacific*. Justice Deane however, reached a different conclusion from his colleagues. He concluded that the function of section 3 was merely to provide a "declaratory foundation" for the operation of section 4.[103] The intention of sections 3 and 4 was to extinguish aboriginal title "only to the extent" that it "adversely affected the validity of any past 'disposal' of any part of the Torres Strait Islands in pursuance of Crown lands legislation".[104] Justice Deane relied upon the introductory words of section 3, which referred to the removal of doubt as to the application of the Crown lands legislation, to conclude that the section was essentially declaratory and merely intended "to set the stage" for section 4.

The Court did not consider whether or not aboriginal title on the Islands had been extinguished before the Racial Discrimination Act came into effect in 1975. The question of extinguishment of title would according to Justices Brennan, Toohey and Gaudron, "involve consideration of the legal effect upon native title of both annexation and subsequent alienation by the Crown of rights in over land".[105] The three Justices offered this enigmatic comment:

> [A]lthough it is inappropriate to express a view on that question, it should be noted that s.4 of the 1985 Act, which confirms disposals made after annexation, invites attention to the possibility of competing interests.[106]

It is suggested that the Justices contemplated that an accommodation of competing interests between unextinguished aboriginal title and Crown lands and resources legislation might entail giving effect to a pre-1975 grant, whilst recognising aboriginal title to land not subject to such grant. That result would be consistent with United States and Canadian jurisprudence which has ruled that aboriginal title will be considered to be extinguished only to the extent of inconsistent grants and not merely by general Crown lands and resources legislation.[107]

101. Ibid, 223.
102. Ibid, 226.
103. Ibid, 225-227.
104. Ibid, 227.
105. Ibid.
106. Ibid.
107. Supra, 457-467.

This accommodation of aboriginal title and existing grants is also the result achieved by the analysis of Justice Deane. It suggests that at least four members of the High Court might well be disposed to adopt the analysis of the United States and Canadian courts in a future case.

III. CONSTITUTIONAL LIMITATIONS ON THE EXTINGUISHMENT OF ABORIGINAL TITLE

A. Canada

The grant of federal jurisdiction with respect to "Indians, and Lands reserved for the Indians" in section 91(24) of the Canadian Constitution Act 1867 ("the Constitution Act") reflects the recognition that the responsibility was "not a trust which could conveniently be confined to the local Legislatures".[108] The federal government was thus empowered to protect the Indians and their lands from local interests. Such protection would appear necessarily to extend to aboriginal title to traditional lands at common law. This would suggest that the provinces could not, after Confederation in 1867, on Union at a later date extinguish aboriginal title - that power lay exclusively within the jurisdiction of the federal government.

In *Calder*[109] counsel for the Province of British Columbia did not even argue that the Province could extinguish aboriginal title after Confederation. Counsel agreed "that Parliament had not taken any steps or procedures to extinguish the Indian right of title after British Columbia entered Confederation"[110] and that no constitutional question was involved. The limitation upon the powers of the provinces was assumed by the Quebec Superior Court and the Court of Appeal in the *Kanatewat v*

108. United Kingdom, House of Commons 1837 *Report from the Select Committee on Aborigines (British Settlements)* reprinted in Irish University Press Series of British Parliamentary Papers *Anthropology - Aborigines* vol 2 (Shannon: Irish University Press, 1968) 77.
109. Supra n 8.
110. Ibid, 169.

James Bay Development Corp [111] ("*James Bay*"), and by the Nova Scotia Court of Appeal in *R v Isaac*.[112]

The Supreme Court of Canada has yet to expressly pass upon the matter, but it has jealously guarded the exclusive jurisdiction conferred by section 91(24). In *Derrickson v Derrickson* it refused to apply the ownership and possession provisions of provincial matrimonial property laws on an Indian reserve. Justice Chouinard declared for the Court:

> The right to possession of lands on an Indian reserve is manifestly of the very essence of the federal exclusive legislative power under s-s. 91(24) of the *Constitution Act, 1867*. It follows that provincial legislation cannot apply to the right of possession of Indian reserve lands.[113]

It is suggested that aboriginal title is also properly regarded as the "essence of the federal exclusive legislative power under s-s 91(24)". The reason for the grant of the power and the weight of judicial authority suggest that only the federal government, after Confederation, had the power to extinguish aboriginal title.

111. [1974] RP 38; reversed [1975] CA 166; leave to appeal to Supreme Court of Canada refused (1973) 41 DLR (3d) 1.

112. Supra n 74. In *Ominayak* infra n 148 and *MacMillan Bloedel* infra n 151 all members of the Alberta and British Columbia Court of Appeals, respectively, found there was a serious question to be tried, thereby recognising the merits of the argument in support of the exclusive jurisdiction of the federal government.

In the lower court decisions in *Bear Island* and *MacMillan Bloedel* the judges concluded that the Provinces had jurisdiction to extinguish aboriginal title. In *Bear Island* supra n 69:

> In my opinion, Ontario, after 1867, had, in respect of *unceded* Crown lands, a beneficial interest subject to aboriginal rights, which rights were held at the pleasure of the Crown and which could be extinguished by Ontario legislation.
>
> The only limitation on Ontario's power to extinguish aboriginal rights in that the Ontario legislation must fall under a head of general provincial legislative power and competence and not purport specifically to extinguish aboriginal rights.

Similar reasons were given by Gibbs J in *Martin v Queen in right of British Columbia* [1985] 2 CNLR 26 (BCS Ct). The conclusions of Steele J and Gibbs J were not adopted on appeal.

113. (1986) 26 DLR (4th) 175, 184.

In the result, until 1982, the inquiry as to the extinguishment of aboriginal title in Canada was directed to whether or not such extinguishment had been accomplished under colonial authority prior to Confederation or Union, or under federal authority thereafter. In 1982 section 35(1) of the Canadian Constitution Act was passed. It declared:

> [T]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed.

The subsection has been construed not merely as a rule of construction but as providing for the entrenchment of existing aboriginal and treaty rights.[114] It has been judicially assumed that "a power to extinguish is necessarily inconsistent with the recognition and affirmation of aboriginal rights in section 35(1)".[115] Since 1982 aboriginal title may only be extinguished by a constitutional amendment or by agreement with the aboriginal people concerned.

B. Australia

An assessment made in 1983 suggested that either the State or the Commonwealth might extinguish aboriginal title.[116]

On Federation in Australia in 1901 section 51(xxvi) of the Australian Constitution gave to the Commonwealth Parliament "power to make laws for the peace, order and good government of the Commonwealth with respect to ... the people of any race, *other than the aboriginal race in any State*, for whom it is deemed necessary to make special laws". The Constitution thereby conceded primary jurisdiction with respect to aboriginal people outside the Commonwealth territories to the States.[117] By 1901 all the States had already enacted special legislation and erected

114. *Sparrow* supra n 86, 268; *R v Agawa* (1988) 65 OR (2d) 505, 512; *R v Arcan* [1989] 2 CNLR 110, 118.
115. *Sparrow* supra n 86, 269; and see *R v Agawa* supra n 114.
116. R H Bartlett "Aboriginal Land Claims at Common Law" (1983) 15 UWAL Rev 293, 344. The assessment was premised on concurrent jurisdiction with respect to aboriginal interests and people.
117. G Sawer "The Australian Constitution and the Australian Aborigine" (1966-67) 2 FL Rev 17. Aborigines in the territories were subject to Commonwealth jurisdiction: s 122 of the Australian Constitution.

administrative machinery to govern and control the aboriginal people.[118] Sawer adds the suggestion that "it was widely thought that the aborigines were a dying race whose future was unimportant".[119]

Public pressure, arising from the circumstances of aboriginal people in Australia, brought about a change in 1967. In that year the phrase excluding aboriginal people in the States from the federal power conferred by section 51(xxvi) was deleted from the Australian Constitution following a referendum.[120] The power of the Federal Parliament to make special laws respecting the aboriginal people was thereby made concurrent with that of the States.

The 1967 amendment merely removed the limitation upon the jurisdiction of the Commonwealth. It did not deny the competence of the States. The suggestion[121] that the States upon Federation had no jurisdiction or power to extinguish aboriginal title is not considered tenable. To the extent that it is founded upon Canadian authority it is considered that the reliance is misplaced. Before Confederation in Canada the Colonies were recognised as having jurisdiction to extinguish aboriginal title. All judges of the Supreme Court of Canada who considered the question in *Calder* were of that opinion.[122] The unanimous decision of the Court in *Canadian Pacific Limited v Paul*[123] is to similar effect. The Provinces only lacked jurisdiction after Confederation because of section 91(24) of the Canadian Constitution Act. Similarly, and contrary to the proponents of the suggested limit on State power, the United States jurisprudence declares that any limit on the power derives from the Constitution not the common law. As Chief Justice Marshall explained in *Johnson v McIntosh*

118. P W Johnston "The Repeals of Section 70 of the Western Australian Constitution Act 1889: Aborigines and Governmental Breach of Trust" (1989) 19 UWAL Rev 318.
119. Supra n 117, 18. See also Johnston supra n 118, 322-323.
120. But note that C Howard *Australian Federal Constitution Law* 3rd edn (Sydney: Law Book Co, 1985) 575 suggests that the two 1967 amendments relating to Aboriginals were "widely believed to have been proposed ... only in order to improve the prospects of an accompanying amendment which would have broken the nexus ... between the size of the House of Representatives and ... the Senate".
121. See M C Blum and J Malbon "Aboriginal Title, the Common Law and Federalism" in *The Emergence of Australian Law* (Butterworths: Sydney, 1989) 37-41.
122. Supra n 8 Judson J, 155, 167; Hall J, 216-17. Hall J stressed that the powers of the Colony of British Columbia were limited by express instructions to compensate upon extinguishment.
123. (1988) 53 DLR (4th) 487.

"exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it",[124] and as Justice Powell observed in *Oneida County v Oneida Indians* it was "with the adoption of the Constitution, [that] Indian relations became the exclusive province of federal law".[125]

It is accordingly suggested that in Australia both State and Commonwealth were empowered to extinguish aboriginal title. The State of Queensland appeared to have acted upon such opinion in 1985 in passing the Coast Islands Act. The Coast Islands Act was passed with the declared objective of extinguishing aboriginal title on the Torres Strait Islands. In *Mabo*[126] in the High Court the plaintiffs argued that the Coast Islands Act was inconsistent with the Racial Discrimination Act enacted by the Commonwealth in 1975.[127]

Section 10 of the Racial Discrimination Act declares that in the event of the denial by any law of the Commonwealth, a State or Territory to persons of a particular race of a right which is enjoyed by persons of another race, then "by force of this section" persons of the particular race should enjoy that right. The majority of the High Court held that the Coast Islands Act was inconsistent with section 10. Justices Brennan,

124. Supra n 10, 585.
125. 470 US 236, 234 (1985).
126. Supra n 4.
127. The Racial Discrimination Act was passed in furtherance of the International Convention on the Elimination of All Forms of Racial Discrimination. S 9 of the Racial Discrimination Act declares that it is "unlawful for a person to do any act" so as to discriminate on the race or origin and thereby deny the equal enjoyment of any human rights. None of the six members of the Court who considered the question thought s 9 was inconsistent with the Coast Islands Act. As Brennan, Toohey, and Gaudron JJ observed:

> Section 9 proscribes the doing of an act of the character therein mentioned. It does not prohibit the enactment of a law creating, extinguishing or otherwise affecting legal rights in or over land: ibid, 216.

The Racial Discrimination Act has withstood constitutional challenge. In *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 s 9 was held to be a valid law with respect to s 51(xxix) (the external affairs powers) of the Australian Constitution.
See also *Gerhardy v Brown* (1984) 159 CLR 70; and the discussion of that case in D Wood "Positive Discrimination and the High Court" (1987) 17 UWAL Rev 128.

Toohey and Gaudron declared:

> By extinguishing the traditional legal rights characteristically vested in the Miriam people, the 1985 Act abrogated the immunity of the Miriam people from arbitrary deprivation of their legal rights in and over the Murray Islands.[128]

The three Justices declared the consequences of their holding in these terms:

> In practical terms, this means that if traditional native title was not extinguished before the Racial Discrimination Act came into force, a State law which seeks to extinguish it now will fail.[129]

Justice Deane was more circumspect:

> The confiscation or extinction of such rights and interests without any compensation or any procedure for ascertaining or assessing the existence and extent of the claims of particular individuals is a denial of the entitlements to ownership and inheritance of property, including the implicit immunity from arbitrary dispossession, which are the "rights" for the purposes of section 10(1) of the Commonwealth Act.[130]

It is suggested that Justices Brennan, Toohey and Gaudron misstated the consequences of their finding if they contemplated that a State could not extinguish aboriginal title. The Racial Discrimination Act did not deny the concurrent jurisdiction of the State and Commonwealth to extinguish aboriginal title. But both State and Commonwealth must act in accordance with the Racial Discrimination Act and avoid the discriminatory deprivation of property rights. The entry by a State or the Commonwealth into a land claims settlement agreement or "treaty" with respect to aboriginal title or the establishment of land claims procedures in a State or Commonwealth statute that otherwise extinguished aboriginal title would constitute mechanisms that could be consistent with section 10.

In the result in both Canada and Australia constitutional limitations upon the extinguishment of aboriginal title are substantial. In Canada since Confederation only the federal government has been empowered to extinguish aboriginal title. Since 1982 aboriginal title may be extinguished, in the absence of a constitutional amendment, only by agreement. In Australia originally only the States had jurisdiction to extinguish

128. Ibid, 218; and Deane J, 232.
129. Ibid, 218-219.
130. Ibid, 231-232.

aboriginal title within their boundaries. From 1967 to the present State and Commonwealth have had concurrent jurisdiction. But in 1975 the Racial Discrimination Act limited such jurisdiction by imposing the requirement that any extinguishment not be discriminatory on the basis of race.

In Canada aboriginal title is now accorded greater protection than other property interests. In Australia it is accorded the same protection, in particular, aboriginal title is accorded protection by the Racial Discrimination Act from discrimination on the basis of race; and, by section 51(xxxi) of the Australian Constitution, protection from acquisition on unjust terms.

IV. IMPLICATIONS FOR RESOURCE DEVELOPMENT

The criteria and the analysis suggested above indicate a cloud on the title of the Province or State in respect to future resource development grants. Moreover past grants by a Province, where it is alleged aboriginal title is unextinguished, since Confederation (1867) or Union (British Columbia, 1871), or by a State in Australia, since the enactment of the Racial Discrimination Act in 1975, are suspect. The problems presented in both Australia and Canada are considerable. Aboriginal title has been recognised as part of the law of Canada since 1973. Canadian experience is accordingly suggested to be useful in consideration of the implications in Australia. The pattern that emerges is that of negotiation towards an agreement acknowledging aboriginal rights of ownership and participation in resource development. All the agreements have recognised and given effect to past resource dispositions. Aboriginal people have not been necessarily concerned to prevent development, and indeed have been proponents of oil and gas development and mining once given an opportunity to participate in the economic benefits.

The only reported case in Australia where aboriginal title at common law was asserted as a barrier to resource development is *Milirrpum*.[131]

131. Supra n 1.

The plaintiffs sought a declaration that the ordinances under which the Commonwealth had authorised the issuance of mining leases to Nabalco with respect to their traditional lands were ultra vires and void. The lands had originally been part of the Arnhem Land Aboriginal Reserve but an area of 140 square miles had been excised in 1963 to allow bauxite mining to take place. The leases were asserted to be invalid. The Northern Territory Supreme Court denied the declaration and injunctive relief sought in aid. Senior counsel for the plaintiffs, Woodward QC, was subsequently appointed by the Commonwealth government to inquire into and report upon "The appropriate means to recognise and establish the traditional rights and interests of the Aborigines".[132] The Commonwealth Aboriginal Land Rights (Northern Territory) Act 1976 ("the Land Rights Act"), based upon Woodward's recommendations, provided for the grant of an estate in fee simple to Land Trusts of reserved lands, and unalienated Crown lands to which the Aboriginal Land Commissioner determined aboriginal people were entitled by tradition. Minerals were reserved to the Crown, but partial beneficial entitlement and control of mineral development was conferred upon the aboriginal people. In the absence of an existing interest a miner was required to negotiate a consent agreement with a Land Council. The Act declared that existing interests would continue in full force and effect. Included in such existing interests were the mining leases issued to Nabalco.[133]

The Land Rights Act was a legislative response to a failure in court to establish aboriginal title. The denial at common law resulted in the legislative recognition of aboriginal ownership and control over resource development. The common law in its origin and development has always sought a highly pragmatic accommodation of the interests of settlers and resource developers and aboriginal people. The denial of the common law almost inevitably leads to a legislative response which is not necessarily as beneficial an accommodation for both interests as the common law would have required.[134] Moreover, if the parties reconcile their

132. Australia, Parliament 1973 *Aboriginal Land Rights Commission First Report* Parl Paper 138, Canberra.

133. For a more detailed early comment on the Land Rights Act see M Barker "Aborigines, Natural Resources and the Law" (1983) 15 UWAL Rev 245, 287-292.

134. See Bartlett supra n 116, 345.

interests by agreement, rather than having them reconciled by legislative fiat, an acceptance of the result and the need to work within such framework may be more likely.

The cases wherein aboriginal title has been asserted in Canada in the face of resource development commence with *Re Paulette's Application*[135] in 1973. The plaintiff Indian bands sought to file a caveat asserting aboriginal title to the western half of the Northwest Territories, where significant oil and gas development was taking place and the construction of a multi-billion dollar oil and gas pipeline was proposed. The Northwest Territories Supreme Court upheld the plaintiff's right to file a caveat. The federal government responded by the announcement of a policy to enter into negotiations for the settlement of land claims in the region. In 1989 an agreement in principle was reached with the Dene people that provided for rights of ownership and participation in resource development. The Dene have already engaged in joint ventures with oil companies in the region. Development proceeded in the interim, in consultation with the Dene, and all resource dispositions granted in the region were recognised and given effect to in the Agreement.

In November 1973 the Quebec Superior Court issued an injunction to restrain the construction of the James Bay Hydro Project upon the application of the Indians and Inuit of the region. In *James Bay* Justice Malouf declared that the Quebec statute purporting to authorise the project was ultra vires and that the balance of convenience favoured the petitioner:

> The right of petitioner to pursue their way of life in the lands subject to dispute far outweighs any consideration that can be given to such monetary damages.[136]

The Quebec government responded by entering into negotiations with the aboriginal people that resulted in the James Bay Agreement in 1975. The Agreement recognises, amongst other things, ownership of a small area of the region, rights over much of the region with respect to hunting, trapping and fishing, and financial compensation in lieu of mineral

135. [1973] 6 WWR 97. The decision was subsequently overturned on the grounds that a covenant could not be filed against unpatented lands in the Northwest Territories: *Paulette v The Queen* (1976) 72 DLR (3d) 161.

136. Supra n 111, 219. The matter never went to trial as the injunction was subsequently suspended, and later discharged.

ownership. All past provincial dispositions were recognised and given effect to by the Agreement.

In 1978 the Inuit of the Baker Lake region in the Northwest Territories sought an injunction to restrain the issuance of mining licences in order to protect wildlife, particularly caribou, that were important to their hunting and trapping activities.[137] The evidence showed that approximately one half of the Inuit's real income was derived from hunting, trapping and fishing.[138] The Federal Court issued an interim injunction in April 1978 allowing the issuance of the licences but imposing conditions that no mining activities could take place close to water crossings or calving areas. Justice Mahoney found a serious question to be tried and observed:

> I have no hesitation in finding that the balance of convenience falls mainly on the side of granting an interim injunction. The minerals, if there, will remain; the caribou will not.[139]

In November 1979 at trial,[140] the injunction was dissolved. Negotiations have been proceeding towards a settlement of land claims in the Central and Eastern Arctic, which includes the area of Baker Lake, since 1976. An agreement in principle was reached in December 1989. It provides for rights of Inuit ownership and participation in future resource development, and recognises existing resource dispositions.

In 1973 the Temagami Band filed caveats in the Land Titles Office over an area of 4000 square miles in Ontario. In 1978 the Province filed a statement of claim seeking a declaration that the Province had the right to issue disposition of lands for settlement, mining, forestry and tourism purposes and that the Band had no interest in the lands. The trial of the matter lasted from June 1982 to December 1984. In *Bear Island* in December 1984 the Ontario Supreme Court issued an order in the form sought by the Province on the grounds amongst others that public lands legislation and development thereunder, and a Treaty of 1850 had extinguished any aboriginal title of the Band.[141] In 1989 the Ontario Court of Appeal dismissed an appeal.[142] On 19 October, 1989 the Band

137. *Hamlet of Baker v Minister of Indian Affairs and Northern Development* [1979] 1 FC 487.
138. Ibid, 491.
139. Ibid, 495.
140. Supra n 50.
141. Supra n 69.
142. Supra n 78.

was granted leave to appeal to the Supreme Court of Canada. On the same day the Band announced that it would seek an injunction to restrain the construction of a road being built to allow lumbering in the area. In response the Premier of Ontario announced that road construction would be halted pending the outcome of the injunction application.[143]

Bear Island is not a model that any parties involved in such disputes would care to follow. The Province made no attempt to negotiate a settlement until 1985. The actions of counsel at trial for the Band in the handling of the case were the subject of disparaging references by other Band counsel and by the Ontario Court of Appeal.[144] No settlement has yet been reached. In 1989 the Province offered a forty square mile reserve and thirty million dollars to the Band by way of settlement.

In 1983 the Lubicon Band of Indians in Alberta sought an interim injunction to restrain on-going oil and gas exploration and development in an area of 8500 square miles in northern Alberta. Amongst other things the Band asserted that it had aboriginal title to the area which had not been extinguished. The Band asserted that the Provincial legislation under which the oil and gas permits and leases were issued was ultra vires and accordingly that any dispositions made thereunder were a nullity. Justice Forsyth[145] found that there was a serious question to be tried, but refused to issue an injunction. The Band asserted that the continuation of the activities of the oil companies would lead to irreparable harm to their traditional way of life, in particular, of hunting and trapping. The Band relied upon the judgment of Justice Malouf in *James Bay*. Justice Forsyth rejected the argument, observing:

> This is not a case of an isolated community in the remote north where access is only available by air on rare occasions and whose way of life is dependent to a great extent on living off the land itself. The twentieth century, for better or for worse, has been part of the applicants' lives for a considerable period of time. The influence of the outside world comes from various sources, in many cases not

143. D Grant and R Mackie "Temagami Road halted pending court case", Globe and Mail Newspaper 20 Oct 1989, A10.

144. Supra n 78, 120-121.

145. *Ominayak v Norcen Energy Resources* (1983) 29 Alta LR (2d) 151, 152 ("*Ominayak*").

> connected with any of the activities of any of the respondents. On that basis alone I am satisfied an interim injunction in the various forms sought and for the various reasons advanced by the applicants is not appropriate under the circumstances and the court's discretion should not be exercised in favour of the applicants.[146]

Further he held that the balance of convenience favored the oil companies because they would "suffer large and significant damages" and a "loss of competitive position in the industry" if the injunction was granted and because of the "admitted inability of the applicants to give a meaningful undertaking to the court as to damages".[147]

The decision of Justice Forsyth was upheld in 1985 on appeal to the Alberta Court of Appeal.[148] The Court referred to the development of agriculture in parts of the area and oil and gas activity in the 1960s and 1970s and concluded that the evidence supported the finding of Justice Forsyth that the "deterioration in the way of life" of the Band did not date from the activities of the respondents.[149] In any event counsel for the Band conceded, and the Court agreed, that with respect to producing oil wells the balance of convenience must favor the oil companies. With respect to exploration activities the Court did not consider that the evidence showed a critical reduction in wildlife and in any event it was necessarily temporary in nature and "after it ends the wildlife will return in number".[150]

The decision suggests that with respect to oil and gas exploration and production the Court would invariably consider that the balance of convenience favoured the oil companies. The evidence would have to indicate a much greater impact upon wildlife, such as in *Baker Lake*, than was demonstrated in *Ominayak*. In October 1988 the Province and the Band reached a settlement of the land claim. The Province agreed to transfer 204.5 square kilometres including mineral rights. The Band agreed to recognise all dispositions made by the Province. The dispute has not yet been finally settled because the Band is negotiating social and

146. Ibid, 157.
147. Ibid, 157-158.
148. [1985] 3 WWR 193.
149. Ibid, 198.
150. Ibid, 202.

economic development funding with, and is seeking compensation for lost oil and gas royalties from, the federal government.

Two months after the Alberta Court of Appeal refused to issue an injunction in the *Ominayak* case, the British Columbia Court of Appeal did so in *Martin v The Queen in Right of British Columbia and MacMillan Bloedel Ltd*[151] ("*MacMillan Bloedel*"). The Clayoquot and Ahousaht Indian Bands sought an injunction to restrain the logging of Meares Island by MacMillan Bloedel. MacMillan Bloedel held a tree-farm licence issued under the provincial Forest Act. Meares Island is an island to the west of Vancouver Island. It is heavily forested. There are two small Indian reserves on the Island. The British Columbia Supreme Court concluded that the plaintiffs had "no prospect of success at trial".[152] Justice Gibbs adopted the reasoning of Justice Judson in *Calder* and concluded that ordinances issued by the Colony of Vancouver Island before Union with Canada had extinguished aboriginal title.

On appeal in March 1985 the British Columbia Court of Appeal issued an injunction restraining the logging of Meares Island by MacMillan Bloedel. All five members of the Court concluded, upon a consideration of *Calder*, that there was a serious question to be tried as to whether aboriginal title existed on Meares Island. The majority of the Court also concluded that the balance of convenience favoured the Indian Band and that the injunction must issue to prevent them suffering irreparable harm. The evidence did not establish that the logging of Meares Island was "economically essential" to MacMillan Bloedel.[153] Meares Island comprised only one per cent of the tree licence in question and only two per cent of the Island was proposed to be logged in 1985. Justice Seaton observed that the importance of the trees to MacMillan Bloedel was not economic but symbolic,[154] and went on to observe that:

> Meares Island is of importance to MacMillan Bloedel, but it cannot be said that denying or postponing its right would cause irreparable harm. If an injunction prevents MacMillan Bloedel from logging pending the trial and it is decided that MacMillan Bloedel has the right to log, the timber will still be there.
>
> The position of the Indians is quite different. It appears that the area to be logged will be wholly logged. The forest that the Indians know and use will be permanently destroyed. The tree from which the bark was partially stripped in 1642 may

151. [1985] 2 CNLR 58.
152. [1985] 2 CNLR 26, 49.
153. Supra n 151, 68.
154. Ibid.

> be cut down, middens may be destroyed, fish traps damaged and canoe runs despoiled. Finally, the Island's symbolic value will be gone. The subject matter of the trial will have been destroyed before the rights are decided.
>
> If logging proceeds and it turns out that the Indians have the right to the area with the trees standing, it will no longer be possible to give them that right. The area will have been logged. The courts will not be able to do justice in the circumstances. That is the sort of result that the courts have attempted to prevent by granting injunctions.[155]

The majority stressed that the logging would permanently destroy the forest, denying to the Indian bands its material, traditional and symbolic value.

It was forcefully argued that the issuance of the injunction would cast doubts as to provincial sovereignty over resources and bring about a significant detrimental economic impact. The argument was rejected. Justice Seaton observed:

> It has also been suggested that a decision favourable to the Indians will cast doubt on the tenure that is the basis for the huge investment that has been and is being made. I am not influenced by the argument. Logging will continue on this coast even if some parts are found to be subject to certain Indian rights. It may be that in some areas the Indians will be entitled to share in one way or another, and it may be that in other areas there will be restrictions on the type of logging. There is a problem about tenure that has not been attended to in the past. We are being asked to ignore the problem as others have ignored it. I am not willing to do that.[156]

It was argued that if an injunction was issued in this situation, further applications might be brought and the entire forest industry would be shut down. The majority responded by stressing the symbolic importance of this dispute to both the forest industry and the Indians. Justice Seaton observed that if other applications were brought

> they will be considered in the light of this decision. They will be seen as an addition to the Meares Island restriction and in consequence, the balance of convenience may be seen to have shifted to favour the industry.[157]

The decision indicates a preparedness to force the matter to resolution whether by litigation or by settlement. The Province of British Columbia refused to enter into negotiations on account of the issuence of an injunction on interlocutory proceedings. The Court recognised that there was a serious question to be tried as to the existence of aboriginal title but

155. Ibid, 71-72.
156. Ibid, 73.
157. Ibid, 73; and see MacFarlane JA, 78.

the Province was not prepared on such a basis to extend such recognition to the claim as entering into negotiations would provide. The commencement of negotiations for the settlement of aboriginal title would necessarily require a re-examination of resource dispositions and the power to grant such dispositions throughout the Province. The "problem about tenure", as Justice Seaton described it[158] is so fundamental that the Province will not alter its position except upon a final court determination following a trial.

V. CONCLUSION

Resource development has been a paramount objective of provincial and state legislatures in Canada and Australia. In some cases development has been sought irrespective of aboriginal title. It is the principal thesis of this article that the changed constitutional settings in Canada and Australia now require an accommodation between aboriginal title and resource development if development is to proceed.

The crucial question is whether aboriginal title was extinguished prior to the introduction of limits upon the power of extinguishment. The suggested criteria in both countries is "a clear and plain indication" of an intention to "exercise complete dominion adverse" to the aboriginal right of occupancy. It is unlikely that general public lands and resources legislation will of itself be considered to have extinguished aboriginal title.[159] Grants issued thereunder will have done so, but where none have issued or where the grant is not "adverse" to aboriginal title, aboriginal title will continue to exist.

This accommodation of resource grants and aboriginal title must be seen as a product of the pragmatism of the common law, manifested most clearly by Chief Justice Marshall in *Johnson v McIntosh*.[160] The common law did not deny the validity of resource grants but neither did it extinguish aboriginal title to any greater extent than required to give effect to the grant. The common law acknowledged the dominance of the resource developer, recognising the legitimacy of the acts of the colonial power, but also sought to give due regard to those possessed of existing rights, that is, the aboriginal peoples.

158. Supra n 156.
159. Compare R D Lumb "Aboroginal Land Rights: Judicial Approaches in Perspective" (1988) 62 ALJ 273, 284.
160. Supra n 10.

The dominance of the resource developer has been upset by the constitutional arrangements put in place in Canada and Australia.

Since 1867, the Provinces, and since 1982, the federal government, have in Canada been constitutionally restrained from extinguishing aboriginal title. Since 1975 the States and the Commonwealth have in Australia been restrained from extinguishing aboriginal title in violation of the right not to be discriminated against on the basis of race. In both countries an agreement between an aboriginal group and the government providing for the settlement or accommodation of aboriginal title to resource disposition and development would satisfy the constitutional and legislative restraints. An agreement may not be necessary in Australia insofar as a land claims settlement mechanism might also satisfy the right of immunity from arbitrary deprivation of property. It has already been suggested that agreements or treaties may be more effective in settling a dispute than an imposed mechanism.[161]

The need to accommodate aboriginal title was recognised in the Northern Territory following the *Milirrpum*[162] decision by the Land Rights Act. The Act recognised and protected existing mining interests, including the bauxite mine involved in the *Milirrpum* case, and made provision upon agreement with aboriginal land councils for future resource grants. In Canada the accommodation has invariably been made by means of an agreement or treaty with the group possessed of aboriginal title. Such agreements have always recognised and protected existing resource interests and made provision for future resource grants.

Unsurprisingly, settlements with respect to aboriginal title have been hastened by legal action brought to restrain resource development. In all the cases where an application for injunction was brought the courts have found there to be a serious question to be tried. Legal action has focused public and political attention such that settlements have been arrived at even where action was unsuccessful, as in *Milirrpum* and *Ominayak*. And where injunctions actually issued, although temporarily, negotiations and settlement ensued, as in *James Bay* and *Baker Lake*.

161. Compare treaty proposal in Australia: see J Crawford "The Aboriginal Legal Heritage: Aboriginal Public Law and the Treaty Proposal" (1989) 63 ALJ 392.
162. Supra n 1.

The only instance in the reported cases where resource development has been halted by a claim of aboriginal title is *MacMillan Bloedel*. In that case damage to the land would have been severe and yet the economic damage on account of stoppage was minimal and the "problem about tenure" in British Columbia is so fundamental that only a final court determination following trial will bring about negotiations and a settlement.

This article has indicated the framework within which an accommodation between resource development and aboriginal title must be reached. In Canada agreements have invariably been reached. Resource developers have come to recognise that their interests are not at the heart of the dispute. The principle issue is the question of control and economic rent as between an aboriginal group and government. The existing interests of resource developers have always been protected in any settlement and developers have secured their necessary rate of return on investment. It is the governments who must, now under constitutional and legislative compulsion, give up some control and economic rent in order to secure a settlement of aboriginal title.

6. POSTSCRIPT

In the northern summer of 1990 there were several significant legal developments respecting aboriginal land rights in Canada. The Supreme Court handed down decisions in *R v Horseman,*[163] *R v Sioui,*[164] *R v Sparrow,*[165] and *Mitchell v Peguis Indian Band.*[166] *R v Sparrow* was the first case to consider section 35 of the Canadian Constitution Act 1982.[167] The decisions suggest, in the language of the Supreme Court, that a "generous" construction of aboriginal and treaty rights should be adopted. The decisions sustain and perhaps strengthen the conclusions reached in this article.[168]

163. (Unreported) Supreme Court of Canada 3 May 1990.
164. (Unreported) Supreme Court of Canada 24 May 1990.
165. (Unreported) Supreme Court of Canada 31 May 1990.
166. (Unreported) Supreme Court of Canada 21 June 1990.
167. Supra n 165.
168. I hope to publish a further comment or note on these decisions in (1991) 21 UWAL Rev (forthcoming).