INTRODUCTION

In *Delgamuukw v. B.C.*,[1] the Supreme Court affirmed that compensation was an ordinary part of the Crown's obligation to justify any infringement of Aboriginal title, just as in the earlier cases of *R. v. Sparrow*[2] and *R. v. Gladstone*,[3] compensation was an element of justification in the infringement of Aboriginal rights generally. Chief Justice Lamer, at para. 169 of *Delgamuukw* said this:

> The economic aspect of Aboriginal title suggests that compensation is relevant to the question of justification as well, a possibility suggested in *Sparrow* and which I repeated in *Gladstone*. Indeed, compensation for breaches of fiduciary duty are a well-established part of the landscape of Aboriginal rights: *Guerin*. In keeping with the duty of honour and good faith on the Crown, fair compensation will ordinarily be required when Aboriginal title is infringed. The amount of compensation payable will vary with the nature of the particular Aboriginal title affected and with the nature and severity of the infringement and the extent to which Aboriginal interests were accommodated. Since the issue of damages was severed from the principal action, we received no submissions on the appropriate legal principles that would be relevant to determining the appropriate level of compensation of infringements of Aboriginal title. In the circumstances, it is best that we leave those difficult questions to another day.

La Forest J. said this at para. 203:

> Under the second part of the justification test, these legislative objectives are subject to accommodation of the Aboriginal peoples' interests. This accommodation must always be in accordance with the honour and good faith of the Crown. Moreover, when dealing with a generalized claim over vast tracts of land, accommodation is not a simple matter of asking whether licences have been fairly allocated in one industry, or whether conservation measures have been properly implemented for a specific resource. Rather, the question of accommodation of "Aboriginal title" is much broader than this. Certainly, one aspect of accommodation in this context entails notifying and consulting Aboriginal peoples with respect to the development of the affected territory. Another aspect of accommodation is fair compensation. More specifically, in a situation of expropriation, one asks whether fair compensation is

[1] [1997] 3 S.C.R. 1010.

[2] [1990] 1 S.C.R. 1075.

[3] [1996] 2 S.C.R. 723.

available to the Aboriginal peoples; see *Sparrow*, *supra*, at p. 1119. Indeed, the treatment of "Aboriginal title" as a compensable right can be traced back to the Royal Proclamation, 1763. The relevant portions of the Proclamation are as follows:

> . . . such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them [Aboriginal peoples] or any of them, as their Hunting Grounds. . . .
>
> We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians ... but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in Our Name ... . [Emphasis added.]

Clearly, the Proclamation contemplated that Aboriginal peoples would be compensated for the surrender of their lands; see also Slattery, *supra*, at pp. 751-52. It must be emphasized, nonetheless, that fair compensation in the present context is not equated with the price of a fee simple. Rather, compensation must be viewed in terms of the right and in keeping with the honour of the Crown. Thus, generally speaking, compensation may be greater where the expropriation relates to a village area as opposed to a remotely visited area. I add that account must be taken of the interdependence of traditional uses to which the land was put.

These passages raise as many questions as they answer. Chief Justice Lamer relates compensation to:

a) the economic aspect of Aboriginal title[4];

b) the duty of honour and good faith of the Crown towards Aboriginal people;

c) the nature of the particular title affected;

d) the severity of the infringement; and

e) the degree to which Aboriginal title was accommodated.

[4] The economic aspect of aboriginal title refers to the fact that aboriginal title includes the right to use the land for commercial purposes (*R. v. Gladstone*, [1996] 2 S.C.R. particularly at paras. 58 and 59. The aboriginal title is inherently exclusive, and that exclusivity raises the same difficulties as aboriginal rights which are without internal limitation, and thus would tend towards exclusivity. For an interesting comparisoin in the context of a customary right to take oysters "without stint" in England, see *Goodman and Blake v. the Mayor of Saltash* (1882), 7 App. Cas. 633 where the normal restrictions on the recognition of customary rights to internally limited rights were overcome by reference to concepts of trust law.

La Forest J.'s propositions with respect to compensation are:

a) compensation is part of the constitutional duty to accommodate legislative objectives to the existence of Aboriginal title;
b) the duty to provide Aboriginal peoples with compensation is historically rooted in the Royal Proclamation of 1763;
c) compensation is not to be equated with the price of a fee simple;
d) compensation may be greater for expropriation of village sites than for expropriation of remotely visited area; and
e) compensation must take into account the interdependence of traditional uses to which the land was put.

These lists together comprise some of the issues which must be examined, and to which we will return, but there are others as well. The major problem remains that despite the Court's insistence that compensation must ordinarily be paid for infringements, every day in this country infringements of Aboriginal title are taking place, and no compensation is received by Aboriginal people. Because the federal and provincial governments are able to rely on the proposition that the onus of establishing both Aboriginal title[5] and its infringement lies with the Aboriginal people[6] the status quo prior to the *Delgamuukw* decision is often the status quo today. This is the knot which this paper will attempt to loosen, with an examination of the law of expropriation. Some of the issues which bear scrutiny are:

a) The common law's historic respect for property rights;
b) How Aboriginal title came to be deprived of equal treatment with other forms of property;

[5] See Kent McNeil "The Onus of Proof of Aboriginal Title" (1999), *37 Osgoode Hall L.J.* 775.

[6] *Sparrow* at pages 1120 and 1121; *Delgamuukw* at para.143.

c) The effect of constitutionalization of Aboriginal title and rights;

d) Compensation as a function of the nature of Aboriginal title;

e) Compensation in the context of the division of powers;

f) Compensation and the honour of the Crown;

g) Expropriation and Aboriginal Title.

I would note that in *Sparrow* the Court made specific reference to compensation arising in the context of expropriation. There is no such limitation in what was said in *Delgamuukw*. It is difficult to see how since the government cannot extinguish aboriginal title and rights,[7] there can be any expropriation of aboriginal title or rights in the sense that that term is commonly understood, since expropriation extinguishes rights. Therefore the distinction between expropriation and regulation in expropriation law and in constituional law[8] is not in my view useful in determining questions of compensation for infringements of aboriginal title and rights. All such infringements are regulatory in nature.

THE COMMON LAW'S HISTORIC RESPECT FOR PROPERTY RIGHTS

The common law has long held the property of persons to be sacrosanct. Perhaps the highest expression of this came in the case of *Entick v. Carrigton* (1765),[9] where Lord Camden C.J. is reported to have said, in the State Trials Report:

> The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been abridged by some public law for the good of the whole....
>
> By the laws of England, every invasion of private property constitutes a trespass. No

[7] As said in R. v. Van der Peet, [1996] 2 S.C.R. 507 at para. 28, "Subsequent to s. 35(1) aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out by this Court in *Sparrow*."

[8] *Attorney-General for Canada v. Attorney-General for Ontario*, [1898] A.C. 700, applied in *Sparrow*,

[9] 2 Wils. K.B. 275, 19 How St. Tr. 1030; D.L Keir and F.H Lawson, *Cases in Constitutional Law* (6th ed.), Lawson and Bentley eds. (Oxford: Oxford University Press, 1979) 292 at page 294.

> man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. This justification is submitted to the judges, who are to look into the books; and see if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.

Entick v. Carrington is authority for the proposition that there is no prerogative right in the Crown to commit a trespass–which has important implications in the context of Aboriginal title. I would note particularly that this case was delivered at the time of the Royal Proclamation, and Lord Camden's rigour can be read into the language of the proclamation:

> And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds....
>
> And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved. without our especial leave and Licence for that Purpose first obtained.
>
> And We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described. or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.
>
> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests. and to the great Dissatisfaction of the said Indians: In order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require. that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement: but that. if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at

> some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie...

I would also note that–consistent with the absence of a need to prove damages in trespass, *Delagamuukw* moves right from the question of proof of title to the question of justification. In other words, if title is established, justification is required without the further proof of a *prima facie* infringement, just as trespass is actionable in itself without proof of nuisance. The trespass on title should be, in my opinion, sufficient to prove infringement without actually showing damage. The degree of infringement is only important in determining the quantum of compensation, not in establishing an entitlement to it. The distinction here is that between general and special damages. Of that distinction, Rand J. said in *Karas v. Rowlett*[10]:

> Strictly speaking, general damages are those which, upon the breach of a legal duty, the law itself presumes to arise, and they can be shown by general evidence of matters which are accepted as affected by such a breach. But where actual damages themselves are the gist of the remedy, in which the causing of the damages is itself the wrong done, the rule of general damages has no application: *Dixon v. Smith* (1860), 29 L.J. Ex. 125; *Craft v. Boite*, 1 Wms. Saund. At 243 (d). The expression is at times used somewhat loosely to signify elements of special damage which, in a sense, are at large, and in the ascertainment of which the limits of estimation are indefinite. Such, for instance, is the amount allowable for pain and suffering in the case of personal injury through negligence. There damages are actual but are lacking in precise measures or standards of determination.

The distinction between general and special damages provides insight into Chief Justice Lamer's proposition that the severity of the infringement is a relevant consideration to compensation issues. Another authoritative statement of the distinction between general and special damages is found in *Ströms Bruks Akt. Bolag v. Hutchinson*,[11] where Lord McNaghten said:

> "General damages" as I understand the term, are such as the law will presume to be

[10][1944] S.C.R 1 at page 10.

[11][1905] A.C. 515.

> the direct natural or probable consequence of the act complained of. "Special damages," on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character, and therefore, they must be claimed specially and proved strictly.

Lord Justice Bowen in *Ratcliffe v. Evans*,[12] said this:

> The law presumes that some damage will flow in the ordinary course of things from the mere invasion of the plaintiff's rights, and calls it general damage. Special damage in such a context means the particular damage, beyond the general damage, which results from the particular circumstances of the case, and of the plaintiff's claim to be compensated, for which he ought to give warning in his pleadings in order that there may be may no surprise at the trial.

As Bowen L.J. indicates, in many cases, even though general damages are presumed, special damages must be pleaded and proved in order to obtain damages beyond the limits of what the law is prepared to presume. After all, the general damages may be merely nominal damages, which as Atkin L. J. said in *Société des Hôtels Paris-Plage v. Cummings*,[13] borrowing a picturesque phrase from Maule J. in *Beaumont v. Greathead*,[14] "are a fond thing vainly invented, 'a mere peg on which to hang costs'". So the issue of degree of infringement is relevant, not to the entitlement to, but to the quantum of compensation.

The principle stated in *Entick v. Carrington* applied equally to the property of the original inhabitants of colonial territories. In *Campbell v. Hall*,[15] in construing the Royal Proclamation, six propositions are set out by Lord Mansfield, one of which is the following:

> The 4th, that the law and legislative government of every dominion, equally affects

[12][1892] 2 Q.B. 524

[13][1922] 1 K.B. 451

[14](1846), 2 C.B. 494

[15](1774), 1 Cowp. 204 at pages 208-209.

> all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives.[16]

And in *Mitchell v. the United States*,[17] the US Supreme Court said:

> it is enough to consider it as a settled principle that their [i.e. Aboriginal people's] right of occupancy is considered as sacred as the fee simple of the whites.

Yet for all this, the law did not apply equally to Aboriginal people. Their property in Canada was taken from them with no thought of treating them equally and specifically often without any thought of compensation. Given that equality has, at least since *Campbell v. Hall*, been so central to the common law's self image, one has to ask why that happened.

I believe a lot of the problem can be traced to the words of Lord Watson in *St. Catherine's Milling and Lumber Co. v. the Queen*[18] in describing the interest of Aboriginal peoples under the Royal Proclamation:

> Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion,

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[16]It is interesting to note that if the Royal Proclamation had authorized the unequal treatment of Aboriginal peoples, it may very well have contravened this proposition and violated the sixth of Lord Mansfield's propositions in that case:

> The 6th, and last proposition is, that if the King (and when I say the King, I always mean the King without the concurrence of Parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles; He cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put.

[17]9 Peters 711 at page 734 (1835).

[18](1888), 14 App. Cas. 46 at pages 54 and 55.

> that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never 'been ceded to or purchased by' the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign. The lands reserved are expressly stated to be 'parts of Our dominions and territories;' and it is declared to be the will and pleasure of the sovereign that, 'for the present,' they shall be reserved for the use of the Indians, as their hunting grounds, under his protection and dominion. There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a *plenum dominium* whenever that title was surrendered or otherwise extinguished.

I propose to break this reasoning down into its constituent propositions:

1) The Indian interest can only be ascribed to the Royal Proclamation. This proposition was denied by the Supreme Court of Canada, in *Calder v. Attorney General for B.C.*,[19] and in *Guerin v. the Queen*,[20] and in *Delgamuukw*[21] itself. Aboriginal title is not dependent upon Crown grant or executive order. It is dependent on a historic relationship with the land itself. Since it is not dependent on Crown grant, it is an allodium, which means: "Land held absolutely in one's own right, and not of any lord or superior; land not subject to feudal duties or burdens."[22] All land in England (the law is different in Scotland) is presumed to be held by grant from the Crown. This is true even in cases of adverse possession where there is a presumption of a grant from the original tenant, or cases where no grant was ever made. But aboriginal title does not depend on any presumptive grant from the Crown. It must be stressed however that the conclusion that aboriginal title is allodial in character does not

[19][1973] S.C.R. 313 at page 390.

[20][1984] 2 S.C.R. 335 at page 378.

[21]at para.114.

[22]as stated in *Black's Law Dictionary* (4th ed.) page 70. See generally Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) chapter 3.

mean that the governments in power are without legislative authority over the land. Indeed it has been stated that powers of expropriation are not based on property rights but on the sovereign power of eminent domain.[23] But in Canada of course those powers can only be exercised in accordance with the Constitution.

2) Lord Watson's reasons were in answer to the proposition that in the absence of surrender or purchase under the terms of the Proclamation, the "entire property"–that is, allodial title– remained with the Indians, as argued by the federal government in that case.[24]

3) The terms of the instrument, that is, the Royal Proclamation, however, show that the interest of the Indians was a "personal and usufructuary right". The use of these particular words is aimed specifically at their relationship to the Crown's interest, and they can be traced to Blackstone, where estates as of fee are explicitly described as usufructuary.[25]

4) The implication of this is that where the Royal Proclamation does not apply, another source for the Crown's allodium needs to be found. There is law to the effect that an allodium–and

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[23]Westlake, *Chapters on the Principles of International Law*, (Cambridge, Cambridge University Press, 1894, Reprinted Littleton: Fred Rothman and Co. 1982) pages 129-133.

[24] at page 48. The Province described it as an "alleged absolute title" The federal government did not describe the interest as an interest in fee, which technically is not the entire property, though the restraints on a fee have diminished over time.

[25]See Blackstone *Commentaries*, Book II, Chapter 7, pages 104 to 106, where fee interests are explicitly described as usufructuary, and "personal" may fairly describe a the fact that a fee is held of the sovereign and incorporates a feudal and personal relationship with the sovereign, who has the allodium.

> This allodial property no subject in England has; it being a received, and now undeniable, principle in the law, that all the lands in England are holden mediately or immediately of the king. The king therefore only hath *absolutum et directum deominium*: but all subjects' lands are in the nature of *feodum* or fee; whether derived to them by descent from their ancestors, or purchased for a valuable consideration; for they cannot come to any man by either of those ways, unless accompanied with those feudal clogs which were laid upon the first feudatory when it was originally granted. A subject therefore, hath only the usufruct, and not the absolute, property of the soil; or, as Sir Edward Coke expresses it, he hath *dominium utile*, but not *dominium directum*. And hence it is, that, in the most solemn acts of law, we express the strongest and highest estate that any subject can have by these words: - "he is seised thereof *in his demesne, as of fee*." It is a man's demesne, *dominicum*, or property, since it belongs to him and his heirs forever: yet this *dominicum*, property, or demesne, is strictly not absolute or allodial, but qualified or feodal: it is his demesne, *as of fee*: that is, it is not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides. (Emphasis added)

Later cases have described this description of the right as personal as referring to its inalienability (see below) but at least in part its inalienability springs from the fact that a non aboriginal person has not the personal status necessary to purchase the land.

I suggest that there can be more than one in the same land–does not automatically vest in the Crown upon the assertion of sovereignty (*Freeman v. Fairlie*; [26] *Lyons v. East India Co.*[27]). This is hinted at as well in *Amodu Tijani v. Secretaty, Southern Nigeria.*[28] But see for the contrary position, *Johnson v. M'Intosh*,[29] *Mabo v. Queensland*[30], and particularly *Sparrow*.[31]

5) The words do not at all describe the precise nature of Aboriginal title, only assert its dependence on the good will of the sovereign, under the terms of the proclamation. The sovereign's good will is however a good will governed by law, because under the principles in *Campbell v. Hall*, the sovereign cannot treat Aboriginal peoples unequally without explicit legislative authority.[32] And while Canadian Courts have not been willing to retreat from the conclusion that the underlying title is in the Crown,[33]they certainly have denied the attribution of the Indian interest to the proclamation, which was the reason for Lord Watson's conclusion.

6) Lord Watson described the Indian interest as usufructuary as a means of describing, as in Blackstone, its relationship to the Crown's underlying title. Chief Justice Lamer seems to

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[26] (1828), 1 Moo. Ind. App. 306.

[27](1836) 1 Moo. P.C. 175.

[28][1921] 2 A.C. 399. At page 403Viscount Haldane says "A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists." At pages 409 and 410 he says native tile "is *prima facie* based... on a communal usufructuary occupation, which may be so complete as to reduce any radical right in the Sovereign to one which only extends to comparatively limited rights of administrative interference." I note Viscount Haldane was counsel in the *St. Catherine's Milling* case before the Privy Council.

[29]8 Wheaton 543 (1823)

[30](1992), 175 C.L.R. 1

[31]at page 1103.

[32]Compare *Brown's Case* (1581), 4 Co. Rep. 21a where a tenant at will by copyhold under custom is said to have an estate not merely is said to have an estate "not merely *ad voluntatem domini*, but *ad volentatem domini secundum consuetudinem manerii*". In other words the will of the Lord is subject to custom: "custom has so established and fixed his estate, that by the custom of the manor it is descendible, and his heir shall inherit it, and therefore his so that the custom of the manor is the soul and life of copyhold estates , for without custom or if they break their custom, they are subject to the lord's will." See generally Kent McNeil, "Racial Discrimination and Unilateral Extinguishment of Aboriginal Title" (1996), 1 A.I.L.R. 181

[33]*Sparrow* at page 1103.

> have kept, in *Delgamuukw* the description of Aboriginal title as usufructuary, but not in relationship to the Crown's title. In *Delgamuukw* the title of the present generation is usufructuary in relation to the rights of future generations. Hence Lamer C.J. described the limits on title by analogy to a life estate, the common law terminology for what would be a usufruct in Roman law.[34] I note that Lord Watson was Scottish, and that Scotland's civilian legal system is no stranger to the Roman legal concepts upon which it is based.

I would suggest that the position that the Courts now are in is that they have accepted that an allodial title to lands in Canada is vested in the Crown, burdened by another allodial title vested in the Aboriginal peoples of Canada. I suggest that it is accurate in terms of the law to describe Aboriginal title as allodial in character because it is not land held of a superior lord and based on a personal relationship with that lord, but based on an immediate and historic occupation of and relationship with land itself. There is no reason in principle why there cannot be more than one allodial title in the land at the same time. Both *Johnson v. M'Intosh*,[35] and *Feeman v. Fairlie*[36] are suggestive in this respect. Real property law is full of such multiplicity, and *St. Catherine's Milling* itself suggests how any conflict between the two titles must be worked out. The Crown in right of the Provinces has "a beneficial interest in these lands [presently burdened by Indian title], available to them as source of revenue whenever the estate of the Crown is disencumbered of the Indian title."[37] Until such time as that occurs, without proper and constitutional legislative authority, activity on lands subject to aboriginal title would seem to constitute a trespass under the Royal proclamation and at common law.

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[34] As to the Roman usufruct, see Barry Nichols, *An Introduction to Roman Law* (Oxford: Clarendon Law Series, Oxford University Press, 1962) at pages 144-148.

[35] 21 U.S (8 Wheat) 543 (1823) particularly at pages 592 and 593.

[36] (1828), 1 Moo. Ind. App. 306 at pages 343 and 344. In that case, while recognizing that natives in India had an allodial title, the Court held that English subjects carried their own law with them, including their status as English subjects, and could not take anything but a fee simple in purchasing the land.

[37] *St. Catherine's Milling and Lumber Co. v. the Queen* at page 59.

Yet the description of the Indian interest under the Royal Proclamation as "personal and usufructuary" has had direct consequences for the treatment of Aboriginal title in terms of compensation. This is because it mislead many people int assuming that Aboriginal title was not a proprietary interest but only a mere personal right more akin to a licence than to an interest in the land itself. For despite the reverence with which the common law traditionally has regarded property, so much so that:

> The recognized rule for the construction of statutes is that, unless the words of the statute clearly so demand, a statute is not to be construed so as to take away the property of a subject without compensation.[38]

–the words personal and usufructuary lead to the conclusion that Aboriginal property is not property at all, but only a mere licence which does not carry with it the obligation to pay compensation.[39]

The high point of this reasoning which described Aboriginal interests as less than rights, and so not compensable, came in *In re Southern Rhodesia*[40], where Lord Sumner said:

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[38]*Attorney-General v. De Keyser's Royal Hotel*, [1920] A.C. 508 at page 542. I pause to note that, given the proposition in *DeKeyser's Royal Hotel*, in so far as the *Fisheries Act*, for instance, provides for the regulation of the fisheries and allows the Aboriginal and treaty rights established in *R. v. Marshall*, [1999] 3 S.C.R. 456 and [1999] 3 S.C.R. 533 to be regulated, in my view to take away those rights without payment of compensation, even if that could be otherwise justified, would require specific legislative authority. In other words, the legislation would have to demonstrate an intention to regulate those rights without payment of compensation. Such an intention would be very hard to justify under the s.35 test. Again I note that since the power to extinguish aboriginal title and rights no longer exists, as Lamer C. J. stated in *Van der Peet* at para. 28, rights to compensation should arise in the context of regulation of those rights and title.

[39]Compare *Bird v. the Great Eastern Railway Co.*(1865), 19 C.B. (N.S.) 268 where it was held that a man with a contractual right, that is a personal right against the person he contracted with, to shoot the game on an estate was not entitled to compensation when a railway expropriated land on that estate.

[40]*In re Southern Rhodesia*, [1919] A.C. 211 at pages 233 and 234.

> The estimation of the rights of Aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization hat their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor "richer than all his tribe."

The suggestion seems to be that the value of Aboriginal peoples' title depends subjectively on their notions of it–contrary to the established objective that the value of something is determined objectively. The suggestion seems to me to invite "great frauds and abuses." In fact, occupation is proof of possession,[41] and possession is proof of ownership,[42] at common law, and the value of ownership can be determined fairly precisely and objectively. The reasoning here seems to obviate the need for any fiduciary relationship with the Crown since Aboriginal people would only be entitled to get what they appreciate the land is worth, contrary to *Guerin*. This reasoning was recognized as racist in *Mabo v. Queensland*[43]. It is inconsistent for the Crown, bound by legal, equitable and constitutional duties to Aboriginal people, to behave like those men who committed those "great frauds and abuses" which were decried in the Royal Proclamation itself. And despite the repeated insistence by the Courts in Canada that Aboriginal title is:

> a usufructuary right only and a personal right <u>in the sense that it is in its nature inalienable except by surrender to the Crown</u>.[44]

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[41]*Delgamuukw* at para. 114.

[42]*Calder* at page 375.

[43](1992), 175 C.L.R. 1. Ironically in my view after such masterful reasons in other respects, Brennan J. left himself open to the same criticism when he decided that Aboriginal title, because it was not based upon Crown Grant, could be extinguished without liability to pay compensation. This is the same differential treatment of Aboriginal property from other forms of property as has occurred in the past.

[44]per Mr. Justice Duff speaking for the Privy Council in *Attorney-General for Quebec v. Attorney-General for Canada*, [1921] 1 A.C. 401 at page 408. The emphasis was added by Wilson J, in *C.P. v. Paul*, [1988] 2 S.C.R. 654 at page 677.

–the idea that aboriginal title was neither proprietary nor a right worthy of compensation, but rather a mere personal licence, took hold, though never absolutely, as the practice of treaty making attests—though even there there were not many treaties in the 20th century.. The insistence in *Delgamuukw* that Aboriginal title is "a right to the land itself"[45] constitutes the most explicit rejection of the notion that Aboriginal title is not a real property interest worthy of compensation to date. It remains to be seen whether the Crown will comprehend what that means in terms of compensation.

THE CONSTITUTIONALIZATION OF ABORIGINAL TITLE AND RIGHTS

In Canada, the constitutionalization of Aboriginal rights and Aboriginal title with the enactment of the *Constitution Act, 1982,* and s. 35, made impossible the development of the old line of differential treatment of Aboriginal title and rights in terms of the application of principles of compensation. So there can be no adoption of arguments such as were accepted by the U.S. Supreme Court in *Tee-Hit-Ton Indians v. United States* which held that:

> Indian occupancy, not specifically recognized as ownership by action authorized by Congress, may be extinguished by the Government without compensation.[46]

A similar statement is found in *Mabo*:

> As the Crown is not competent to derogate from a grant once made, a statute which confers a power on the Crown will be presumed (so far as consistent with the purpose for which the power is conferred) to stop short of authorizing any impairment of an interest in land granted by the Crown or dependent on a Crown grant. But, as native title is not granted by the Crown, there is no comparable presumption affecting the conferring of any executive power on the Crown the

[45]at para. 141.

[46]348 U.S. 272 (1955) at pages 288 and 289.

exercise of which is apt to extinguish native title.[47]

Any requirement that Aboriginal title be recognized is specifically met by the words of s. 35 itself.[48] I note in passing that the ruling in *Fejo* on extinguishment may be qualified by *State of Western Australia v Ward* [2000] FCA 191 where strong reasons were given in dissent qualifying *Fejo*, drawing on the detailed analysis of extinguishment by Lambert J.A. in *Delgamuukw v. B.C.*, [1993] 5 W.W.R. 97(B.C.C.A.), and particularly on his critique of Brennan J.'s analysis of extinguishment in *Mabo*, upon which *Fejo* was based.

COMPENSATION AND THE NATURE OF ABORIGINAL TITLE

To this point it has been shown that the licence approach to compensation for infringements of Aboriginal title was inevitably wrong and completely inconsistent with the constitutional fact of recognition and affirmation of Aboriginal rights and title under s. 35 of the *Constitution Act, 1982*. Rights dependent on the whim of the sovereign are not rights recognized and affirmed by the constitution. The use of the word "affirm"–"to make firm, to strengthen, to confirm, to support"[49] suggests that these rights cannot be "destroyed by a side wind"[50] and deserve at least the same

[47]at page 64.

[48]The High Court of Australia recognized the constitutional strength of the position of Aboriginal peoples in Canada in *Fejo v. Northern Territory of Australia* [1998] H.C.A. 58:

> Native title originates in the traditions and customs of the indigenous peoples of Australia. It is from them, and not from the common law, that it takes its content. This is so in all territories over which, in earlier times, the Crown claimed sovereignty. But care must be exercised in the use of judicial authorities of other former colonies and territories of the Crown because of the peculiarities which exist in each of them arising out of historical and constitutional developments, the organisation of the indigenous peoples concerned and applicable geographical or social considerations. In the United States of America, for example, the law governing the rights of indigenous peoples to land was affected by the early recognition of a measure of sovereignty of, and the provision of a special constitutional status to treaties with, the Indian tribes. The position in Canada and New Zealand has followed a different course again, affected respectively by the supervening amendment to the Constitution and the re-interpretation of the legal relationship between the general population and the indigenous peoples.

[49]as defined in the *Oxford English Dictionary*.

[50]*Forbes v. Ecclesiastical Commissioners for England* (1872), L.R. 15 Eq. Cas. 50 at page 53–used in describing customary rights in England.

protection as other property rights more conventional to the common law. In this respect the absence of protection for common law property rights in the *Charter* is conspicuous. Compensation is necessary because the governments must face the consequences of infringing Aboriginal title and rights. In the absence of compensation, what mechanism would exist to ensure that the governments are accountable and that they take rights seriously?[51]

Chief Justice Lamer noted in *Delgamuukw*[52] that the amount of compensation will vary with the nature of the Aboriginal title affected. This is a somewhat surprising statement in the context of an opinion where he has concluded that Aboriginal title is a right to the land itself, and described its characteristics. The statement does not appear to mean simply that the amount will vary with the degree of infringement, since Lamer C.J. lists that as a separate consideration. It may reflect that compensation applies both to Aboriginal title, and Aboriginal rights related to land where the occupation of the land by the Aboriginal people is not sufficient to ground a claim for title. It appears to relate back to reasons in *Delgamuukw* at para. 138 which drew on his earlier reasons in *R. v. Adams*[53]:

> The picture which emerges from *Adams* is that the Aboriginal rights which are recognized and affirmed by s. 35(1) fall along a spectrum with respect to their degree of connection with the land. At the one end, there are those Aboriginal rights which are practices, customs and traditions that are integral to the distinctive Aboriginal culture of the group claiming the right. However, the "occupation and use of the land" where the activity is taking place is not "sufficient to support a claim of title to the land" (at para. 26) ... At the other end of the spectrum, there is Aboriginal title itself. As *Adams* makes clear, Aboriginal title confers more than the right to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive Aboriginal cultures. Site-specific rights can be made out even if title cannot. What Aboriginal title confers is the right to the land itself.

[51] *Sparrow* at page 1119.

[52] at para. 169.

[53] [1996] 3 S.C.R. 101

The distinction between Aboriginal title and Aboriginal rights which Chief Justice Lamer makes here is not one universally made in all common law jurisdictions. In *Mabo*,[54] and in *Wik Peoples v. Queensland*[55] for instance, native title is used generically to describe the entire spectrum which Lamer C.J. envisages:

> The content of such a common law native title will, of course, vary according to the extent of the pre-existing interest of the relevant individual, group or community. It may be an entitlement of an individual, through his or her family, band or tribe, to a limited special use of land in a context where notions of property in land and distinctions between ownership, possession and use are all but unknown... In contrast, it may be a community title which is practically "equivalent to full ownership"(References omitted).

I note that the distinction between use rights and full ownership appears to have motivated La Forest J. when he said, "compensation may be greater where the expropriation relates to a village area as opposed to a remotely visited area."[56] The distinction between general and special damages is relevant here. While an entitlement to general damages would follow from the fact of trespass, or the expropriation of land, further special damages for interference with actual use of the land by aboriginal people would probably require further proof.

The other possible meaning is that the value of the title is affected if it is a shared exclusive title, of which Lamer C.J. admits the possibility.[57] Of course in that case the value of the land must be shared by the groups who have it.

While, however, the content of Aboriginal title derived from historic exclusive occupation of land by

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[54]at page 88.

[55] (1996) 141 ALR 129.

[56]*Delgamuukw* at para. 203.

[57]at para. 158.

a particular group or groups, because it is a right to the land itself, embracing a multitude of uses, should not vary, it is clear that its nature is relevant to the issue of compensation.

Lamer C.J. laid stress on the fact that the economic component of Aboriginal title was relevant to the issue of compensation.[58] The ability to use land commercially, and not for mere subsistence, is an important factor which very much increases the value of Aboriginal title. Similarly the fact that the right involved is not an entitlement to a limited special use of land but a community title practically equivalent to full ownership is also important. While for those Aboriginal rights which are site specific use rights where title cannot be established, compensation must be measured by the value of those rights and the degree of interference, the value of Aboriginal title is measured by the value of the right at stake–a right to the land itself.

So while the amount of compensation cannot be with certainty in all cases measured by the value of a fee simple, the difference cannot be great. And despite the caution with which one must compare property rights conferred by common law to property rights deriving from Aboriginal peoples' historic use and occupation of land,[59] a comparison of the limits imposed by law on those common law rights with the limits imposed on Aboriginal title as expounded in *Delgamuukw* is instructive.

A fee simple is described as the highest estate known to the common law by Blackstone[60], and this is often repeated in the case law:

> in the most solemn acts of law, we express the strongest and highest estate that any subject can have by these words: - "he is seised thereof *in his demesne, as of fee*." It is a man's demesne, *dominicum*, or property, since it belongs to him and his heirs forever:

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[58]*Delgamuukw* at para. 169.

[59]See *Guerin v. the Queen*, [1984] 2 S.C.R. 335; *St. Mary's Indian Band* v. *Cranbrook (City)*, [1997] 2 S.C.R. 657, at para. 14; and other cases.

[60]See footnote 12.

> yet this *dominicum*, property, or demesne, is strictly not absolute or allodial, but qualified or feodal: it is his demesne, *as of fee*: that is, it is not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides.

I would note that a fee simple is the most absolute form of property a subject can have, but it is not absolute allodial property held of no one. A fee simple in possession is what it is—the most complete form of ownership known to the common law, because it is potentially eternal and not subject to any inherent restrictions. It is particularly a right not restricted by any other person with an interest in the land. A fee simple holder cannot be restrained by his or her heirs[61] from doing whatever he wants with the land—destroying it or alienating it completely, and thus destroying the interest of the heir.

By way of contrast, Aboriginal title has apparently a notable limitation.[62] Lands held pursuant to title cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands. This limit is a recognition of the importance of the continuity of the relationship of an Aboriginal community to its land over time. That continuity means that the rights embraced in Aboriginal title cannot be exercised in a manner which would prevent the relationship from continuing into the future. Uses of the lands that would threaten that future relationship are, therefore, by their very nature, excluded from the content of Aboriginal title. Lands subject to Aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to Aboriginal title in the first place. The relationship between an Aboriginal community and the lands over which it has Aboriginal title has an important non-economic component. The land has an inherent and unique value in itself, which is enjoyed by the community with Aboriginal title to it. The community cannot put the land to uses which would destroy that

[61] Of course he or she can be restrained by legislation.

[62] *Delgamuukw* at paras. 125-132.

value. As Lamer C. J. noted in *Delgamuukw*, this limitation may be analogized to the doctrine of equitable waste such that the holders of Aboriginal title cannot commit wanton or extravagant acts of destruction or ruin the property. This inherent limit does not detract from the possibility of surrender to the Crown in exchange for valuable consideration. If Aboriginal peoples wish to use their lands in a way that Aboriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so. This is not a limitation that restricts the use of the land to those activities that have traditionally been carried out on it, but rather allows for a full range of uses of the land, so long as they do not destroy the relationship of the community with the land.

I suggest that an approximation of the value of Aboriginal title lands in comparison to lands held in fee simple may be expressed either positively as a function of the features and limitations of Aboriginal title itself, or negatively as a function of the steps it would take to convert Aboriginal title lands into lands held in fee simple.

The Positive Expression of the Value of Aboriginal Title

In my view the inherent limitation contemplated by Lamer C.J. does not mean that the value of Aboriginal title is not very similar to the value of a fee simple. The doctrine of equitable waste is a doctrine applicable to a life estate holder who has been given the express power to commit waste in his grant. A life estate is an right to use and occupy land subject to the rights of a fee simple holder whose right to use and occupy the land awaits the termination of the life estate, in the same way that the rights of future generations of Aboriginal people await their tiime in the land. But it is important to note that, first of all, the limit Lamer C.J. chose is analogized to equitable waste, not common law waste. The latitude given under the doctrine of equitable waste is much broader than in the case where waste is not permitted, and a person who is only restricted by the doctrine of equitable waste has the right to commit many forms of waste. He or she may fell timber or open mines, or deal

with the produce of the land as if that person were the absolute owner.[63] Secondly, Aboriginal title shares features with fee simple in that because it is owned by a community which is for all intents and purposes immortal, as generation succeeds generation. A life estate held by an immortal being surely approached a fee simple in terms of its time duration. So Aboriginal title may aptly be analogized to a rolling life estate with the possibility of continuing forever, just as the word "fee" itself denotes "that the estate is one which might possibly continue forever."[64]

Furthermore, as the Courts have frequently noted, "it is possible, and, indeed, crucial, to be sensitive to the Aboriginal perspective itself on the meaning of the rights at stake."[65] When faced with a question whether a particular use transgresses the inherent limitation on Aboriginal title, a Court should give a high degree of deference to the Aboriginal perspective, just as a Court gives deference to corporate directors having a duty to act in the best interests of their company,[66] or administrative tribunals acting within the scope of their expertise.[67] Surely the standard of deference a Court gives to the Aboriginal perspective when considering the inherent limitation on Aboriginal title–a deference driven by the constitution itself, must be at least as high as these examples.

It is also important to realize that an inherent limit which could prevent certain uses of land does not mean that there is no ownership of the land. For instance, it is conceivable that strip mining of minerals or clear cutting of trees would not be permitted by aboriginal title because it destroyed what mad the land of central significance to the aboriginal people to whom the title belongs. The

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[63]*Lewis Bowles's Case* (1615), 11 Co. Rep. 79b. Compare *Vane v. Barnard* (1716) 2 Vern. 738; M. & B. 23; E.H. Burn, *Chesire's Modern Law of Real Property* (12th ed.)(London: Butterworths, 1976) at pages 269-271.

[64]See Robert Megarry, *A Manual of the Law of Real Property* (5th ed., by P. V. Baker)(London: Stevens and Sons, 1975) at page 15.

[65]*R. v. Sparrow*, at page 1112.

[66]See, for example, *Re Smith and Fawcett Ltd.*, [1942] Ch. 304 (C.A.).

[67]*Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557.

minerals and the trees still belong to them, and logging of trees or taking of minerals is theirs to do so long as it does not transgress the inherent limitation.[68]

In my submission the fact of inalienability does not diminish the value of Aboriginal title as comapred to the value of lands held in fee simple. Lamer C.J. himself in *Delgamuukw* said this:

> What the inalienability of lands held pursuant to Aboriginal title suggests is that those lands are more than just a fungible commodity. The relationship between an Aboriginal community and the lands over which it has Aboriginal title has an important non-economic component. The land has an inherent and unique value in itself, which is enjoyed by the community with Aboriginal title to it. The community cannot put the land to uses which would destroy that value.

Inalienability thus is a function not of the lack of value of Aboriginal title, but of its special value. Aboriginal title is inalienable in the sense that lands held by Queen Elizabeth qua Queen (i.e. Buckingham Palace) cannot be sold by her without the consent of Parliament (by convention or law) while lands she might hold personally can be alienated by her. Those lands are in a very real sense the inheritance of all British subjects and not hers to sell. Inalienability, by this line of reasoning connotes something which is too precious to lose, something the loss of which could not be contemplated or tolerated. This suggests a value greater than that of a mere fee simple, and higher levels of compensation. This is in stark contrast to the usual view of inalienability as a measure of the fact that something has no market value. Inalienable things are either worthless or priceless. Chief Justice Lamer's comments suggest that the inalienability of aboriginal title is a measure of its pricelessness.[69]

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[68] Kent McNeil, "The Post *Delgamuukw* Nature and Content of Aboriginal Title", on the website of the Delgamuukw Gisday'wa National Process

[69] Jack Woodward and Albert Peeling, *Compensation.* A Paper Delivered at the University of Victoria Conference on *Delgamuukw*, January, 1998; Kent McNeil, "The Post *Delgamuukw* Nature and Content of Aboriginal Title", on the website of the Delgamuukw Gisday'wa National Process

Finally there is one more feature of Aboriginal title lands suggestive of a value greater value than fee simple lands. They are not subject to governmental interference in the same way land held of the Crown is. In the case of aboriginal title, expropriation cannot extinguish aboriginal title and is therefore effectively a regulation of the right to be justified in accordance with the *Sparrow* test. All government action in regard to Aboriginal title is mediated through the Constitution–specifically s.91 (24) of the *Constitution Act, 1867*, which limits provincial jurisdiction; and s. 35 of the *Constitution Act, 1982* which demands that all government action infringing Aboriginal title be justified. These are additional protections which give added value to Aboriginal title. In any case, the need for caution about equating Aboriginal title with fee simple lands is apparent but the answer may often be the same in both cases.[70]

Because, however, in the ordinary course, government expropriations of Aboriginal title and rights will not extinguish them–extinguishment is permanent and does not accord with the concept of minimal impairment set out in *Sparrow* as part of justification,[71] it may be that analogies to the value of fee simple are misleading. Expropriation is usually, though not always, permanent.[72] That is to say it generally extinguishes the rights of a property holder. Where there is not extinguishment of Aboriginal title, in my view there are several factors which come into play in determining an appropriate amount of compensation:

a) the length of time for which the government has the use of the land;

b) whether the government's use is exclusive or whether Aboriginal peoples may exercise their title and rights at the same time;

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[70]I am aware of the decision if the Supreme Court of Canada in *Musqueam Indian Band v. Glass* 2000 SCC 52. In that case the decision turned ultimately on the construction of the lease, though there are some comments hard to reconcile with wht I have suggested. In any case it is hard to understand how objectively the leaseholders in that case in fact are not getting land at a terrible discount since they pay far less in rent than many people in a one bedroom apartment in Vancouver.

[71]*Sparrow* At page 1119; *Van der* Peet at para. 28; and see *Semiahmoo Indian Band v. Canada*, [1998] 1 C.N.L.R. 250 (F.C.A.)at page 264.

[72]*Attorney-General v. De Keyser's Royal Hotel*, *supra*., is an example of temporary expropriation during a wartime emergency.

c) whether activities and areas of particular importance to Aboriginal people are affected;

d) the degree to which the aspects of aboriginal title were accommodated in the expropriation proceedings. For instance, was there meaningful consultation? Were aboriginal people involved in the decision making process? Will aboriginal people benefit economically from the activity?

The list is by no means exhaustive. These questions go to a determination of the degree of infringement of the Aboriginal title, to which Lamer C.J. made reference.[73]

Again it should be stressed that while in the normal context expropriation is permanent and extinguishes property rights, expropriation of aboriginal title must be viewed of as a regulatory, since it cannot extinguish aboriginal title.[74] That is to say that the underlying aboriginal title is not affected by a government's appropriation of the land for specific purposes. Expropriation in the context of aboriginal title is, not surprisingly, *sui generis*

The Negative Expression of the Value of Aboriginal Title

Chif Justice Lamer said clearly[75] that:

> If Aboriginal peoples wish to use their lands in a way that Aboriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so.

Because by means of a surrender it is open to Aboriginal people to convert Aboriginal title lands to lands held in fee simple, it is possible to say that the value of Aboriginal title is the value of fee

[73] *Delgamuukw* at para. 169.

[74] *Van der Peet* at para. 28.

[75] at para 131.

simple lands less whatever costs are involved in such a conversion. Again here the value of Aboriginal title lands approximates the value of lands held in fee simple.

COMPENSATION AND FEDERALISM

Delgamuukw decided that Aboriginal title was a matter coming within the exclusive jurisdiction of the federal government pursuant to head 91(24) of the *Constitution Act, 1867*[76]:

> Section 91(24)... carries with it the jurisdiction to legislate in relation to Aboriginal title.[77]

This conclusion raises many questions with respect to the operation of provincial laws and with respect to the responsibility to pay compensation. It brings into play the doctrine of interjurisdictional immunity set out authoritatively by Mr. Justice Beetz in *Bell Canada v. Quebec*:[78]

> works, such as federal railways, things, such as lands reserved for Indians, and persons, such as Indians, who are within the special and exclusive jurisdiction of Parliament, are still subject to provincial statutes that are general in their application, whether municipal legislation, legislation on adoption, hunting, or the distribution of family property; provided however that the application of these provincial laws does not bear on those subjects in what makes them specifically of federal jurisdiction.

In this passage it is important to note that both Indians and Lands reserved for Indians attract the immunity independently. This is clear since the rejection of the enclave theory in *Cardinal v Attorney General for Alberta*.[79] Head 91 (24) contains two distinct subjects.

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[76] The topic of dederalism and Delgamuukw is discussed in Albert Peeling "Provincial Kurisdiction after *Delgamuukw*", Conference on Aboriginal Title after *Delgamuukw* Continuing Legal Education Society of B.C., March 1998; Kent McNeil, "Aboriginal Title and the Division of Powers" (1998) 61 Sask. Law Rev. 431.

[77] at para. 174.

[78] [1988] 1 S.C.R. 749, at page 762.

[79] [1974] S.C.R. 695 at 703. The decision in *Cardinal* was forcefully reiterated in *Four B Manufacturing Ltd. v. United Garment Workers of America*, [1980] 1 S.C.R. 1031.

Because Aboriginal title falls within the exclusive competence of the federal government in relation to "Lands reserved for the Indians", the pattern of provincial competence should logically follow that of the first subject matter in head 91 (24)–that is, provincial laws of general application apply, but they cannot intrude or trench on what makes Indians specifically of federal jurisdiction, and what makes lands reserved for Indians specifically of federal jurisdiction. The "Indian" immunity has been identified by saying that the provincial governments have no authority to legislate in relation to Indians qua Indians, or in relation to the Indianness of Indians. Such a law is invalid. Furthermore, a provincial law though not invalid, cannot affect Indians qua Indians or affect the Indianness of Indians. Such a law is read down. However, by means of s.88 of the *Indian Act*, provincial laws which affect Indians qua Indians or the Indianness of Indians are referentially incorporated as federal laws and thus apply to Indians.[80] So an Aboriginal person who is charged with a hunting offence under a provincial wildlife statute is technically being charged through the wildlife statute, but under s.88. Any interference with Aboriginal rights, including aboriginal title, can only occur through s.88. This suggests that the federal government should be responsible for compensation.

Turning to "Lands reserved for the Indians", one finds this branch is less analytically developed than the "Indian" branch in the case law, so that the core federal jurisdiction has not been identified precisely. However I suggest that core is not identical with the core of the "Indian" branch just as in Delgamuukw the test for aboriginal title is distinct from the test for aboriginal rights. The case law suggests that the core legislative immunization of Lands reserved for Indians renders inapplicable provincial laws affecting the possession, occupation and use of Lands reserved for Indians.[81] The

[80]*Dick v. The Queen*, [1985] 2 S.C.R. 309.

[81]So in *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, at page 295, Chouinard J. quotes K. M. Lysyk, "Constitutional Developments Relating to Indians and Indian Lands: an Overview", in [1978] *L.S.U.C. Special Lectures* 201, at p. 227, footnote 49, "By analogy, presumably the matters contained within exclusive federal authority over Indian reserve lands include regulation of the manner of land-holding, disposition of interests in reserve lands and how reserve lands may be used (e.g., zoning regulations)." Chouinard J. goes on to state, at page 296, that "The right to possession of lands on an

broadest expression of the immunity is found in *St. Catherine's Milling* where it is said the provinces have:

> a beneficial interest in these lands, available to them as source of revenue whenever the estate of the Crown is disencumbered of the Indian title. [82]

I would note that this expression relates primarily to the provinces' proprietary jurisdiction as owner of land, not to its legislative jurisdiction, and I think care has to be taken to separate the two sources of authority.[83] One could describe the limitation on the provinces' legislative jurisdiction in relation to Lands reserved for the Indians with the statement that the provinces cannot legislate in such a manner as to affect what makes those lands specifically of federal jurisdiction, including an inability to affect the use, occupation and possession of those lands. Their proprietary jurisdiction is even more limited, and they have no power to take any of the land, or authorize any taking of the land. It is not "available to them as a source of revenue." To quote *Entick v. Carrington* again, they can be "called upon to answer called upon to answer for bruising the grass and even treading upon the soil" if they have no justification. Furthermore, s.88 of the *Indian Act* does not appear to apply to "Lands reserved for the Indians",[84] and even if it did, it would only apply to reserve lands as defined by the Act, not to Aboriginal title, just as Indians in that section means Indians under the *Indian Act*, not to all Aboriginal peoples.[85] I would note particularly in this regard that the *Indian Act* contains two specific sections providing for the expropriation of reserve land, s.35 and s.18(2). Finally–in so far as provincial legislation through s.88 could expropriate Aboriginal title without providing for

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Indian reserve is manifestly of the very essence of the federal exclusive legislative power under s. 91(24) of the *Constitution Act, 1867*. It follows that provincial legislation cannot apply to the right of possession of Indian reserve lands."

[82] See Hamar Foster, "Is *Delgamuukw* Invented Law?"*********
[83] *Attorney-General for Canada v. Attorney-General for Ontario*, [1898] A.C.700

[84] *Derrickson* left that question open at page 299. For a detailed discussion see Kent McNeil, "Aboriginal Title and Section 88 of the *Indian Act*" forthcoming UBCLR.

[85] *R. v. Alphonse*, [1993] 5 W.W.R. 400 (B.C.C.A.)

compensation, it is of dubious validity both because there is no prerogative power to expropriate lands–that requires specific legislative authority–and because insofar as there is expropriation of Aboriginal property without compensation, that is effectively a "singling out" of Aboriginal title which is beyond provincial legislative competence and cannot be referentially incorporated by s.88.[86]

There is plenty of authority to support the proposition that the obligation to pay compensation rests ultimately with the federal government.[87] It may be that the federal government could legislate to clarify that the responsibility for compensation for infringement lies with the infringing government, as is the case with s.35 of the *Indian Act*. The federal government would not be imposing financial obligations on a province because a province is free to choose not to infringe title. Such legislation however would have to be drafted in a way which does not run afoul of the federal government's fiduciary obligations to Aboriginal peoples. On the one hand, a province should not be able to take the benefit of s. 88 without its attendant burdens.[88] Conversely, it seems unreasonable that the federal government could be liable to pay for incursions into Aboriginal title for which it does not benefit. On the other hand, the legislation would have to contain guidelines for its use in order for it to be consistent with the Crown's fiduciary obligations to aboriginal people. So, in *R. v. Adams* the Supreme Court said:

> In light of the Crown's unique fiduciary obligations towards aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown

[86]See for example *Leighton v. B.C. (Gov't)*, [1989] 3 C.N.L.R. 136 (B.C.C.A.)

[87]See for example *Attorney General for Canada v. Attorney General for Ontario*, [1897] A.C. 199; *Ontario Mining Co Ltd. v. Seybold*, [1903] A.C. 73; *Dominion of Canada v. Provonce of Ontario*, [1910] A.C. 637.

[88]*Sparling v. Quebec (Caisse de Dépôt et Placement du Québec)*, [1988] 2 S.C.R. 1015.

> with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of aboriginal rights under the *Sparrow* test.[89]

Thus s. 35 of the *Indian Act* allows for the taking of reserve land with the consent of the governor in council. The consent is only given if terms of payment are worked out. Nevertheless, if the provincial action is only effective with federal consent, then the federal government might bear financial responsibility for the infringement. And despite the words in *Adams*, s. 88 itself remains strikingly without any sort of guidelines. Its effect is automatic, and it is doubtful whether a provincial government whose laws come within its criteria could avoid its application.[90] Given the statement in *Adams*, the Supreme Court's treatment of section 88 in the companion case of *R. v. Cote*[91] is problematic:

> I know of no case which has authoritatively discounted the potential existence of an implicit justification stage under s. 88. In the near future, Parliament will no doubt feel compelled to re-examine the existence and scope of this statutory protection in light of these uncertainties and in light of the parallel constitutionalization of treaty rights under s. 35(1).

How can there be an implicit justification in accordance with the fiduciary relationship contemplated in *Adams*?

I suggest that if there is a referential incorporation of provincial expropriation powers as federal laws, that may be done either:

1) by expressly denying the obligation to pay compensation by either level of government– which in my view would fail to meet the justification test in s.35 of the *Constitution Act, 1982*; or

2) without speaking as to compensation, in which case there is a statutory presumption that

[89] *R. v. Adams*, [1996] 3 S.C.R. 101 at para. 54.

[90] *Natural Parents v. Superintendent of Child Welfare*, [1976] 2 S.C.R. 751, per Beetz J.

[91] [1996] 3 S.C.R. 139 at para 87.

compensation is intended–this would apply in the case of s.88;or

3) it may do so in such a way that provincial expropriation must incur an obligation to pay compensation–as is the case with s.35 of the *Indian Act*.

What is unknown is whether the silence of s.88, to the extent that it is operative in the case of provincial laws in relation to Aboriginal rights or title (to the extent that s. 88 is operative in the case of aboriginal title), means that the obligation to pay lies with the federal or provincial government. I think this may be a proper case for argument along the lines followed by Chief Justice Dickson in *Mitchell v. Peguis Indian Band*[92]:

> While this appeal does not involve the interpretation of a treaty, I find it helpful to consider the Aboriginal perspective in illustrating the ambiguity of "Her Majesty" in s. 90(1)(b). *Nowegijick* dictates taking a generous liberal approach to interpretation. In my opinion, reference to the notion of "Aboriginal understanding", which respects the unique culture and history of Canada's Aboriginal peoples, is an appropriate part of that approach. In the context of this appeal, the Aboriginal understanding of "the Crown" or "Her Majesty" is rooted in pre-Confederation realities. The recent case of *Guerin* took as its fundamental premise the "unique character both of the Indians' interest in land and of the historical relationship with the Crown." (At p. 387, emphasis added.) That relationship began with pre-Confederation contact between the historic occupiers of North American lands (the Aboriginal peoples) and the European colonizers (since 1763, "the Crown"), and it is this relationship between Aboriginal peoples and the Crown that grounds the distinctive fiduciary obligation on the Crown. On its facts, *Guerin* only dealt with the obligation of the federal Crown arising upon surrender of land by Indians and it is true that, since 1867, the Crown's role has been played, as a matter of the federal division of powers, by Her Majesty in right of Canada, with the *Indian Act* representing a confirmation of the Crown's historic responsibility for the welfare and interests of these peoples. However, the Indians' relationship with the Crown or sovereign has never depended on the particular representatives of the Crown involved. From the Aboriginal perspective, any federal-provincial divisions that the Crown has imposed on itself are internal to itself and do not alter the basic structure of Sovereign-Indian relations. This is not to suggest that Aboriginal peoples are outside the sovereignty of the Crown, nor does it call into question the divisions of jurisdiction in relation to Aboriginal peoples in federal Canada.
>
> One can over-emphasize the extent to which Aboriginal peoples are affected only by the decisions and actions of the federal Crown. Part and parcel of the division of powers is the incidental effects doctrine according to which a law in relation to a

[92][1990] 2 S.C.R. 85.

> matter within the competence of one level of government may validly affect a matter within the competence of the other; as recently stated in *Alberta Government Telephones v. Canada (Canadian Radio-television and Telecommunications Commission)*, supra, at p. 275, "Canadian federalism has evolved in a way which tolerates overlapping federal and provincial legislation in many respects, . . ." As long as Indians are not affected qua Indians, a provincial law may affect Indians, and significantly so in terms of everyday life. Section 88 of the *Indian Act* greatly increases the extent to which the provinces can affect Indians by acknowledging the validity of laws of general application, unless they are supplanted by treaties or federal law. This fluidity of responsibility across lines of jurisdiction accords well with the fact that the newly entrenched s. 35 of the *Constitution Act, 1982*, applies to all levels of government in Canada.

This reasoning was recently followed in *Campbell et al v. Attorney General for BC et al.*[93] It also accords well with the conclusion in *Luuxhon v. Canada*[94] at para. 53:

> I conclude that the duty to negotiate in good faith, founded upon the fiduciary relationship between Aboriginal people and the Crown, applies equally to the Crown in Right of Canada and the Crown in Right of British Columbia.

Section 35 of the *Constitution Act, 1982*, incorporating as it does the fiduciary relationship between the Crown and Aboriginal peoples, applies to the Crown in any of its manifestations and whether represented by its federal or provincial ministers. It is impossible for a province to expropriate Aboriginal title without incurring an obligation to Aboriginal peoples to pay compensation to them, though it may have a remedy against the federal Crown if it does so, to the extent that the authority for infringement comes from the federal government. Certainly where land is taken under a statutory grant of authority it is common for those authorized by the statute to pay.

I suggest that there may be remedies under both federal and provincial expropriation legislation which have yet to be used by Aboriginal people.

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[93]2000 BCSC 1123.

[94](March 23, 1999) C981165 Vancouver Registry (B.C.S.C.).

THE FEDERAL GOVERNMENT'S FIDUCIARY DUTY

As has been said before, the common law has always been keenly protective of property rights. This protection, through the mechanism of the Royal Proclamation of 1763, and the longstanding practice of treaty making, was always intended to apply to Aboriginal peoples in Canada, but history reveals a dismal record in that respect. In the wake of *Delgamuukw*, it is impossible for that record to continue. Unfortunately all levels of Canadian government have chosen to take the approach that until Aboriginal title is proven, the status quo ante can continue. In my view, however, this is wrong headed. Aboriginal title exists now, and it gives rise to rights of compensation now. Insofar as the federal government allows Aboriginal title to continue to be eroded away, the federal government fails in its fiduciary duties to Aboriginal people. In *R. v. Adams*,[95] Chief Justice Lamer wrote:

> In a normal setting under the *Canadian Charter of Rights and Freedoms*, where a statute confers a broad, unstructured administrative discretion which may be exercised in a manner which encroaches upon a constitutional right, the court should not find that the delegated discretion infringes the Charter and then proceed to a consideration of the potential justifications of the infringement under s. 1. Rather, the proper judicial course is to find that the discretion must subsequently be exercised in a manner which accommodates the guarantees of the *Charter*. See *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at pp. 1078-79; *R. v. Swain*, [1991] 1 S.C.R. 933, at pp. 1010-11; and *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 720.
>
> I am of the view that the same approach should not be adopted in identifying infringements under s. 35(1) of the *Constitution Act, 1982*. In light of the Crown's unique fiduciary obligations towards Aboriginal peoples, Parliament may not simply adopt an unstructured discretionary administrative regime which risks infringing Aboriginal rights in a substantial number of applications in the absence of some explicit guidance. If a statute confers an administrative discretion which may carry significant consequences for the exercise of an Aboriginal right, the statute or its delegate regulations must outline specific criteria for the granting or refusal of that discretion which seek to accommodate the existence of Aboriginal rights. In the absence of such specific guidance, the statute will fail to provide representatives of the Crown with sufficient directives to fulfil their fiduciary duties, and the statute will be found to represent an infringement of Aboriginal rights under the *Sparrow* test.

[95][1996] 3 S.C.R. 101 at paras. 53 and 54,

In the case of expropriation of title and rights of Aboriginal people, it is surely not in accordance to continue to act as if there were no title or rights until proven. As discussed below, at a minimum, those who expropriate aboriginal title should afford the aboriginal peoples the opportunity to prove their title, including, payment of the costs of proving that title. Measures need to be taken to structure the exercise of those discretionary expropriation powers in accordance with both the fiduciary duties of the Crown and with the historic respect for property rights.

The intricacies of the law of fiduciary obligations to pay compensation are notorious, and the law is far from settled. *Guerin* is one example. Others include *Canson Enterprises Ltd. v. Boughton & Co.*,[96] and *Hodgkinson v. Simms*.[97] Is the fiduciary obligation, for instance, ultimately a question of the vulnerability of aboriginal people to government power, or is it a matter of a duty of loyalty to aboriginal people imposed on the Crown to ensure, for instance, that aboriginal people are not treated unfairly in comparison with the newcomers. How does one quantify damages for breach of fiduciary duty and do the limitation periods apply? These are all more or less open questions. While it is difficult to say much with precision in the absence of facts, it can be said that all issues of compensation need to be looked at in terms of the justification of infringements of aboriginal title, and that the behaviour of the Crown is a critical factor.

EXPROPRIATION AND ABORIGINAL TITLE

It is worth remembering that the common law has an innate horror of the "crooked cord of discretion" which Aboriginal peoples find themselves facing. It cannot be that the status quo is in accordance with the fundamental tenets of the common law, or with the intent of s.35 of the *Constitution Act, 1982*. There is a well developed body of law which governs expropriation and

[96][1991] 3 S.C.R. 534

[97][1994] 3 S.C.R. 377.

compensation in the common law which does apply in the situation where Aboriginal title is taken (not extinguished but taken) and under which governments can be held accountable. The basic principle of that law was stated by Rand J. as follows:

> A compensation statute is not to be approached with the attitude that Parliament intended an individual to be victimized in loss because of the accident that his land rather than his neighbour's should be required for public purposes.[98]

This principle has been held to mean that:

> the question of costs of proceedings such as these should be approached in the same spirit... The individual affected is properly given the right to claim and, if possible, to recover in such proceedings what he considers is the value to him of the land which is being compulsorily taken from him. He should not be handicapped in any way in asserting his rights and the fact that he does not succeed in obtaining more than has been offered should not, in certain cases at least, mean that in a bona fide attempt to obtain what he is entitled to he should lose part of that because a tribunal takes a different view from his.[99]

In the ordinary course a claimant is entitled to have his or her legal costs paid for by the expropriating authority. In my view the same entitlement belongs to Aboriginal people when the infringement of their Aboriginal title gives them the right to compensation. It cannot be that the honour of the Crown allows it to turn a blind eye and take lands subject to title without giving the same ability to prove their case to Aboriginal people as it gives to every citizen in Canada.

CONCLUSION

The issues of compensation, which were unexplored by the Supreme Court of Canada in *Delgamuukw*, are issues of extraordinary complexity and difficulty. Indeed there is a way of reading

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[98] *Diggon-Hibben Ltd. v. the King*, [1949] S.C.R. 712 at page 715.

[99] *Re De Graf and Winnepeg* (1960) 30 W.W.R. 476 (Man. Q.B)at page 477; affirmed (1961), 26 D.L.R. (2d) 742 (Man. C.A.).

the decisions in *Delgamuukw* and in *Calder* as hinging on the Court's ability to answer the questions without ordering compensation. The extinguishment argument's attraction for the Courts was not based on its legal cogency, but as a way of expressing a feeling that these issues are political questions too big for the judiciary to handle. Thus one of the central propositions in aboriginal law is found in *Kruger and Manuel v. the Queen*, [1978] 1 S.C.R. 104 at 109:

> Claims to aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be considered on the facts pertinent to that Band and to that land, and not on any global basis.

This was picked up again in *R. v. Vanderpeet*. [1996] 2 S.C.R. 507 at para.49:

> The definition of an aboriginal right must, if it is truly to reconcile the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory, take into account the aboriginal perspective, yet do so in terms which are cognizable to the non-aboriginal legal system.

It is best therefore to frame questions concerning compensation as specifically as possible.

Questions concerning compensation are multifaceted. Different considerations apply when one addresses compensation prior to 1982 and compensation after 1982 and the enactment of section 35 of the *Constitution Act, 1982*. There are questions concerning limitation periods. But it must be remembered that no reconciliation can be made without some measure of compensation and s. 35 demands that the burden of past injustices be carried not by Aboriginal peoples alone. In *Mitchell v. Peguis Indian Band* at page 99, Dickson C.J. noted that "It is Canadian society at large which bears the historical burden of the current situation of native peoples," Compensation issues must ultimately be addressed as part of justification, and perhaps in negotiation. However, some fundamentals are worth repeating:

1) Since there can be no extinguishment of aboriginal title, all expropriation of aboriginal title is

regulatory in nature.

2) There is a presumption of statutory interpretation in favour of compensation, and in the event that a government infringes Aboriginal title without mentioning compensation, Aboriginal peoples are entitled to compensation.

3) Aboriginal peoples are entitled to have the government bear their costs in making compensation claims, in the same manner as they do in other cases, in a way that does not disadvantage them. This means that the government should bear costs prior to any decision and not simply afterwards, as they do in other cases of expropriation.

4) Aboriginal title can be valued in a manner which makes it virtually equivalent to the value of a fee simple.

5) Since expropriation without consent cannot extinguish aboriginal tile, compensation must not only be approached on the basis of the value of the land taken, but on the basis of interference with enjoyment of aboriginal title. Principles of nuisance law may be relevant here.

6) Compensation will be greater where the other parts of the justification test are not fully satisfied, and lesser where Aboriginal people are fully consulted, where their particular concerns are addressed, where their right to choose is respected, and where they are offered economic and other advantages from the government. These are effectively forms of compensation which might diminish the monetary value of the award.

7) Compensation should be due from the government which is responsible for the infringement.